Detention and expulsion of EEA nationals: A practical guide to stopping removal and obtaining release

Seminar reference materials

Presented and produced by:

Zubier Yazdani, Partner at Deighton Pierce Glynn

Adrian Berry, Barrister at Garden Court Chambers

Leonie Hirst, Barrister at Garden Court Chambers

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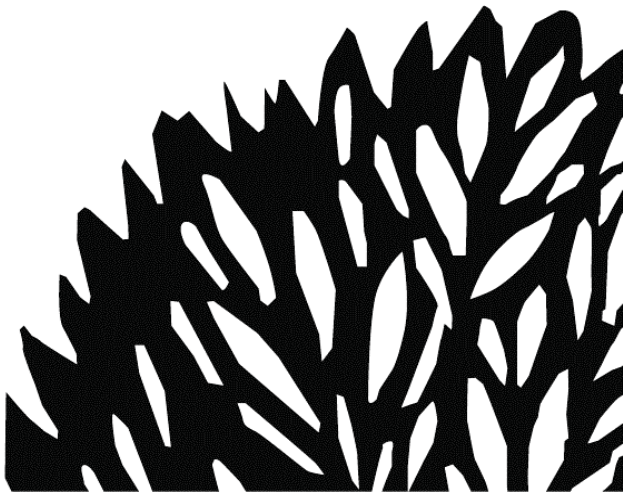

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Immigration Act 1971 c. 77

Schedule 3 SUPPLEMENTARY PROVISIONS AS TO DEPORTATION

Detention or control pending deportation

This version in force from: **July 28, 2014** to **present**

2.—

(1) Where a recommendation for deportation made by a court is in force in respect of any person, [and that person is not detained in pursuance of the sentence or order of any court] [1]

, he shall, unless the court by which the recommendation is made otherwise directs [or a direction is given under sub-paragraph (1A) below,] [2]

be detained pending the making of a deportation order in pursuance of the recommendation, unless the Secretary of State directs him to be released pending further consideration of his case [or he is released on bail] [3]

.

[(1A) Where—

(a) a recommendation for deportation made by a court on conviction of a person is in force in respect of him; and

(b) he appeals against his conviction or against that recommendation,

the powers that the court determining the appeal may exercise include power to direct him to be released without setting aside the recommendation.

] [4]

(2) Where notice has been given to a person in accordance with regulations under [section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision)] [5]

of a decision to make a deportation order against him, [and he is not detained in pursuance of the sentence or order of a court] [6]

, he may be detained under the authority of the Secretary of State pending the making of the deportation order.

Immigration Act 1988 c. 14

This version in force from: **April 22, 2011** to **present**

(version 2 of 2)

7.— Persons exercising Community rights and nationals of member States.

(1) A person shall not under the principal Act require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable [EU] [1]

right or of any provision made under section 2(2) of the European Communities Act 1972.

(2) The Secretary of State may by order made by statutory instrument give leave to enter the United Kingdom for a limited period to any class of persons who are nationals of member States but who are not entitled to enter the United Kingdom as mentioned in subsection (1) above; and any such order may give leave subject to such conditions as may be imposed by the order.

(3) References in the principal Act to limited leave shall include references to leave given by an order under subsection (2) above and a person having leave by virtue of such an order shall be treated as having been given that leave by a notice given to him by an immigration officer within the period specified in paragraph 6(1) of Schedule 2 to that Act.

Human Rights Act 1998 c. 42

Schedule 1 THE ARTICLES

Part I THE CONVENTION

This version in force from: **October 2, 2000** to **present**

(version 1 of 1)

RIGHTS AND FREEDOMS

Right to life

Right to liberty and security

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Immigration and Asylum Act 1999 c. 33

Part I IMMIGRATION: GENERAL

Removal from the United Kingdom

This version in force from: **October 20, 2014** to **present**

(version 5 of 5)

[10 Removal of persons unlawfully in the United Kingdom

(1) A person may be removed from the United Kingdom under the authority of the Secretary of State or an immigration officer if the person requires leave to enter or remain in the United Kingdom but does not have it.

(2) Where a person ("P") is liable to be or has been removed from the United Kingdom under subsection (1), a member of P's family who meets the following three conditions may also be removed from the United Kingdom under the authority of the Secretary of State or an immigration officer, provided that the Secretary of State or immigration officer has given the family member written notice of the intention to remove him or her.

(3) The first condition is that the family member is—

(a) P's partner,

(b) P's child, or a child living in the same household as P in circumstances where P has care of the child,

(c) in a case where P is a child, P's parent, or

(d) an adult dependent relative of P.

(4) The second condition is that—

(a) in a case where the family member has leave to enter or remain in the United Kingdom, that leave was granted on the basis of his or her family life with P;

(b) in a case where the family member does not have leave to enter or remain in the United Kingdom, in the opinion of the Secretary of State or immigration officer the family member—

(i) would not, on making an application for such leave, be granted leave in his or her own right, but

(ii) would be granted leave on the basis of his or her family life with P, if P had leave to enter or remain.

(5) The third condition is that the family member is neither a British citizen, nor is he or she entitled to enter or remain in the United Kingdom by virtue of an enforceable EU right or of any provision made under section 2(2) of the European Communities Act 1972.

(6) A notice given to a family member under subsection (2) invalidates any leave to enter or remain in the United Kingdom previously given to the family member.

(7) For the purposes of removing a person from the United Kingdom under subsection (1) or (2), the Secretary of State or an immigration officer may give any such direction for the removal of the person as may be given under paragraphs 8 to 10 of Schedule 2 to the 1971 Act.

(8) But subsection (7) does not apply where a deportation order is in force against a person (and any directions for such a person's removal must be given under Schedule 3 to the 1971 Act).

(9) The following paragraphs of Schedule 2 to the 1971 Act apply in relation to directions under subsection (7) (and the persons subject to those directions) as they apply in relation to directions under paragraphs 8 to 10 of Schedule 2 (and the persons subject to those directions)—

(a) paragraph 11 (placing of person on board ship or aircraft);

(b) paragraph 16(2) to (4) (detention of person where reasonable grounds for suspecting removal directions may be given or pending removal in pursuance of directions);

(c) paragraph 17 (arrest of person liable to be detained and search of premises for person liable to arrest);

(d) paragraph 18 (supplementary provisions on detention);

(e) paragraph 18A (search of detained person);

(f) paragraph 18B (detention of unaccompanied children);

(g) paragraphs 19 and 20 (payment of expenses of custody etc);

(h) paragraph 21 (temporary admission to UK of person liable to detention);

(i) paragraphs 22 to 25 (bail);

(j) paragraphs 25A to 25E (searches etc).

(10) The Secretary of State may by regulations make further provision about—

(a) the time period during which a family member may be removed under subsection (2);

(b) the service of a notice under subsection (2).

(11) In this section *"child"* means a person who is under the age of 18.

] [1]

Notes

1 . Substituted by Immigration Act 2014 c. 22 Pt 1 s.1 (October 20, 2014: substitution has effect as SI 2014/2771 subject to savings and transitional provisions as specified in SI 2014/2771 arts 9-11)

Detention Centre Rules 2001/238

Part II DETAINED PERSONS

ADMISSIONS AND DISCHARGE

This version in force from: **April 22, 2011** to **present**

(version 2 of 2)

9.— Detention reviews and up-date of claim

(1) Every detained person will be provided, by the Secretary of State, with written reasons for his detention at the time of his initial detention, and thereafter monthly.

(2) The Secretary of State shall, within a reasonable time following any request to do so by a detained person, provide that person with an update on the progress of any relevant matter relating to him.

(3) For the purposes of paragraph (2) *"relevant matter"* means any of the following—

(a) a claim for asylum;

(b) an application for, or for the variation of, leave to enter or remain in the United Kingdom;

(c) an application for British nationality;

(d) a claim for a right of admission into the United Kingdom under a provision of [EU] [1]

law;

(e) a claim for a right of residence in the United Kingdom under a provision of [EU] [1]

law;

(f) the proposed removal or deportation of the detained person from the United Kingdom;

(g) an application for bail under the Immigration Acts or under the Special Immigration Appeals Commission Act 1997;

(h) an appeal against, or an application for judicial review in relation to, any decision taken in connection with a matter referred to in paragraphs (a) to (g).

Notes

1 . Word substituted by Treaty of Lisbon (Changes in Terminology) Order 2011/1043 Pt 2 art.6(2)(a) (April 22, 2011)

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DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004

on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 12, 18, 40, 44 and 52 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the Opinion of the European Economic and Social Committee [2],

Having regard to the Opinion of the Committee of the Regions [3],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [4],

[1] OJ C 270 E, 25.9.2001, p. 150.
[2] OJ C 149, 21.6.2002, p. 46.
[3] OJ C 192, 12.8.2002, p. 17.
[4] Opinion of the European Parliament of 11 February 2003 (OJ C 43 E, 19.2.2004, p. 42), Council Common Position of 5 December 2003 (OJ C 54 E, 2.3.2004, p. 12) and Position of the European Parliament of 10 March 2004 (not yet published in the Official Journal).

Whereas:

(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

(4) With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, there needs to be a single legislative act to amend Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1], and to repeal the following acts: Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [2], Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [3], Council Directive 90/364/EEC of 28 June 1990 on the right of residence [4], Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [5] and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [6].

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

1 OJ L 257, 19.10.1968, p. 2. Regulation as last amended by Regulation (EEC) No 2434/92 (OJ L 245, 26.8.1992, p. 1).
2 OJ L 257, 19.10.1968, p. 13. Directive as last amended by the 2003 Act of Accession.
3 OJ L 172, 28.6.1973, p. 14.
4 OJ L 180, 13.7.1990, p. 26.
5 OJ L 180, 13.7.1990, p. 28.
6 OJ L 317, 18.12.1993, p. 59.

(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

(7) The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls.

(8) With a view to facilitating the free movement of family members who are not nationals of a Member State, those who have already obtained a residence card should be exempted from the requirement to obtain an entry visa within the meaning of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [1] or, where appropriate, of the applicable national legislation.

(9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice.

[1] OJ L 81, 21.3.2001, p. 1. Regulation as last amended by Regulation (EC) No 453/2003 (OJ L 69, 13.3.2003, p. 10).

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

(11) The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures.

(12) For periods of residence of longer than three months, Member States should have the possibility to require Union citizens to register with the competent authorities in the place of residence, attested by a registration certificate issued to that effect.

(13) The residence card requirement should be restricted to family members of Union citizens who are not nationals of a Member State for periods of residence of longer than three months.

(14) The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.

(15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.

(17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.

(18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.

(19) Certain advantages specific to Union citizens who are workers or self-employed persons and to their family members, which may allow these persons to acquire a right of permanent residence before they have resided five years in the host Member State, should be maintained, as these constitute acquired rights, conferred by Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State [1] and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity [2].

(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law.

[1] OJ L 142, 30.6.1970, p. 24.
[2] OJ L 14, 20.1.1975, p. 10.

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.

(22) The Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health. In order to ensure a tighter definition of the circumstances and procedural safeguards subject to which Union citizens and their family members may be denied leave to enter or may be expelled, this Directive should replace Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health [1].

(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.

[1] OJ 56, 4.4.1964, p. 850. Directive as last amended by Directive 75/35/EEC (OJ 14, 20.1.1975, p. 14).

(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.

(25) Procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State, as well as to uphold the principle that any action taken by the authorities must be properly justified.

(26) In all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State.

(27) In line with the case-law of the Court of Justice prohibiting Member States from issuing orders excluding for life persons covered by this Directive from their territory, the right of Union citizens and their family members who have been excluded from the territory of a Member State to submit a fresh application after a reasonable period, and in any event after a three year period from enforcement of the final exclusion order, should be confirmed.

(28) To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures.

(29) This Directive should not affect more favourable national provisions.

(30) With a view to examining how further to facilitate the exercise of the right of free movement and residence, a report should be prepared by the Commission in order to evaluate the opportunity to present any necessary proposals to this effect, notably on the extension of the period of residence with no conditions.

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

General provisions

Article 1

Subject

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

Article 2

Definitions

For the purposes of this Directive:

1) "Union citizen" means any person having the nationality of a Member State;

2) "Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3

Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

CHAPTER II

Right of exit and entry

Article 4

Right of exit

1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.

2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies.

3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.

4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.

Article 5

Right of entry

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

CHAPTER III

Right of residence

Article 6

Right of residence for up to three months

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

Article 7

Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

Article 8

Administrative formalities for Union citizens

1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.

2. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. For the registration certificate to be issued, Member States may only require that

– Union citizens to whom point (a) of Article 7(1) applies present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons;

– Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein;

– Union citizens to whom point (c) of Article 7(1) applies present a valid identity card or passport, provide proof of enrolment at an accredited establishment and of comprehensive sickness insurance cover and the declaration or equivalent means referred to in point (c) of Article 7(1). Member States may not require this declaration to refer to any specific amount of resources.

4. Member States may not lay down a fixed amount which they regard as "sufficient resources"' but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

5. For the registration certificate to be issued to family members of Union citizens, who are themselves Union citizens, Member States may require the following documents to be presented:

(a) a valid identity card or passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Article 9

Administrative formalities for family members who are not nationals of a Member State

1. Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months.

2. The deadline for submitting the residence card application may not be less than three months from the date of arrival.

3. Failure to comply with the requirement to apply for a residence card may make the person concerned liable to proportionate and non-discriminatory sanctions.

Article 10

Issue of residence cards

1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

(a) a valid passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Article 11

Validity of the residence card

1. The residence card provided for by Article 10(1) shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years.

2. The validity of the residence card shall not be affected by temporary absences not exceeding six months a year, or by absences of a longer duration for compulsory military service or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

Article 12

Retention of the right of residence by family members in the event of death or departure of the Union citizen

1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.

3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

Article 13

Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis.

Article 14

Retention of the right of residence

1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

Article 15

Procedural safeguards

1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.

2. Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State.

3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies.

CHAPTER IV

Right of permanent residence

Section I

Eligibility

Article 16

General rule for Union citizens and their family members

1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

Article 17

Exemptions for persons no longer working in the host Member State and their family members

1. By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years.

If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60;

(b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work.

If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence;

(c) workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week.

For the purposes of entitlement to the rights referred to in points (a) and (b), periods of employment spent in the Member State in which the person concerned is working shall be regarded as having been spent in the host Member State.

Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment.

2. The conditions as to length of residence and employment laid down in point (a) of paragraph 1 and the condition as to length of residence laid down in point (b) of paragraph 1 shall not apply if the worker's or the self-employed person's spouse or partner as referred to in point 2(b) of Article 2 is a national of the host Member State or has lost the nationality of that Member State by marriage to that worker or self-employed person.

3. Irrespective of nationality, the family members of a worker or a self-employed person who are residing with him in the territory of the host Member State shall have the right of permanent residence in that Member State, if the worker or self-employed person has acquired himself the right of permanent residence in that Member State on the basis of paragraph 1.

4. If, however, the worker or self-employed person dies while still working but before acquiring permanent residence status in the host Member State on the basis of paragraph 1, his family members who are residing with him in the host Member State shall acquire the right of permanent residence there, on condition that:

(a) the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years; or

(b) the death resulted from an accident at work or an occupational disease; or

(c) the surviving spouse lost the nationality of that Member State following marriage to the worker or self-employed person.

Article 18

Acquisition of the right of permanent residence by certain family members who are not nationals of a Member State

Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State**.**

Section II

Administrative formalities

Article 19

Document certifying permanent residence for Union citizens

1. Upon application Member States shall issue Union citizens entitled to permanent residence, after having verified duration of residence, with a document certifying permanent residence.

2. The document certifying permanent residence shall be issued as soon as possible.

Article 20

Permanent residence card for family members
who are not nationals of a Member State

1. Member States shall issue family members who are not nationals of a Member State entitled to permanent residence with a permanent residence card within six months of the submission of the application. The permanent residence card shall be renewable automatically every ten years.

2. The application for a permanent residence card shall be submitted before the residence card expires. Failure to comply with the requirement to apply for a permanent residence card may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. Interruption in residence not exceeding two consecutive years shall not affect the validity of the permanent residence card.

Article 21

Continuity of residence

For the purposes of this Directive, continuity of residence may be attested by any means of proof in use in the host Member State. Continuity of residence is broken by any expulsion decision duly enforced against the person concerned.

CHAPTER V

Provisions common to the right of residence and the right of permanent residence

Article 22

Territorial scope

The right of residence and the right of permanent residence shall cover the whole territory of the host Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals.

Article 23

Related rights

Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there.

Article 24

Equal treatment

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

Article 25

General provisions concerning residence documents

1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.

2. All documents mentioned in paragraph 1 shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.

Article 26

Checks

Member States may carry out checks on compliance with any requirement deriving from their national legislation for non-nationals always to carry their registration certificate or residence card, provided that the same requirement applies to their own nationals as regards their identity card. In the event of failure to comply with this requirement, Member States may impose the same sanctions as those imposed on their own nationals for failure to carry their identity card.

CHAPTER VI

Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health

Article 27

General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

Article 28

Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Article 29

Public health

1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.

3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine.

Article 30

Notification of decisions

1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

Article 31

Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

– where the expulsion decision is based on a previous judicial decision; or

– where the persons concerned have had previous access to judicial review; or

– where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

Article 32

Duration of exclusion orders

1. Persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which has been validly adopted in accordance with Community law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.

The Member State concerned shall reach a decision on this application within six months of its submission.

2. The persons referred to in paragraph 1 shall have no right of entry to the territory of the Member State concerned while their application is being considered.

Article 33

Expulsion as a penalty or legal consequence

1. Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.

2. If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.

CHAPTER VII

Final provisions

Article 34

Publicity

Member States shall disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication.

Article 35

Abuse of rights

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

Article 36

Sanctions

Member States shall lay down provisions on the sanctions applicable to breaches of national rules adopted for the implementation of this Directive and shall take the measures required for their application. The sanctions laid down shall be effective and proportionate. Member States shall notify the Commission of these provisions not later than .....* and as promptly as possible in the case of any subsequent changes.

Article 37

More favourable national provisions

The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.

Article 38

Repeals

1. Articles 10 and 11 of Regulation (EEC) No 1612/68 shall be repealed with effect from … *.

2. Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC shall be repealed with effect from …. *.

* Two years from the date of entry into force of this Directive.

3. References made to the repealed provisions and Directives shall be construed as being made to this Directive.

Article 39

Report

No later than.....* the Commission shall submit a report on the application of this Directive to the European Parliament and the Council, together with any necessary proposals, notably on the opportunity to extend the period of time during which Union citizens and their family members may reside in the territory of the host Member State without any conditions. The Member States shall provide the Commission with the information needed to produce the report.

Article 40

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ……**.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

* Four years from the date of entry into force of this Directive
** Two years from the date of entry into force of this Directive.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted.

Article 41

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 42

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 29 April 2004.

For the European Parliament
The President
P. COX

For the Council
The President
M. McDOWELL

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Consolidated Version at 6th April 2015

This version does not show all omitted text, to see this please refer to the version for 6th April 2015 (/Archive/V20150406) rather than this consolidated edition.

Green Text: Changes from the original version of the document.

PART 1
INTERPRETATION ETC (Et cetera)

Citation and commencement

1. These Regulations may be cited as the Immigration (European Economic Area) Regulations 2006 and shall come into force on 30th April 2006.

General interpretation

2. (1) In these Regulations—

"the 1971 Act" means the Immigration Act 1971(**4**);

"the 1999 Act" means the Immigration and Asylum Act 1999(**5**);

"the 2002 Act" means the Nationality, Immigration and Asylum Act 2002;

"the 2014 Act" means the Immigration Act 2014

"the Accession Regulations" means the Accession (Immigration and Worker Registration) Regulations 2004;

"civil partner" does not include—

(a) a party to a civil partnership of convenience; or

(b) the civil partner ("C") of a person ("P") where a spouse, civil partner or durable partner of C or P is already present in the United Kingdom;

"decision maker" means the Secretary of State, an immigration officer or an entry clearance officer (as the case may be);

"derivative residence card" means a card issued to a person, in accordance with regulation 18A, as proof of the holder's derivative right to reside in the United Kingdom as at the date of issue;

"deportation order" means an order made pursuant to regulation 24(3);

"document certifying permanent residence" means a document issued to an EEA national, in accordance with regulation 18, as proof of the holder's permanent right of residence under regulation 15 as at the date of issue;

"durable partner" does not include the durable partner ("D") of a person ("P") where a spouse, civil partner or durable partner of D or P is already present in the United Kingdom and where that marriage, civil partnership or durable partnership is subsisting;

"EEA decision" means a decision under these Regulations that concerns—

(a) a person's entitlement to be admitted to the United Kingdom;

(b) a person's entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card;

(c) a person's removal from the United Kingdom; or

(d) the cancellation, pursuant to regulation 20A, of a person's right to reside in the United Kingdom;

but does not include decisions under regulations 24AA (human rights considerations and interim orders to suspend removal) or 29AA (temporary admission in order to submit case in person)

"EEA family permit" means a document issued to a person, in accordance with regulation 12, in connection with his admission to the United Kingdom;

"EEA national" means a national of an EEA State who is not also a British citizen;

"EEA State" means—

(a) a member State, other than the United Kingdom;

(b) Norway, Iceland or Liechtenstein; or

(c) Switzerland;

"entry clearance" has the meaning given in section 33(1) of the 1971 Act(**7**);

"entry clearance officer" means a person responsible for the grant or refusal of entry clearance;

"exclusion order" means an order made under regulation 19(1B)

"immigration rules" has the meaning given in section 33(1) of the 1971 Act;

"military service" means service in the armed forces of an EEA State;

"permanent residence card" means a card issued to a person who is not an EEA national, in accordance with regulation 18, as proof of the holder's permanent right of residence under regulation 15 as at the date of issue;

"qualifying EEA State residence card" means—

(a) a valid document called a "Residence card of a family member of a Union Citizen" issued under Article 10 of Council Directive 2004/38/EC (http://www.legislation.gov.uk/european/directive/2004/0038) (as applied, where relevant, by the EEA Agreement) by an EEA State listed in sub-paragraph (b) to a non-EEA family member of an EEA national as proof of the holder's right of residence in that State;

(b) any EEA State, except Switzerland;

"registration certificate" means a certificate issued to an EEA national, in accordance with regulation 16, as proof of the holder's right of residence in the United Kingdom as at the date of issue;

"relevant EEA national" in relation to an extended family member has the meaning given in regulation 8(6);

"residence card" means a card issued to a person who is not an EEA national, in accordance with regulation 17, as proof of the holder's right of residence in the United Kingdom as at the date of issue;

"spouse" does not include—

(a) a party to a marriage of convenience; or

(b) the spouse ("S") of a person ("P") where a spouse, civil partner or durable partner of S or P is already present in the United Kingdom;

(2) Paragraph (1) is subject to paragraph 1(a) of Schedule 4 (transitional provisions).

(3) Section 11 of the 1971 Act (construction of references to entry)(4) shall apply for the purpose of determining whether a person has entered the United Kingdom for the purpose of these Regulations as it applies for the purpose of determining whether a person has entered the United Kingdom for the purpose of that Act.

Continuity of residence

3. (1) This regulation applies for the purpose of calculating periods of continuous residence in the United Kingdom under regulation 5(1) and regulation 15.

(2) Continuity of residence is not affected by —

(a) periods of absence from the United Kingdom which do not exceed six months in total in any year;

(b) periods of absence from the United Kingdom on military service; or

(c) any one absence from the United Kingdom not exceeding twelve months for an important reason such as pregnancy and childbirth, serious illness, study or vocational training or an overseas posting.

(3) But continuity of residence is broken if a person is removed from the United Kingdom under these Regulations.

"Worker", "self-employed person", "self-sufficient person" and "student"

4. (1) In these Regulations —

(a) "worker" means a worker within the meaning of Article 45 of the Treaty on the Functioning of the European Union;

(b) "self-employed person" means a person who establishes himself in order to pursue activity as a self-employed person in accordance with Article 49 of the Treaty on the Functioning of the European Union;

(c) "self-sufficient person" means a person who has—

(i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence; and

(ii) comprehensive sickness insurance cover in the United Kingdom;

(d) "student" means a person who—

(i) is enrolled, for the principal purpose of following a course of study (including vocational training), at a public or private establishment which is—

(aa) financed from public funds; or

(bb) otherwise recognised by the Secretary of State as an establishment which has been accredited for the purpose of providing such courses or training within the law or administrative practice of the part of the United Kingdom in which the establishment is located;

(ii) has comprehensive sickness insurance cover in the United Kingdom; and

(iii) assures the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that he has sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence.

(2) For the purposes of paragraph (1)(c) or (d), where family members of the person concerned reside in the United Kingdom and their right to reside is dependent upon their being family members of that person—

(a) the requirement for that person to have sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence shall only be satisfied if his resources and those of the family members are sufficient to avoid him and the family members becoming such a burden;

(b) the requirement for that person to have comprehensive sickness insurance cover in the United Kingdom shall only be satisfied if he and his family members have such cover.

(3) Omitted.

(4) For the purposes of paragraphs (1)(c) and (d) and paragraph (2), the resources of the person concerned and, where applicable, any family members, are to be regarded as sufficient if —

(a) they exceed the maximum level of resources which a British citizen and his family members may possess if he is to become eligible for social assistance under the United Kingdom benefit system; or

(b) paragraph (a) does not apply but, taking into account the personal situation of the person concerned and, where applicable, any family members, it appears to the decision maker that the resources of the

person or persons concerned should be regarded as sufficient.

(5) For the purpose of regulation 15A(2) references in this regulation to "family members" includes a "primary carer" as defined in regulation 15A(7).

"Worker or self-employed person who has ceased activity"

5. (1) In these Regulations, "worker or self-employed person who has ceased activity" means an EEA national who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the conditions in this paragraph if he—

(a) terminates his activity as a worker or self-employed person and—

(i) has reached the age at which he is entitled to a state pension on the date on which he terminates his activity; or

(ii) in the case of a worker, ceases working to take early retirement;

(b) pursued his activity as a worker or self-employed person in the United Kingdom for at least twelve months prior to the termination; and

(c) resided in the United Kingdom continuously for more than three years prior to the termination.

(3) A person satisfies the conditions in this paragraph if—

(a) he terminates his activity in the United Kingdom as a worker or self-employed person as a result of a permanent incapacity to work; and

(b) either—

(i) he resided in the United Kingdom continuously for more than two years prior to the termination; or

(ii) the incapacity is the result of an accident at work or an occupational disease that entitles him to a pension payable in full or in part by an institution in the United Kingdom.

(4) A person satisfies the conditions in this paragraph if—

(a) he is active as a worker or self-employed person in an EEA State but retains his place of residence in the United Kingdom, to which he returns as a rule at least once a week; and

(b) prior to becoming so active in that EEA State, he had been continuously resident and continuously active as a worker or self-employed person in the United Kingdom for at least three years.

(5) A person who satisfies the condition in paragraph (4)(a) but not the condition in paragraph (4)(b) shall, for the purposes of paragraphs (2) and (3), be treated as being active and resident in the United Kingdom during any period in which he is working or self-employed in the EEA State.

(6) The conditions in paragraphs (2) and (3) as to length of residence and activity as a worker or self-employed person shall not apply in relation to a person whose spouse or civil partner is a British citizen.

(7) Subject to regulations 6(2), 7A(3) or 7B(3), for the purposes of this regulation—

(a) periods of inactivity for reasons not of the person's own making;

(b) periods of inactivity due to illness or accident; and

(c) in the case of a worker, periods of involuntary unemployment duly recorded by the relevant employment office,

shall be treated as periods of activity as a worker or self-employed person, as the case may be.

"Qualified person"

6. (1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as—

(a) a jobseeker;

(b) a worker;

(c) a self-employed person;

(d) a self-sufficient person; or

(e) a student.

(2) Subject to regulations 7A(4) or 7B(4), a person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—

(a) he is temporarily unable to work as the result of an illness or accident;

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom for at least one year, provided that he—

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;

(ba) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom for less than one year, provided that he—

(i) has registered as a jobseeker with the relevant employment office; and

(ii) satisfies conditions A and B;

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(2A) A person to whom paragraph (2)(ba) applies may only retain worker status for a maximum of six months.

(3) A person who is no longer in self-employment shall not cease to be treated as a self-employed person for the purpose of paragraph (1)(c) if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident.

(4) For the purpose of paragraph (1)(a), a "jobseeker" is a person who satisfies conditions A, B and, where

relevant C.

(5) Condition A is that the person—

(a) entered the United Kingdom in order to seek employment; or

(b) is present in the United Kingdom seeking employment, immediately after enjoying a right to reside pursuant to paragraph (1)(b) to (e) (disregarding any period during which worker status was retained pursuant to paragraph (2)(b) or (ba)).

(6) Condition B is that the person can provide evidence that he is seeking employment and has a genuine chance of being engaged.

(7) A person may not retain the status of a worker pursuant to paragraph (2)(b), or jobseeker pursuant to paragraph (1)(a), for longer than the relevant period unless he can provide compelling evidence that he is continuing to seek employment and has a genuine chance of being engaged.

(8) In paragraph (7), "the relevant period" means—

(a) in the case of a person retaining worker status pursuant to paragraph (2)(b), a continuous period of six months;

(b) in the case of a jobseeker, 91 days, minus the cumulative total of any days during which the person concerned previously enjoyed a right to reside as a jobseeker, not including any days prior to a continuous absence from the United Kingdom of at least 12 months.

(9) Condition C applies where the person concerned has, previously, enjoyed a right to reside under this regulation as a result of satisfying conditions A and B—

(a) in the case of a person to whom paragraph (2)(b) or (ba) applied, for at least six months; or

(b) in the case of a jobseeker, for at least 91 days in total,

unless the person concerned has, since enjoying the above right to reside, been continuously absent from the United Kingdom for at least 12 months.

(10) Condition C is that the person has had a period of absence from the United Kingdom.

(11) Where condition C applies—

(a) paragraph (7) does not apply; and

(b) condition B has effect as if "compelling" were inserted before "evidence".

Family member

7. (1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person—

(a) his spouse or his civil partner;

(b) direct descendants of his, his spouse or his civil partner who are—

(i) under 21; or

(ii) dependants of his, his spouse or his civil partner;

(c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;

(d) a person who is to be treated as the family member of that other person under paragraph (3).

(2) A person shall not be treated under paragraph (1)(b) or (c) as the family member of a student residing in the United Kingdom after the period of three months beginning on the date on which the student is admitted to the United Kingdom unless—

(a) in the case of paragraph (b), the person is the dependent child of the student or of his spouse or civil partner; or

(b) the student also falls within one of the other categories of qualified persons mentioned in regulation 6(1).

(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.

(4) Where the relevant EEA national is a student, the extended family member shall only be treated as the family member of that national under paragraph (3) if either the EEA family permit was issued under regulation 12(2), the registration certificate was issued under regulation 16(5) or the residence card was issued under regulation 17(4).

Application of the Accession Regulations

7A. (1) This regulation applies to an EEA national who was an accession State worker requiring registration on 30th April 2011 ('an accession worker').

(2) In this regulation—

"accession State worker requiring registration" has the same meaning as in regulation 1(2)(d) of the Accession Regulations;

"legally working" has the same meaning as in regulation 2(7) of the Accession Regulations.

(3) In regulation 5(7)(c), where the worker is an accession worker, periods of involuntary unemployment duly recorded by the relevant employment office shall be treated only as periods of activity as a worker—

(a) during any period in which regulation 5(4) of the Accession Regulations applied to that person; or

(b) when the unemployment began on or after 1st May 2011.

(4) Regulation 6(2) applies to an accession worker where he—

(a) was a person to whom regulation 5(4) of the Accession Regulations applied on 30th April 2011; or

(b) became unable to work, became unemployed or ceased to work, as the case maybe, on or after 1st May 2011.

(5) For the purposes of regulation 15, an accession worker shall be treated as having resided in accordance

with these Regulations during any period before 1st May 2011 in which the accession worker—

(a) was legally working in the United Kingdom; or

(b) was a person to whom regulation 5(4) of the Accession Regulations applied.

(6) Subject to paragraph (7), a registration certificate issued to an accession worker under regulation 8 of the Accession Regulations shall, from 1st May 2011, be treated as if it was a registration certificate issued under these Regulations where the accession worker was legally working in the United Kingdom for the employer specified in that certificate on—

(a) 30th April 2011; or

(b) the date on which the certificate is issued where it is issued after 30th April 2011.

(7) Paragraph (6) does not apply—

(a) if the Secretary of State issues a registration certificate in accordance with regulation 16 to an accession worker on or after 1st May 2011; and

(b) from the date of registration stated on that certificate.

Application of the EU2 Regulations

7B. (1) This regulation applies to an EEA national who was an accession State national subject to worker authorisation before 1st January 2014.

(2) In this regulation—

"accession State national subject to worker authorisation" has the same meaning as in regulation 2 of the EU2 Regulations;

"the EU2 Regulations" means the Accession (Immigration and Worker Authorisation) Regulations 2006.

(3) Regulation 2(12) of the EU2 Regulations (accession State national subject to worker authorisation: legally working) has effect for the purposes of this regulation as it does for regulation 2(3) and (4) of the EU2 Regulations.

(4) In regulation 5(7)(c), where the worker is an accession State national subject to worker authorisation, periods of involuntary unemployment duly recorded by the relevant employment office must only be treated as periods of activity as a worker when the unemployment began on or after 1st January 2014.

(5) Regulation 6(2) applies to an accession State national subject to worker authorisation where the accession State national subject to worker authorisation became unable to work, became unemployed or ceased to work, as the case may be, on or after 1st January 2014.

(6) For the purposes of regulation 15, an accession State national subject to worker authorisation must be treated as having resided in accordance with these Regulations during any period before 1st January 2014 in which the accession State national subject to worker authorisation was legally working in the United Kingdom.

(7) An accession worker card issued to an accession State national subject to worker authorisation under

regulation 11 of the EU2 Regulations before 1st January 2014 must be treated as if it were a registration certificate issued under these Regulations so long as it has not expired.

"Extended family member"

8. (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—

(a) the person is residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.

(4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.

(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

(6) In these Regulations "relevant EEA national" means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).

Family members of British citizens

9. (1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a British citizen as if the British citizen ("P") were an EEA national.

(2) The conditions are that—

(a) P is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom;

(b) if the family member of P is P's spouse or civil partner, the parties are living together in the EEA State

or had entered into the marriage or civil partnership and were living together in the EEA State before the British citizen returned to the United Kingdom; and

(c) the centre of P's life has transferred to the EEA State where P resided as a worker or self-employed person.

(3) Factors relevant to whether the centre of P's life has transferred to another EEA State include—

(a) the period of residence in the EEA State as a worker or self-employed person;

(b) the location of P's principal residence;

(c) the degree of integration of P in the EEA State.

(4) Where these Regulations apply to the family member of P, P is to be treated as holding a valid passport issued by an EEA State for the purpose of the application of regulation 13 to that family member.

"Family member who has retained the right of residence"

10. (1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the conditions in this paragraph if—

(a) he was a family member of a qualified person or of an EEA national with a permanent right of residence when that person died;

(b) he resided in the United Kingdom in accordance with these Regulations for at least the year immediately before the death of the qualified person or the EEA national with a permanent right of residence; and

(c) he satisfies the condition in paragraph (6).

(3) A person satisfies the conditions in this paragraph if—

(a) he is the direct descendant of—

(i) a qualified personor an EEA national with a permanent right of residence who has died;

(ii) a person who ceased to be a qualified person on ceasing to reside in the United Kingdom; or

(iii) the person who was the spouse or civil partner of the qualified person or the EEA national with a permanent right of residence mentioned in sub-paragraph (i) when he died or is the spouse or civil partner of the person mentioned in sub-paragraph (ii); and

(b) he was attending an educational course in the United Kingdom immediately before the qualified person or the EEA national with a permanent right of residence died or ceased to be a qualified person and continues to attend such a course.

(4) A person satisfies the conditions in this paragraph if the person is the parent with actual custody of a child who satisfies the condition in paragraph (3).

(5) A person satisfies the conditions in this paragraph if—

(a) he ceased to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of the marriage or civil partnership of that person;

(b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) he satisfies the condition in paragraph (6); and

(d) either—

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii) the former spouse or civil partner of the qualified person has custody of a child of the qualified person or the EEA national with a permanent right of residence;

(iii) the former spouse or civil partner of the qualified person or the EEA national with a permanent right of residence has the right of access to a child of the qualified person or the EEA national with a permanent right of residence, where the child is under the age of 18 and where a court has ordered that such access must take place in the United Kingdom; or

(iv) the continued right of residence in the United Kingdom of the person is warranted by particularly difficult circumstances, such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting.

(6) The condition in this paragraph is that the person—

(a) is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b) is the family member of a person who falls within paragraph (a).

(7) In this regulation, “educational course” means a course within the scope of Article 12 of Council Regulation (EEC) No. (Number) 1612/68 (http://www.legislation.gov.uk/european/regulation/1968/1612) on freedom of movement for workers(**10**).

(8) A person with a permanent right of residence under regulation 15 shall not become a family member who has retained the right of residence on the death or departure from the United Kingdom of the qualified person or the EEA national with a permanent right of residence or the termination of the marriage or civil partnership, as the case may be, and a family member who has retained the right of residence shall cease to have that status on acquiring a permanent right of residence under regulation 15.

PART 2
EEA RIGHTS

Right of admission to the United Kingdom

11. (1) An EEA national must be admitted to the United Kingdom if he produces on arrival a valid national identity card or passport issued by an EEA State.

(2) A person who is not an EEA national must be admitted to the United Kingdom if he is—

(a) a family member of an EEA national and produces on arrival a valid passport and a qualifying EEA State residence card, provided the conditions in regulation 19(2)(a) (non-EEA family member to be accompanying or joining EEA national in the United Kingdom) and (b) (EEA national must have a right to reside in the United Kingdom under these Regulations) are met; or

(b) a family member of an EEA national, a family member who has retained the right of residence, a person who meets the criteria in paragraph (5) or a person with a permanent right of residence under regulation 15 and produces on arrival—

(i) a valid passport; and

(ii) an EEA family permit, a residence card, a derivative residence card or a permanent residence card.

(3) An immigration officer must not place a stamp in the passport of a person admitted to the United Kingdom under this regulation who is not an EEA national if the person produces a residence card, a derivative residence card, a permanent residence card or a qualifying EEA State residence card.

(4) Before an immigration officer refuses admission to the United Kingdom to a person under this regulation because the person does not produce on arrival a document mentioned in paragraph (1) or (2), the immigration officer must give the person every reasonable opportunity to obtain the document or have it brought to him within a reasonable period of time or to prove by other means that he is—

(a) an EEA national;

(b) a family member of an EEA national with a right to accompany that national or join him in the United Kingdom;

(ba) a person who meets the criteria in paragraph (5); or

(c) a family member who has retained the right of residence or a person with a permanent right of residence under regulation 15.

(5) A person (“P”) meets the criteria in this paragraph where—

(a) P previously resided in the United Kingdom pursuant to regulation 15A(3) and would be entitled to reside in the United Kingdom pursuant to that regulation were P in the country;

(b) P is accompanying an EEA national to, or joining an EEA national in, the United Kingdom and P would be entitled to reside in the United Kingdom pursuant to regulation 15A(2) were P and the EEA national both in the United Kingdom;

(c) P is accompanying a person (“the relevant person”) to, or joining the relevant person in, the United Kingdom and—

(i) the relevant person is residing, or has resided, in the United Kingdom pursuant to regulation 15A(3); and

(ii) P would be entitled to reside in the United Kingdom pursuant to regulation 15A(4) were P and the relevant person both in the United Kingdom;

(d) P is accompanying a person who meets the criteria in (b) or (c) (“the relevant person”) to the United

Kingdom and—

(i) P and the relevant person are both—

(aa) seeking admission to the United Kingdom in reliance on this paragraph for the first time; or

(bb) returning to the United Kingdom having previously resided there pursuant to the same provisions of regulation 15A in reliance on which they now base their claim to admission; and

(ii) P would be entitled to reside in the United Kingdom pursuant to regulation 15A(5) were P and the relevant person there; or

(e) P is accompanying a British citizen to, or joining a British citizen in, the United Kingdom and P would be entitled to reside in the United Kingdom pursuant to regulation 15A(4A) were P and the British citizen both in the United Kingdom.

(6) Paragraph (7) applies where—

(a) a person ("P") seeks admission to the United Kingdom in reliance on paragraph (5)(b), (c) or (e); and

(b) if P were in the United Kingdom, P would have a derived right of residence by virtue of regulation 15A(7)(b)(ii).

(7) Where this paragraph applies a person ("P") will only be regarded as meeting the criteria in paragraph (5)(b), (c) or (e) where P—

(a) is accompanying the person with whom P would on admission to the United Kingdom jointly share care responsibility for the purpose of regulation 15A(7)(b)(ii); or

(b) has previously resided in the United Kingdom pursuant to regulation 15A(2), (4) or (4A) as a joint primary carer and seeks admission to the United Kingdom in order to reside there again on the same basis.

(8) But this regulation is subject to regulations 19(1), (1A), (1AB) and (2) and 23A.

Issue of EEA family permit

12. (1) An entry clearance officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and—

(a) the EEA national—

(i) is residing in the UK in accordance with these Regulations; or

(ii) will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and

(b) the family member will be accompanying the EEA national to the United Kingdom or joining the EEA national there.

(1A) An entry clearance officer must issue an EEA family permit to a person who applies and provides proof that, at the time at which he first intends to use the EEA family permit, he—

(a) would be entitled to be admitted to the United Kingdom by virtue of regulation 11(5); and

(b) will (save in the case of a person who would be entitled to be admitted to the United Kingdom by virtue of regulation 11(5)(a)) be accompanying to, or joining in, the United Kingdom any person from whom his right to be admitted to the United Kingdom under regulation 11(5) will be derived.

(1B) An entry clearance officer must issue an EEA family permit to a family member who has retained the right of residence.

(2) An entry clearance officer may issue an EEA family permit to an extended family member of an EEA national who applies for one if—

(a) the relevant EEA national satisfies the condition in paragraph (1)(a);

(b) the extended family member wishes to accompany the relevant EEA national to the United Kingdom or to join him there; and

(c) in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit.

(3) Where an entry clearance officer receives an application under paragraph (2) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

(4) An EEA family permit issued under this regulation shall be issued free of charge and as soon as possible.

(5) But an EEA family permit shall not be issued under this regulation if the applicant or the EEA national concerned is not entitled to be admitted to the United Kingdom as a result of regulation 19(1A) or (1AB) or falls to be excluded in accordance with regulation 19(1B) falls to be excluded from the United Kingdom on grounds of public policy, public security or public health in accordance with regulation 21.

(6) An EEA family permit will not be issued under this regulation to a person (“A”) who is the spouse, civil partner or durable partner of a person (“B”) where a spouse, civil partner or durable partner of A or B holds a valid EEA family permit.

Initial right of residence

13. (1) An EEA national is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the date on which he is admitted to the United Kingdom provided that he holds a valid national identity card or passport issued by an EEA State.

(2) A family member of an EEA national or a family member who has retained the right of residence who is residing in the United Kingdom under paragraph (1) who is not himself an EEA national is entitled to reside in the United Kingdom provided that he holds a valid passport.

(3) An EEA national or his family member who becomes an unreasonable burden on the social assistance system of the United Kingdom will cease to have a right to reside under this regulation.

(4) A person who otherwise satisfies the criteria in this regulation will not be entitled to reside in the United Kingdom under this regulation where the Secretary of State or an immigration officer has made a decision under —

(a) regulation 19(3)(b), 20(1), 20A(1) or 23A; or

(b) regulation 21B(2), where that decision was taken in the preceding twelve months

Extended right of residence

14. (1) A qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person.

(2) A family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a permanent right of residence under regulation 15 is entitled to reside in the United Kingdom for so long as he remains the family member of the qualified person or EEA national.

(3) A family member who has retained the right of residence is entitled to reside in the United Kingdom for so long as he remains a family member who has retained the right of residence.

(4) A right to reside under this regulation is in addition to any right a person may have to reside in the United Kingdom under regulation 13 or 15.

(5) A person who otherwise satisfies the criteria in this regulation will not be entitled to a right to reside in the United Kingdom under this regulation where the Secretary of State or an immigration officer has made a decision under regulation 19(3)(b), 20(1), 20A(1) or 23A.

Permanent right of residence

15. (1) The following persons shall acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

(c) a worker or self-employed person who has ceased activity;

(d) the family member of a worker or self-employed person who has ceased activity;

(e) a person who was the family member of a worker or self-employed person where—

(i) the worker or self-employed person has died;

(ii) the family member resided with him immediately before his death; and

(iii) the worker or self-employed person had resided continuously in the United Kingdom for at least the two years immediately before his death or the death was the result of an accident at work or

an occupational disease;

(f) a person who—

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of that period, a family member who has retained the right of residence.

(1A) Residence in the United Kingdom as a result of a derivative right of residence does not constitute residence for the purpose of this regulation.

(2) The right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.

(3) A person who satisfies the criteria in this regulation will not be entitled to a permanent right to reside in the United Kingdom where the Secretary of State or an immigration officer has made a decision under regulation 19(3)(b), 20(1), 20A(1) or 23A.

Derivative right of residence

15A. (1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.

(2) P satisfies the criteria in this paragraph if—

(a) P is the primary carer of an EEA national ("the relevant EEA national"); and

(b) the relevant EEA national—

(i) is under the age of 18;

(ii) is residing in the United Kingdom as a self-sufficient person; and

(iii) would be unable to remain in the United Kingdom if P were required to leave.

(3) P satisfies the criteria in this paragraph if—

(a) P is the child of an EEA national ("the EEA national parent");

(b) P resided in the United Kingdom at a time when the EEA national parent was residing in the United Kingdom as a worker; and

(c) P is in education in the United Kingdom and was in education there at a time when the EEA national parent was in the United Kingdom.

(4) P satisfies the criteria in this paragraph if—

(a) P is the primary carer of a person meeting the criteria in paragraph (3) ("the relevant person"); and

(b) the relevant person would be unable to continue to be educated in the United Kingdom if P were required to leave.

(4A) P satisfies the criteria in this paragraph if—

(a) P is the primary carer of a British citizen ("the relevant British citizen");

(b) the relevant British citizen is residing in the United Kingdom; and

(c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.

(5) P satisfies the criteria in this paragraph if—

(a) P is under the age of 18;

(b) P's primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4);

(c) P does not have leave to enter, or remain in, the United Kingdom; and

(d) requiring P to leave the United Kingdom would prevent P's primary carer from residing in the United Kingdom.

(6) For the purpose of this regulation—

(a) "education" excludes nursery education;

(b) "worker" does not include a jobseeker or a person who falls to be regarded as a worker by virtue of regulation 6(2); and

(c) "an exempt person" is a person—

(i) who has a right to reside in the United Kingdom as a result of any other provision of these Regulations;

(ii) who has a right of abode in the United Kingdom by virtue of section 2 of the 1971 Act;

(iii) to whom section 8 of the 1971 Act, or any order made under subsection (2) of that provision, applies; or

(iv) who has indefinite leave to enter or remain in the United Kingdom.

(7) P is to be regarded as a "primary carer" of another person if

(a) P is a direct relative or a legal guardian of that person; and

(b) P—

(i) is the person who has primary responsibility for that person's care; or

(ii) shares equally the responsibility for that person's care with one other person who is not an exempt person.

(7A) Where P is to be regarded as a primary carer of another person by virtue of paragraph (7)(b)(ii) the criteria in paragraphs (2)(b)(iii), (4)(b) and (4A)(c) shall be considered on the basis that both P and the person with whom care responsibility is shared would be required to leave the United Kingdom.

(7B) Paragraph (7A) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to P assuming equal care responsibility.

(8) P will not be regarded as having responsibility for a person's care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person's care.

(9) A person who otherwise satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) will not be entitled to a derivative right to reside in the United Kingdom where the Secretary of State or an immigration officer has made a decision under regulation 19(3)(b), 20(1), 20A(1) or 23A.

Continuation of a right of residence

15B. (1) This regulation applies during any period in which, but for the effect of regulation 13(4), 14(5), 15(3) or 15A(9), a person ("P") who is in the United Kingdom would be entitled to reside here pursuant to these Regulations.

(2) Where this regulation applies, any right of residence will (notwithstanding the effect of regulation 13(4), 14(5), 15(3) or 15A(9)) be deemed to continue during any period in which—

(a) an appeal under regulation 26 could be brought, while P is in the United Kingdom, against a relevant decision (ignoring any possibility of an appeal out of time with permission); or

(b) an appeal under regulation 26 against a relevant decision, brought while P is in the United Kingdom, is pending.

(3) Periods during which residence pursuant to regulation 14 is deemed to continue as a result of paragraph (2) will not constitute residence for the purpose of regulation 15 unless and until—

(a) a relevant decision is withdrawn by the Secretary of State; or

(b) an appeal against a relevant decision is allowed and that appeal is finally determined.

(4) Periods during which residence is deemed to continue as a result of paragraph (2) will not constitute residence for the purpose of regulation 21(4)(a) unless and until—

(a) a relevant decision is withdrawn by the Secretary of State; or

(b) an appeal against a relevant decision is allowed and that appeal is finally determined.

(5) A "relevant decision" for the purpose of this regulation means a decision pursuant to regulation 19(3)(b), 20(1) or 20A(1) which would, but for the effect of paragraph (2), prevent P from residing in the United Kingdom pursuant to these Regulations.

(6) This regulation does not affect the ability of the Secretary of State to give directions for P's removal while an appeal is pending or before it is finally determined.

(7) In this regulation, "pending" and "finally determined" have the meanings given in section 104 of the 2002 Act(1 (http://www.legislation.gov.uk/uksi/2014/1976/schedule/made#f00005)).

PART 3
RESIDENCE DOCUMENTATION

Issue of registration certificate

16. (1) The Secretary of State must issue a registration certificate to a qualified person immediately on

application and production of—

(a) a valid identity card or passport issued by an EEA State;

(b) proof that he is a qualified person.

(2) In the case of a worker, confirmation of the worker's engagement from his employer or a certificate of employment is sufficient proof for the purposes of paragraph (1)(b).

(3) The Secretary of State must issue a registration certificate to an EEA national who is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 immediately on application and production of—

(a) a valid identity card or passport issued by an EEA State; and

(b) proof that the applicant is such a family member.

(4) The Secretary of State must issue a registration certificate to an EEA national who is a family member who has retained the right of residence on application and production of—

(a) a valid identity card or passport; and

(b) proof that the applicant is a family member who has retained the right of residence.

(5) The Secretary of State may issue a registration certificate to an extended family member not falling within regulation 7(3) who is an EEA national on application if—

(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the registration certificate.

(6) Where the Secretary of State receives an application under paragraph (5) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

(7) A registration certificate issued under this regulation shall state the name and address of the person registering and the date of registration.

(8) But this regulation is subject to regulations 7A(6) and 20(1).

Issue of residence card

17. (1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 on application and production of—

(a) a valid passport; and

(b) proof that the applicant is such a family member.

(2) The Secretary of State must issue a residence card to a person who is not an EEA national but who is a

family member who has retained the right of residence on application and production of—

(a) a valid passport; and

(b) proof that the applicant is a family member who has retained the right of residence.

(3) On receipt of an application under paragraph (1) or (2) and the documents that are required to accompany the application the Secretary of State shall immediately issue the applicant with a certificate of application for the residence card and the residence card shall be issued no later than six months after the date on which the application and documents are received.

(4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—

(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.

(5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

(6) A residence card issued under this regulation may take the form of a stamp in the applicant's passport and shall be valid for—

(a) five years from the date of issue; or

(b) in the case of a residence card issued to the family member or extended family member of a qualified person, the envisaged period of residence in the United Kingdom of the qualified person,

whichever is the shorter.

(6A) A residence card issued under this regulation shall be entitled "Residence card of a family member of an EEA national" or "Residence card of a family member who has retained the right of residence", as the case may be.

(7) Omitted.

(8) But this regulation is subject to regulation 20(1) and (1A).

Issue of a document certifying permanent residence and a permanent residence card

18. (1) The Secretary of State must issue an EEA national with a permanent right of residence under regulation 15 with a document certifying permanent residence as soon as possible after an application for such a document and proof that the EEA national has such a right is submitted to the Secretary of State.

(2) The Secretary of State must issue a person who is not an EEA national who has a permanent right of residence under regulation 15 with a permanent residence card no later than six months after the date on which an application for a permanent residence card and proof that the person has such a right is submitted to the Secretary of State.

(3) Subject to paragraph (5), a permanent residence card shall be valid for ten years from the date of issue and must be renewed on application.

(4) Omitted.

(5) A document certifying permanent residence and a permanent residence card shall cease to be valid if the holder ceases to have a right of permanent residence under regulation 15.

(6) But this regulation is subject to regulation 20.

Issue of a derivative residence card

18A. (1) The Secretary of State must issue a person with a derivative residence card on application and on production of—

(a) a valid identity card issued by an EEA State or a valid passport; and

(b) proof that the applicant has a derivative right of residence under regulation 15A.

(2) On receipt of an application under paragraph (1) the Secretary of State must issue the applicant with a certificate of application as soon as possible.

(3) A derivative residence card issued under paragraph (1) may take the form of a stamp in the applicant's passport and will be valid until—

(a) a date five years from the date of issue; or

(b) any other date specified by the Secretary of State when issuing the derivative residence card.

(4) A derivative residence card issued under paragraph (1) must be issued and as soon as practicable.

(5) But this regulation is subject to regulations 20(1) and 20(1A).

PART 4
REFUSAL OF ADMISSION AND REMOVAL ETC

Exclusion and removal from the United Kingdom

19. (1) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if his exclusion is justified on grounds of public policy, public security or public health in accordance with regulation 21.

(1A) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if that person is subject to a deportation or exclusion order, except where the person is temporarily admitted pursuant to regulation 29AA.

(1AB) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if the Secretary of State considers there to be reasonable grounds to suspect that his admission would lead to the abuse of a right to reside in accordance with regulation 21B(1).

(1B) If the Secretary of State considers that the exclusion of an EEA national or the family member of an EEA national is justified on the grounds of public policy, public security or public health in accordance with regulation

21 the Secretary of State may make an order for the purpose of these Regulations prohibiting that person from entering the United Kingdom.

(2) A person is not entitled to be admitted to the United Kingdom as the family member of an EEA national under regulation 11(2) unless, at the time of his arrival—

(a) he is accompanying the EEA national or joining him in the United Kingdom; and

(b) the EEA national has a right to reside in the United Kingdom under these Regulations.

(3) Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if â€“

(a) that person does not have or ceases to have a right to reside under these Regulations;

(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21; or

(c) the Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with regulation 21B(2).

(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 1971 Act unless his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

Refusal to issue or renew and revocation of residence documentation

20. (1) The Secretary of State may refuse to issue, revoke or refuse to renew a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card if the refusal or revocation is justified on grounds of public policy, public security or public health or on grounds of abuse of rights in accordance with regulation 21B(2).

(1A) A decision under regulation 19(3) or 24(4) to remove a person from the United Kingdom, or a decision under regulation 23A to revoke a person's admission to the United Kingdom, will (save during any period in which a right of residence is deemed to continue as a result of regulation 15B(2)) invalidate a registration certificate, residence card, document certifying permanent residence or permanent residence card held by that person or an application made by that person for such a certificate, card or document.

(2) The Secretary of State may revoke a registration certificate or a residence card or refuse to renew a residence card if the holder of the certificate or card has ceased to have, or never had a right to reside under these Regulations.

(3) The Secretary of State may revoke a document certifying permanent residence or a permanent residence card or refuse to renew a permanent residence card if the holder of the certificate or card has ceased to have, or never had a right of permanent residence under regulation 15.

(4) An immigration officer may, at the time of a person's arrival in the United Kingdom—

(a) revoke that person's residence card if he is not at that time the family member of a qualified person or of an EEA national who has a right of permanent residence under regulation 15, a family member who has retained the right of residence or a person with a right of permanent residence under regulation 15;

(b) revoke that person's permanent residence card if he is not at that time a person with a right of permanent residence under regulation 15.

(5) An entry clearance officer or immigration officer may at any time revoke a person's EEA family permit if—

(a) the revocation is justified on grounds of public policy, public security or public health; or

(b) the person is not at that time the family member of an EEA national with the right to reside in the United Kingdom under these Regulations or is not accompanying that national or joining him in the United Kingdom.

(6) Any action taken under this regulation on grounds of public policy, public security or public health shall be in accordance with regulation 21.

Cancellation of a right of residence

20A. (1) Where the conditions in paragraph (2) are met the Secretary of State may cancel a person's right to reside in the United Kingdom pursuant to these Regulations.

(2) The conditions in this paragraph are met where—

(a) a person has a right to reside in the United Kingdom as a result of these Regulations;

(b) the Secretary of State has decided that the cancellation of that person's right to reside in the United Kingdom is justified on grounds of public policy, public security or public health in accordance with regulation 21 or on grounds of abuse of rights in accordance with regulation 21B(2);

(c) the circumstances are such that the Secretary of State cannot make a decision under regulation 20(1); and

(d) it is not possible for the Secretary of State to remove the person from the United Kingdom pursuant to regulation 19(3)(b) or 2(c).

Verification of a right of residence

20B.(1) This regulation applies when the Secretary of State—

(a) has reasonable doubt as to whether a person ("A") has a right to reside under regulation 14(1) or (2); or

(b) wants to verify the eligibility of a person ("A") to apply for documentation issued under Part 3.

(2) The Secretary of State may invite A to—

(a) provide evidence to support the existence of a right to reside, or to support an application for

documentation under Part 3; or

(b) attend an interview with the Secretary of State.

(3) If A purports to be entitled to a right to reside on the basis of a relationship with another person ("B"), the Secretary of State may invite B to—

(a) provide information about their relationship with A; or

(b) attend an interview with the Secretary of State.

(4) If, without good reason, A or B fail to provide the additional information requested or, on at least two occasions, fail to attend an interview if so invited, the Secretary of State may draw any factual inferences about A's entitlement to a right to reside as appear appropriate in the circumstances.

(5) The Secretary of State may decide following an inference under paragraph (4) that A does not have or ceases to have a right to reside.

(6) But the Secretary of State must not decide that A does not have or ceases to have a right to reside on the sole basis that A failed to comply with this regulation.

(7) This regulation may not be invoked systematically.

(8) In this regulation, "a right to reside" means a right to reside under these Regulations.

Decisions taken on public policy, public security and public health grounds

21. (1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(**11**).

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently

serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation(**12**) or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010 shall not constitute grounds for the decision; and

(b) if the person concerned is in the United Kingdom, diseases occurring after the three month period beginning on the date on which he arrived in the United Kingdom shall not constitute grounds for the decision.

Application of Part 4 to persons with a derivative right of residence

21A. (1) Where this regulation applies Part 4 of these Regulations applies subject to the modifications listed in paragraph (3).

(2) This regulation applies where a person—

(a) would, notwithstanding Part 4 of these Regulations, have a right to be admitted to, or reside in, the United Kingdom by virtue of a derivative right of residence arising under regulation 15A(2), (4), (4A) or (5);

(b) holds a derivative residence card; or

(c) has applied for a derivative residence card.

(3) Where this regulation applies Part 4 applies in relation to the matters listed in paragraph (2) as if—

(a) references to a matter being justified on grounds of public policy, public security or public health in accordance with regulation 21 referred instead to a matter being "conducive to the public good";

(b) the reference in regulation 20(5)(a) to a matter being "justified on grounds of public policy, public security or public health" referred instead to a matter being "conducive to the public good";

(c) references to "the family member of an EEA national" referred instead to "a person with a derivative right of residence";

(d) references to "a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card" referred instead to "a derivative residence card";

(e) the reference in regulation 19(1A) to a deportation or exclusion order referred also to a deportation or exclusion order made under any provision of the immigration Acts.

(f) regulation 20(4) instead conferred on an immigration officer the power to revoke a derivative residence card where the holder is not at that time a person with a derivative right of residence; and

(g) regulations 20(3), 20(6) and 21 were omitted.

Abuse of rights or fraud

21B. (1) The abuse of a right to reside includes—

(a) engaging in conduct which appears to be intended to circumvent the requirement to be a qualified person;

(b) attempting to enter the United Kingdom within 12 months of being removed pursuant to regulation 19(3)(a), where the person attempting to do so is unable to provide evidence that, upon re-entry to the United Kingdom, the conditions for any right to reside, other than the initial right of residence under regulation 13, will be met;

(c) entering, attempting to enter or assisting another person to enter or attempt to enter, a marriage or civil partnership of convenience; or

(d) fraudulently obtaining or attempting to obtain, or assisting another to obtain or attempt to obtain, a right to reside.

(2) The Secretary of State may take an EEA decision on the grounds of abuse of rights where there are reasonable grounds to suspect the abuse of a right to reside and it is proportionate to do so.

(3) Where these Regulations provide that an EEA decision taken on the grounds of abuse in the preceding twelve months affects a person's right to reside, the person who is the subject of that decision may apply to the Secretary of State to have the effect of that decision set aside on grounds that there has been a material change in the circumstances which justified that decision.

(4) An application under paragraph (3) may only be made whilst the applicant is outside the United Kingdom.

(5) This regulation may not be invoked systematically.

(6) In this regulation, "a right to reside" means a right to reside under these Regulations.

PART 5
PROCEDURE IN RELATION TO EEA DECISIONS

Person claiming right of admission

22. (1) This regulation applies to a person who claims a right of admission to the United Kingdom under regulation 11 as—

(a) a person, not being an EEA national, who—

(i) is a family member of an EEA national;

(ii) is a family member who has retained the right of residence;

(iii) has a derivative right of residence;

(iv) has a permanent right of residence under regulation 15; or

(v) is in possession of a qualifying EEA State residence card;

(b) an EEA national, where there is reason to believe that he may fall to be excluded under regulation 19(1) (1A) or (1B); or

(c) a person to whom regulation 29AA applies.

(2) A person to whom this regulation applies is to be treated as if he were a person seeking leave to enter the United Kingdom under the 1971 Act for the purposes of paragraphs 2, 3, 4, 7, 16 to 18 and 21 to 24 of Schedule 2 to the 1971 Act(**14**) (administrative provisions as to control on entry etc (Et cetera)), except that—

(a) the reference in paragraph 2(1) to the purpose for which the immigration officer may examine any persons who have arrived in the United Kingdom is to be read as a reference to the purpose of determining whether he is a person who is to be granted admission under these Regulations;

(b) the references in paragraphs 4(2A), 7 and 16(1) to a person who is, or may be, given leave to enter are to be read as references to a person who is, or may be, granted admission under these Regulations; and

(c) a medical examination is not be carried out under paragraph 2 or paragraph 7 as a matter of routine and may only be carried out within three months of a person's arrival in the United Kingdom.

(3) For so long as a person to whom this regulation applies is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to the 1971 Act, he is deemed not to have been admitted to the United Kingdom.

Person refused admission

23. (1) This regulation applies to a person who is in the United Kingdom and has been refused admission to the United Kingdom—

(a) because he does not meet the requirement of regulation 11 (including where he does not meet those requirements because his EEA family permit, residence card, derivative residence card or permanent residence card has been revoked by an immigration officer in accordance with regulation 20); or

(b) in accordance with regulation 19(1) , (1A), (1AB) or (2).

(2) A person to whom this regulation applies, is to be treated as if he were a person refused leave to enter under the 1971 Act for the purpose of paragraphs 8, 10, 10A, 11, 16 to 19 and 21 to 24 of Schedule 2 to the 1971 Act, except that the reference in paragraph 19 to a certificate of entitlement, entry clearance or work permit is to be read as a reference to an EEA family permit, residence card, derivative residence card, a qualifying EEA State residence card, or a permanent residence card or a permanent residence card.

Revocation of admission

23A. (1) This regulation applies to a person admitted to the United Kingdom under regulation 11 in circumstances where, pursuant to regulation 19(1) (exclusion justified on grounds of public policy, public security or public health), (1A) (person subject to deportation order or exclusion order) or (1AB) (reasonable grounds to suspect that admission would lead to the abuse of a right to reside), that person was not entitled to be admitted.

(2) Paragraph 6(2) of Schedule 2 to the 1971 Act(2) (administrative provisions as to control on entry: refusal of leave to enter) applies to a person to whom this regulation applies, as though the references—

(a) to that person's examination under paragraph 2 of Schedule 2 to the 1971 Act were to that paragraph as applied by regulation 22(2)(a) and (c) of these Regulations;

(b) to notices of leave to enter the United Kingdom were to a decision to admit that person to the United Kingdom under these Regulations;

(c) to the cancellation of such a notice and the refusal of leave to enter were to revocation of the decision to admit that person to the United Kingdom under this regulation.

(3) Where a person's admission to the United Kingdom is revoked, that person is to be treated as a person to whom admission to the United Kingdom has been refused and regulation 23 applies accordingly.

Person subject to removal

24. (1) If there are reasonable grounds for suspecting that a person is someone who may be removed from the United Kingdom under regulation 19(3)(b), that person may be detained under the authority of the Secretary of State pending a decision whether or not to remove the person under that regulation, and paragraphs 17 and 18 of Schedule 2 to the 1971 Act(5) shall apply in relation to the detention of such a person as those paragraphs apply in relation to a person who may be detained under paragraph 16 of that Schedule.

(2) Where a decision is taken to remove a person under regulation 19(3)(a)or (c), the person is to be treated as if he were a person to whom section 10(1)(a) of the 1999 Act(**15**) applied, and section 10 of that Act (removal of certain persons unlawfully in the United Kingdom) is to apply accordingly.

(3) Where a decision is taken to remove a person under regulation 19(3)(b), the person is to be treated as if he were a person to whom section 3(5)(a) of the 1971 Act(**16**) (liability to deportation) applied, and section 5 of that Act(**17**) (procedure for deportation) and Schedule 3 to that Act(**18**) (supplementary provision as to deportation) are to apply accordingly.

(4) A person who enters the United Kingdom in breach of a deportation or exclusion order, or in circumstances where that person was not entitled to be admitted pursuant to regulation 19(1) or (1AB), shall be removable as an illegal entrant under Schedule 2 to the 1971 Act and the provisions of that Schedule shall apply accordingly .

(5) Where such a deportation order is made against a person but he is not removed under the order during the two year period beginning on the date on which the order is made, the Secretary of State shall only take action to remove the person under the order after the end of that period if, having assessed whether there has been any material change in circumstances since the deportation order was made, he considers that the removal

continues to be justified on the grounds of public policy, public security or public health.

(6) A person to whom this regulation applies shall be allowed one month to leave the United Kingdom, beginning on the date on which he is notified of the decision to remove him, before being removed pursuant to that decision except—

(a) in duly substantiated cases of urgency;

(b) where the person is detained pursuant to the sentence or order of any court;

(c) where a person is a person to whom regulation 24(4) applies.

(7) Paragraph (6) of this regulation does not apply where a decision has been taken under regulation 19(3) on the basis that the relevant person—

(a) has ceased to have a derivative right of residence; or

(b) is a person who would have had a derivative right of residence but for the effect of a decision to remove under regulation 19(3)(b).

Human rights considerations and interim orders to suspend removal

24AA. (1) This regulation applies where the Secretary of State intends to give directions for the removal of a person ("P") to whom regulation 24(3) applies, in circumstances where—

(a) P has not appealed against the EEA decision to which regulation 24(3) applies, but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); or

(b) P has so appealed but the appeal has not been finally determined.

(2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, would not be unlawful under section 6 of the Human Rights Act 1998(2) (public authority not to act contrary to Human Rights Convention).

(3) The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.

(4) If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken, except—

(a) where the expulsion decision is based on a previous judicial decision;

(b) where P has had previous access to judicial review; or

(c) where the removal decision is based on imperative grounds of public security.

(5) In this regulation, "finally determined" has the same meaning as in Part 6.

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Revocation of deportation and exclusion orders

24A. (1) A deportation or exclusion order shall remain in force unless it is revoked by the Secretary of State under this regulation.

(2) A person who is subject to a deportation or exclusion order may apply to the Secretary of State to have it revoked if the person considers that there has been a material change in the circumstances that justified the making of the order.

(3) An application under paragraph (2) shall set out the material change in circumstances relied upon by the applicant and may only be made whilst the applicant is outside the United Kingdom.

(4) On receipt of an application under paragraph (2), the Secretary of State shall revoke the order if the Secretary of State considers that the criteria for making such an order are no longer satisfied.

(5) The Secretary of State shall take a decision on an application under paragraph (2) no later than six months after the date on which the application is received.

PART 6
APPEALS UNDER THESE REGULATIONS

Interpretation of Part 6

25. (1) In this Part—

"Commission" has the same meaning as in the Special Immigration Appeals Commission Act 1997(**19**);

(2) For the purposes of this Part, and subject to paragraphs (3) and (4), an appeal is to be treated as pending during the period when notice of appeal is given and ending when the appeal is finally determined, withdrawn or abandoned.

(3) An appeal is not to be treated as finally determined while a further appeal may be brought; and, if such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned.

(4) A pending appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom.

Appeal rights

26. (1) Subject to the following paragraphs of this regulation, a person may appeal under these Regulations against an EEA decision.

(2) If a person claims to be an EEA national, he may not appeal under these Regulations unless he produces a valid national identity card or passport issued by an EEA State.

(2A) If a person claims to be in a durable relationship with an EEA national he may not appeal under these Regulations unless he produces—

(a) a passport; and

(b) sufficient evidence to satisfy the Secretary of State that he is in a relationship with that EEA national.

(3) If a person to whom paragraph (2) does not apply claims to be a family member who has retained the right of residence or the family member or relative of an EEA national he may not appeal under these Regulations unless he produces—

(a) a passport; and

(b) either—

(i) an EEA family permit;

(ia) a qualifying EEA State residence card;

(ii) proof that he is the family member or relative of an EEA national; or

(iii) in the case of a person claiming to be a family member who has retained the right of residence, proof that he was a family member of the relevant person.

(3A) If a person claims to be a person with a derivative right of entry or residence he may not appeal under these Regulations unless he produces a valid national identity card issued by an EEA State or a passport, and either—

(a) an EEA family permit; or

(b) proof that—

(i) where the person claims to have a derivative right of entry or residence as a result of regulation 15A(2), he is a direct relative or guardian of an EEA national who is under the age of 18;

(ii) where the person claims to have a derivative right of entry or residence as a result of regulation 15A(3), he is the child of an EEA national;

(iii) where the person claims to have a derivative right of entry or residence as a result of regulation 15A(4), he is a direct relative or guardian of the child of an EEA national;

(iv) where the person claims to have a derivative right of entry or residence as a result of regulation 15A(5), he is under the age of 18 and is a dependant of a person satisfying the criteria in (i) or (iii);

(v) where the person claims to have a derivative right of entry or residence as a result of regulation 15A(4A), he is a direct relative or guardian of a British citizen.

(4) A person may not bring an appeal under these Regulations on a ground certified under paragraph (5) or rely on such a ground in an appeal brought under these Regulations.

(5) The Secretary of State or an immigration officer may certify a ground for the purposes of paragraph (4) if it has been considered in a previous appeal brought under these Regulations or under section 82(1) of the 2002 Act(**23**).

(6) Except where an appeal lies to the Commission, an appeal under these Regulations lies to the First-tier

Tribunal.

(7) The provisions of or made under the 2002 Act referred to in Schedule 1 shall have effect for the purposes of an appeal under these Regulations to the First-tier Tribunal in accordance with that Schedule.

(8) For the avoidance of doubt, nothing in this Part prevents a person who enjoys a right of appeal under this regulation from appealing to the First-tier Tribunal under section 82(1) of the 2002 Act (right of appeal to the Tribunal), or, where relevant, to the Commission pursuant to section 2 of the Special Immigration Appeals Act 1997 (jurisdiction of the Commission: appeals), provided the criteria for bringing such an appeal under those Acts are met.

Out of country appeals

27. (1) Subject to paragraphs (2) and (3), a person may not appeal under regulation 26 whilst he is in the United Kingdom against an EEA decision—

(a) to refuse to admit him to the United Kingdom;

(zaa) to revoke his admission to the United Kingdom;

(aa) to make an exclusion order against him;

(b) to refuse to revoke a deportation or exclusion order made against him;

(c) to refuse to issue him with an EEA family permit;

(ca) to revoke, or to refuse to issue or renew any document under these Regulations where that decision is taken at a time when the relevant person is outside the United Kingdom; or

(d) to remove him from the United Kingdom after he has entered the United Kingdom in breach of a deportation or exclusion order, or in circumstances where that person was not entitled to be admitted pursuant to regulation 19(1) or (1AB).

(2) Paragraphs (1)(a) to (aa) do not apply where the person is in the United Kingdom and—

(a) the person held a valid EEA family permit, registration certificate, residence card, derivative residence card, document certifying permanent residence or , permanent residence card or qualifying EEA State residence card. on his arrival in the United Kingdom or can otherwise prove that he is resident in the United Kingdom; or

(b) the person is deemed not to have been admitted to the United Kingdom under regulation 22(3) but at the date on which notice of the decision to refuse to admit him is given he has been in the United Kingdom for at least 3 months. or

~~(c)~~ Omitted.

~~(3)~~ Omitted.

Appeals to the Commission

28. (1) An appeal against an EEA decision lies to the Commission where paragraph (2) or (4) applies.

(2) This paragraph applies if the Secretary of State certifies that the EEA decision was taken—

(a) by the Secretary of State wholly or partly on a ground listed in paragraph (3); or

(b) in accordance with a direction of the Secretary of State which identifies the person to whom the decision relates and which is given wholly or partly on a ground listed in paragraph (3).

(3) The grounds mentioned in paragraph (2) are that the person's exclusion or removal from the United Kingdom is—

(a) in the interests of national security; or

(b) in the interests of the relationship between the United Kingdom and another country.

(4) This paragraph applies if the Secretary of State certifies that the EEA decision was taken wholly or partly in reliance on information which in his opinion should not be made public—

(a) in the interests of national security;

(b) in the interests of the relationship between the United Kingdom and another country; or

(c) otherwise in the public interest.

(5) In paragraphs (2) and (4) a reference to the Secretary of State is to the Secretary of State acting in person.

(6) Where a certificate is issued under paragraph (2) or (4) in respect of a pending appeal to the First-tier Tribunal or Upper Tribunal the appeal shall lapse.

(7) An appeal against an EEA decision lies to the Commission where an appeal lapses by virtue of paragraph (6).

(8) The Special Immigration Appeals Commission Act 1997 shall apply to an appeal to the Commission under these Regulations as it applies to an appeal under section 2 of that Act to which subsection (2) of that section applies (appeals against an immigration decision) but paragraph (i) of that subsection shall not apply in relation to such an appeal.

National security: EEA Decisions

28A. (1) Section 97A(7) of the 2002 Act applies to an appeal against an EEA decision where the Secretary of State has certified under regulation 28(2) or (4) that the EEA decision was taken in the interests of national security.

(2) Where section 97A so applies, it has effect as if—

(a) the references in that section to a deportation order were to an EEA decision;

(b) subsections (1), (1A), (2)(b) and (4) were omitted;

(c) the reference in subsection (2)(a) to section 79 were a reference to regulations 27(2) and (3) and 29 of these Regulations; and

(d) in subsection (2A), for sub-paragraphs (a) and (b), "against an EEA decision" were substituted."

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Effect of appeals to the First-tier Tribunal or Upper Tribunal

29. (1) This Regulation applies to appeals under these Regulations made to the First-tier Tribunal or Upper Tribunal.

(2) If a person in the United Kingdom appeals against an EEA decision to refuse to admit him to the United Kingdom (other than a decision under regulation 19(1), (1A) or (1B)), any directions for his removal from the United Kingdom previously given by virtue of the refusal cease to have effect, except in so far as they have already been carried out, and no directions may be so given while the appeal is pending.

(3) If a person in the United Kingdom appeals against an EEA decision to remove him from the United Kingdom (other than a decision under regulation 19(3)(b)), any directions given under section 10 of the 1999 Act or Schedule 3 to the 1971 Act for his removal from the United Kingdom are to have no effect, except in so far as they have already been carried out, while the appeal is pending.

(4) But the provisions of Part I of Schedule 2, or as the case may be, Schedule 3 to the 1971 Act with respect to detention and persons liable to detention apply to a person appealing against a refusal to admit him, or a decision to revoke his admission, or a decision to remove him as if there were in force directions for his removal from the United Kingdom, except that he may not be detained on board a ship or aircraft so as to compel him to leave the United Kingdom while the appeal is pending.

(4A) In paragraph (4), the words “except that he” to the end do not apply to an EEA decision to which regulation 24AA applies.

(5) In calculating the period of two months limited by paragraph 8(2) of Schedule 2 to the 1971 Act for—

(5) In calculating the period of two months limited by paragraph 8(2) of Schedule 2 to the 1971 Act for—

(a) the giving of directions under that paragraph for the removal of a person from the United Kingdom; and

(b) the giving of a notice of intention to give such directions,

any period during which there is pending an appeal by him under is to be disregarded (except in cases where the EEA decision was taken pursuant to regulation 19(1), (1A), (1B) or (3)(b)).

(6) If a person in the United Kingdom appeals against an EEA decision to remove him from the United Kingdom, a deportation order is not to be made against him under section 5 of the 1971 Act while the appeal is pending.

(7) Paragraph 29 of Schedule 2 to the 1971 Act (grant of bail pending appeal) applies to a person who has an appeal pending under these Regulations as it applies to a person who has an appeal pending under section 82(1) of the 2002 Act.

Temporary admission in order to submit case in person

29AA. (1) This regulation applies where—

(a) a person (“P”) was removed from the United Kingdom pursuant to regulation 19(3)(b);

(b) P has appealed against the decision referred to in sub-paragraph (a);

(c) a date for P's appeal has been set by the First Tier Tribunal or Upper Tribunal; and

(d) P wants to make submissions before the First Tier Tribunal or Upper Tribunal in person.

(2) P may apply to the Secretary of State for permission to be temporarily admitted (within the meaning of paragraphs 21 to 24 of Schedule 2 to the 1971 Act(3), as applied by this regulation) to the United Kingdom in order to make submissions in person.

(3) The Secretary of State must grant P permission, except when P's appearance may cause serious troubles to public policy or public security.

(4) When determining when P is entitled to be given permission, and the duration of P's temporary admission should permission be granted, the Secretary of State must have regard to the dates upon which P will be required to make submissions in person.

(5) Where—

(a) P is temporarily admitted to the United Kingdom pursuant to this regulation;

(b) a hearing of P's appeal has taken place; and

(c) the appeal is not finally determined,

P may be removed from the United Kingdom pending the remaining stages of the redress procedure (but P may apply to return to the United Kingdom to make submissions in person during the remaining stages of the redress procedure in accordance with this regulation).

(6) Where the Secretary of State grants P permission to be temporarily admitted to the United Kingdom under this regulation, upon such admission P is to be treated as if P were a person refused leave to enter under the 1971 Act for the purposes of paragraphs 8, 10, 10A, 11, 16 to 18 and 21 to 24 of Schedule 2(4) to the 1971 Act.

(7) Where Schedule 2 to the 1971 Act so applies, it has effect as if—

(a) the reference in paragraph 8(1) to leave to enter were a reference to admission to the United Kingdom under these Regulations; and

(b) the reference in paragraph 16(1) to detention pending a decision regarding leave to enter or remain in the United Kingdom were to detention pending submission of P's case in person in accordance with this regulation.

(8) P will be deemed not to have been admitted to the United Kingdom during any time during which P is temporarily admitted pursuant to this regulation.

PART 7
GENERAL

Alternative evidence of identity and nationality

29A. (1) Subject to paragraph (2), where a provision of these Regulations requires a person to hold or produce a valid identity card issued by an EEA State or a valid passport the Secretary of State may accept alternative evidence of identity and nationality where the person is unable to obtain or produce the required document due to

circumstances beyond his or her control.

(2) This regulation does not apply to regulation 11

Revocations, transitional provisions and consequential amendments

Effect on other legislation

30. Schedule 2 (effect on other legislation) shall have effect.

Revocations, transitional provisions and consequential amendments

31. (1) The Regulations listed in column 1 of the table in Part 1 of Schedule 3 are revoked to the extent set out in column 3 of that table, subject to Part 2 of that Schedule and to Schedule 4.

(2) Schedule 4 (transitional provisions) and Schedule 5 (consequential amendments) shall have effect.

Tony McNulty
Minister of State

Home Office
30th March 2006

SCHEDULE 1

Regulation 26(7)

APPEALS TO THE FIRST-TIER TRIBUNAL

1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act(6) (right of appeal to the Tribunal)—

section 84(7) (grounds of appeal), as though the sole permitted ground of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom ("an EU ground of appeal");

section 85(8) (matters to be considered), as though—

(i) the references to a statement under section 120(9) of the 2002 Act include, but are not limited to, a statement under that section as applied by paragraph 4 of Schedule 2 to these Regulations; and

(ii) a "matter" in subsection (2) and a "new matter" in subsection (6) include a ground of appeal of a kind listed in section 84 of the 2002 Act and an EU ground of appeal;

section 86(10) (determination of appeal);

section 105 and any regulations made under that section; and

section 106 and any rules made under that section(**25**).

2. Tribunal Procedure Rules have effect in relation to appeals under these Regulations

SCHEDULE 2
Regulation 30

EFFECT ON OTHER LEGISLATION

Leave under the 1971 Act

1. (1) In accordance with section 7 of the Immigration Act 1988(**26**), a person who is admitted to or acquires a right to reside in the United Kingdom under these Regulations shall not require leave to remain in the United Kingdom under the 1971 Act during any period in which he has a right to reside under these Regulations but such a person shall require leave to remain under the 1971 Act during any period in which he does not have such a right.

(2) Subject to sub-paragraph (3), Where a person has leave to enter or remain under the 1971 Act which is subject to conditions and that person also has a right to reside under these Regulations, those conditions shall not have effect for as long as the person has that right to reside.

(3) Where the person mentioned in sub-paragraph (2) is an accession State national subject to worker authorisation working in the United Kingdom during the accession period and the document endorsed to show that the person has leave is an accession worker authorisation document, any conditions to which that leave is subject restricting his employment shall continue to apply.

(4) In sub-paragraph (3)—

(a) "accession period" has the meaning given in—

(i) regulation 1(2)(c) of the Accession (Immigration and Worker Authorisation) Regulations 2006, in relation to a person who is an accession State national subject to worker authorisation within the meaning of regulation 2 of those Regulations; and

(ii) regulation 1(2) of the Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013, in relation to a person who is an accession State national subject to worker authorisation within the meaning of regulation 2 of those Regulations;

(b) "accession State national subject to worker authorisation" has the meaning given in—

(i) regulation 2 of the Accession (Immigration and Worker Authorisation) Regulations 2006; and

(ii) regulation 2 of the Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013; and

(c) "accession worker authorisation document" has the meaning given in—

(i) regulation 9(2) of the Accession (Immigration and Worker Authorisation) Regulations 2006, in

relation to a person who is an accession State national subject to worker authorisation within the meaning of regulation 2 of those Regulations; and

(ii) regulation 1(2) of the Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013, in relation to a person who is an accession State national subject to worker authorisation within the meaning of regulation 2 of those Regulations.

Persons not subject to restriction on the period for which they may remain

2. (1) For the purposes of the 1971 Act and the British Nationality Act 1981(**27**), a person who has a permanent right of residence under regulation 15 shall be regarded as a person who is in the United Kingdom without being subject under the immigration laws to any restriction on the period for which he may remain.

(2) But a qualified person, the family member of a qualified person , a person with a derivative right of residence and a family member who has retained the right of residence shall not, by virtue of that status, be so regarded for those purposes.

Carriers' liability under the 1999 Act

3. For the purposes of satisfying a requirement to produce a visa under section 40(1)(b) of the 1999 Act(**28**) (charges in respect of passenger without proper documents), "a visa of the required kind" includes an EEA family permit, a residence card , a derivative residence card , a qualifying EEA State residence card or a permanent residence card required for admission under regulation 11(2).

Appeals under the 2002 Act and previous immigration Acts

4. (1) Omitted

(2) Omitted

(3) Omitted

(4) Omitted

(5) Omitted

(6) Omitted.

(7) Omitted.

(8) Section 120 of the 2002 Act applies to a person ("P") if an EEA decision has been taken or may be taken in respect of P and, accordingly, the Secretary of State or an immigration officer may by notice require a statement from P under subsection (2) of that section, and that notice has effect for the purpose of section 96(2) of the 2002 Act(11).

(9) Where section 120 of the 2002 Act so applies, it has effect as though—

(a) subsection (3) also provides that a statement under subsection (2) need not repeat reasons or grounds relating to the EEA decision under challenge previously advanced by P; and

(c) subsection (5) also applies where P does not have a right to reside in the United Kingdom under these Regulations, or only has such a right to reside by virtue of regulation 15B of these Regulations

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(continuation of a right of residence).

(10) For the purposes of an appeal brought pursuant to section 82(1) of the 2002 Act, subsections (2) and (6)(a) of section 85 (matters to be considered) have effect as though section 84 included a ground of appeal that the decision appealed against breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom.

SCHEDULE 3

Regulation 31(2)

REVOCATIONS AND SAVINGS

PART 1
TABLE OF REVOCATIONS

(1) *Regulations revoked*	*(2)* *References*	*(3)* *Extent of revocation*
The Immigration (European Economic Area) Regulations 2000	S.I. 2000/2326 (http://www.legislation.gov.uk/id/uksi/2000/2326)	The whole Regulations
The Immigration (European Economic Area) (Amendment) Regulations 2001	S.I. 2001/865 (http://www.legislation.gov.uk/id/uksi/2001/865)	The whole Regulations
The Immigration (Swiss Free Movement of Persons) (No. 3) Regulations 2002	S.I. 2002/1241 (http://www.legislation.gov.uk/id/uksi/2002/1241)	The whole Regulations
The Immigration (European Economic Area) (Amendment) Regulations 2003	S.I. 2003/549 (http://www.legislation.gov.uk/id/uksi/2003/549)	The whole Regulations
The Immigration (European Economic Area) (Amendment No. 2) Regulations 2003	S.I. 2003/3188 (http://www.legislation.gov.uk/id/uksi/2003/3188)	The whole Regulations
The Accession (Immigration and Worker Registration) Regulations 2004	S.I. 2004/1219 (http://www.legislation.gov.uk/id/uksi/2004/1219)	Regulations 3 and 6

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(1)	*(2)*	*(3)*
Regulations revoked	*References*	*Extent of revocation*
The Immigration (European Economic Area) and Accession (Amendment) Regulations 2004	S.I. 2004/1236 (http://www.legislation.gov.uk/id/uksi/2004/1236)	Regulation 2
The Immigration (European Economic Area) (Amendment) Regulations 2005	S.I. 2005/47 (http://www.legislation.gov.uk/id/uksi/2005/47)	The whole Regulations
The Immigration (European Economic Area)(Amendment) (No. 2) Regulations 2005	S.I. 2005/671 (http://www.legislation.gov.uk/id/uksi/2005/671)	The whole Regulations

PART 2
SAVINGS

1. The—

(a) Immigration (Swiss Free Movement of Persons) (No. 3) Regulations 2002(**32**) are not revoked insofar as they apply the 2000 Regulations to posted workers; and

(b) the 2000 Regulations and the Regulations amending the 2000 Regulations are not revoked insofar as they are so applied to posted workers;

and, accordingly, the 2000 Regulations, as amended, shall continue to apply to posted workers in accordance with the Immigration (Swiss Free Movement of Persons) (No. 3) Regulations 2002.

2. In paragraph 1, "the 2000 Regulations" means the Immigration (European Economic Area) Regulations 2000(**33**) and "posted worker" has the meaning given in regulation 2(4)(b) of the Immigration (Swiss Free Movement of Persons) (No. 3) Regulations 2002.

SCHEDULE 4
Regulation 31(2)

TRANSITIONAL PROVISIONS

Interpretation

1. In this Schedule—

(a) the "2000 Regulations" means the Immigration (European Economic Area) Regulations 2000(**34**) and expressions used in relation to documents issued or applied for under those Regulations shall have the meaning given in regulation 2 of those Regulations;

(b) the "Accession Regulations" means the Accession (Immigration and Worker Registration) Regulations 2004(**35**).

Existing documents

2. (1) An EEA family permit issued under the 2000 Regulations shall, after 29th April 2006, be treated as if it were an EEA family permit issued under these Regulations.

(2) Subject to paragraph (4), a residence permit issued under the 2000 Regulations shall, after 29th April 2006, be treated as if it were a registration certificate issued under these Regulations.

(3) Subject to paragraph (5), a residence document issued under the 2000 Regulations shall, after 29th April 2006, be treated as if it were a residence card issued under these Regulations.

(4) Where a residence permit issued under the 2000 Regulations has been endorsed under the immigration rules to show permission to remain in the United Kingdom indefinitely it shall, after 29th April 2006, be treated as if it were a document certifying permanent residence issued under these Regulations and the holder of the permit shall be treated as a person with a permanent right of residence under regulation 15.

(5) Where a residence document issued under the 2000 Regulations has been endorsed under the immigration rules to show permission to remain in the United Kingdom indefinitely it shall, after 29th April 2006, be treated as if it were a permanent residence card issued under these Regulations and the holder of the permit shall be treated as a person with a permanent right of residence under regulation 15.

(6) Paragraphs (4) and (5) shall also apply to a residence permit or residence document which is endorsed under the immigration rules on or after 30th April 2006 to show permission to remain in the United Kingdom indefinitely pursuant to an application for such an endorsement made before that date.

Outstanding applications

3. (1) An application for an EEA family permit, a residence permit or a residence document made but not determined under the 2000 Regulations before 30 April 2006 shall be treated as an application under these Regulations for an EEA family permit, a registration certificate or a residence card, respectively.

(2) But the following provisions of these Regulations shall not apply to the determination of an application mentioned in sub-paragraph (1)—

(a) the requirement to issue a registration certificate immediately under regulation 16(1); and

(b) the requirement to issue a certificate of application for a residence card under regulation 17(3).

Decisions to remove under the 2000 Regulations

4. (1) A decision to remove a person under regulation 21(3)(a) of the 2000 Regulations shall, after 29th April 2006, be treated as a decision to remove that person under regulation 19(3)(a) of these Regulations.

(2) A decision to remove a person under regulation 21(3)(b) of the 2000 Regulations, including a decision which is treated as a decision to remove a person under that regulation by virtue of regulation 6(3)(a) of the Accession Regulations, shall, after 29th April 2006, be treated as a decision to remove that person under regulation 19(3)(b) of these Regulations.

(3) A deportation order made under section 5 of the 1971 Act by virtue of regulation 26(3) of the 2000 Regulations shall, after 29th April 2006, be treated as a deportation made under section 5 of the 1971 Act by virtue of regulation 24(3) of these Regulations.

Appeals

5. (1) Where an appeal against an EEA decision under the 2000 Regulations is pending immediately before 30th April 2006 that appeal shall be treated as a pending appeal against the corresponding EEA Decision under these Regulations.

(2) Where an appeal against an EEA decision under the 2000 Regulations has been determined, withdrawn or abandoned it shall, on and after 30th April 2006, be treated as an appeal against the corresponding EEA decision under these Regulations which has been determined, withdrawn or abandoned, respectively.

(3) For the purpose of this paragraph—

(a) a decision to refuse to admit a person under these Regulations corresponds to a decision to refuse to admit that person under the 2000 Regulations;

(b) a decision to remove a person under regulation 19(3)(a) of these Regulations corresponds to a decision to remove that person under regulation 21(3)(a) of the 2000 Regulations;

(c) a decision to remove a person under regulation 19(3)(b) of these Regulations corresponds to a decision to remove that person under regulation 21(3)(b) of the 2000 Regulations, including a decision which is treated as a decision to remove a person under regulation 21(3)(b) of the 2000 Regulations by virtue of regulation 6(3)(a) of the Accession Regulations;

(d) a decision to refuse to revoke a deportation order made against a person under these Regulations corresponds to a decision to refuse to revoke a deportation order made against that person under the 2000 Regulations, including a decision which is treated as a decision to refuse to revoke a deportation order under the 2000 Regulations by virtue of regulation 6(3)(b) of the Accession Regulations;

(e) a decision not to issue or renew or to revoke an EEA family permit, a registration certificate or a residence card under these Regulations corresponds to a decision not to issue or renew or to revoke an EEA family permit, a residence permit or a residence document under the 2000 Regulations, respectively.

Periods of residence prior to the entry into force of these Regulations

6. (1) Any period during which a person (“P”), who is an EEA national, carried out an activity or was resident in the United Kingdom in accordance with the conditions in subparagraph (2) or (3) is to be treated as a period during which the person carried out that activity or was resident in the United Kingdom in accordance with these Regulations for the purpose of calculating periods of activity and residence there under.

(2) P carried out an activity, or was resident, in the United Kingdom in accordance with this subparagraph where such activity or residence was at that time in accordance with—

(a) the 2000 Regulations;

(b) the Immigration (European Economic Area) Order 1994(1) (“the 1994 Order”); or

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(c) where such activity or residence preceded the entry into force of the 1994 Order, any of the following Directives which was at the relevant time in force in respect of the United Kingdom—

(i) Council Directive 64/221/EEC (http://www.legislation.gov.uk/european/directive/1964/0221);

(ii) Council Directive 68/360/EEC (http://www.legislation.gov.uk/european/directive/1968/0360);

(iii) Council Directive 72/194/EEC (http://www.legislation.gov.uk/european/directive/1972/0194);

(iv) Council Directive 73/148/EEC (http://www.legislation.gov.uk/european/directive/1973/0148);

(v) Council Directive 75/34/EEC (http://www.legislation.gov.uk/european/directive/1975/0034);

(vi) Council Directive 75/35/EEC (http://www.legislation.gov.uk/european/directive/1975/0035);

(vii) Council Directive 90/364/EEC (http://www.legislation.gov.uk/european/directive/1990/0364);

(viii) Council Directive 90/365/EEC (http://www.legislation.gov.uk/european/directive/1990/0365); and

(ix) Council Directive 93/96/EEC (http://www.legislation.gov.uk/european/directive/1993/0096).

(3) P carried out an activity or was resident in the United Kingdom in accordance with this subparagraph where P—

(a) had leave to enter or remain in the United Kingdom; and

(b) would have been carrying out that activity or residing in the United Kingdom in accordance with these Regulations had the relevant state been an EEA State at that time and had these Regulations at that time been in force.

(4) Any period during which P carried out an activity or was resident in the United Kingdom in accordance with subparagraph (2) or (3) will not be regarded as a period during which P carried out that activity or was resident in the United Kingdom in accordance with these Regulations where it was followed by a period—

(a) which exceeded two consecutive years and for the duration of which P was absent from the United Kingdom; or

(b) which exceeded two consecutive years and for the duration of which P's residence in the United Kingdom—

(i) was not in accordance with subparagraph (2) or (3); or

(ii) was not otherwise in accordance with these Regulations.

(5) The relevant state for the purpose of subparagraph (3) is the state of which P is, and was at the relevant time, a national.

SCHEDULE 5

Regulation 31(2)

CONSEQUENTIAL AMENDMENTS

Statutory Instruments

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The Channel Tunnel (International Arrangements) Order 1993

1. (1) The Channel Tunnel (International Arrangements) Order 1993(**36**) is amended as follows.

(2) In Schedule 4, in paragraph 5—

(a) at the beginning of the paragraph, for "the Immigration (European Economic Area) Regulations 2000" there is substituted "the Immigration (European Economic Area) Regulations 2006";

(b) in sub-paragraph (a), for "regulation 12(2)" there is substituted "regulation 11(2)" and for "residence document or document proving family membership" there is substituted "residence card or permanent residence card";

(c) for sub-paragraph (b) there is substituted—

"(b) in regulations 11(4) and 19(2) after the word "arrival" and in regulations 20(4) and (5) after the words "United Kingdom" insert "or the time of his production of the required documents in a control zone or a supplementary control zone".

The Travel Restriction Order (Prescribed Removal Powers) Order 2002

2. (1) The Travel Restriction Order (Prescribed Removal Powers) Order 2002(**37**) is amended as follows.

(2) In the Schedule, for "Immigration (European Economic Area) Regulations 2000 (2000/2326 (http://www.legislation.gov.uk/id/uksi/2000/2326))" in the first column of the table there is substituted "Immigration (European Economic Area) Regulations 2006" and for "Regulation 21(3)" in the corresponding row in the second column of the table there is substituted "Regulation 19(3)".

The Immigration (Notices) Regulations 2003

3. (1) The Immigration (Notices) Regulations 2003(**38**) are amended as follows.

(2) In regulation 2, in the definition of "EEA decision"—

(a) at the end of paragraph (b), "or" is omitted;

(b) in paragraph (c), after "residence document;", there is inserted "or"; and

(c) after paragraph (c), there is inserted—

"(d) on or after 30th April 2006, entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, document certifying permanent residence or permanent residence card;"

The Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003

4. (1) The Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003(**39**) is amended as follows.

(2) In article 11(1), for sub-paragraph (e) there is substituted—

"(e) the Immigration (European Economic Area) Regulations 2006.".

(3) In Schedule 2, in paragraph 5—

(a) at the beginning of the paragraph, for "the Immigration (European Economic Area) Regulations 2000" there is substituted "the Immigration (European Economic Area) Regulations 2006";

(b) in sub-paragraph (a), for "in regulation 2, at the beginning insert" there is substituted "in regulation 2(1), after the definition of "civil partner" insert";

(c) in sub-paragraph (b), for "regulation 12(2)" there is substituted "regulation 11(2)" and for "residence document or document proving family membership" there is substituted "residence card or permanent residence card";

(d) for sub-paragraph (c) there is substituted—

"(c) in regulations 11(4) and 19(2) after the word "arrival" and in regulations 20(4) and (5) after the words "United Kingdom" insert "or the time of his production of the required documents in a Control Zone".

The Immigration and Asylum Act 1999 (Part V Exemption: Relevant Employers) Order 2003

5. (1) The Immigration and Asylum Act 1999 (Part V Exemption: Relevant Employers) Order 2003(**40**) is amended as follows.

(2) In Article 2, in the definition of "EEA national" and "family member of an EEA national", for "Immigration (European Economic Area) Regulations 2000" there is substituted "Immigration (European Economic Area) Regulations 2006".

The Immigration (Restrictions on Employment) Order 2004

6. (1) The Immigration (Restrictions on Employment) Order 2004(**41**) is amended as follows.

(2) In Part 1 of the Schedule (descriptions of documents for the purpose of article 4(2)(a) of the Order)—

(a) for paragraph 4 there is substituted—

"**4.** A registration certificate or document certifying permanent residence within the meaning of regulation 2 of the Immigration (European Economic Area) Regulations 2006, including a document which is treated as a registration certificate or document certifying permanent residence by virtue of Schedule 4 to those Regulations.";

(b) for paragraph 5 there is substituted—

"**5.** A residence card or a permanent residence card within the meaning of regulation 2 of the Immigration (European Economic Area) Regulations 2006, including a document which is treated as a residence card or a permanent residence card by virtue of Schedule 4 to those Regulations".

The Accession (Immigration and Worker Registration) Regulations 2004

7. (1) The Accession (Immigration and Worker Registration) Regulations 2004(**42**) are amended as follows.

(2) In regulation 1(2) (interpretation)—

(a) after paragraph (b) there is inserted—

"(ba) "the 2006 Regulations" means the Immigration (European Economic Area) Regulations 2006;";

(b) in paragraph (j), for "regulation 3 of the 2000 Regulations" these is substituted "regulation 4 of the 2006 Regulations".

(3) In regulation 2 ("accession State worker requiring registration")—

(a) Omitted.

(b) paragraph (9)(a) is omitted;

(c) for paragraph (9)(c) there is substituted—

"(c) "family member" has the same meaning as in regulation 7 of the 2006 Regulations.".

(4) In regulation 4 (right of residence of work seekers and workers from relevant acceding States during the accession period)—

(a) in paragraph (1), before "Council Directive" there is inserted "Council Directive 2004/38/EC (http://www.legislation.gov.uk/european/directive/2004/0038) of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States(**43**), insofar as it takes over provisions of";

(b) in paragraph (3), for "2000 Regulations" there is substituted "2006 Regulations";

(c) in paragraph (4), for "An" there is substituted "A national of a relevant accession State who is seeking employment and an" and for "2000 Regulations" there is substituted "2006 Regulations".

(5) For regulation 5 (application of 2000 Regulations in relation to accession State worker requiring registration) there is substituted—

"*Application of 2006 Regulations in relation to accession State worker requiring registration*

5. (1) The 2006 Regulations shall apply in relation to a national of a relevant accession State subject to the modifications set out in this regulation.

(2) A national of a relevant accession State who is seeking employment in the United Kingdom shall not be treated as a jobseeker for the purpose of the definition of "qualified person" in regulation 6(1) of the 2006 Regulations and an accession State worker requiring registration shall be treated as a worker for the purpose of that definition only during a period in which he is working in the United Kingdom for an authorised employer.

(3) Subject to paragraph (4), regulation 6(2) of the 2006 Regulations shall not apply to an accession State worker requiring registration who ceases to work.

(4) Where an accession State worker requiring registration ceases working for an authorised employer in the circumstances mentioned in regulation 6(2) of the 2006 Regulations during the one month period beginning on the date on which the work begins, that regulation shall apply to that worker during the remainder of that one month period.

(5) An accession State worker requiring registration shall not be treated as a qualified person for the purpose of regulations 16 and 17 of the 2006 Regulations (issue of registration certificates and residence cards)."

The Asylum and Immigration Tribunal (Procedure) Rules 2005

8. (1) The Asylum and Immigration Tribunal (Procedure) Rules 2005(**44**) are amended as follows.

(2) In regulation 18(1)(b), after "("the 2000 Regulations")" there is inserted "or, on or after 30th April 2006, paragraph 4(2) of Schedule 2 to the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations")".

(3) In regulation 18(2), after "2000 Regulations" there is inserted "or paragraph 4(2) of Schedule 2 to the 2006 Regulations".

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement Directive 2004/38/EC (http://www.legislation.gov.uk/european/directive/2004/0038) of the European Parliament and the Council of 29th April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 (http://www.legislation.gov.uk/european/regulation/1968/1612) and repealing Directives 64/221/EEC (http://www.legislation.gov.uk/european/directive/1964/0221), 68/360/EEC (http://www.legislation.gov.uk/european/directive/1968/0360), 72/194/EEC (http://www.legislation.gov.uk/european/directive/1972/0194), 73/148/EEC (http://www.legislation.gov.uk/european/directive/1973/0148), 75/35/EEC (http://www.legislation.gov.uk/european/directive/1975/0035), 90/364/EEC (http://www.legislation.gov.uk/european/directive/1990/0364), 90/365/EEC (http://www.legislation.gov.uk/european/directive/1990/0365) and 93/96/EEC (http://www.legislation.gov.uk/european/directive/1993/0096). The Regulations come into force on 30th April 2006. A Transposition Note setting how the Government has transposed into UK law the main elements of this Directive will be available on the Office of Public Sector Information website.

Directive 2004/38/EC (http://www.legislation.gov.uk/european/directive/2004/0038) provides for the free movement of Union citizens and their family members within the territory of the member States. The repealed Directives were extended to Norway, Iceland and Liechtenstein by the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (OJ No. L 1, 3.1.94, p.3) and it is envisaged that Directive 2004/38/EC (http://www.legislation.gov.uk/european/directive/2004/0038) will also be extended to these States. In addition, an agreement between the European Community and its member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons, signed at Brussels on 21st June 1999 (Cm (Command Paper) 4904) confers on Swiss nationals and their family members broadly similar rights of entry into and residence in the United Kingdom as were contained in the repealed Directives. As was the case with the Regulations implementing the repealed Directives, these Regulations will also apply to nationals from Norway, Iceland Liechtenstein and Switzerland and their family members as well as to Union citizens and their family members. This will avoid having to apply a slightly different free movement regime to nationals from Norway,

Iceland, Liechtenstein and Switzerland and their family members from that which has to apply to Union citizens and their family members under Directive 2004/38/EC (http://www.legislation.gov.uk/european/directive/2004/0038).

Directive 2004/38/EC (http://www.legislation.gov.uk/european/directive/2004/0038) is based on the provisions of the repealed Directives but it also contains new provisions, some of which reflect the case law of the European Court of Justice relating to the repealed Directives and the free movement of persons and some of which represent new developments of the law on the free movement of persons. The main new developments, which are reflected in these Regulations, are:

(a) the inclusion of civil partners as family members of EU nationals along with spouses so far as member States who treat such partnerships as equivalent to marriage are concerned;

(b) the introduction of an initial right of residence of 3 months in a host member State for EU nationals and their family members provided they do not become an unreasonable burden on the social assistance system of the host member State – this right of residence is not conditional on the EU national being, for example, a worker, self-employed, as was the case under the repealed Directives;

(c) the introduction of a permanent right of residence in a host member State, which generally applies after 5 years residence in that member State.

Part 1 (regulations 1 to 10) of the Regulations contains the interpretation provisions for the Regulations. Part 2 (regulations 11 to 15) sets out the free movement rights conferred on EEA nationals—

(i) the right of EEA nationals and their family members to be admitted to the United Kingdom provided they have the relevant documents (*regulation 11*);

(ii) the right of EEA nationals and their family members to reside in the United Kingdom for an initial period of 3 months (*regulation 13*);

(iii) the right of a "qualified person" (a jobseeker, worker, self-employed person, self-sufficient person or student), a family member a qualified person, and a "family member who has retained the right of residence" (for example, a family member of a deceased qualified person who satisfies specified conditions) to reside in the United Kingdom for as long as they have this status (*regulation 14*); and

(iv) the right of EEA nationals and their family members to permanent residence in the United Kingdom in specified circumstances (for example, after they have resided in the United Kingdom under the Regulations for 5 years (*regulation 15*)).

Part 3 (regulations 16 to 18) provides for the issue of residence documentation, which can be used as proof of the rights of residence provided for in the Regulations. Part 4 (regulations 19 to 21) provides for the exclusion and removal of EEA nationals and their family members. As under the previous Directives, EEA nationals and their family members can be excluded on public policy, public security and public health grounds. Part 5 (regulations 22 to 24) contains procedural provisions relating to persons who claim admission under the Regulations, who are refused admission, or are being removed. Part 6 (regulations 25 to 29) and Schedule 1 set out the appeal rights in relation to decisions taken under the Regulations. Schedule 2 deals with the effect of the Regulations on other legislation. Schedule 3 lists the regulations that are being repealed by the new Regulations. Schedule 4 contains transitional provisions. Schedule 5 contains consequential amendments.

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(**1**) S.I. 2000/1813 (http://www.legislation.gov.uk/id/uksi/2000/1813).

(**2**) 1972 c. 68 (http://www.legislation.gov.uk/id/ukpga/1972/68).

(**3**) 2002 c. 41 (http://www.legislation.gov.uk/id/ukpga/2002/41).

(**4**) 1971 c. 77 (http://www.legislation.gov.uk/id/ukpga/1971/77).

(**5**) 1999 c. 33 (http://www.legislation.gov.uk/id/ukpga/1999/33).

(**6**) Civil partner has the meaning given by Schedule 1 to the Interpretation Act 1978 (c. 30) (http://www.legislation.gov.uk/id/ukpga/1978/30) as amended by paragraph 59 of Schedule 27 to the Civil Partnership Act 2004 (c. 33) (http://www.legislation.gov.uk/id/ukpga/2004/33).

(**7**) Section 33(1) is amended by paragraph 5 of the Schedule to the Immigration Act 1988 (c. 14) (http://www.legislation.gov.uk//id/ukpga/1988/14).

(**8**) OJ No. C325, 24.12.02, p. 51.

(**9**) The Register of Education and Training Providers is maintained by, and is available on the website of, the Department for Education and Skills.

(**10**) OJ No. L 257, 19.10.68, p. 2 (OJ/SE 1st series 1968, vol II, p. 475).

(**11**) Cmd 1976.

(**12**) The relevant instrument of the World Health Organisation for these purposes is currently the International Health Regulations (2005).

(**13**) 1984 c. 22 (http://www.legislation.gov.uk/id/ukpga/1984/22); section 38 applies to a “notifiable disease”, as defined in section 10 of the Act and has been applied to an additional list of diseases by the Public Health (Infectious Diseases) Regulations S.I. 1988/1546 (http://www.legislation.gov.uk/id/uksi /1988/1546).

(**14**) The relevant parts of Schedule 2 were amended by Schedule 6 to the Criminal Justice Act 1972 (c. 71) (http://www.legislation.gov.uk/id/ukpga/1972/71), paragraphs 2 and 3 of Schedule 4 to the British Nationality Act 1981 (c. 61) (http://www.legislation.gov.uk/id/ukpga/1981/61), paragraphs 6, 8, 9 and 10 of the Schedule to the Immigration Act 1988 (c. 14) (http://www.legislation.gov.uk//id/ukpga/1988/14), paragraphs 5, 7, 10 and 11 of Schedule 2, and Schedule 4 to the Asylum and Immigration Act 1996 (c. 49) (http://legislation.gov.uk/id/ukpga/1996/49), paragraph 70 of Schedule 13 to the Access to Justice Act 1999 (c. 22) (http://www.legislation.gov.uk/id/ukpga/1999/22), section 140 of and paragraphs 43, 56, 58 to 63 of Schedule 14, and Schedule 16 to the 1999 Act, sections 63, 64 and 73 of and paragraphs 3 and 4 of Schedule 7 to the 2002 Act, paragraph 149 of Schedule 8 to the Courts Act 2003

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(c. 39) (http://www.legislation.gov.uk/id/ukpga/2003/39), paragraph 1 of Schedule 2 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (c. 19) (http://www.legislation.gov.uk/id/ukpga/2004/19), and S.I. 1993/1813 (http://www.legislation.gov.uk/id/uksi/1993/1813).

(**15**) Section 10 is amended by sections 73 to 75 of and Schedule 9 to the 2002 Act.

(**16**) Section 3(5) is amended by paragraphs 43 and 44 of Schedule 14 to the 1999 Act.

(**17**) Section 5 is amended by paragraph 2 of Schedule 4 to the British Nationality Act 1981 (c. 61) (http://www.legislation.gov.uk/id/ukpga/1981/61), paragraph 2 of the Schedule to the Immigration Act 1988 (c. 14) (http://www.legislation.gov.uk//id/ukpga/1988/14), paragraph 2 of Schedule 2 to the Asylum and Immigration Act 1996 (c. 49) (http://legislation.gov.uk/id/ukpga/1996/49) and paragraph 37 of Schedule 27 to the Civil Partnership Act 2004 (c. 33) (http://www.legislation.gov.uk/id/ukpga/2004/33).

(**18**) Schedule 3 is amended by paragraphs 1 and 2 of Schedule 10 to the Criminal Justice Act 1982 (c. 48) (http://www.legislation.gov.uk/id/ukpga/1982/48), paragraph 10 of Schedule 10 to the Immigration Act 1988 (c. 14) (http://www.legislation.gov.uk//id/ukpga/1988/14), paragraph 13 of Schedule 2 to the Asylum and Immigration Act 1996 (c. 49) (http://legislation.gov.uk/id/ukpga/1996/49), section 54 of, and paragraphs 43 and 68 of Schedule 14 to, the 1999 Act, paragraphs 7 and 8 of Schedule 7 to the 2002 Act, paragraph 150 of Schedule 8, and Schedule 10, to the Courts Act 2003 (c. 39) (http://www.legislation.gov.uk/id/ukpga/2003/39), and section 34 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (c. 19) (http://www.legislation.gov.uk/id/ukpga/2004/19).

(**19**) 1997 c. 68 (http://www.legislation.gov.uk/id/ukpga/1997/68).

(**20**) 1998 c. 42 (http://www.legislation.gov.uk/id/ukpga/1998/42).

(**21**) Cmd 9171.

(**22**) Cmnd 3906.

(**23**) Section 82(1) is amended by section 26 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (c. 19) (http://www.legislation.gov.uk/id/ukpga/2004/19).

(**24**) Section 84(1) is amended by S.R. 2003/341 (http://www.legislation.gov.uk/id/nisr/2003/341).

(**25**) Sections 85 to 87 and 105 to 106 are amended by, and sections 103A to 103E are inserted by, section 26 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (c. 19) (http://www.legislation.gov.uk/id/ukpga/2004/19).

(**26**) 1988 c. 14 (http://www.legislation.gov.uk//id/ukpga/1988/14).

(**27**) 1981 c. 61 (http://www.legislation.gov.uk/id/ukpga/1981/61).

(**28**) Section 40 was substituted by paragraph 13 of Schedule 8 to the 2002 Act.

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(**29**) S.I 2004/1219 (http://www.legislation.gov.uk/id/uksi/2004/1219), amended by S.I. 2004/1236 (http://www.legislation.gov.uk/id/uksi/2004/1236) and S.I. 2005/2400 (http://www.legislation.gov.uk/id/uksi/2005/2400).

(**30**) 1993 c. 23 (http://www.legislation.gov.uk/id/ukpga/1993/23).

(**31**) 1996 c. 49 (http://legislation.gov.uk/id/ukpga/1996/49).

(**32**) S.I. 2002/1241 (http://www.legislation.gov.uk/id/uksi/2002/1241).

(**33**) S.I. 2000/2326 (http://www.legislation.gov.uk/id/uksi/2000/2326), amended by S.I. 2001/865 (http://www.legislation.gov.uk/id/uksi/2001/865), S.I. 2003/549 (http://www.legislation.gov.uk/id/uksi/2003/549), S.I. 2003/3188 (http://www.legislation.gov.uk/id/uksi/2003/3188), S.I. 2005/47 (http://www.legislation.gov.uk/id/uksi/2005/47) and S.I. 2005/671 (http://www.legislation.gov.uk/id/uksi/2005/671).

(**34**) S.I. 2000/2326 (http://www.legislation.gov.uk/id/uksi/2000/2326), amended by S.I. 2001/865 (http://www.legislation.gov.uk/id/uksi/2001/865), S.I. 2003/549 (http://www.legislation.gov.uk/id/uksi/2003/549), S.I. 2003/3188 (http://www.legislation.gov.uk/id/uksi/2003/3188), S.I. 2005/47 (http://www.legislation.gov.uk/id/uksi/2005/47) and S.I. 2005/671 (http://www.legislation.gov.uk/id/uksi/2005/671).

(**35**) S.I. 2004/1219 (http://www.legislation.gov.uk/id/uksi/2004/1219), amended by S.I. 2004/1236 (http://www.legislation.gov.uk/id/uksi/2004/1236) and 2005/2400 (http://www.legislation.gov.uk/id/uksi/2005/2400).

(**36**) S.I. 1993/1813 (http://www.legislation.gov.uk/id/uksi/1993/1813), amended by S.I. 1994/1405 (http://www.legislation.gov.uk/id/uksi/1994/1405), S.I. 1996/2283 (http://www.legislation.gov.uk/id/uksi/1996/2283), S.I. 2000/913 (http://www.legislation.gov.uk/id/uksi/2000/913), S.I. 2000/1775 (http://www.legislation.gov.uk/id/uksi/2000/1775), S.I. 2001/178 (http://www.legislation.gov.uk/id/uksi/2001/178), S.I. 2001/418 (http://www.legislation.gov.uk/id/uksi/2001/418), S.I. 2001/1544 (http://www.legislation.gov.uk/id/uksi/2001/1544), S.I. 2000/3707 (http://www.legislation.gov.uk/id/uksi/2000/3707) and S.I. 2003/2799 (http://www.legislation.gov.uk/id/uksi/2003/2799).

(**37**) S.I. 2002/313 (http://www.legislation.gov.uk/id/uksi/2002/313).

(**38**) S.I. 2003/658 (http://www.legislation.gov.uk/id/uksi/2003/658).

(**39**) S.I. 2003/2818 (http://www.legislation.gov.uk/id/uksi/2003/2818).

(**40**) S.I. 2003/3214 (http://www.legislation.gov.uk/id/uksi/2003/3214).

(**41**) S.I. 2004/755 (http://www.legislation.gov.uk/id/uksi/2004/755).

(**42**) S.I. 2004/1219 (http://www.legislation.gov.uk/id/uksi/2004/1219); amended by S.I. 2004/1236 (http://www.legislation.gov.uk/id/uksi/2004/1236) and S.I. 2005/2400 (http://www.legislation.gov.uk

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/id/uksi/2005/2400).

(**43**) OJ L 158, 30.4.2004, p.77 (the full title of the Directive is Council Directive 2004/38/EC (http://www.legislation.gov.uk/european/directive/2004/0038) of the European Parliament and the Council on the rights of citizens of the Union and their family members to move and reside freely within the territory of the member States amending Regulation (EEC) No. 1612/68 (http://www.legislation.gov.uk/european/regulation/1968/1612) and repealing Directives 64/221/EEC (http://www.legislation.gov.uk/european/directive/1964/0221), 68/360/EEC (http://www.legislation.gov.uk/european/directive/1968/0360), 72/194/EEC (http://www.legislation.gov.uk/european/directive/1972/0194), 75/34/EEC (http://www.legislation.gov.uk/european/directive/1975/0034), 90/364/EEC (http://www.legislation.gov.uk/european/directive/1990/0364), 90/365/EEC (http://www.legislation.gov.uk/european/directive/1990/0365) and 93/96/EEC (http://www.legislation.gov.uk/european/directive/1993/0096)).

(**44**) S.I. 2005/230 (http://www.legislation.gov.uk/id/uksi/2005/230).

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PART TWO

NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION

Article 18

(ex Article 12 TEC)

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 19

(ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Article 20

(ex Article 17 TEC)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

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(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Article 21

(ex Article 18 TEC)

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

Article 22

(ex Article 19 TEC)

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

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Article 23

(ex Article 20 TEC)

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.

The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.

Article 24

(ex Article 21 TEC)

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come.

Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 227.

Every citizen of the Union may apply to the Ombudsman established in accordance with Article 228.

Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.

Article 25

(ex Article 22 TEC)

The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this Part. This report shall take account of the development of the Union.

On this basis, and without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2). These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

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3. The Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities.

4. In accordance with paragraph 2, the national market organisations may be replaced by the common organisation provided for in Article 40(1) if:

(a) the common organisation offers Member States which are opposed to this measure and which have an organisation of their own for the production in question equivalent safeguards for the employment and standard of living of the producers concerned, account being taken of the adjustments that will be possible and the specialisation that will be needed with the passage of time;

(b) such an organisation ensures conditions for trade within the Union similar to those existing in a national market.

5. If a common organisation for certain raw materials is established before a common organisation exists for the corresponding processed products, such raw materials as are used for processed products intended for export to third countries may be imported from outside the Union.

Article 44

(ex Article 38 TEC)

Where in a Member State a product is subject to a national market organisation or to internal rules having equivalent effect which affect the competitive position of similar production in another Member State, a countervailing charge shall be applied by Member States to imports of this product coming from the Member State where such organisation or rules exist, unless that State applies a countervailing charge on export.

The Commission shall fix the amount of these charges at the level required to redress the balance; it may also authorise other measures, the conditions and details of which it shall determine.

TITLE IV

FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

CHAPTER 1

WORKERS

Article 45

(ex Article 39 TEC)

1. Freedom of movement for workers shall be secured within the Union.

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2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Article 46

(ex Article 40 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular:

(a) by ensuring close cooperation between national employment services;

(b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;

(c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;

(d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

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Article 47

(ex Article 41 TEC)

Member States shall, within the framework of a joint programme, encourage the exchange of young workers.

Article 48

(ex Article 42 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

(a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or

(b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.

CHAPTER 2

RIGHT OF ESTABLISHMENT

Article 49

(ex Article 43 TEC)

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

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I

(Legislative acts)

REGULATIONS

REGULATION (EU) No 492/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 5 April 2011

on freedom of movement for workers within the Union

(codification)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 46 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [3] has been substantially amended several times [4]. In the interests of clarity and rationality the said Regulation should be codified.

(2) Freedom of movement for workers should be secured within the Union. The attainment of this objective entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, as well as the right of such workers to move freely within the Union in order to pursue activities as employed persons subject to any limitations justified on grounds of public policy, public security or public health.

(3) Provisions should be laid down to enable the objectives laid down in Articles 45 and 46 of the Treaty on the Functioning of the European Union in the field of freedom of movement to be achieved.

(4) Freedom of movement constitutes a fundamental right of workers and their families. Mobility of labour within the Union must be one of the means by which workers are guaranteed the possibility of improving their living and working conditions and promoting their social advancement, while helping to satisfy the requirements of the economies of the Member States. The right of all workers in the Member States to pursue the activity of their choice within the Union should be affirmed.

(5) Such right should be enjoyed without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services.

(6) The right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers be eliminated, in particular as regards the conditions for the integration of the worker's family into the host country.

[1] OJ C 44, 11.2.2011, p. 170.
[2] Position of the European Parliament of 7 September 2010 (not yet published in the Official Journal) and decision of the Council of 21 March 2011.
[3] OJ L 257, 19.10.1968, p. 2.
[4] See Annex I.

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(7) The principle of non-discrimination between workers in the Union means that all nationals of Member States have the same priority as regards employment as is enjoyed by national workers.

(8) The machinery for vacancy clearance, in particular by means of direct cooperation between the central employment services and also between the regional services, as well as by coordination of the exchange of information, ensures in a general way a clearer picture of the labour market. Workers wishing to move should also be regularly informed of living and working conditions.

(9) Close links exist between freedom of movement for workers, employment and vocational training, particularly where the latter aims at putting workers in a position to take up concrete offers of employment from other regions of the Union. Such links make it necessary that the problems arising in this connection should no longer be studied in isolation but viewed as interdependent, account also being taken of the problems of employment at the regional level. It is therefore necessary to direct the efforts of Member States toward coordinating their employment policies,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

EMPLOYMENT, EQUAL TREATMENT AND WORKERS' FAMILIES

SECTION 1

Eligibility for employment

Article 1

1. Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.

Article 2

Any national of a Member State and any employer pursuing an activity in the territory of a Member State may exchange their applications for and offers of employment, and may conclude and perform contracts of employment in accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom.

Article 3

1. Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

(a) where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or

(b) where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.

The first subparagraph shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled.

2. There shall be included in particular among the provisions or practices of a Member State referred to in the first subparagraph of paragraph 1 those which:

(a) prescribe a special recruitment procedure for foreign nationals;

(b) limit or restrict the advertising of vacancies in the press or through any other medium or subject it to conditions other than those applicable in respect of employers pursuing their activities in the territory of that Member State;

(c) subject eligibility for employment to conditions of registration with employment offices or impede recruitment of individual workers, where persons who do not reside in the territory of that State are concerned.

Article 4

1. Provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment of foreign nationals in any undertaking, branch of activity or region, or at a national level, shall not apply to nationals of the other Member States.

2. When in a Member State the granting of any benefit to undertakings is subject to a minimum percentage of national workers being employed, nationals of the other Member States shall be counted as national workers, subject to Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [1].

[1] OJ L 255, 30.9.2005, p. 22.

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Article 5

A national of a Member State who seeks employment in the territory of another Member State shall receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment.

Article 6

1. The engagement and recruitment of a national of one Member State for a post in another Member State shall not depend on medical, vocational or other criteria which are discriminatory on grounds of nationality by comparison with those applied to nationals of the other Member State who wish to pursue the same activity.

2. A national who holds an offer in his name from an employer in a Member State other than that of which he is a national may have to undergo a vocational test, if the employer expressly requests this when making his offer of employment.

SECTION 2

Employment and equality of treatment

Article 7

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.

Article 8

A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union. He may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law. Furthermore, he shall have the right of eligibility for workers' representative bodies in the undertaking.

The first paragraph of this Article shall not affect laws or regulations in certain Member States which grant more extensive rights to workers coming from the other Member States.

Article 9

1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.

2. A worker referred to in paragraph 1 may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist, and shall enjoy the resultant benefits and priorities.

If his family has remained in the country whence he came, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption.

SECTION 3

Workers' families

Article 10

The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.

CHAPTER II

CLEARANCE OF VACANCIES AND APPLICATIONS FOR EMPLOYMENT

SECTION 1

Cooperation between the Member States and with the Commission

Article 11

1. The Member States or the Commission shall instigate or together undertake any study of employment or unemployment which they consider necessary for freedom of movement for workers within the Union.

The central employment services of the Member States shall cooperate closely with each other and with the Commission with a view to acting jointly as regards the clearing of vacancies and applications for employment within the Union and the resultant placing of workers in employment.

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2. To this end the Member States shall designate specialist services which shall be entrusted with organising work in the fields referred to in the second subparagraph of paragraph 1 and cooperating with each other and with the departments of the Commission.

The Member States shall notify the Commission of any change in the designation of such services and the Commission shall publish details thereof for information in the *Official Journal of the European Union*.

Article 12

1. The Member States shall send to the Commission information on problems arising in connection with the freedom of movement and employment of workers and particulars of the state and development of employment.

2. The Commission, taking the utmost account of the opinion of the Technical Committee referred to in Article 29 ('the Technical Committee'), shall determine the manner in which the information referred to in paragraph 1 of this Article is to be drawn up.

3. In accordance with the procedure laid down by the Commission taking the utmost account of the opinion of the Technical Committee, the specialist service of each Member State shall send to the specialist services of the other Member States and to the European Coordination Office referred to in Article 18 such information concerning living and working conditions and the state of the labour market as is likely to be of guidance to workers from the other Member States. Such information shall be brought up to date regularly.

The specialist services of the other Member States shall ensure that wide publicity is given to such information, in particular by circulating it among the appropriate employment services and by all suitable means of communication for informing the workers concerned.

SECTION 2

Machinery for vacancy clearance

Article 13

1. The specialist service of each Member State shall regularly send to the specialist services of the other Member States and to the European Coordination Office referred to in Article 18:

(a) details of vacancies which could be filled by nationals of other Member States;

(b) details of vacancies addressed to third countries;

(c) details of applications for employment by those who have formally expressed a wish to work in another Member State;

(d) information, by region and by branch of activity, on applicants who have declared themselves actually willing to accept employment in another country.

The specialist service of each Member State shall forward this information to the appropriate employment services and agencies as soon as possible.

2. The details of vacancies and applications referred to in paragraph 1 shall be circulated according to a uniform system to be established by the European Coordination Office referred to in Article 18 in collaboration with the Technical Committee.

This system may be adapted if necessary.

Article 14

1. Any vacancy within the meaning of Article 13 communicated to the employment services of a Member State shall be notified to and processed by the competent employment services of the other Member States concerned.

Such services shall forward to the services of the first Member State the details of suitable applications.

2. The applications for employment referred to in point (c) of the first subparagraph of Article 13(1) shall be responded to by the relevant services of the Member States within a reasonable period, not exceeding 1 month.

3. The employment services shall grant workers who are nationals of the Member States the same priority as the relevant measures grant to nationals vis-à-vis workers from third countries.

Article 15

1. The provisions of Article 14 shall be implemented by the specialist services. However, in so far as they have been authorised by the central services and in so far as the organisation of the employment services of a Member State and the placing techniques employed make it possible:

(a) the regional employment services of the Member States shall:

(i) on the basis of the information referred to in Article 13, on which appropriate action will be taken, directly bring together and clear vacancies and applications for employment;

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(ii) establish direct relations for clearance:

— of vacancies offered to a named worker,

— of individual applications for employment sent either to a specific employment service or to an employer pursuing his activity within the area covered by such a service,

— where the clearing operations concern seasonal workers who must be recruited as quickly as possible;

(b) the services territorially responsible for the border regions of two or more Member States shall regularly exchange data relating to vacancies and applications for employment in their area and, acting in accordance with their arrangements with the other employment services of their countries, shall directly bring together and clear vacancies and applications for employment.

If necessary, the services territorially responsible for border regions shall also set up cooperation and service structures to provide:

— users with as much practical information as possible on the various aspects of mobility, and

— management and labour, social services (in particular public, private or those of public interest) and all institutions concerned, with a framework of coordinated measures relating to mobility,

(c) official employment services which specialise in certain occupations or specific categories of persons shall cooperate directly with each other.

2. The Member States concerned shall forward to the Commission the list, drawn up by common accord, of services referred to in paragraph 1 and the Commission shall publish such list for information, and any amendment thereto, in the *Official Journal of the European Union*.

Article 16

Adoption of recruiting procedures as applied by the implementing bodies provided for under agreements concluded between two or more Member States shall not be obligatory.

SECTION 3

Measures for controlling the balance of the labour market

Article 17

1. On the basis of a report from the Commission drawn up from information supplied by the Member States, the latter and the Commission shall at least once a year analyse jointly the results of Union arrangements regarding vacancies and applications.

2. The Member States shall examine with the Commission all the possibilities of giving priority to nationals of Member States when filling employment vacancies in order to achieve a balance between vacancies and applications for employment within the Union. They shall adopt all measures necessary for this purpose.

3. Every 2 years the Commission shall submit a report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of Chapter II, summarising the information required and the data obtained from the studies and research carried out and highlighting any useful points with regard to developments on the Union's labour market.

SECTION 4

European Coordination Office

Article 18

The European Office for Coordinating the Clearance of Vacancies and Applications for Employment ('the European Coordination Office'), established within the Commission, shall have the general task of promoting vacancy clearance at Union level. It shall be responsible in particular for all the technical duties in this field which, under the provisions of this Regulation, are assigned to the Commission, and especially for assisting the national employment services.

It shall summarise the information referred to in Articles 12 and 13 and the data arising out of the studies and research carried out pursuant to Article 11, so as to bring to light any useful facts about foreseeable developments on the Union labour market; such facts shall be communicated to the specialist services of the Member States and to the Advisory Committee referred to in Article 21 and the Technical Committee.

Article 19

1. The European Coordination Office shall be responsible, in particular, for:

(a) coordinating the practical measures necessary for vacancy clearance at Union level and for analysing the resulting movements of workers;

(b) contributing to such objectives by implementing, in cooperation with the Technical Committee, joint methods of action at administrative and technical levels;

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(c) carrying out, where a special need arises, and in agreement with the specialist services, the bringing together of vacancies and applications for employment for clearance by those specialist services.

2. It shall communicate to the specialist services vacancies and applications for employment sent directly to the Commission, and shall be informed of the action taken thereon.

Article 20

The Commission may, in agreement with the competent authority of each Member State, and in accordance with the conditions and procedures which it shall determine on the basis of the opinion of the Technical Committee, organise visits and assignments for officials of other Member States, and also advanced programmes for specialist personnel.

CHAPTER III

COMMITTEES FOR ENSURING CLOSE COOPERATION BETWEEN THE MEMBER STATES IN MATTERS CONCERNING THE FREEDOM OF MOVEMENT OF WORKERS AND THEIR EMPLOYMENT

SECTION 1

The Advisory Committee

Article 21

The Advisory Committee shall be responsible for assisting the Commission in the examination of any questions arising from the application of the Treaty on the Functioning of the European Union and measures taken in pursuance thereof, in matters concerning the freedom of movement of workers and their employment.

Article 22

The Advisory Committee shall be responsible in particular for:

(a) examining problems concerning freedom of movement and employment within the framework of national manpower policies, with a view to coordinating the employment policies of the Member States at Union level, thus contributing to the development of the economies and to an improved balance of the labour market;

(b) making a general study of the effects of implementing this Regulation and any supplementary measures;

(c) submitting to the Commission any reasoned proposals for revising this Regulation;

(d) delivering, either at the request of the Commission or on its own initiative, reasoned opinions on general questions or on questions of principle, in particular on exchange of information concerning developments in the labour market, on the movement of workers between Member States, on programmes or measures to develop vocational guidance and vocational training which are likely to increase the possibilities of freedom of movement and employment, and on all forms of assistance to workers and their families, including social assistance and the housing of workers.

Article 23

1. The Advisory Committee shall be composed of six members for each Member State, two of whom shall represent the Government, two the trade unions and two the employers' associations.

2. For each of the categories referred to in paragraph 1, one alternate member shall be appointed by each Member State.

3. The term of office of the members and their alternates shall be 2 years. Their appointments shall be renewable.

On expiry of their term of office, the members and their alternates shall remain in office until replaced or until their appointments are renewed.

Article 24

The members of the Advisory Committee and their alternates shall be appointed by the Council, which shall endeavour, when selecting representatives of trade unions and employers' associations, to achieve adequate representation on the Committee of the various economic sectors concerned.

The list of members and their alternates shall be published by the Council for information in the *Official Journal of the European Union*.

Article 25

The Advisory Committee shall be chaired by a member of the Commission or his representative. The Chairman shall not vote. The Committee shall meet at least twice a year. It shall be convened by its Chairman, either on his own initiative, or at the request of at least one third of the members.

Secretarial services shall be provided for the Committee by the Commission.

Article 26

The Chairman may invite individuals or representatives of bodies with wide experience in the field of employment or movement of workers to take part in meetings as observers or as experts. The Chairman may be assisted by expert advisers.

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Article 27

1. An opinion delivered by the Advisory Committee shall not be valid unless two thirds of the members are present.

2. Opinions shall state the reasons on which they are based; they shall be delivered by an absolute majority of the votes validly cast; they shall be accompanied by a written statement of the views expressed by the minority, when the latter so requests.

Article 28

The Advisory Committee shall establish its working methods by rules of procedure which shall enter into force after the Council, having received an opinion from the Commission, has given its approval. The entry into force of any amendment that the Committee decides to make thereto shall be subject to the same procedure.

SECTION 2

The Technical Committee

Article 29

The Technical Committee shall be responsible for assisting the Commission in the preparation, promotion and follow-up of all technical work and measures for giving effect to this Regulation and any supplementary measures.

Article 30

The Technical Committee shall be responsible in particular for:

(a) promoting and advancing cooperation between the public authorities concerned in the Member States on all technical questions relating to freedom of movement of workers and their employment;

(b) formulating procedures for the organisation of the joint activities of the public authorities concerned;

(c) facilitating the gathering of information likely to be of use to the Commission and the undertaking of the studies and research provided for in this Regulation, and encouraging exchange of information and experience between the administrative bodies concerned;

(d) investigating at a technical level the harmonisation of the criteria by which Member States assess the state of their labour markets.

Article 31

1. The Technical Committee shall be composed of representatives of the Governments of the Member States. Each Government shall appoint as member of the Technical Committee one of the members who represent it on the Advisory Committee.

2. Each Government shall appoint an alternate from among its other representatives — members or alternates — on the Advisory Committee.

Article 32

The Technical Committee shall be chaired by a member of the Commission or his representative. The Chairman shall not vote. The Chairman and the members of the Committee may be assisted by expert advisers.

Secretarial services shall be provided for the Committee by the Commission.

Article 33

The proposals and opinions formulated by the Technical Committee shall be submitted to the Commission, and the Advisory Committee shall be informed thereof. Any such proposals and opinions shall be accompanied by a written statement of the views expressed by the various members of the Technical Committee, when the latter so request.

Article 34

The Technical Committee shall establish its working methods by rules of procedure which shall enter into force after the Council, having received an opinion from the Commission, has given its approval. The entry into force of any amendment which the Committee decides to make thereto shall be subject to the same procedure.

CHAPTER IV

FINAL PROVISIONS

Article 35

The rules of procedure of the Advisory Committee and of the Technical Committee in force on 8 November 1968 shall continue to apply.

Article 36

1. This Regulation shall not affect the provisions of the Treaty establishing the European Atomic Energy Community which deal with eligibility for skilled employment in the field of nuclear energy, nor any measures taken in pursuance of that Treaty.

Nevertheless, this Regulation shall apply to the category of workers referred to in the first subparagraph and to members of their families in so far as their legal position is not governed by the above-mentioned Treaty or measures.

2. This Regulation shall not affect measures taken in accordance with Article 48 of the Treaty on the Functioning of the European Union.

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3. This Regulation shall not affect the obligations of Member States arising out of special relations or future agreements with certain non-European countries or territories, based on institutional ties existing on 8 November 1968, or agreements in existence on 8 November 1968 with certain non-European countries or territories, based on institutional ties between them.

Workers from such countries or territories who, in accordance with this provision, are pursuing activities as employed persons in the territory of one of those Member States may not invoke the benefit of the provisions of this Regulation in the territory of the other Member States.

Article 37

Member States shall, for information purposes, communicate to the Commission the texts of agreements, conventions or arrangements concluded between them in the manpower field between the date of their being signed and that of their entry into force.

Article 38

The Commission shall adopt measures pursuant to this Regulation for its implementation. To this end it shall act in close cooperation with the central public authorities of the Member States.

Article 39

The administrative expenditure of the Advisory Committee and of the Technical Committee shall be included in the general budget of the European Union in the section relating to the Commission.

Article 40

This Regulation shall apply to the Member States and to their nationals, without prejudice to Articles 2 and 3.

Article 41

Regulation (EEC) No 1612/68 is hereby repealed.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II.

Article 42

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 5 April 2011.

For the European Parliament
The President
J. BUZEK

For the Council
The President
GYŐRI E.

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ANNEX I

REPEALED REGULATION WITH LIST OF ITS SUCCESSIVE AMENDMENTS

Council Regulation (EEC) No 1612/68 (OJ L 257, 19.10.1968, p. 2)	
Council Regulation (EEC) No 312/76 (OJ L 39, 14.2.1976, p. 2)	
Council Regulation (EEC) No 2434/92 (OJ L 245, 26.8.1992, p. 1)	
Directive 2004/38/EC of the European Parliament and of the Council (OJ L 158, 30.4.2004, p. 77)	Only Article 38(1)

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ANNEX II

Correlation Table

Regulation (EEC) No 1612/68	This Regulation
Part I	Chapter I
Title I	Section 1
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Article 2	Article 2
Article 3(1), first subparagraph	Article 3(1), first subparagraph
Article 3(1), first subparagraph, first indent	Article 3(1), first subparagraph, point (a)
Article 3(1), first subparagraph, second indent	Article 3(1), first subparagraph, point (b)
Article 3(1), second subparagraph	Article 3(1), second subparagraph
Article 3(2)	Article 3(2)
Article 4	Article 4
Article 5	Article 5
Article 6	Article 6
Title II	Section 2
Article 7	Article 7
Article 8(1)	Article 8
Article 9	Article 9
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Article 26	Article 23
Article 27	Article 24
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Article 29	Article 26
Article 30	Article 27
Article 31	Article 28
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Article 33	Article 30
Article 34	Article 31
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Regulation (EEC) No 1612/68	This Regulation
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Article 42(3), second subparagraph	Article 36(3), second subparagraph
Article 43	Article 37
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Article 45	—
Article 46	Article 39
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Article 48	Article 42
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Chapter 50 Liability to administrative removal under section 10 (non EEA)

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Section 1 – Removals and appeals system changed by Immigration Act 2014

1.1 Single Power of Removal

From 6 April 2015 a person who requires, but does not have, leave to enter or remain in the United Kingdom is liable to removal[1]. No removal decision is required.

Such a person must still be notified of their liability to removal. If a person is subject to enforcement action for breach of conditions or deception, their leave must be brought to an end to make them removable.

This chapter explains the single power of removal which is introduced by the Immigration Act 2014 and now implemented in full. It outlines the different ways in which notice of liability to removal can be served. It includes guidance on serving

[1]Under section 10 of the [1999] Act, as amended by section 1 of the Immigration Act 2014

RED.0001, which replaces forms IS151A, IS151A part 2 and IS151B from the previous removal system.

Immigration Enforcement should not serve IS151A, IS151A part 2 or IS151B from 6 April. Section 1.6 on transitional arrangements explains where a person can still be removed **in reliance** on an old style removal decision.

Removals under the EEA Regulations are not yet changing and forms IS151A (EEA) and IS151B (EEA) will continue to be used. See chapter 50 (EEA) for guidance.

1.2 New appeals/ administrative review regime

A decision to refuse a protection (asylum or humanitarian protection) claim, a human rights claim or to revoke protection (asylum or humanitarian protection) status where the claim is not certified and the decision is made while the affected individual is in the UK now attracts an in-country right of appeal. This applies to all protection and human rights claims and decisions to revoke protection status decided on or after 6 April, regardless of the date of application.

No other decision made on or after 6 April will attract a right of appeal except for the following transitional appeals:

Under the pre-Immigration Act 2014 appeals regime, the following rights of appeal existed against the refusal of an application:

1. Appeal against a refusal to vary a person's leave to enter or remain in the UK if the result of the refusal is that the person has no leave. To qualify the application had to be made while the applicant had leave to enter or remain – (the application was in-time), and the applicant’s leave had to have expired by the time they were notified of the decision to refuse further leave.
2. Appeals against a refusal of entry clearance, although the available grounds of appeal are limited for some cases by section 88A.
3. Appeals against the refusal of a certificate of entitlement to a right of abode.

These appeal rights continue to exist for decisions made on or after 6 April 2015 where:

1. an application made before 20 October 2014 for leave to remain as a Tier 4 Migrant or their family member;
2. an application made before 2 March 2015 for leave to remain as a Tier 1 Migrant, Tier 2 Migrant or Tier 5 Migrant or their family member;
3. any other application made before 6 April 2015 where the outcome was an appealable decision under the pre-Immigration Act 2014 regime, unless the decision was a refusal of an asylum or human rights claim;
4. a person with continuing leave is examined on arrival in the UK before 6 April 2015 and that leave is cancelled on or after 6 April 2015 under paragraph 2A(8) of Schedule 2 to the Immigration Act 1971, insofar as that person would have been entitled to a right of appeal against the cancellation decision if it had been taken before 6 April 2015.

There is no right of appeal against the refusal of an application for work or study (PBS) leave. (See section 1.6 for transitional arrangements where a Tier 4 application was made before 20 October 2014, or a Tier 1, 2 or 5 application before 2 March 2015). An unsuccessful applicant may apply for administrative review to challenge alleged case working errors. In-time applications continue to have 3C leave until the administrative review is concluded.

There is no right of appeal or administrative review against a decision to curtail leave or against the service of notice of liability to removal where a person has no leave.

See https://www.gov.uk/government/publications/appeals and Key facts: administrative review for further guidance on changes to appeals and administrative review.

1.3 Notice of liability for removal

There are two main types of notice of liability to removal:

1) **RED.0001**

This form replaces IS151A, IS151A part 2 and IS151B for enforcement decisions and removals casework. Sections 2 and 3 provide guidance on how it should be served. It is used:

a) To make a decision to curtail or revoke existing leave – eg when a person with extant (**not** 3C) leave is found working in breach. This makes them liable to removal.

b) To give notice that a person has no leave (eg is an overstayer) and is therefore liable to removal.

RED0001 does not invalidate a pending application, which will need to be refused separately (see below).

2) **Certain casework decisions**

Notice of liability to removal is also included in some letters and decisions produced by caseworkers **where the person is left with no remaining leave and no in-country right of appeal or administrative review**. These include where:

i. an application for administrative review of a refusal is unsuccessful
ii. an application for leave is rejected as invalid or is withdrawn
iii. an asylum or human rights claim is certified under sections 94 or 96 of the 2002 Act
iv. leave is curtailed or revoked with immediate effect.

If notice has been served in such a letter, a RED0001 is not required for removal.[2]

A person who has an in-country right of appeal but no leave will be informed in the decision letter that they are liable to detention or reporting. They will be given notification of a removal window or other appropriate notification of removal when their appeal rights are exhausted.

1.4 What is in a notice of liability to removal

[2] Current templates for in-country letters which may include liability to removal are ICD.3971.IA, ICD.1182.IA, ICD.3051.IA, ICD.3052.IA, ICD.4824.IA, ARN.003, ARN.004, ARN.005, ASL.0015.ACD.IA, ASL.1006.IA, ASL.1956.IA and ASL.2704.IA.

These notices tell the person a) they are liable to removal and b) the country to which they will be removed if they do not leave voluntarily. Notices also include information on the consequences of being in the UK illegally, the help available to return home, and a s.120 one stop notice. This requires the migrant to raise with the Home Office as soon as reasonably practicable any grounds not previously raised as to why they should be allowed to remain in or not be removed from the UK. The duty to raise new grounds under s.120 is ongoing while the person is in the UK without leave. They will also be reminded of their ongoing duty during any contact management and reporting events.

See https://www.gov.uk/government/publications/appeals for guidance on the s.120 notice and the ongoing duty.

1.5 Removal Directions

Individuals can now be notified of a three month removal window during which they will be removable. See updated **Chapter 60 EIG** for full details.

In the section "Liability for Removal" there are now 3 options. These are:

> **A-You will not be removed for the first seven calendar days after you receive this notice. Following the end of this seven day period, and for up to three months from the date of this notice, you may be removed without further notice.**
>
> This box must be ticked for persons who are **not detained** and who therefore have a 7 day notice period in which to seek legal advice before the 3 month removal window begins.
>
> **B-You will not be removed before_____ *(insert date and time)*. After this time, and for up to three months from the date of this notice, you may be removed without further notice.**
>
> This box must be ticked for persons who are **detained** and who therefore have a minimum period of 72 hours in which to seek legal advice before the 3 month removal window begins. The 72 hour period will need to be calculated in accordance with the instructions in chapter 60 EIG.

C-You will be given further notice of when you will be removed.

This box must be ticked for the following:

- Family cases
- Persons without leave who have a protection (asylum or humanitarian protection) or human rights claim or administrative review or appeal pending
- Where the Home Office has evidence that a person meets one or more of the criteria for vulnerability listed in EIG chapter 55.10 (persons unsuitable for detention).

Normally **Protection or Human Rights claimants without leave** will receive a fresh notice starting the 3 month removal window (RED.0004 (fresh)) when they are appeal rights exhausted (ARE) and they become removable. **Vulnerable groups** will receive a further notice by way of removal directions (IS 151D) or limited notice of removal (IS 151G):

1.6 Removal under old style removal decisions - transitional

The Immigration Act powers on removal are fully implemented from 6 April. New notice of liability to removal may be served on <u>any</u> person who requires leave and does not have it (it is no longer restricted by the date of application for certain types of leave).

There are limited circumstances where a person can <u>alternatively</u> be removed under the old system of removal decisions (IS151A, IS151A part 2, IS151B, section 47).

A. Where an old style removal decision has been correctly served on a person prior to 6 April 2015. There is no need to re-serve a new notice of liability to removal.

If IS151A has been served on its own without the second part of the notice, then a new notice of liability to removal should be served.

B. Where a person made an in-country application for Tier 4 before 20 October 2014, or for Tiers 1, 2 or 5 before 2 March 2015 **and this application is decided on or after 6 April 2015**. These applications retain a transitional right of appeal if they were made in time and a section 47 decision should be made by the caseworker **at the point of refusal if the person now has 3C leave**. An overstayer whose PBS application was made within the 28 day grace period and fell into this transitional category could be served an old style s.10 decision.

The only persons who can receive an old style removal decision on or after 6 April 2015 are those in category B, at the point at which their application which retains the transitional right of appeal is decided. If they are unsuccessful in a subsequent application or are encountered as an overstayer, they should be served the appropriate notice of liability to removal under the new system (RED0001 or a casework decision).

Section 2: RED notices

2.1 RED forms

RED forms are available on the CID document generator under both Enforcement Forms and Removals/ Decision Notices.

- **RED0001** form replaces IS151A, IS151 A part 2 and IS151B for encountered overstayers, persons working in breach etc
- **RED0001 FAM** form replaces the IS 151A for family members of a person subject to the RED0001.
- **RED0002** forms are s.120 notices and a reminder notice of the section 120 duty (see section 3.3 below).
- **RED0003** should be served with the RED0001. It is a form for the migrant to respond to the s.120 notice contained in the RED0001.
- **RED0004 (fresh)** should be served where a new three month removal window is being set (see chapter 60.2.1).
- **RED0004 (extension)** should be served before a removal window expires in order to extend that window by 28 days (see chapter 60.2.1).

2.2 When to serve RED0001

For all circumstances listed below, IS151A, IS151A part 2 and IS151B must not be served as it has no effect.

NB: RED0001 contains options which should be deleted as appropriate, depending on whether the person has no leave or leave is being curtailed or revoked. These appear in red on a computer screen. Please make sure you select the appropriate option and delete others.

1. A migrant has extant (not 3C) leave but has eg breached the conditions of this leave (eg when encountered working illegally) or used deception to obtain it. There is no outstanding application.

You will consider if their leave should be curtailed with immediate effect. [For more information on how to consider curtailment, see the curtailment modernised guidance]. If you decide to curtail leave under the Immigration Rules, use the space on the RED0001 to curtail their extant leave with immediate effect. You must include full evidence and reasoning for the decision. Guidance on wording and legal reasoning is provided below. There is no appeal against the decision to curtail leave. Once the decision to curtail leave is served, they are liable to removal as a person with no leave and the RED0001 notifies them of this.

2. A migrant now has no leave, or never had leave – i.e. you encounter them as an overstayer or an illegal entrant. There is no outstanding application.

RED0001 is used to give formal notice that they have no leave. You should include details of how you have come to this conclusion on the form (e.g. the circumstances in which you encountered them and the details of their expired leave).

2.3 When not to serve RED0001

1. A person encountered without leave or in breach of their conditions has a pending application, or pending appeal or administrative review.

Use form IS96 to require them to report to the Home Office or detain them. If it is appropriate to detain, forms IS91 and IS91R should be served as well. Annex G gives more information on serving the IS96

NB: Where an application is still outstanding, you should Immediately contact the relevant casework team for expedition (see below), with evidence of the breach or deception if applicable.

2. If the application is refused, notice of liability to removal will be served as a casework decision, as in section 1.3.2.

3. A person has already been served notice of liability to removal (eg following an unsuccessful administrative review). RED0001 may be served in these circumstances but is not legally required.

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Section 3: Completing RED0001

The RED0001 has two functions – firstly, to enable an individual to be informed that a decision has been made in their case (ie curtailment of leave, etc). They will be removable as a consequence.

Alternatively it allows an individual to be informed that they are removable as a person with no leave under S10 (eg an illegal entrant or overstayer), once the decision that they have no leave has been taken and explained.

3.1 Bringing leave to an end via RED0001

You must include clear evidence and reasoning for your decision and cite the appropriate legal basis for curtailment.

Working in breach

A person is liable to curtailment if found to be working in breach of a restriction or prohibition on employment. The breach must be of sufficient gravity to warrant such action. There must be firm and recent evidence (normally within six months - in other cases a warning should be issued and a report submitted) of working in breach, including one of the following:

- an admission by the offender of working in breach;
- a statement by the employer implicating the suspect;
- documentary evidence such as pay slips, the offender's details on the pay roll, NI records, tax records, P45;
- sight by the IO, or by a police officer who gives a statement to that effect, of the offender working, preferably on two or more separate occasions, or on one occasion over an extended period, or of wearing the employer's uniform. In practice, this should generally be backed up by other evidence.

Deception

A person is liable to curtailment if deception is used in obtaining or seeking to obtained limited leave by deception. [Section 76 (2) of the 2002 Act, as amended by

the Immigration Act 2015, should be used to revoke indefinite leave to enter or remain where it was obtained by deception]

Evidence of deception should be clear and unambiguous. Where possible, original documentary evidence, admissions or statements from two or more witnesses should be obtained which substantiate that deception has been used.

The deception does not need to be material to the decision where it is "active" deception, i.e. where a migrant submits false or fraudulently obtained documentation or makes a false statement. In contrast, where the deception relates to the non-disclosure of facts, it must be material to the immigration decision. In this context "material" deception means that the deception is used in relation to an issue which is or may be determinative of the application for leave

The evidence must always prove **on the balance of probability** (i.e. proof that the fact in issue more probably occurred than not) that deception had been used to gain the leave, whether or not an admission of deception is made. The onus - as always in such situations - is on the officer making the assertion to prove his case and the evidence needs to be of sufficient strength and quality to justify a finding that deception has been used and should be scrutinised carefully before a decision is made.

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Sample wording

As an example this form of wording could apply when dealing with a worker in breach.

> **Decision**
>
> . On [insert date] you were granted leave to remain in the United Kingdom until [insert date]...on condition that you [do not access public funds] and that employment [is prohibited] [is limited to 20/10 hours a week during term time provided you are studying at [name of sponsor]].
>
> You are specifically considered a person who has failed to observe a condition of leave to enter or remain because on [insert date] you were observed to be

> working for [insert employer] and you were observed [state evidence of working]. [Name of employer] has confirmed that you were in employment with them for x hours a week in excess of the hours you could legally work.
>
> It is not considered that the circumstances in your case are such that discretion should be exercised in your favour. The Secretary of State therefore curtails your leave to [enter/remain in] the United Kingdom under paragraph 323(i) with reference to 322(3) of the Immigration Rules so as to expire with immediate effect.

An example for a limited leave to remain deception case would be:

> You have used deception in seeking/gaining leave to remain or a variation of leave to remain, namely, you [insert details]. It is not considered that the circumstances in your case are such that discretion should be exercised in your favour. The Secretary of State therefore curtails your leave to [enter/remain in] the United Kingdom with immediate effect under paragraph 323(ia) of the Immigration Rules.

For examples of curtailment wording see guidance on curtailment letter templates and general grounds for refusal.

For more information on how to consider curtailment, see the curtailment modernised guidance. This guidance also includes information on considering the exercise of discretion if the curtailment is not on a mandatory ground. See Annex B of this chapter for guidance on when a person may be breaching their conditions.

3.2 Serving RED0001 on overstayers and illegal entrants

You must explain here how you reached the view that the individual is an overstayer or illegal entrant. Examples of wording to use are provided in Annex A below.

There must be proof of overstaying, and the following are indications that the person is an overstayer:

- Home Office file,
- Passport*,

- landing card,
- or the offender's own admission as to his date of entry and duration of leave.

*You should not always accept at face value that the last entry in a passport is the last date of entry as he or she may have left and subsequently re-entered on another passport, clandestinely or in some other way, or because they last entered on or after 30 July 2000 under one of the provisions of the Immigration (Leave to Enter and Remain) Order 2000 (see chapters 2.1, 3.9 and 3.12).

Where there is insufficient evidence to support a contention of overstaying, a report should be submitted to the relevant casework section for consideration of further action. Where possible, the report should contain a statement about the suspect's claimed status and circumstances, and should refer to any other supporting evidence.

3.3 Reminder forms

The last page of the **RED.0001** includes instructions on where the response to the s120 notice (the RED.0003 form) should be sent. If a person is detained, this should be filled in with the relevant NRC caseworker details.

There are three RED.0002 notices. Two are s.120 notices and the third is a reminder notice of the s120 duty.

- The RED.0002 (charged) should be used where a person is required to make a charged application if they wish to make an Article 8 claim (eg are not detained and there is no operational reason to waive the requirement)
- The RED.0002 (enforcement non-charged) should be used where they are not required to make a charged application (eg where removals casework are preparing a case for tasking to enforcement, or where a person is detained). If necessary, you can fill in a time limit for response (eg if while not detained, they were given 14 days to respond to an earlier s.120, but they are now detained and this period needs to be shortened).

- The RED.0002 (reminder) reminds a person both of their liability to removal and their s.120 duty and may be adapted to refer to either charged or non charged applications. This may be served at reporting events.

3.4 Recording service

The service of **RED** forms must be recorded on CID. It is important to record them all as:
- the **RED.0001** places the duty on the migrant to notify the Home Office of any changing circumstance or new reason for wishing to remain in the UK
- the **RED.0003** gives them the means to respond (note however it's not a prescribed form and the migrant can respond to the s120 in any way they please).
- the reminder (**RED.0002**) will assist in considering the certification of any subsequent asylum and/or human rights claim under s. 96 if the matter should have been raised earlier.

Where removal action is delayed, for example where we need to obtain a travel document, the migrant can be reminded of the continuing need to provide details at the earliest opportunity by the service of a **RED.0002.** More information on S120 is available in the Appeals Policy guidance

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Section 4: Family members

The new section 10 also provides for the removal of family members and now includes relatives beyond spouses and children. The Section states:-

Section 10(2) Where a person ("P") is liable to be or has been removed from the United Kingdom under subsection (1), a member of P's family who meets the following three conditions may also be removed from the United Kingdom under the authority of the Secretary of State or an immigration officer, provided that the Secretary of State or immigration officer has given the family member written notice of the intention to remove him or her.

(3) The first condition is that the family member is—

(a) P's partner,

(b) P's child, or a child living in the same household as P in circumstances where P has care of the child,

(c) in a case where P is a child, P's parent, or

(d) an adult dependent relative of P.

(4) The second condition is that—

(a) in a case where the family member has leave to enter or remain in the United Kingdom, that leave was granted on the basis of his or her family life with P;

(b) in a case where the family member does not have leave to enter or remain in the United Kingdom, in the opinion of the Secretary of State or immigration officer the family member—

(i) would not, on making an application for such leave, be granted leave in his or her own right, but

(ii) would be granted leave on the basis of his or her family life with P, if P had leave to enter or remain.

(5) The third condition is that the family member is neither a British citizen, nor is he or she entitled to enter or remain in the United Kingdom by virtue of an enforceable EU right or of any provision made under section 2(2) of the European Communities Act 1972.

Notice of removal will invalidate any leave for family members under the new Section 10(6).

The Immigration (Removal of Family Members) Regulations 2014 govern the time period for removal of family members (same as now) and how we will serve the notice of removal.

If the family member is not encountered with the main applicant but comes to attention later removal can take place provided the removal occurs within eight weeks from the removal of the main applicant. After that period the family member should be treated in their own right.

Family members will be served with the **RED.0001 FAM** form.

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Section 5 Testing credibility

When encountered a person may satisfy you that they have outstanding leave to enter or remain but doubts may exist as to whether they continue to qualify for that leave. Where the individual's account seems credible then any necessary enquiries to establish exactly what they are doing can be followed up in a routine manner. However, if the account seems too incredible, for example a student is encountered working during term time in remote area miles away from their claimed place of study, and there are doubts that the individual might not be readily contactable in the days ahead then a short period of detention could be considered.

Clearly in these cases enquiries must be made at the earliest opportunity to determine what action is appropriate in all the circumstances. If, despite the initial doubts, you are satisfied that the person does, in fact, continue to meet the normal requirements of the Rules then they should be released from detention without delay. Where, however, they no longer qualify under the Rules, curtailment may be appropriate. See also guidance on curtailment.

As a guide when students are encountered you should establish

- where they attend their studies
- what they are studying, and
- if they are in term time or vacation time.

You should also contact the place of study and get confirmation that he remains a student and is regularly attending. If there are any doubts over the information being provided by the college you should let the Sponsorship Investigations Team know so they can have regard for this in their dealings with the college.

Annex A

Examples of specific grounds for concluding a person is illegal entrant/overstayer etc

Illegal Entry Cases

No credible account of entry

You are specifically considered a person who has entered the United Kingdom without leave because you are unable to give a credible account of your entry to the United Kingdom.

Entered with assistance of agent

You are specifically considered a person who has entered the United Kingdom without leave because you admit to having entered the United Kingdom unlawfully with the assistance of an agent.

Clandestine entry

You are specifically considered a person who has entered without leave because you have admitted to entering the United Kingdom hidden in a vehicle.

Entry by presenting false or forged British or EEA passports

You are specifically considered a person who has entered the UK **without leave** because you presented a British Passport/EEA ID card/Passport you were not entitled to and as a national of [insert nationality] you have therefore entered the UK without obtaining leave to enter which is a breach under section 3 (1) (a) and an offence under section 24(1)(a) Immigration Act 1971"

or

"You presented a counterfeit/forged British Passport/EEA ID card/Passport to gain entry into the UK and as a national of [insert nationality] you have entered the UK without obtaining leave to enter. You have therefore entered the UK without obtaining leave to enter which is a breach under section 3 (1) (a) and an offence under section 24(1)(a) Immigration Act 1971 (as amended)."

or

"Record checks have shown that the passport you claimed to have used for your last entry was reported lost by its [insert nationality] owner. In addition fingerprint evidence strongly suggests that you are in fact an [insert nationality] national. You are specifically considered a person who has entered by documentary deception because record checks have shown that the passport you claimed to have used for your last entry was reported lost by its [insert nationality] owner. In addition fingerprint evidence strongly suggests that you are in fact an [insert nationality] national

Unable to show evidence of lawful entry (NELE)

You are specifically considered a person who has been unable to show evidence of lawful entry because you cannot produce the passport on which you claim to have entered the UK and you have failed to complete/return a method of entry questionnaire when asked to do so.

or;

You are specifically considered a person who has been unable to show evidence of lawful entry because you cannot produce the passport on which you claim to have entered the United Kingdom.

Entered in breach of a deportation order

You are specifically considered a person who has entered in breach of a deportation order as you were removed from the United Kingdom on (insert date) after a deportation order was signed against you on (insert date). That order has not been revoked and you returned to the United Kingdom on or around (insert date).

Overstayers

Paragraph 6 of the Immigration Rules states:

> "'Overstayed' or 'Overstaying' means the applicant has stayed in the UK beyond the latest of
>
> (i) the time limit attached to the last period of leave granted, or
>
> (ii) beyond the period that his leave was extended under sections 3C or 3D of the Immigration Act 1971.

- **Home Office records show overstayed**

You are specifically considered a person who has overstayed their period of granted leave because landing card records show that on **(insert date)** you were granted leave to enter as a visitor for six months by an Immigration Officer at **(insert Port)**. It was only in **(insert date)** that you applied to regularise your stay here.

♦ **Passport shows overstayed**

You are specifically considered a person who has overstayed their period of granted leave because your passport shows you were given leave to enter as a visitor for six months by an Immigration Officer at **(insert Port)** on **(insert date)** and it was only in **(insert date)** that you applied to regularise your stay here.

♦ **Visa shows overstayed**

You are specifically considered a person who has overstayed their period of granted leave because you were issued with a visit visa on **(insert date)** which was valid until **(insert date)**. Holders of visit visas may only remain in the United Kingdom for a maximum of six months on any one visit[3], or until the visa expires if less than six months. You arrived in the United Kingdom on **(insert date)** and were landed in line with the visa (for example, until **(insert date)**. You did not however seek to regularise your position in the United Kingdom until **(insert date)**.

♦ **British Irish Visa Scheme (BIVS) Overstayer – Irish issued visa**

You are specifically considered a person who has overstayed their period of leave. You were issued with an Irish visa eligible under the British-Irish Visa Scheme (BIVS) on **(insert date)** which was valid until **(insert date),** and given leave to land or be in the Republic of Ireland by the Irish authorities pursuant to that Irish visa which expired on **(insert date)**.

Holders of BIVS visas who travel on to the United Kingdom who fulfil the requirements of the BIVS are only permitted to stay in the United Kingdom for the remaining period of validity of the person's current permission to land or be in Ireland as endorsed in their passport.

You arrived in United Kingdom from the Republic of Ireland on **(insert date)** and had leave to enter the United Kingdom conferred by the Immigration (control of entry through the Republic of Ireland) Order 1972 as the holder of a BIVS visa until (insert date).

[3] Persons accompanying academic visitors can get up to 12 months according to para 42 of the Immigration Rules

You did not however seek to regularise your position in the United Kingdom until **(insert date)**.*delete if not known

♦ **British Irish Visa Scheme (BIVS) Overstayer – UK issued visa**

You are specifically considered a person who has overstayed their period of leave. You were issued with a United Kingdom visit visa eligible under the British-Irish Visa Scheme (BIVS) on **(insert date)** which was valid until **(insert date).**

Holders of visit visas may only remain in the United Kingdom for a maximum of six months on any one visit, or until the visa expires if less than six months.

You arrived in the United Kingdom on **(insert date)** and were landed in line with the visa (for example, until **(insert date)**. You did not however seek to regularise your position in the United Kingdom until **(insert date)**.*delete if not known

♦ **No passport but applicant admits to being an overstayer**

You are specifically considered a person who has overstayed their period of granted leave because you admit to having arrived in the United Kingdom on **(insert date)** when you were permitted to enter as a visitor for six months. It was only in **(insert date)** that you applied to regularise your stay here.

Spouse/Family member

You are specifically considered a person who is liable to administrative removal because you are the spouse/ son/ daughter / adult dependent relative of **(insert relation)** who is being administratively removed.

Annex B Guidance on breach of conditions

Students who work

Not all students are entitled to work. Some students are entitled by virtue of the conditions of their leave to take employment either as part of the course they are undertaking or simply as part-time / vacation work. Whether they are permitted to work at all and the duration of work they may undertake during term time depends on the type of course being studied and the type of sponsoring organisation. Further details of permission to work granted to students are provided below.

Permitted employment for students

Date of application	Education Provider	Course Type	Age of migrant?	Work Conditions
Before 2 March 2010	Any	Any	n/a	- Max. 20 hours per week during term time - Any duration during vacations. - Employment as part of course related work placement (no more than half of total length of course). - Employment as Student Union Sabbatical Officer (max 2 years). - Employment as a postgraduate doctor or dentist on a recognised Foundation programme. - No self-employment - No employment as a professional sports person

				(including a sports coach) or an entertainer.
From 3 March 2010 to 3 July 2011 (inclusive)	Any	- Degree level (NQF 6 and above) - Foundation degree course (NQF 5)	n/a	- Max. 20 hours per week during term time - Any duration during vacations. - Employment as part of course related work placement (no more than half of total length of course). - Employment as Student Union Sabbatical Officer (max 2 years). - Employment as a postgraduate doctor or dentist on a recognised Foundation programme. - No self-employment - No employment as a professional sports person (including a sports coach) or an entertainer.
	Any	Below degree level (NQF 5 and below) (excluding foundation degree course)	n/a	- Max. 10 hours per week during term time - Any duration during vacations. - Employment as part of course related work placement (no more than half of total length of course). - Employment as Student Union Sabbatical Officer (max 2 years). - Employment as a

				postgraduate doctor or dentist on a recognised Foundation programme. - No self-employment - No employment as a professional sports person (including a sports coach) or an entertainer.
On or after 4 July 2011	Tier 4 (General) Students Higher Education Institution (i.e. University) or sponsored by an overseas HEI to undertake a short-term Study Abroad Programme in the UK.	Degree level (NQF 6) or above	n/a	- Max. 20 hours per week during term time - Any duration during vacations. - Employment as part of course related work placement (no more than half of total length of course)* - Employment as Student Union Sabbatical Officer (max 2 years) - Employment as a postgraduate doctor or dentist on a recognised Foundation programme. - No self-employment - No employment as a professional sports person (including a sports coach) or an entertainer.
		Below degree level (NQF 5 and below)	n/a	- Max. 10 hours per week during term time - Any duration during vacations. - Employment as part of course related work placement (no more than half of total length of course).*

				- Employment as Student Union Sabbatical Officer (max 2 years) - Employment as a postgraduate doctor or dentist on a recognised Foundation programme. - No self-employment - No employment as a professional sports person (including a sports coach) or an entertainer.
	Tier 4 (General) Students at a publicly-funded Further Education College	Any	n/a	- Max. 10 hours per week during term time - Any duration during vacations. - Employment as part of course related work placement (no more than a third of the total length of course).* - Employment as Student Union Sabbatical Officer (max 2 years) - Employment as a postgraduate doctor or dentist on a recognised Foundation programme. - No self-employment - No employment as a professional sports person (including a sports coach) or an entertainer.
	Tier 4 (General) Students privately funded	Any	n/a	No work allowed.

	Further Education College			
	Tier 4 (Child) Students (Children under 16 yrs of age may only be educated at independent fee paying schools)	Any	Aged 16 or over	- Max. 10 hours per week during term time - Any duration during vacations. - Employment as part of course related work placement (no more than half of total length of course) - Employment as Student Union Sabbatical Officer (max 2 years) - Employment as a postgraduate doctor or dentist on a recognised Foundation programme. - No self-employment - No employment as a professional sports person (including a sports coach) or an entertainer.
			Under 16	No work allowed

* For Tier 4 (General) Student cases that were granted leave between 4 July 2011 and 5 April 2012 (inclusive), employment as part of a course-related work placement was restricted to half the total length of the course undertaken in the UK. For Tier 4 (General) Student cases granted leave from 6 April 2012 onwards employment as part of a course-related work placement is restricted to no more than one third of the total length of the course undertaken in the UK unless the student is following a course at degree level or above and is sponsored by an HEI or by an overseas HEI to undertake a short-term Study Abroad Programme in the UK, or there is a statutory duty for the course length to be longer than one third of the course length.

Visitors are not permitted to undertake work whilst in the UK, this includes work placements that form part of a course/period of study undertaken as a student/child visitor.

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Students must be following a course to legally work

Under the Immigration Rules paragraphs 245ZW(c)(iii) (for on entry) and 245ZY(c)(iii) (for leave to remain) set out the rules on Tier 4 (General) Student working (245ZZB(c)(iii) and 245ZZD(c)(iii) set out the rules for Tier 4 (Child) Students) and state that the right to work either 20 hours or 10 hours per week, or no work rights at all, arises from the type of institution that the migrant is sponsored by and the particular course the student is following. Therefore any Tier 4 (General) Student encountered working must be:

(1) Following a course of study; and
(2) Following that course of study at the appropriate level and type of institution that permits them to work the number of hours that they are working. A student who has moved to a new sponsor or is undertaking a new course which does not permit the student to work at all or the number of hours he is working then the student is in breach of his conditions but see paragraph 50.7.2 below for further details on students switching colleges. Where the student is working in breach then curtailment action, and subsequent liability to removal under section 10 of the 1999 Act, can be taken against them.

Officers will need to establish:

(1) The type of sponsoring body;

(2) The exact course the individual is on and whether sponsorship continues. Officers may need to contact the sponsoring organisation for this.

However you must be certain that where the conditions of a student's leave permit work that the student in question is not working during a vacation or during the period of leave granted before a course commences or after the course ends, which varies depending on the duration of the course. The following table sets out the periods of leave to be granted before and after a course to Tier 4 (General) Students (often referred to as the wrap-up period) under paragraphs 245ZW(b) and 245ZY(b) of the Rules, as applicable:

Type of course	**Period of leave to remain to be granted before the course starts**	**Period of leave to remain to be granted after the course ends**
12 months or more	1 month	4 months
6 months or more but less than 12 months	1 month	2 months
Pre-sessional course of less than 6 months	1 month	1 month
Course of less than 6 months that is not a pre-sessional course	7 days	7 days
Postgraduate doctor or dentist	1 month	1 month

If the grant of entry clearance or leave to remain is being made less than 1 month, or in the case of a course of less than 6 months that is not a pre-sessional course, less than 7 days before the start of the course, entry clearance / leave to remain will be granted with immediate effect.

Students who have a right to work are allowed to work full time during vacations and during the period of leave that is granted before a course commences or after the course ends. A student who is following the required course of study or who has successfully completed their course and is found working full time during these periods would not be in breach of their conditions of stay. However a student who has ceased studying before completion of their course would have no right to undertake part time or vacation employment as they are no longer following a course of study, independently of whether his leave has been curtailed.

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Students who switch college

Students are allowed under Tier 4 guidance to switch educational establishments but they must seek permission to do so. They can start a new course **before** approval has been given where:

- They have applied to the Home Office for permission to stay and study with a Tier 4 sponsor which has a highly trusted sponsor rating; and
- Their permission to stay and study in the UK with the former sponsor is still valid; and
- Their prospective Tier 4 sponsor has assigned a confirmation of acceptance for studies to them for the new course.

  As the student is permitted to start the course they can undertake part time/vacation work assuming the level of course is such that it would allow for employment (see 50.7 above).

A student cannot start the new course until we have approved the new application where they are applying to us for permission to stay and study with a sponsor that does not have highly trusted sponsor rating. In such circumstances, they also cannot undertake part time/vacation work until such time as permission is granted.

Any student encountered who has changed his educational establishment without seeking approval can be considered for curtailment action if he has failed to seek permission to change college (breach of condition restricting study).

(Note though that a student who is following an approved course of study can additionally undertake supplementary study at any other institution as long as this does not interfere with their main course)

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Students who completed their course early but have not had their leave curtailed to provide for a revised wrap-up period in line with their new course completion date

Migrants working for periods in excess of the wrap up period allowed normally at the end of a course will be liable to curtailment for working in breach. If it appears the sponsor has failed to notify the Home Office of the student completing the course, refer to Sponsorship Investigations Team (SIT) as the sponsoring body may be failing in their duty to notify that the student is no longer attending.

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Students seeking to remain in another capacity

Students can only undertake part time/vacation work where they are attending the course and have permission to do so.

There is provision in the Rules however for a person to be allowed to take employment where they have an outstanding in time Tier 2 application (including to work as a postgraduate Dentist or a Dentist in Training) which is supported by a Certificate of Sponsorship assigned by a licensed Tier 2 Sponsor and made following successful completion of course at degree level or above with a Sponsor that is a Recognised Body or a body in receipt of public funding as a higher education institution (para 245ZT /245ZY).

Some self-employment is allowed where the person has made an application for leave to remain as a Tier 1 (Graduate Entrepreneur) Migrant which is supported by an endorsement from a qualifying Higher Education Institution and which is made following successful completion of a course at degree level or above at a Sponsor that is a Recognised Body or a body in receipt of public funding as a higher education institution

Some employment is allowed where a migrant has successfully completed a PhD at a Sponsor that is a Recognised Body or a body in receipt of public funding as a higher education institution and has been granted leave to remain as a Tier 4 (General) Student on the doctorate extension scheme or has made a valid application for leave to remain as a Tier 4 (General) Student on the doctorate extension scheme but has not yet received a decision on that application.

Also employment as a postgraduate Dentist or a Dentist in Training is allowed where the migrant has a pending in time application for leave to remain as a Tier 4 (General) Student supported by a confirmation of acceptance for studies assigned by a highly trusted sponsor to sponsor the migrant to do a recognised Foundation Programme.

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Sponsor licence revoked or sponsor has ceased to trade

The right to work is dependent on the student (i) following a course of study at the appropriate academic level (ii) with a Sponsor of the specified academic status. If the Sponsor no longer has a sponsor licence because it has been revoked, the student can no longer meet these requirements and therefore will be in breach of their conditions if they are found working. If the Sponsor has ceased trading, the student is unable to meet either requirement and would therefore be in breach of their conditions if they are found working.

In both of these situations, the student will normally be subject to curtailment action. Where the student is encountered in circumstances where it is not appropriate to curtail with immediate effect, then their details should be passed to the Sponsorship Investigation Team with a request that consideration be given to curtailment to 60 days. A student with curtailed leave is normally no longer legally able to undertake part time/vacation work.

Recourse to public funds

The 1996 Act introduced a restriction on the use of public funds for certain persons subject to control. From 8 November 1996, the grant of leave to enter or remain has, where appropriate, included the requirement" that the holder is required to maintain and accommodate themself and any dependants without recourse to public funds".

A person whose leave to enter or remain prohibits recourse to public funds is liable to curtailment if found to be in receipt of a public fund (see 50.11.1). Action may therefore be initiated under the Immigration Rules provided that one of the following is available:

- an admission that the person has been in receipt of public funds; and/or

- a statement from an official from the relevant benefit agency that public funds have been claimed.

A person whose passport endorsement does not expressly prohibit recourse to public funds does not breach a condition of his leave nor commit a criminal offence under section 24(1) (b)(ii) of the 1971 Act if they are in receipt of public funds (Those on temporary admission or illegal entrants who have not been granted leave are not liable to enforcement action in this category, as they have not been granted leave which prohibits recourse to public funds).

When a person started claiming public funds before a restriction was endorsed in their passport, there may have been a legitimate entitlement to claim e.g. Child Benefit. In such a case, a report should be sent to the relevant casework section to enable an approach to be made to the relevant benefit agency with a request that they review the claim. If, after interview, it appears that the person may qualify for benefits, submit a report to the relevant casework section.

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List of public funds

For a definition of what constitutes public funds see paragraph 6 of **Immigration Rules**

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Continuing leave

When a person makes an in-time application for variation of his leave, and the leave then expires before a decision is taken, section 3C of the 1971 Act means that the leave, and any conditions attached to that leave, automatically extends to the point at which the decision on the application is made (including a decision to reject the application as invalid). The 3C leave continues during the period that an appeal or

administrative review (AR) could be brought, even if no appeal/AR is submitted. If no appeal is brought the leave ends at the same time as the deadline for the appeal/AR. If an appeal/AR is lodged, the 3C leave and the conditions attached to that leave continue while the appeal/AR is pending.

Continuing leave and student's right to work: Where a Tier 4 student's leave is extended by virtue of sections 3C of the Immigration Act 1971, such extended leave will continue to have effect subject to the conditions that applied to it immediately prior to it being extended under such provisions of the 1971 Act. Therefore, a student who when section 3C leave commences has ceased studying, and has thereby lost the right to work, will not re-acquire their right to work by virtue of their leave being extended under the 1971 Act.

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Annex C

British Irish Visa Scheme (BIVS)

The British-Irish Visa Scheme, underpinned by amendments by the Immigration (Control of Entry through Republic of Ireland) Order 2014, allows for short term travel between the UK and Ireland, on the basis of one visit visa, by approved nationals who are visa-required for the purpose of travel to or entrance into both the UK and Ireland. The scheme does **not** apply to countries whose nationals are not visa-required in both the UK and Ireland. The following classes of visa come within the scope of the Scheme:

- **UK:** Visas granted to persons seeking leave to enter or remain in the UK as defined in Part 2 of the Immigration Rules of the UK, except those seeking leave to enter as (i) a Visitor in Transit or (ii) a Visitor seeking to enter for the purpose of marriage or to enter a civil partnership.

- **Ireland:** All short-stay 'C' visas, single-entry or multiple-entry, issued for the following purposes of travel to Ireland:
    - Visit (family/friend)
    - Visit (tourist)
    - Conference/Event
    - Business

Visas will be endorsed with the coding "BIVS" when confirmed as eligible for the Scheme.

Holders of BIVS visas will be subject to standard checks on arrival by the relevant border control authority, and enforcement action will be taken against those who are found to abuse the Scheme in either the Republic of Ireland or the UK. The visa holder must enter the state which issued the visa in the first instance.

The first phases of the Scheme commenced in China on the 28 October 2014 and India on 10 February 2015. Further rollout of the Scheme is subject to evaluation of phase one.

Overstayers and workers in breach

If you encounter the holder of a BIVS visa who has abused the conditions of their stay while in the UK, i.e. working in breach of the UK conditions, or overstaying, while in the UK; you must fully consider whether to curtail the leave(if appropriate) and serve a RED0001 You will need to consider where and when the period of leave to enter the UK was conferred by the Immigration (Control of Entry through the Republic of Ireland) Order 1972 as amended in 2014 in order to determine if the holder of a visa issued by Ireland has overstayed:

- **First arrival into the common travel area**
  Holders of UK issued BIVS visas must enter the UK first, and direct travel to the Ireland will not be possible; the reverse applies for BIVS visas issued by the Ireland. If leave to enter the UK is conferred on arrival (in the case of a UK-issued BIVS), or leave to land is granted by the Irish authorities in line with a BIVS visa issued by Ireland, this will be limited to 90 days or less leave to land in Ireland for Irish issued visa, or 180 days or less leave to enter the UK for UK issued visas.

  Where permission to land, enter or reside is denied, the individual will be returned to the **country of embarkation**. The visa will be revoked or cancelled by the issuing country.

- **Subsequent travel to the other jurisdiction**
  Where holders of 'BIVS' endorsed visas travel on from the visa issuing country to the non-issuing country, the duration of stay permitted will vary (see below). If permission to enter is not granted, the individual will be **returned to the issuing country**. This would include those refused leave to enter due to their permission to remain in the issuing country having expired.

Ireland – arrival from the UK only

If permission to enter is granted, the duration of stay permitted will be the shorter of the following periods:

- 90 days or less, or
- the remaining period of validity of the person's leave to enter the United Kingdom.

United Kingdom – arrival from Ireland only

Where a person holds a valid 'BIVS' endorsed Irish Visa and has extant leave to land or remain in Ireland they may enter the UK and remain for the duration of their leave to land/ remain in Ireland, as shown by the appropriate stamp in their passport rather than the dates printed on the visa, which are the dates between which the visa may be used for initial travel to Ireland.

- **Re-entry into the country of first arrival**
  A holder of a UK issued BIVS visa who re-enters the UK from Ireland, having entered Ireland under the terms of the Scheme, will be allowed a maximum stay of the leave to enter originally conferred by the entry clearance on the person's arrival in the UK.

Any discretionary factors and extenuating circumstances should be fully considered and evidenced as with any curtailment or liability to removal, and existing processes for bringing leave to an end should be followed as set out in this guidance.

Removal directions should be set directly to the country from which the person originally departed on their journey (or other country where the person can be returned to, if appropriate) rather than to the BIVS partner country.

Information on administrative removals of individuals travelling under the Scheme will be maintained by each jurisdiction and shared on request.

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Following the administrative removal of any UK visa holder for working in breach while they are in the UK, you should consider whether it is appropriate to request

revocation of the multiple entry BIVS visa by an entry clearance officer (ECO) under paragraph 30A(i) of the Immigration Rules paragraph.

To request revocation of the visa, you should complete the 'visa concerns process' through the Central Reference System (CRS). Guidance is located on pages 6-8 of the Border Force manual - Cancellation of entry clearance.

Irish issued BIVS visas

Following the decision to administratively remove an Irish visa holder for working in breach of condition imposed in line with the BIVS scheme on the person's UK leave, the individual may, where there is extant time on the Irish visa, request to be removed to Ireland to continue their stay as a visitor.

In these cases, you must complete proforma IS 141 (BIVS) requesting a decision on admissibility to Ireland within 48hours of receipt of the form prior to setting removal directions. The IS 141 (BIVS) form requires an UK unique reference number (URN) and AVATS number, both of which can be found on i-search.

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If Ireland confirms that the individual would be inadmissible to Ireland, you should arrange for removal outside the CTA.

If Ireland confirms that the individual would be permitted to re-enter Ireland from the UK on their current visa, removal directions should be set for Ireland.

Individuals, who are subject to removal following an abuse of the British-Irish Visa Scheme (BIVS), should be removed directly to the country from which the person originally departed on their journey (or other country where the person can be returned to, if appropriate) rather than to the BIVS partner country, rather than returned to Ireland.

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Annex D Persons exempt from liability to removal

The following are exempt from administrative removal

- British citizens, including:

  (a) anyone born in the UK or the Falkland Islands prior to 1 January 1983;

  (b) anyone born in the UK or the Falkland Islands on or after 1 January 1983, or in any other qualifying territory (see below) on or after 21 May 2002, whose father (if legitimate) or mother is a British citizen or settled in the UK or relevant territory (as the case may be);

  Note: An illegitimate child whose father is British did not automatically qualify at birth for British citizenship before 1 July 2006. However, if subsequently legitimated by the marriage of their parents, pursuant to section 47 of the 1981 Act, they are treated as if born in wedlock, i.e. as if were a British citizen from birth. For children born on or after 1 July 2006, there is no distinction between married and unmarried parents. From 6 April 2015, persons who did not automatically acquire British citizenship because their parents were unmarried will be entitled to register as British Citizens. See check if you are a British citizen for more details

  (c) anyone who was a British overseas territories citizen immediately before 21 May 2002 by connection with a "qualifying territory" (i.e. a British overseas territory other than the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus);

- Diplomats: under section 8(3) of the 1971 Act, as amended by section 4 of the 1988 Act, and section 6 of the 1999 Act, those who are exempt from control by virtue of their diplomatic status;

- Consular staff: under section 8(4) of the 1971 Act, those who are exempt from control by virtue of their consular status;

- under section 2(1)(b) of the 1971 Act, children born outside the UK prior to 1 January 1983 who are Commonwealth citizens and have a mother who was a

citizen of the UK and Colonies by birth at the time of the birth and therefore have the right of abode but are not British citizens;

Annex E Summary of changes in legal basis:

Grounds	Old basis – Pre-IA 2014 cases	New basis – IA 2014 Cases
Breach of conditions of leave	S10(1)(a) of the Immigration and Asylum Act 1999	Paragraphs 323(i) / 322(3) of the Immigration Rules for breach of conditions. Paragraphs 323(i) / 322(4) of the immigration Rules for failure to maintain or accommodate himself or dependants without recourse to public funds.
Overstays leave	S10(1)(a) of the Immigration and Asylum Act 1999	S10(1) of the Immigration and Asylum Act 1999 (as amended by the Immigration Act 2014)
Uses deception (successfully or not) in seeking leave to remain	S10(1)(b) of the Immigration and Asylum Act 1999	Paragraph 323(ia) of the Immigration Rules.
Family member of person liable to removal under s10	S10(1)(c) of the Immigration and Asylum Act 1999	S10(2) to (6) of the Immigration and Asylum Act 1999 (as amended by the Immigration Act 2014)

Annex F

Action to be taken when it is claimed an application has been made but it is not on CID

In instances where enforcement staff are provided with information that a suspected immigration offender has lodged an application with the Home Office for consideration, and a search of CID fails to find an application, enquiries may be made to establish whether an application has been made.

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Annex G Completion of an IS96

IS96 was previously served to notify a person (already served with notice of liability to removal) about reporting conditions. It now has multiple uses. **Note: The IS96 Ports notice is not affected by the changes set out below.**

It retains the previous function of placing someone without leave on reporting conditions but it may now also be used to inform a person of their liability to detention and TA/vary leave and impose conditions where they have not previously been notified, such as persons walking into ASU as illegal entrants claiming asylum, or where they still have extant or s.3C leave but are likely to be removed from the UK.

Note: if the person is being detained rather than placed on reporting conditions, the IS96 should accompany but not replace the appropriate IS91 detention notices.

Under the section “Liability to Detention” there are now two options:

A. You are a person without leave who has been served with a notice of liability to removal

This box must be ticked for persons who have already been notified, either in a RED.0001, RED.0001 (FAM), or other refusal decision which includes notice of liability to removal. You do not need to complete the “Statement of Specific Reasons” section as the person will already have been provided with the reasons why they are liable to removal.

B. You are a person where there is reasonable suspicion that you may be liable to removal from the United Kingdom

This box must be ticked for the following categories:

- persons without leave but who are not yet liable to removal due to an outstanding application or a pending administrative review or appeal (e.g. illegal entrants claiming asylum or overstayers making a human rights claim)
- persons without leave who have not been notified of liability to removal but have asked to make a voluntary departure (e.g. lorry drops)
- persons with extant or s.3C leave who have an application pending where there is reasonable suspicion that their case falls for refusal under the Immigration Rules making them liable to removal (e.g. GGfR where there is evidence of a sham marriage, or curtailment for deception or breach of conditions).
- persons with extant or s.3C leave who have an administrative review or appeal pending where there is reasonable suspicion that, following an adverse decision, their behaviour (e.g. entering a sham marriage or breach of conditions) will make them liable to removal.
- family members of such persons listed within A or B. (see above) who haven't yet received a separate RED.0001(FAM).

You will need to complete the "Statement of Specific Reasons" section providing evidence and the legal basis for why you consider the person to be liable to detention and removal (such as the reasons for the illegal entry or overstayer contention or evidence of breach of conditions or sham marriage). For family members you will need to include the name of the main person who is liable to removal and the family member's relationship to that person.

Under the "Restrictions" section there are now two options:

A. I hereby authorise the variation of your leave subject to the following restrictions

This box must be ticked where the person has extant or s.3C leave which is being varied under s.3(3)(a) of the Immigration Act 1971.

B. I hereby authorise your (further) temporary admission to the United Kingdom subject to the following restrictions

This box must be ticked where the person has no leave to enter or remain.

The rest of the notice, detailing the reporting conditions, is unchanged. If the person is being detained then the "Restrictions" section of the IS96 should be left blank or struck through and the appropriate IS 91 detention notices must be served.

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Revision History

Date change published	Officer/Unit	Specifics of change	Authorised by;	Version number after change (this chapter)
28-02-12	EID	Delete reference to 395c	Richard Quinn	V4
July 2012	, SID	Delete section 50.3.1 (no longer relevant, and insert one line in 50.2 as EEA Admin removals now possible.	Sonia Dower	V5
27/11/2013	Enforcement and Returns Operational Policy	Minor formatting changes, inclusion of restriction box in external version, inclusion of revision history in external version. Amendment to 50.3 on children born in UK	Kristian Armstrong Head of Asylum Enforcement and Criminality Policy	V6
28July 2014	Enforcement and Returns Operational Policy	Change to 50.2 to clarify conditions attached to stay,deletion of 50.5.1 re-regularisation of overstayers scheme,changes to 50.7 on students	Kristian Armstrong Head of Enforcement and Criminality Policy Angela Perfect Central Operations	V7

		working, 50.9 domestic workers, new annex A.		
/10/2014	Enforcement Operational Policy	General housekeeping, hyper-linking, official sensitive markings, re-instating missing heading for 50.5.2, and new content – 50.14 on tier 4 applications made after 20/10/2014	Kristian Armstrong	V8
08/01/2015	Enforcement Operational Policy	General housekeeping, hyper- new content – Sections 50.2.1 - British Irish Visa Scheme	Kristian Armstrong	V9
26 February 2015	Enforcement Operational Policy	Additions to 50.2 BIVS, revisions to 50.14 on other PBS applications made after March 2015	Andrew Elliot	V10
6 April 2015	Enforcement Policy	Chapter revised to reflect new section 10 removal process from 6 April. Breach of conditions cases which now require curtailment action moved to annex B,BIVS to annex C	Rebecca Handler	V11
17 April 2015	Enforcement Policy	General update, amendments to 1.6 to delete advice on service of old style section 10 notices and 3.3 to effect that time for providing response to 120 notice can be shortened	Philippa Rouse Head of Criminality and Enforcement Unit	V12

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European Economic Area nationals qualified persons

This guidance applies and interprets the Immigration (European Economic Area) Regulations 2006 (as amended). These Regulations make sure the UK complies with its duties under the Free Movement of Persons Directive 2004/38/EC.

European Economic Area nationals qualified persons

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This guidance tells you how to assess if a European Economic Area (EEA) national is a qualified person.

It applies and interprets the Immigration (EEA) Regulations 2006 established under domestic law.

This makes sure the UK complies with its duties under the Free Movement of Persons Directive 2004/38/EC.

Swiss nationals
Switzerland is not part of the European Union (EU). Swiss nationals and their family members have the same free movement rights as EEA nationals. In this guidance all reference to EEA nationals also refers to Swiss nationals.

Changes to this guidance - This page tells you what has changed since previous versions.

Contacts - This page tells you who to contact for help if your senior caseworker or deputy chief caseworker cannot answer your question.

Information owner - This page tells you about this version of the document and who owns it.

Safeguard and promote child welfare - This page explains your duty to safeguard and promote the welfare of children and tells you where to find more information

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This section lists changes to the 'European Economic Area nationals qualified persons' guidance, with the most recent at the top.

Date of the change	Details of the change
7 April 2015	Change request: • changes to reflect change of application forms • other minor changes
26 February 2015	Change request: • Removed 2 paragraphs from page 'Assessing continuous residence', from the section 'Absences from the UK'.
05 February 2015	Completely revised by the free movement operational policy team and the guidance, rules and forms team.

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European Economic Area nationals qualified persons

Key facts

This page tells you the key facts for a European Economic Area (EEA) national who is a qualified person.

Eligibility requirements	To benefit from free movement rights and have a right of residence in the UK for longer than 3 months, an EEA national must show: • evidence of identity and nationality of an EEA member state, and • evidence they are exercising a free movement right in the UK.
Application forms	Applicants do not need to complete an application form. However, if they wish to do so, they can apply for a document using one of the following forms: • EEA(QP) – Application for a registration certificate as a qualified person. • EEA(PR) - Application for a document certifying permanent residence.
Cost of application	See Fees for Home Office services EEA family permit applications remain free of charge.
Residence documents	The right of residence for an EEA or Swiss national and their direct family members does not depend on them holding a document issued under these regulations. These documents only confirm a right of residence as a qualified person or as a family member at the time the document is issued. Extended family members must apply for documents under these regulations to have their right of residence confirmed.
Validity of documents	Registration certificates and documents certifying permanent residence issued to EEA nationals have no expiry date.
Dependants	Under the regulations, EEA nationals can bring in direct family members if the conditions of regulation 7 are met or extended family members if the conditions of regulation 8 are met.
Switching	EEA nationals can change the basis of their stay as long as they continue to exercise their free movement rights in the UK. For example, a student can switch to become a worker and count both periods of leave towards acquiring permanent

	residence.

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Qualified persons

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This section tells you which European Economic Area (EEA) nationals are defined as a 'qualified person' under the Immigration (EEA) Regulations 2006 ('the Regulations').

EEA nationals who reside in the UK for more than three months must be exercising free movement rights. In doing so, they are classed as a 'qualified' person.

Qualified person
A qualified person is defined in regulation 6 of the regulations as an EEA national who is living in the UK as a:

- job seeker – regulation 6(1)(a)
- worker – regulation 6(1)(b)
- self-employed person – regulation 6(1)(c)
- self-sufficient person – regulation 6(1)(d)
- student – regulation 6(1)(e).

An EEA national can change the basis of their stay in the UK. For example, if they enter the UK as a jobseeker and then take employment and become a worker. In such cases, the EEA national can count both periods towards the five year qualifying period for permanent residence.

Qualified persons do not need to apply to for a document confirming a right of residence in the UK. However, if they wish to do so they may apply for a registration certificate.

For more information on applications for a registration certificate, see related link: Processes and procedures: applications for a registration certificate.

For more information on permanent residence, see related link: Rights of permanent residence for qualified persons.

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Jobseekers

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This page tells you how a European Economic Area (EEA) national can be a qualified person in the jobseeker category under the Immigration (European Economic Area) Regulations 2006 (as amended).

Croatian nationals who come under worker authorisation cannot be considered as jobseekers. Further information on Croatian nationals can be found in the related link: Accession state countries.

A jobseeker is defined in regulation 6(4) of the Immigration (EEA) Regulations 2006 ('the Regulations') as an EEA national who:

- enters the UK in order to seek employment
- is present in the UK seeking employment, immediately after enjoying a right to reside as a:
  - worker
  - self-employed person
  - self-sufficient person
  - student
- can provide evidence they are seeking employment and have a genuine chance of being employed

Seeking employment
Evidence of this may include:

- job application forms
- letters of invite to interviews
- rejection letters from employers
- Jobcentre Plus registration documents

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Immigration (EEA) (Amendment)

	Genuine chance of being employed Evidence of this may include: • academic or professional qualifications • other experience So, for example, a person applying for positions as a surgeon with no qualifications or experience in this capacity cannot show they have a genuine chance of doing this work. **Seeking work for longer than 6 months** From 1 January 2014, regulation 6(7) stops an EEA national from keeping the status of jobseeker for longer than six months unless they can provide compelling evidence to show they are continuing to seek employment and have a genuine chance of employment. For example, an EEA national enters the UK as a student and shortly after starts employment. After 13 months they are made redundant and register with Jobcentre Plus. Eight months later, they are still seeking work but provide evidence to show they have recently done further training which, when they finish in 2 months time, guarantees them a position as an apprentice. In this case, this is enough evidence to show they have a genuine chance of being working.	Regulations 2012 Immigration (EEA) (Amendment) (no.2) Regulations 2012 Immigration (EEA) (Amendment) Regulations 2013 Immigration (EEA) (Amendment) (no. 2) Regulations 2013 Immigration (EEA) (Amendment) Regulations 2014

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This section tells you how a European Economic Area (EEA) national can be a qualified person in the worker category under the Immigration (European Economic Area) Regulations 2006 (as amended).

A worker is an EEA national who is exercising their free movement rights in the UK by working in paid employment on a full-time or part-time basis.

Evidence of this may include:

- payslips dated no more than six weeks before the application was made
- a letter from the employer confirming employment, or
- a contract of employment.

Assessing whether the EEA national is a 'worker'
While there is no minimum amount of hours which an EEA national must be employed for in order to qualify as a worker, the employment must be genuine and effective and not marginal or supplementary.

Effective work may have no formal contract but should have:

- something that is recognisably a labour contract
- an employer
- agreement between employer and employee that the worker will perform certain tasks
- the employer will pay or offer services (such as free accommodation) or goods for the tasks performed.

Marginal means the work involves so little time and money that it is unrelated to the lifestyle of the worker. It is supplementary because the worker is clearly spending most of their time on something else, not work.

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External links

Companies House

Yell.com

HMRC rates and thresholds for employers

For example a student who gets a job behind the student union bar for two hours a week is actually a student, their work is marginal and supplementary to their actual role as a student.

You must carefully assess each case on its own merits to see whether the EEA national's claimed employment is genuine and effective.

Relevant considerations include:

- is there a genuine employer-employee relationship
- is the work regular or intermittent
- how long has the EEA national been employed for
- number of hours worked
- level of earnings.

Case example 1
Mr A is a Spanish national and has recently started work on a construction site for cash in hand for 20 hours each week and earns £250 each week. He provides evidence of a contract of employment and bank statements showing funds regularly entering his account. He has recently registered with HMRC for tax purposes. In this scenario, it is more likely than not that Mr A is a genuine worker.

Case example 2
Mr B is a Dutch national and has recently started work washing cars for a relative. He works cash in hand and has no employment contract. He claims to earn £100 each week and tries to supplement this with odd jobs elsewhere when he can. He has no bank account and cannot show any evidence of tax or NI payments. In this scenario, it is more likely than not, that Mr B's work is marginal and ancillary.

Tax and National Insurance (NI)
Compliance with the requirement to pay tax and NI is a domestic matter for the UK authorities and failure to comply does not stop an EEA national from qualifying as a worker.

	However, non-compliance may indicate that the EEA national is in 'marginal and ancillary' employment. This cannot be the sole basis on which you determine that the EEA national is not exercising treaty rights as a worker, but is a factor which can be taken into consideration when making this assessment. If an EEA national appears to be doing an employment activity which is genuine and effective, but is not paying tax and NI, you must accept they are exercising Treaty rights as a worker. However, in these circumstances you must report the employer to Her Majesty's revenue and customs (HMRC) for non-compliance with the UK tax and NI requirements. **Rough sleeping** An EEA national who is rough sleeping is not automatically stopped from being a qualified person, although the fact they are rough sleeping will warrant further enquiries into any claimed employment. The relevant consideration is set out above for workers. While rough sleeping in itself is not sufficient grounds for concluding that an EEA national is not a qualified person, it may be taken into account as a factor when considering whether the work is genuine and effective. This consideration must be undertaken on a case by case basis, taking into account all of the relevant information. For example, if an EEA national is rough sleeping, and is working for only a few hours a week, you may consider that the work is not 'genuine and effective'. However, an EEA national who is working 40 hours a week in a clear employment relationship, but who is unable to support themselves because they are poorly paid, should be considered to be a worker. **HM Revenue & Customs (HMRC) threshold** HMRC has a Primary Earnings Threshold (PET), which is the point at which employees must pay class 1 National Insurance contributions. If an EEA national is earning below PET you must make a further enquiries into whether the activity relied upon is genuine and effective. The PET for the financial year 2014 - 2015 is £153 each week, or £663 each calendar	

	month. The PET is up-rated each financial year and you must check the HMRC website for the current rate. See related links: HMRC rates and thresholds for employees. **Charity work** An EEA national doing unpaid charitable work does not qualify as a worker but may be considered to be self-sufficient, see related link: Self-sufficient persons. They may be considered to be a worker if they are doing charity work that involves taking part in the commercial activities of the charity for which they receive payment in the form of having their living expenses and accommodation provided. For more information, see related link: EEA case law – Steymann judgment. **Retaining worker status** There are some circumstances when an EEA national who is no longer working does not stop being treated as a worker for the purposes of the regulations. For further information on this, see in this section: Retaining worker status.	

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Retaining worker status

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This page tells you how a European Economic Area (EEA) national worker in the UK, who has temporarily stopped working can continue to be considered a worker for the purposes of the Immigration (EEA) Regulations 2006 ('the Regulations').

Someone who has temporarily stopped working can still be considered a worker under regulation 6(2) of the regulations if they can provide proof that they:

- are temporarily unable to work because of illness or an accident
- are in duly recorded involuntary unemployment
- are involuntarily unemployed and have embarked on vocational training
- voluntarily stopped working to start vocational training related to their previous employment

Temporarily unable to work due to illness or accident
In these cases the applicant must provide medical certificates and a letter from their doctor outlining the reasons for their inability to work and why this is temporary as evidence.

The Upper Tribunal stated in the case of FMB Uganda [2010] UKUT 447 (IAC) that there is no time limit on the definition of 'temporary' in relation to applications under the regulations.

They ruled that anything not permanent is considered temporary even if it lasts for a long time. Therefore if the evidence from the doctor states the incapacity is temporary you must accept this even if the applicant has been unable to work for some time.

For further information see related link: EEA case law - FMB Uganda.

Duly recorded involuntary unemployment
An EEA national may still qualify as a worker if they are involuntarily unemployed and provide proof that they:

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Related links

External links

Upper Tribunal Decision in FMB Uganda [2010] UKUT 447(IAC)

Immigration (EEA) Regulations 2006

Free Movement of Persons Directive (2004/38/EC)

The Immigration (EEA) (Amendment) Regulations 2009

The Immigration (EEA) (Amendment) Regulations 2011

Immigration (EEA) Amendment Regulations 2012

	• have registered as a job seeker with Jobcentre Plus or a recruitment agency
	• entered the UK to seek employment
	• are in the UK seeking employment immediately after enjoying a right to reside as a jobseeker, student, self-employed person or self-sufficient person
	
	They must also give evidence to show they are looking for employment and have a genuine chance of being employed.
	
	Evidence that they are seeking employment and have a genuine chance of being engaged.
	
	This can be provided in the form of:
	
	• a letter from their former employer confirming:
	  ○ the dates they were employed
	  ○ their unemployment was involuntary
	• a letter from Jobcentre Plus or a recruitment agency confirming they have registered with them
	• proof they are seeking work
	
	If the EEA national was employed before becoming involuntarily unemployed, then they cannot keep worker status for longer than 6 months.
	
	However, if they had been employed for more than one year they can keep worker status if they can provide compelling evidence to show they are continuing to seek employment and have a genuine chance of being employed.
	
	But if they were employed for less than 6 months and were then made redundant and registered with Jobcentre Plus, but after a further 6 months had still not got any employment they would not be able to keep their worker status any longer and must either become a qualified person in another capacity (for example as a student or self-sufficient person, but not a jobseeker) or leave the UK if they have no other right to reside in the UK.
	
	Involuntary unemployment and vocational training
		Immigration (EEA Amendment) (no.2) Regulations 2012
		
		Immigration (EEA)(Amendment) Regulations 2013
		
		Immigration (EEA) (Amendment)(no. 2) Regulations 2013
		
		Immigration (EEA)(Amendment) Regulations 2014

	EEA nationals who are involuntarily unemployed and have started vocational training must provide evidence in the form of:
	
	• a notice of their involuntary unemployment from their former employer
	• a letter from their training provider confirming:
	  ○ what type of vocational training they have enrolled on
	  ○ they are attending the training
	
	Voluntary unemployment and vocational training
	As well as the above evidence, if a person has voluntarily stopped working but has started vocational training, they must also show that their vocational training is related to their previous employment.	

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Self-employed person

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This page tells you how a European Economic Area (EEA) national can qualify as a self-employed person under the Immigration (EEA) Regulations 2006 ('the Regulations').

Case law defined by the Court of Justice of the European Union has determined the definition of self-employed person is a community concept, not subject to national definitions.

This means assessing an application from someone on the basis of being self-employed must be non-discriminatory and make sure EEA nationals are not under greater restrictions than those placed upon a British citizens.

Definition of self employment
A self-employed person is an EEA national, exercising their free movement rights in the UK by working for themselves and generating an income in a self-employed capacity.

You must consider the following factors, although not all the factors will be relevant to every application. You must decide each application after analysing all the relevant circumstances. Applicants must provide evidence to show they meet the factors listed below:

- economic activity
- responsibility and personal freedom
- genuine and effective self employment
- registration with HM Revenue & Customs (HMRC)

In addition the two factors below will only apply depending on the type of self-employment:

- permanence and stability
- membership of a professional body

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HMRC Website - Employment status

	Reasonable evidence of self-employment may include:
	
	• proof of registration for tax and National Insurance (NI) purposes with HMRC for example:
	  o letter of self-employed status
	  o letter confirming payment of tax and NI contributions
	• invoices for work done
	• a copy of their business accounts
	• an accountant's letter
	• leases on business premises (if applicable)
	• advertisements for their business
	• business bank statements.
	
	Any evidence submitted must be dated no more than six months before the application date.
	
	Assessing whether the self-employed activity is 'genuine and effective'
	While there is no minimum amount of hours an EEA national must engage in self-employed activity to qualify as a self-employed person, the employment must be genuine and effective and not marginal or supplementary.
	
	The factors set out above will help you in considering whether the claimed self-employment is 'genuine'.
	
	You can take marginal to mean that the self-employed activity involves so little time and money as to be largely irrelevant to the lifestyle of the EEA national. It is supplementary because in this situation the EEA national is clearly spending most of their time on something else, not the self-employed activity.
	
	You must carefully assess if the EEA national's claimed self-employment is 'genuine and effective'. You must assess each case on its own merits, taking into account all of the circumstances of the case.	

	For information on taking into account rough sleeping and the HMRC threshold see related link: Retaining worker status.	

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This page tells you how to assess a self-employed European Economic Area (EEA) national in the UK who has temporarily stopped working.

Under the Immigration (EEA) Regulations 2006 ('the Regulations') these applicants could still be considered as working in line with regulation 6(3) of the regulations if they provide proof they are temporarily unable to work in a self-employed capacity because of:

- an illness, or
- accident.

They must provide a medical certificate from their doctor and a letter from their doctor explaining the reason why they are temporarily unable to work as evidence.

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This page tells you what documents a European Economic Area (EEA) national must provide with an application for a document confirming their right of residence as a qualified person in the self-sufficient person category.

A self-sufficient person is an EEA national who is exercising their free movement rights in the UK. They must be able to provide proof that they have:

- enough money to cover their own and any family member's living expenses without becoming a burden on the social assistance system in the UK, and
- comprehensive sickness insurance in the UK for themselves and any family members.

For more information on assessing if the EEA national has sufficient resources so that they do not become a burden on the social assistance system of the UK, see related link: Assessing sufficient resources.

For further information on comprehensive sickness insurance, see related link: Comprehensive sickness insurance.

They could also qualify as self-sufficient based on the income of their family member if this money is available to them. For example, their non-EEA spouse may have permission to work in the UK under the Immigration Rules and be providing financial support to the EEA national from their income alone.

This would be considered acceptable for the purposes of the Immigration (EEA) Regulations 2006, as long as the EEA national also has comprehensive sickness insurance cover for themselves and any family members.

Charity workers
An EEA national may qualify as a self-sufficient person if they can show they have enough

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	funds to support themselves, or the charity is meeting their living costs. They must have comprehensive sickness insurance but the charity can meet the cost of this. For example, a minister of religion might qualify as self-sufficient if their living costs are being met by the religious institution they are employed by. For information on charity workers who might be considered to be workers, see related link: Worker. **Retired people** An EEA national may qualify as self-sufficient if they can show they receive a state or private pension or have enough income from other sources, such as investments, to cover their living expenses without needing to claim benefits in the UK.	

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This page tells you the documents a European Economic Area (EEA) national must provide with an application for a document confirming their right of residence as a qualified person in the student category.

An EEA national exercising their free movement rights in the UK as a student must show they:

- Are enrolled for the main purpose of following a course of study (including vocational training) at a public or private establishment which is:
  - financed from public funds, or
  - otherwise recognised by the Secretary of State as an establishment accredited to provide such courses or training within the law or administrative practice of the part of UK in which it is located.
- Have enough money to meet their living expenses and so will not become a burden on the social assistance system of the UK during their residence. Suitable evidence of this includes:
  - bank statements
  - other evidence of the award of a grant or sponsorship, or
  - written confirmation by the student that they have enough money.
- Have comprehensive sickness insurance cover in the UK. For further information on comprehensive sickness insurance, see related link: Comprehensive sickness insurance.

For more information on assessing if the student has sufficient resources so that they do not become a burden on the social assistance system of the UK, see related link: Assessing sufficient resources.

For further information on assessing educational establishments, see related link: Assessing educational establishments.

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	Public funds EEA nationals in the UK as students are expected to support themselves without relying on public funds. For more information, see related link: Public funds.	

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Assessing educational establishments

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This section gives you an overview of the consideration process to check if an educational establishment can be relied upon by an EEA national to qualify as a student for the purposes of the Immigration (European Economic Area) Regulations 2006 (the Regulations).

There are four stages for considering if an educational establishment is acceptable for the purposes of the regulations:

- stage 1: Tier 4 register of sponsors
- stage 2: Knowledge of Life (KoL) accredited colleges database
- stage 3: Euro educational establishments database
- stage 4: independent evidence

You must work through the stages in the order given.

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Stage one – Tier 4 register of sponsors

Stage two – KoL accredited colleges database

Stage three – Euro educational establishments database

Stage four – Independent evidence

Adding establishments to the Euro database.

Related links

Tier 4 Register of Sponsors

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Stage one: Tier 4 register of sponsors

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This page takes you through the first stage of the consideration process to check if an educational establishment can be relied upon by an EEA national to qualify as a student for the purposes of the Immigration (European Economic Area) Regulations 2006.

You must check if the establishment is listed on the register. Establishments listed on this register are acceptable for the purposes of regulation 4.

See related links: Tier 4 Register of Sponsors.

If the establishment does not appear on the register, you must proceed to stage two of the consideration process.

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Stage two – KoL accredited colleges database

Stage three – Euro educational establishments database

Stage four – Independent evidence

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This page takes you through the second stage of the consideration process to check an educational establishment can be relied upon by a European Economic Area (EEA) national to qualify as a student for the purposes of the Immigration (European Economic Area) Regulations 2006 (the Regulations).

The second stage of the consideration process is to check whether the educational establishment is on the Knowledge of Life (KoL) accredited college database.

KoL accredited college database
If an establishment does not appear on the Tier 4 register of students, you must check if it appears on the KoL database.

This database lists all establishments which the Home Office has already confirmed are publicly funded or accredited by one of the following accreditation bodies:

- Accreditation UK
- the British Accreditation Council
- the Accreditation Body for Language Services
- the Accreditation Body for International Colleges.

If an establishment is listed as being publicly funded or as being accredited on this database, this is acceptable for the purposes of regulation 4 of the Regulations.

If an establishment does not appear on the database, you must proceed to stage three of the consideration process.

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Stage three: Euro educational establishment database

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This page takes you through the third stage of the consideration process to check if an educational establishment can be relied upon by a European Economic Area (EEA) national to qualify as a student for the purposes of the Immigration (European Economic Area) Regulations 2006 (the Regulations).

The third stage of the consideration process is to check whether the educational establishment is on the Euro educational establishment database college database.

Euro educational establishments database
If an establishment is not included on the Tier 4 register or Knowledge of Life (KoL) database, you must check if the establishment appears on the 'Euro educational establishments' database.

This database includes educational establishments which do not appear on the Tier 4 register or KoL database and for which evidence has been received to demonstrate that the establishment is either publicly funded or holds a valid and satisfactory full inspection, review or audit from an approved inspecting body.

If an establishment is included on this list it will be acceptable for the purposes of the regulations.

If an establishment is listed on the database but the public funding or inspection shows as expired, you must write to the applicant asking for evidence to show the establishment still meets the requirements for inclusion on the database.

If evidence is received, you must notify the database owner of this in order that the database can be updated.

If the establishment is not included on the Euro educational establishment's database, you must proceed to stage four of the consideration process.

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Stage two – KoL accredited colleges database

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Adding establishments to the Euro database

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Stage four: Independent evidence

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This page takes you through the fourth stage of the consideration process to check if an educational establishment can be relied upon by a European Economic Area (EEA) national to qualify as a student for the purposes of the Immigration (European Economic Area) Regulations 2006 (the Regulations).

The fourth stage of the consideration process is to check whether the EEA national can produce independent evidence that the educational establishment is either:

- publicly funded, or
- otherwise accredited.

An establishment not listed on the Tier 4, Knowledge of Life (KoL) or Euro databases may still be in receipt of public funding or otherwise accredited.

This evidence can be provided following the guidelines set out below, where not provided by the applicant, must be requested before a refusal is issued.

'Publicly funded'
An establishment will be 'publicly funded' if it is:

- an establishment or Further Education provider maintained by a local education authority, or
- an establishment in the Higher Education sector which received financial support by a higher education funding council (pursuant to the Further and Higher Education Act 1992)
- any establishment receiving grants, loans or other payments form the Higher Education Funding Council for England.

If evidence is submitted which demonstrates the establishment in question is publicly funded as described above this is acceptable for the purposes of the regulations.

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Assessing educational establishments

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Adding establishments to the Euro database

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Immigration (EEA) Regulations 2006

	Establishments verified using the above process must be added to the Euro Educational Establishments database for future reference. Please see related links: Adding establishments to the European Educational Establishments Database. **'Otherwise accredited'** A private establishment not included on the Tier 4 register, KoL database or Euro database may still be accepted as accredited if evidence is received that the institution holds a valid and satisfactory full institutional inspection, review, or audit by a body with a formal role in the statutory regulation of education in the UK. This evidence can be provided in line with the guidelines set out below and, where not provided by the applicant, should be requested before a refusal is issued. The relevant bodies are: • Quality Assurance Agency for Higher Education • Ofsted • Education Scotland • Estyn • Education and Training Inspectorate • Independent Schools Inspectorate • Bridge Schools Inspectorate, or • School Inspection Service. Establishments which have been verified using the above process should be added to the Euro Educational Establishments database for future reference. See related links: adding establishments to the Euro Educational Establishments Database. **No evidence submitted to demonstrate that the establishment is publicly funded or otherwise accredited.** If no evidence is received after writing out, the application for a document can be refused on the basis that the applicant has not demonstrated they are enrolled at a private or public educational establishment.	Free Movement of Persons Directive (2004/38/EC) The Immigration (EEA) (Amendment) Regulations 2009 The Immigration (EEA) (Amendment) Regulations 2011 Immigration (EEA) (Amendment) Regulations 2012 Immigration (EEA) (Amendment) (no.2) Regulations 2012 Immigration (EEA) (Amendment) Regulations 2013 Immigration (EEA) (Amendment) (no. 2) Regulations 2013 Immigration (EEA) (Amendment) Regulations 2014

	Before refusing the application, you must consider if the applicant meets the requirements under regulation 4(1)(c) and could be considered as exercising treaty rights as a self-sufficient person rather than a student. See related link: Assessing sufficient resources	

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Adding Establishments to the Euro Educational Establishments Database

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This page tells you how to add an educational establishment to the Euro educational establishments database.

If you have verified an educational establishment which is not included currently on the Tier 4 register or Knowledge of Life (KoL) database, and/or is publicly funded or accredited you must arrange for the establishment to be added to the Euro educational establishments database.

Official sensitive – do not disclose – start of section

This information has been removed as it is restricted for internal Home Office use only.

Official sensitive – do not disclose – end of section

You must include the following information in the email message:

- Name of the establishment.
- Source of funding if publicly funded (for example, the Skills Funding Agency, Higher Education Funding Council for England).
- Formal body from which the institution holds a valid and satisfactory full institutional inspection, review or audit if privately funded.
- Confirmation of the evidence submitted.
- Confirmation that the caseworker has verified this information with the relevant funding or inspecting body.
- Expiry date of funding or accreditation.

The establishment will then be added to the Euro database for future reference.

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This page tells you how to assess if a European Economic Area (EEA) national self-sufficient person or student and their family members have sufficient resources not to become a burden on the social assistance system of the UK.

The Immigration (European Economic Area) Regulations 2006 ('the Regulations') state that a European Economic Area (EEA) national self-sufficient person or student and their family members must have sufficient resources available so they do not to become a burden on the social assistance system of the UK.

When deciding if an EEA national and their family members have sufficient resources you must first check if they exceed the maximum level of resources which a British citizen and their family members can have before they no longer qualify for social assistance under the UK benefit system.

If they do exceed the maximum level then you must accept that they have sufficient resources.

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Exceeding the maximum level of resources to qualify for social assistance

Declarations made by students

Related links

Comprehensive Sickness insurance

External links

Immigration (EEA) Regulations 2006

Free Movement of Persons Directive (2004/38/EC)

The Immigration (EEA) (Amendment) Regulations 2009

The Immigration (EEA) (Amendment) Regulations 2011

		Immigration (EEA) (Amendment) Regulations 2012 Immigration (EEA) (Amendment) (no.2) Regulations 2012 Immigration (EEA) (Amendment) Regulations 2013 Immigration (EEA) (Amendment) (no. 2) Regulations 2013 Immigration (EEA) (Amendment) Regulations 2014

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This page tells you how to consider whether a European Economic Area (EEA) national claiming a right of residence as a student or self-sufficient persons has resources which exceed the maximum level of resources to qualify for social assistance.

This must take into account the personal situation of the applicant and their family members.

In most cases it will be clear if an applicant exceeds the maximum level of resources which a British citizen and their family members are allowed to have before they no longer qualify for social assistance.

The applicant will exceed this level if they provide documents showing they have enough resources to cover their essential outgoings. For example the applicant can provide evidence of resources by providing one or more of the following:

- bank statements showing savings
- evidence of pension payments
- receipt of educational grants from overseas
- income of a partner, spouse or other family member to which they have regular access, for example:
  - parental funding
  - a spouse's salary earned through lawful working in the UK

This is not a complete list of all the types of evidence. Applicants can provide any other evidence showing that they and their family members have enough resources available to them to take them above the level of resources which a British citizen and their family members may possess before they are no longer eligible for social assistance under the UK benefit system. You must assess each case on an individual basis.

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	Taking into account the personal situation of the applicant and any family members
	If an EEA national and their family member's resources do not exceed the maximum levels of resources a British citizen and their family members can have before they no longer qualify for social assistance, you must take into account their personal situation to see if their resources are nonetheless sufficient on the facts of the case. This means assessing their:
	
	• financial commitments, such as:
	  ○ rent
	  ○ mortgage
	  ○ utilities
	  ○ loans
	  ○ credit cards
	  ○ other personal debt
	• additional costs, such as
	  ○ travel
	  ○ food costs
	
	This is not a complete list and evidence must be assessed on a case-by-case basis. If you are unsure whether or not to accept evidence, you must speak to your senior caseworker.
	
	The applicant can also show they have enough resources if their circumstances are about to change, such as:
	
	• receiving inheritance, for example a solicitor's letter confirming when this is to be received
	• potential employment, for example a letter confirming an offer of a job
	• retirement or receiving pension payments, for example a letter from the pension company confirming when it is to be paid
	
	This is not a complete list of all the types of evidence an applicant can provide.
	
	You must assess each case on an individual basis and make sure that where the applicant	

	has dependent family members the resources are enough for the whole family. If, having taken into account the personal situation of the EEA national and examined the evidence, you are satisfied that their resources and that of their family members exceed or will shortly exceed what is required to meet their financial commitments and living costs, those resources should be regarded as sufficient. In all cases where the applicant does not exceed the maximum level they can have so that they qualify for social assistance you must speak to your senior caseworker.	

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This page tells you how EEA national students can assure the Secretary of State they have sufficient resources not to become a burden on the social assistance system. This is in line with regulation 4(1)(d)(iii) of the Immigration (EEA) Regulations 2006 ('the Regulations').

The regulations allow students to assure the Secretary of State they have sufficient resources not to become a burden on the social assistance system by making a declaration.

This means that when dealing with applications from students you might receive either:

- evidence in the form of documentation
- a declaration

You must not insist that documentary evidence of available income or resources is provided.

Where the applicant chooses to make a declaration they must confirm that they meet the above requirements relating to having sufficient resources.

If the declaration is not clear or detailed enough to confirm these requirements are met you must either:

- request further information
- refuse the application

In cases where a declaration is made and the declaration is not clear enough you must speak to your senior caseworker for approval before refusing the application.

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Comprehensive sickness insurance

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Comprehensive sickness insurance

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This section defines comprehensive sickness insurance and explains which European Economic Area (EEA) nationals and their family members must to hold it.

You can accept an EEA national or their family member as having comprehensive sickness insurance if they hold any form of insurance that will cover the costs of the majority of medical treatment they may receive in the UK.

You must take a proportionate approach when you consider if an insurance policy is comprehensive. For example, a policy may contain certain exemptions but if the policy covers the applicant for medical treatment in the majority of circumstances you can accept it.

The definition of comprehensive sickness insurance does not include:

- cash back health schemes, such as:
  - dental
  - optical, or
  - prescription charges
- travel insurance policies
- access to the UK's National Health Service (NHS).

For information on the acceptable documents to show they have comprehensive sickness insurance, see related link: Comprehensive sickness insurance - documents required.

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Applicants who must have comprehensive sickness insurance
Comprehensive sickness insurance - documents required

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Applicants who must have comprehensive sickness insurance

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This page tells you which European Economic Area (EEA) nationals and their family members must have comprehensive sickness insurance to be eligible for a document confirming their right of residence in the UK.

Regulation 4(1)(c) and (d) of the Immigration European Economic Area (EEA) Regulations 2006 states that nationals living in the UK as self sufficient people or students must have comprehensive sickness insurance.

Also regulation 4(2) of the regulations states that if an EEA national is living in the UK as a self sufficient person their comprehensive sickness insurance must also cover their family members.

You must refuse an application from a self sufficient person or a student if they do not provide evidence of comprehensive sickness insurance.

However, you must consider if the transitional arrangements for students apply before you refuse the application, if the:

- application relates to the right of permanent residence, and
- EEA national sponsor is a student.

For more information on the transitional arrangements for students, see related link: Transitional arrangements for permanent residence applications from students.

In this section

Comprehensive sickness insurance

Comprehensive sickness insurance - documents required

Student permanent residence applications – transitional arrangements

Related Links

External links

Immigration (EEA) Regulations 2006

Free Movement of Persons Directive (2004/38/EC)

The Immigration (EEA) (Amendment) Regulations 2009

The Immigration (EEA) (Amendment) Regulations 2011

Immigration (EEA) (Amendment)

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Comprehensive sickness insurance: documents required

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This page tells you what documents a European Economic Area (EEA) national or their family member can provide to show they have comprehensive sickness insurance.

For applications for a registration certificate or a residence card
They must provide one of the following documents to show they have comprehensive sickness insurance:

- a comprehensive private medical insurance policy document
- a valid European Health Insurance Card (EHIC) issued by an EEA member state other than the UK (for people temporarily in the UK)
- form S1
- form S2, or
- form S3.

For applications for a document certifying permanent residence or a permanent residence card
They must provide one of the following documents or a combination of these documents covering their five continuous years residence in the UK:

- a comprehensive private medical insurance policy document
- a valid European Health Insurance Card (EHIC) issued by an EEA member state other than the UK (or its predecessor form E111)
- form S1 (or its predecessor forms E109 or E121)
- form S2 (or its predecessor form E112), or
- form S3.

For information on the definition of comprehensive sickness insurance, see related link: Comprehensive sickness insurance.

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External links

Immigration (EEA) Regulations 2006

Free Movement of Persons Directive (2004/38/EC)

The Immigration (EEA) (Amendment) Regulations 2009

The Immigration (EEA) (Amendment) Regulations 2011

Immigration (EEA) (Amendment) Regulations 2012

Immigration (EEA Amendment) (no.2) Regulations 2012

Immigration (EEA) (Amendment) Regulations 2013

Immigration (EEA) (Amendment) (no. 2)

	Applications for a registration certificate or a residence card - EHIC is provided If the applicant provides a valid EHIC as evidence of comprehensive sickness insurance, it must have been issued by a member state other than the UK, because the member state that issued the card will cover the cost of treatment. You can only accept the valid EHIC as comprehensive sickness insurance if the applicant is living in the UK on a temporary basis. If it is clear from other information they provide they are in the UK temporarily you do not need to request further information. For example, a student may be undertaking a year long course and have a provisional job offer in their home country. If it is not clear and they have not provided specific evidence you need to request a statement of intent showing they are in the UK on a temporary basis. The statement must be signed and dated by the applicant and assessed on its individual merits. For example, the statement could: • include a declaration that they have a number of properties or business interests in their home country to which they intend to return, or • provide details of their family ties in their home country and evidence of visits home. **Applications for a document certifying permanent residence or a permanent residence card - EHIC or E111 is provided** You do not need a statement of intent with these applications as at the permanent residence stage you are deciding if the applicant has already acquired a right of permanent residence in the UK. Therefore the applicant's intentions for the future are irrelevant. In these circumstances, applicants only need to provide evidence to show they had an EHIC (or an E111) for the whole of their five years continuous residence. If the applicant submits an EHIC which does not cover the whole of the period relied upon,	Regulations 2013 Immigration (EEA) (Amendment) Regulations 2014

	or does not feature a 'valid from' date, they must also submit evidence from the issuing authority confirming that they held a valid EHIC card for the period relied upon. **Forms S1, E109 and E121** From 1 May 2010 the S1 form replaced the E109 and E121 forms. The S1 form is a certificate of entitlement to health care in another EEA country for a limited duration and can only be used by certain people. For example: • state pensioners, or • dependants of an insured person working in another member state . If applying for permanent residence they can provide one or a combination of these forms for their five years continuous residence. **Forms S2 and E112** From 1 May 2010 the S2 form replaced the E112 form. The S2 covers the actual cost of treatment. For example, insured people who are referred for specific treatment in another EEA country or Switzerland will have the cost of their treatment covered. When applying for permanent residence or a permanent residence card the applicant may provide one or a combination of these forms for their five years continuous residence. **Form S3** The S3 form will cover the cost of treatment. For example, retired frontier workers continuing treatment in the member state they previously worked in will have the cost of their treatment covered.	

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This section tells you about the right of permanent residence for EEA nationals who have exercised their free movement rights in the UK as a qualified person.

Under regulation 15 of the Immigration (EEA) Regulations 2006 ('the Regulations') EEA nationals can apply for a document certifying permanent residence in the UK if they have lived here for five continuous years in line with the European Union (EU) laws relating to free movement rights that were in force during the 5 year period.

If an EEA national has the right of permanent residence in the UK they will only lose this right if they are absent from the UK for more than two consecutive years. There are no other conditions they must satisfy in order to continue to have this right.

For information on the meaning of continuous residence, see related link: assessing continuous residence.

All documents submitted as evidence to show the applicant has been a qualified person for a continuous period of five years must be originals. You cannot accept photocopies unless there are valid reasons why the applicant cannot provide the original document.

In such circumstances, you can accept a copy certified by the body or authority which issued the original document or by a legal representative. All documents not in English must be accompanied by an official English translation.

Applications for a permanent residence document
Although it is preferable, it is not compulsory for applicants to complete the EEA(PR) application form to apply for a document certifying permanent residence.

All applicants claiming to be a qualified person must provide evidence of their nationality by providing either:

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Related links

External links

Immigration (EEA) Regulations 2006

Free Movement of Persons Directive (2004/38/EC)

The Immigration (EEA) (Amendment) Regulations 2009

The Immigration (EEA) (Amendment)

	• a valid passport from an EEA state • a national identity (ID) card from an EEA state The passport or ID card must show the applicant has been an EEA national for the whole of the 5 continuous years. They must also provide evidence to show they have been resident in the UK for the same 5 continuous years. For further information, please see related links: Assessing continuous residence. For details of the evidence they must provide for each category see related links.	Regulations 2011 Immigration (EEA) (Amendment) Regulations 2012 Immigration (EEA) (Amendment) (no.2) Regulations 2012 Immigration (EEA) (Amendment) Regulations 2013 Immigration (EEA) (Amendment) (no. 2) Regulations 2013 Immigration (EEA) (Amendment) Regulations 2014

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This section explains how to assess continuous residence in applications for a document certifying a right of permanent residence under regulation 17 of the Immigration (European Economic Area) Regulations 2006 ('the Regulations').

In order for an EEA national to be issued with a document certifying a right of permanent residence, they must provide evidence to show that they have resided in the UK in accordance with regulations for a continuous period of five years.

Evidence of a continuous five year period of residence in the UK can include:

- tenancy agreements
- utility bills
- bank statements
- school or nursery letters or immunisation records in support of applications for children.

This is not a complete list of evidence that you can accept.

Definition of continuity
Regulation 3 of the regulations sets out how the five year period is calculated. When you calculate the five year period of residence, the following absences will not count as a break in continuity:

- time spent out of the UK of six months or less in total in any year
- time spent outside the UK on military service
- any single period of time spent outside the UK of 12 months or less that was for an important reason. These reasons can include:
  - pregnancy

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Related links

External links

Immigration (EEA) Regulations 2006

Free Movement of Persons Directive (2004/38/EC)

The Immigration (EEA) (Amendment) Regulations 2009

The Immigration (EEA) (Amendment) Regulations 2011

	○ childbirth ○ serious illness ○ study ○ vocational training, or ○ an overseas posting. **Absences from the UK** An absence of less than six months, or for up to 12 months for an important reason, will not break continuity of residence for the purposes of acquiring a right of permanent residence. Therefore the period does not restart when that person re-enters the UK. If the applicant was removed from the UK at any time during the five year period then the continuity of residence is broken. When you calculate if an applicant has spent more than six months outside the UK in any year you must base it on the period of time the applicant claims to have resided in the UK in line with the regulations. For example: • If an EEA national claims they have resided in the UK from October 2005 to October 2010 you will begin each of the years in October. • If they lived and worked in the UK from October 2005 until February 2008, resigned from their job to work in another EEA state for 10 months before returning to live and work in the UK in December 2008 their continuity of residence was broken. This is because in the year October 2007 to October 2008 they were absent from the UK for more than six months, and it was not for an important reason. **No valid proof of continuous residence provided** You must refuse the application if the applicant has not proved that they have been resident in the UK continuously for five years. Regulation 26 of the Immigration (EEA) Regulations 2006 (the Regulations) provides a right of appeal against a refusal on this basis.	Immigration (EEA) (Amendment) Regulations 2012 Immigration (EEA) (Amendment) (no.2) Regulations 2012 Immigration (EEA) (Amendment) Regulations 2013 Immigration (EEA) (Amendment)(no. 2) Regulations 2013 Immigration (EEA)(Amendment) Regulations 2014

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This section explains the specific considerations which apply to applications for a document certifying permanent residence or permanent residence cards from EU8 national workers and their family members.

The Accession (Immigration and Worker Registration) Regulations 2004 introduced the workers registration scheme (WRS) covering the countries that joined the European Union on 1 May 2004. The scheme lasted until 30 April 2011, when transitional arrangements for EU8 nationals ended. See related links.

The period 1 May 2004 to 30 April 2011 is known, in relation to EU8 countries, as the ‘accession period’.

Nationals of the following countries (known as EU8 nationals) were covered by the WRS:

- Czech Republic
- Estonia
- Hungary
- Latvia
- Lithuania
- Poland
- Slovakia
- Slovenia.

Exemption from worker registration
Not all EU8 nationals needed to register their employment. For a list of exemptions, see related link: European Casework Instructions chapter 7 – accession state nationals (archived).

Checks to make

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Permanent residence for EU2 nationals

Permanent residence for Croatian nationals

Related links

The Accession (Immigration and Worker Registration) Regulations 2004

The Accession (Immigration and Worker Registration) (Amendment) Regulations 2005

The Accession (Immigration and Worker Registration) (Amendment) Regulations 2007

The Accession (Immigration and Worker

	If an EU8 national is relying on a period of work between 1 May 2004 and 30 April 2011, you must check that the EU8 national either: • registered their employment, or • was exempt from the need to register. The applicant must provide evidence of registration or exemption. If the applicant was issued with an EEA registration certificate (or residence permit under the 2000 Regulations) after they became exempt from the scheme, they must provide this document. As long as CID confirms the registration certificate or residence permit was issued on the basis of exemption, you do not need to see further evidence of exemption. If the applicant was not issued with an EEA registration certificate or residence permit during the accession period, they must provide proof to show they were registered on the scheme or exempt, such as: • their worker registration card and all worker registration certificates held • letters from employers or contracts of employment confirming the dates they worked, or • proof they were exempt from the scheme for other reasons (such as proof they were the family member of an EEA national who was not an accession state national and was exercising treaty rights in the UK). If an applicant claims to have lost their WRS card or certificate, you must ask the free movement operational policy team to check whether they were registered as claimed (see related link for contact details). If you cannot determine whether the applicant needed to register, you must ask your senior caseworker (SCW) for advice. If your SCW cannot work this out this, they must get advice from the Free Movement Operational Policy Team.	Registration) (Amendment) Regulations 2009 Links to staff intranet removed

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EU8 nationals background information

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This page gives you background information on the EU8 accession category.

Key points

During the accession period, an EU8 national needed to register their employment under the worker registration scheme (WRS) within one month (30 days) of starting a new job if:

- they were not exempt from worker registration, and
- the employment was expected to last more than one month.

Employment was treated as being authorised for the first month. This means that an EU8 national did not have to register if the time of the employment was for one month or less.

If the employment lasted for more than one month, and the EU8 national applied to register within the first 30 days but the application was not decided by the end of that month, they were treated as though they were legally working while the application was pending.

If they did not apply within one month, the employment would be unauthorised after the first month, unless or until they registered.

EU8 nationals who changed employers before completing 12 months of uninterrupted employment in the UK needed to re-register with their new employer under the scheme.

If an EU8 national complied with WRS for the required period of 12 months, they became exempt from the scheme at the end of that 12 months. They could then choose to apply for a registration certificate as a worker under the European Economic Area (EEA) Regulations. Persons who completed 12 months registered employment did not have to register any further employment with the scheme.

An EU8 national who has worked in the UK, and who had to register under the WRS during the accession period but did not do so, would not have been exercising free movement

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Related links

	rights in the UK for any time spent in the UK as a worker before 30 April 2011. During the accession period, EU8 nationals who were under worker registration: • Could not establish a right of residence as a jobseeker. • Only had a right of residence as a worker while they were working in line with the WRS. This means if they stopped working for any reason before completing 12 months, they would not be treated as a worker in accordance with regulation 6(2) of the EEA Regulations. **Documents issued to EU8 nationals during the accession period** When an EU8 national registered for the first time on the WRS, they were issued with a: • Worker registration card. This contained a photograph of the applicant and was valid for the duration of the scheme. • Worker registration certificate. This gave the name of the employer named on their application and was valid for as long as they were working for that employer. If the EU8 national changed employer before becoming exempt from the scheme, they needed to register the change of employment. They would then be issued with a new worker registration certificate, giving the name of the new employer. They would not receive a new worker registration card.	

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This section explains the specific considerations which apply to applications for a document certifying permanent residence or permanent residence cards from Bulgarian and Romanian (EU2) nationals and their family members.

Applications involving EU2 nationals or family members of EU2 nationals
If the applicant is either:

- an EU2 national relying on a period of residence in the UK as a worker, or
- a person (of any nationality) relying on a period of residence in the UK as the family member of an EU2 worker

you must be satisfied that the relevant EU2 national:

- was working in line with an accession worker authorisation document if needed, or
- was exempt from holding an accession worker authorisation document.

For example, an EU2 national will get permanent residence if they complete a continuous five-year period as a worker, which started with an uninterrupted 12 month period of work in line with an accession worker authorisation document.

If the EU2 national worked without authorisation while they were subject to that requirement, this will not count as legal residence for the purposes of acquiring permanent residence, nor will any subsequent unauthorised work undertaken during the transitional period.

Checking the relevant EU2 national was authorised to work or was exempt
If the applicant is relying on a period of residence as a worker, you must be satisfied that they were authorised to work or were exempt during the initial 12 month period as a worker.

Applicants who have worked during the accession period will need to provide the following

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Related links

Links to staff intranet removed

External Links

The Accession (Immigration and Worker Authorisation) Regulations 2006

The Accession (Immigration and Worker Authorisation) (Amendment) Regulations 2007

The Accession (Immigration and Worker

	evidence:
	
	• any accession worker authorisation document(s) they have held
	• a letter from the relevant employer(s) confirming the dates they worked for them, or
	• evidence they are or were exempt from worker authorisation, such as:
	  ○ a 'blue' registration certificate confirming they had no restrictions on their right to work, or
	  ○ other evidence, such as proof they are or were married to or in a civil partnership with a British citizen.
	
	There may be circumstances when workers will not be able to provide their worker authorisation document. For example, they have:
	
	• lost it, or
	• since got a blue registration certificate and had to give up their worker authorisation document as part of that application.
	
	In such cases, you must check CID to confirm if a worker authorisation document was issued. You can accept this, alongside the letter from their employer to show they have worked for an interrupted period of 12 months.
	
	EU2 nationals who were self-employed, self-sufficient or students
	The Accession Treaty does not allow member states to interfere with the right of EU2 nationals to exercise free movement rights as self-employed or self-sufficient persons, or as students.
	
	You must consider periods of residence in these categories, or as the family member of such a person, in the same way as for EEA nationals are not under transitional arrangements.
		Authorisation) (Amendment) Regulations 2011

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EU2 nationals exempt from worker authorisation

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This page tells you about EU2 nationals who were exempt from worker authorisation.

If an EU2 national worked for an uninterrupted period of 12 months in line with an accession worker authorisation document, they became exempt from worker authorisation at the end of the 12 months.

This means they would have had no restrictions on their right to work and could reside in the UK as workers or jobseekers in the same way as other European Economic Area (EEA) nationals.

Not all EU2 nationals needed to complete 12 months authorised employment to become exempt. There were a number of exemptions contained in regulation 2 of the Accession Regulations. Examples include, but are not limited to, where the EU2 national:

- was the spouse or civil partner of a British citizen
- was the family member of an EEA national (other than a Bulgarian or Romanian national) who had a right to reside in the UK, or
- held a blue registration certificate as a highly skilled person.

If an EU2 national was exempt from worker authorisation, they were able to apply for a ‘blue’ registration certificate. This was not compulsory except for highly skilled EU2 nationals, who had to get a blue registration certificate to show they were exempt.

For further information on blue registration certificates, see related link: Bulgarian and Romanian casework – blue registration certificate (archived).

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EU2 national students and worker authorisation

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This page tells you about EU2 national students and worker authorisation.

During the transitional period, EU2 nationals were allowed to reside in the UK as students in the same way as other EEA nationals.

They could apply for a 'yellow' registration certificate to confirm their right of residence but, unless they also wished to work, were not forced to do so.

If an EU2 national student wished to work along with, or as part of, their studies, and they were not otherwise exempt from worker authorisation, they first had to get a yellow registration certificate. This allowed the student to work:

- for up to 20 hours each week during term-time (in work not related to their course)
- full-time while undertaking a work placement which forms part of a vocational training course
- full-time during vacation periods
- full-time for the four months following the end of their course (provided they actually complete the course)

For further information, see related link: Bulgarian and Romanian casework: yellow registration certificates (archive).

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Documents for EU2 accession nationals

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This page tells you about the types of document accession workers could apply for.

Meaning of 'accession worker authorisation document'
Regulation 9(2) of the Accession Regulations defines an accession worker authorisation document as**:**

- An accession worker card (AWC) (also known as a 'purple card').
- A seasonal agricultural workers scheme (SAWS) card.
- A passport or travel document endorsed before 1 January 2007 to show the holder was granted leave to enter or remain in the UK, under a condition restricting their employment to a particular employer or category of employment (for example, leave as a work permit holder or au pair). This could be used as an accession worker authorisation document from 1 January 2007 onwards for as long as the leave remained valid and the person was working in line with that leave.

EU2 nationals working in line with one of these documents were called 'authorised workers' below.

Other documents issued to EU2 nationals and their family members during the accession period:

- Yellow registration certificate. This document was issued to EU2 nationals who were under worker authorisation but who were exercising free movement rights as a self-employed person, student or self-sufficient person.
- Blue registration certificate. This document was issued to EU2 nationals who were exempt from worker authorisation. It confirmed that the holder had unconditional access to the UK labour market. There were two types of blue registration certificate:
  - 'half' blue: issued to EU2 nationals who were exempt because they were a family

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	member of another EU2 national who had a right of residence as a self-employed person, student, self-sufficient person, or authorised worker. ○ 'full' blue: issued to all other categories of exempt EU2 nationals. • Family member residence stamp - issued to non-EEA national family members of EU2 nationals who were authorised workers. • Residence cards - issued to family members and extended family members of EU2 nationals (except if the EU2 national was an authorised worker). They look the same as residence cards issued to other non-EEA national family members.	

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EU2 nationals background information

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This page tells you the background information on EU2 nationals and their accession to the European Union.

Bulgaria and Romania (also known as the EU2 or EU2 countries) joined the European Union (EU) on 1 January 2007. During the transitional period, which ended on 31 December 2013, EU2 nationals who wished to work in the UK needed to get an accession worker authorisation document from the Home Office before they started working, unless they qualified under an exemption.

The requirements which applied to EU2 nationals are set out in the Accession (Immigration and Worker Authorisation) Regulation 2006 (as amended) ('the Accession Regulations'). See related links.

These restrictions did not apply to EU2 nationals who resided on a self-employed or self-sufficient basis, or as a student in the UK.

Before 1 January 2014, an EU2 national not exempt from worker authorisation:

- could not establish a right of residence as a jobseeker
- only had a right of residence as a worker when they were working in line with an accession worker authorisation document - this means they could not keep the status of worker under regulation 6(2) of the EEA regulations if they become unemployed

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The Accession (Immigration and Worker Authorisation) (Amendment) Regulations 2007

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This page explains how you must consider applications for a document certifying permanent residence from Croatian nationals.

Croatia joined the European Union on 1 July 2013. Croatian nationals can now exercise free movement rights in the UK, in the same way as other EEA nationals, if they are:

- self-employed persons
- self-sufficient persons, or
- students.

Croatian nationals can also exercise free movement rights as a worker if they obtain permission to do so in line with the Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013.

For information on the requirements for Croatian nationals who wish to exercise free movement rights in the UK as a worker, please see related link: Accession state countries.

Although Croatian nationals have only been able to exercise free movement rights in the UK since 1 July 2013, the judgment in the case of Lassal established that time spent in a host member state by nationals of an accession state can count towards the qualifying period for a right of permanent residence provided the residence:

- was in line with domestic (UK) law, and
- satisfied the conditions of the relevant European law.

For further information, see related links: EEA case law - Lassal

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The Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013

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This page tells you about the Swiss agreement and posted workers

The 2002 Swiss Agreement allows a Swiss national or company that conducts business in the UK to send non-EEA national employees to provide services on their behalf in the UK for up to 90 days without needing permission to work.

People who come to the UK in this way are known as ‘posted workers’.

For a company to qualify, it must show that it complies with the law of Switzerland and has its registered office, central administration or principal place of business in Switzerland.

The posted worker must also have been previously legally resident and employed in Switzerland or an EEA country.

Family members are not allowed to accompany posted workers to the UK.

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This page tells you who to contact for more guidance regarding EEA qualified persons.

If you have read the relevant Regulations and this guidance and still need more help with this category, you must first ask your senior caseworker.

If the question cannot be answered by your senior caseworker they must discuss it with the SEO senior caseworker. If they cannot answer the question your SEO senior caseworker can email the free movement operational policy team. See related link.

Changes to this guidance can only be made by the guidance rules and forms team (GRaFT). If you think the policy content needs amending you must contact the operational policy team, who will commission the GRaFT to update the guidance, if appropriate.

The GRaFT will accept direct feedback on broken links, missing information or the format, style and navigability of this guidance. You can send these using the link: Email: guidance rules and forms team.

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This page details the information owners for the 'European Economic Area nationals qualified persons' guidance.

Version	3.0
Valid from date	7 April 2015
Policy owner	Official – sensitive: information removed
Cleared by director	Official – sensitive: information removed
Director's role	Official – sensitive: information removed
Clearance date	29 December 2014
This version approved for publication by	Official – sensitive: information removed
Approver's role	Official – sensitive: information removed
Approval date	2 March 2015

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Criminal casework

European Economic Area (EEA) foreign national offender (FNO) cases

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This guidance tells criminal casework (CC) staff the process when they consider if deportation of foreign national offenders (FNOs) and their family members from the European Economic Area (EEA) is appropriate.

Deportation of EEA nationals and their family members must be considered under the Immigration (European Economic Area) Regulations 2006, see related link. Under regulation 21 of these regulations, EEA nationals can only be deported from the UK on the following grounds:

- public policy
- public security
- public health

You must be satisfied the person's conduct represents a genuine, present and sufficiently serious threat which affects one of these fundamental interests of society.

The Home Secretary decided the public interest is not generally served by enforcing the deportation of Irish nationals (citizens of the Republic of Ireland), except in the most exceptional circumstances. See link on left: Agreement about deportation of Irish FNO cases.

This guidance outlines the processes followed by the different caseworking areas in CC for considering deportation in EEA cases.

Caseworking area	Type of case managed in this area
Croydon	Cases concerning FNOs who are EEA nationals or family members of another EEA national. You can find a list of eligible countries at related link: Member states of the European

Related links
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See also

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External links
Immigration (EEA) Regulations 2006

Immigration Act 1971

	Economic Area.
Liverpool	Non-detained EEA FNO cases.
Leeds	The minors, mothers and babies team (MMBT) manage the following types of cases: • where the applicant is under 18 • all child FNO cases, regardless of nationality

Changes to this guidance – tells you what has changed since previous versions of this guidance.

Contacts – this page explains who to contact for more help with a specific question on public funds

Information owners – tells you who the information owners are for public funds and tells how the guidance can be updated.

Safeguard and promote child welfare – explains the duty to safeguard and promote the welfare of children and tells you where to find out more.

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This page lists the changes to the 'European Economic Area (EEA) foreign national offender cases' guidance, with the most recent at the top.

Date of the change	Details of the change
06 October 2015	Change request to reflect current process.
27 January 2014	Six month review by the modernised guidance team: • European Economic Area (EEA) foreign national offender cases: o the content on this page has been put into a table • minor housekeeping and plain English changes throughout
23 July 2013	Six month review by the modernised guidance team: • minor housekeeping changes
15 January 2013	Revised and modernised by criminal casework directorate process team and the modernised guidance team.

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This page tells criminal casework (CC) caseworkers the process for receiving foreign national offender (FNO) cases believed to be European Economic Area (EEA) nationals or their family members.

The FNO's holding establishment refers all cases to the CC workflow team in Croydon, using a CCD referral form, see related link: Workflow. All EEA FNOs given one or more custodial sentences are referred for consideration of deportation. There is no longer a requirement for an EEA FNO in receipt of a custodial sentence to meet a particular threshold before being considered for deportation. This guidance applies regardless of the point at which the custodial sentence was imposed.

Those with multiple non-custodial sentences may also be referred for consideration of deportation outside of arrangements with NOMS.

If having considered the case on its individual merits the FNO is not considered suitable for deportation at the present time you must:

- send a warning letter (ICD.0260EEA on the document generator) to the prison for conveyance to the FNO with a covering note to advise them deportation will not be pursued, this may be relevant if they are eligible for Home Detention Curfew
- update CID to record your actions

You must remember the Home Secretary's agreement of 2007 not to pursue deportation of Irish FNOs except in exceptional circumstances. For more details see link on left: Agreement about deportation of Irish FNO cases.

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See also
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This page tells criminal casework (CC) caseworkers about the special agreement made by the Home Secretary in 2007 regarding deportation in the case of EEA nationals from the Republic of Ireland.

On 19 February 2007, the Home Secretary decided the public interest was not generally be served by the deportation of Irish nationals (citizens of the Irish Republic), except in special circumstances. This agreement covers Irish nationals and anyone of dual Irish and another nationality. It does not cover non-EEA nationals who are the dependants of Irish nationals.

Irish FNOs subject to a court recommendation for deportation are referred in the usual way.

It is rare that Irish FNO cases will be considered exceptional enough to merit deportation. Irish nationality does not, however, provide automatic exemption from deportation regardless of individual circumstances.

As a guide, deportation is still considered if an offence involves national security matters, or crimes that pose a serious risk to the safety of the public or a section of the public. For example, a person convicted and serving a custodial sentence of 10 years or more for:

- a terrorism offence
- murder
- a serious sexual or violent offence

If a decision is taken to deport an Irish national under the Immigration (European Economic Area) Regulations 2006, the case is dealt with in line with other EEA deportations and treated as if the decision was taken under section 3(5)(a) of the Immigration Act 1971 (as amended) on the grounds that their presence is not conducive to the public good.

Deportation of Irish nationals is only in the public interest in exceptional circumstances. If a court recommends deportation the Home Secretary can use discretion and consider the referral. Any decision to proceed must be authorised at director level or above.

	Extant deportation orders (DOs) for Irish nationals deported before 19 February 2007 remain in force, and if they try to re-enter the UK while subject to a DO they can be removed as an illegal entrant in the same way as any other deportee whose DO is live. Any application from an Irish national for their DO to be revoked must be considered by CC using the policy in force after 19 February 2007.	

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Transferring EEA FNO cases to the EEA casework teams

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This page tells you the process used for transferring European Economic Area (EEA) foreign national offenders (FNOs) to the dedicated EEA casework team in criminal casework (CC).

A FNO case is only sent to the EEA command if it is established the FNO is an EEA national or they are a non-EEA family member of an EEA national through documentary evidence in the form of either:

- a passport
- an identity card

The Home Office accepts confirmation from the prison where the FNO is being held that they hold the document as evidence of the FNOs nationality. The Home Office also accept nationality if they have previously seen the document.

Non-EEA nationals who qualify under the EEA Regulations 2006 as family members of EEA nationals are usually married or unmarried partners. You must establish that the FNO is a qualifying family member of an EEA national exercising their Treaty Rights in the UK, and make sure they qualify for consideration of deportation under the EEA criteria, before you forward the case to the EEA casework teams.

If the FNO says they are an unmarried partner of an EEA national you must refer the case to the European senior casework team in Liverpool, who will consider if the non-EEA FNO is in a durable relationship that brings them under the scope of the EEA Regulations.

If the FNO qualifies for a residence card as a family member, they will be issued with one, and the case will be referred to the EEA casework team for deportation consideration.

If they are refused a residence card, they do not qualify for consideration under the EEA criteria and the case will be referred to workflow to allocate to another casework team in CC who continue the consideration as a non-EEA case.

External links
Immigration (EEA) Regulations 2006

	If the FNO says they are a married partner of an EEA national the case is referred directly to the EEA casework team. You must consider if the non-EEA FNO is in a genuine marriage that brings them under the scope of the EEA Regulations. This means seeing the passport or identity card of the EEA national, and a valid marriage certificate. If an FNO has had a religious marriage abroad, the case must be referred to the European senior casework team in Liverpool for further investigation. If the marriage is not recognised, the FNO can still be considered as an unmarried partner, which again would be considered by the European senior caseworker. If it is established that someone qualifies under the EEA Regulations and does not meet the criteria for deportation in EEA cases, the original caseworker may decide to concede deportation action. A senior executive officer (SEO) senior caseworker must authorise this. Child FNOs from EEA nationalities must be referred directly to the minors, mothers and babies (MMB) team in Leeds to manage.	

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This page tells criminal casework (CC) caseworkers the processes for considering European Economic Area (EEA) foreign national offender (FNO) cases for deportation.

Once the prison returns the relevant forms to CC and the papers have been collated on the Home Office file by CC workflow (see link on left: Receipt of EEA FNO cases in CC), workflow must send the case to one of the casework teams.

Lengths of sentence and UK residence

If you decide to pursue deportation, you must carefully consider the length of sentence against the FNOs claimed length of residence within the context of the EEA Regulations 2006 (except for cases referred in exceptional circumstances). This helps determine if a case will be pursued.

You must assess the available evidence to support an FNO's claim of how long they have lived in the UK, and if they were exercising EEA Treaty Rights for that period. You may need to get additional evidence by getting National Insurance records and other relevant sources.

Factors for consideration

Although considering article 8 for most criminal cases was brought within the scope of the Immigration Rules (at paragraphs 396 to 400) from 9 July 2012, the UK Immigration Rules do not apply to EEA nationals.

You must consider any rights specified in the European Convention on Human Rights (ECHR) for the FNO and their family members as well as the following individual factors:

- severity of offence
- length of sentence
- age
- state of health
- length of UK residence

Related links

See also

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Immigration (EEA) Regulations 2006

	• strength of ties in the UK • extent of links with the country of origin Considering FNO cases in respect of articles 3 and 8 (and relevant case law) in particular, requires detailed analysis of the evidence available about their circumstances. Provisions for EEA nationals are contained in the 2006 EEA Regulations as amended.	

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This page tells criminal casework (CC) caseworkers about different types of removal schemes used when considering deportation in European Economic Area (EEA) foreign national offender (FNO) cases.

Early removal scheme (ERS)
Determinately-sentenced FNOs can be released from prison anytime between the halfway point of their sentence and sentence expiry date, for the specific purpose of being removed from the UK to their home country. EEA nationals can be considered under this scheme if they meet the criteria for deportation.

If they are released for removal under ERS, they will be made the subject of a deportation order (DO), and their departure is enforced under that authority.

FNOs who fall short of the EEA criteria, but the Home Office still wish to pursue their removal, are referred to the relevant local immigration team (LIT) to consider.

Tariff-expired removal scheme (TERS)
Indeterminately-sentenced FNOs can be released from prison after serving their minimum tariff, for the specific purpose of removal from the UK to their home country, without the need for authorisation from the Parole Board. EEA nationals can be considered under this scheme if they meet the criteria for deportation.

If they are released for removal under TERS, they will already be the subject of a DO, and their departure will be enforced under that authority.

For more details of ERS and TERS, see related links:

- The early removal scheme (ERS)
- The tariff-expired removal scheme (TERS)

Facilitated returns scheme (FRS)

Related links
See also
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	FNOs may depart the UK on their release with a financial incentive to help re-integration into society in their home country. EEA nationals are not eligible for this scheme, and any applications they make will be rejected.	

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This page explains who to contact for more help with a specific European Economic Area (EEA) foreign national offender (FNO) case.

If you have read this guidance and still need more help with this category, you must first ask your senior caseworker or line manager.

If they cannot answer your question, they or you may email Criminality Policy Team (CPT) within Free Movement and Migrant Criminality Unit (FMMCU).

Changes to this guidance can only be made by the Guidance, Rules and Forms team (GRaFT). If you think the policy content needs amending you must contact CPT, who will ask the GRaFT to update the guidance.

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This page tells you about this version of the 'European Economic Area foreign national offender cases' guidance and who owns it.

Version	4.0
Published for Home Office staff on	06 October 2015
Guidance owner	Criminal Casework operational process and policy team/Free Movement and Migrant Criminality Unit
Cleared by director	Information removed – official sensitive
Director's role	Director
Clearance date	14 January 2013
This version approved for publication by	Information removed – official sensitive
Approver's role	Grade 7, Free Movement and Migrant Criminality Unit
Approval date	1 October 2015

Changes to this guidance can only be made by the guidance, rules and forms team (GRaFT). If you think the policy content needs amending you must contact Criminality Policy Team (CPT), who will ask the GRaFT to update the guidance.

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55. Detention and Temporary Release

55.1. Policy

55.1.1. General

The power to detain must be retained in the interests of maintaining effective immigration control. However, there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used (see 55.20 and chapter 57). Detention is **most** usually appropriate:

- to effect removal;
- initially to establish a person's identity or basis of claim; or
- where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release.

To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law but must also accord with stated policy.

As well as the presumption in favour of temporary admission or release, special consideration must be given to family cases where it is proposed to detain one or more family member(s) and the family includes children under the age of 18 (please see chapter 45 for ensured family returns process). Similarly, special consideration must be given when it is proposed to detain unaccompanied children pending their hand over to a local authority or collection by parents or relatives or by other appropriate adult carers or friends, or to escort such children when removing them, for example to an European Union (EU) member state. Section 55 of the Borders, Citizenship and Immigration Act 2009 (s.55) requires certain Home Office functions to be carried out having regard to the need to safeguard and promote the welfare of children in the UK. Staff must therefore ensure they have regard to this need when taking decisions on detention involving or impacting on children under the age of 18 and must be able to demonstrate that this has happened, for example by recording the factors they have taken into account. Staff must also ensure detention is for the shortest possible period of time. Key arrangements for safeguarding and promoting the welfare of children are set out in the statutory guidance issued under s.55.

A properly evidenced and fully justified explanation of the reasoning behind the decision to detain

must be retained on file in all cases.

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55.1.2. Criminal casework cases

Cases concerning foreign national offenders – dealt with by criminal casework – are subject to the general policy set out above in 55.1.1, including the presumption in favour of temporary admission or release and the special consideration in cases involving children. Thus, the starting point in these cases remains that the person should be released on temporary admission or release unless the circumstances of the case require the use of detention. However, the nature of these cases means that special attention must be paid to their individual circumstances.

In any case in which the criteria for considering deportation action (the 'deportation criteria') are met, the risk of re-offending and the particular risk of absconding should be weighed against the presumption in favour of temporary admission or temporary release. Due to the clear imperative to protect the public from harm from a person whose criminal record is sufficiently serious as to satisfy the deportation criteria, and/or because of the likely consequence of such a criminal record for the assessment of the risk that such a person will abscond, in many cases this is likely to result in the conclusion that the person should be detained, provided detention is, and continues to be, lawful. However, any such conclusion can be reached only if the presumption of temporary admission or release is displaced after an assessment of the need to detain in the light of the risk of re-offending and/or the risk of absconding.

Deportation criteria

Foreign nationals and their dependents will be considered for deportation if they meet the criteria set out in Deporting non-EEA foreign nationals or EEA Foreign National Offender Cases.

Further details of the policy which applies to criminal casework cases is set out below.

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55.1.3. Use of detention

General

Detention must be used sparingly, and for the shortest period necessary. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process, for example once any rights of appeal have been exhausted if that is likely to be protracted and/or there are no other factors present arguing more strongly in favour of detention. All other things being equal, a person who has an appeal pending or representations outstanding might have relatively more incentive to comply with any restrictions imposed, if released, than one who does not and is imminently removable (see also 55.14).

Criminal casework cases

As has been set out above, due to the clear imperative to protect the public from harm, the risk of re-offending or absconding should be weighed against the presumption in favour of temporary admission or temporary release in cases where the deportation criteria are met. In criminal casework cases concerning foreign national offenders (FNOs), if detention is indicated, because of the higher likelihood of risk of absconding and harm to the public on release, it will normally be appropriate to detain as long as there is still a realistic prospect of removal within a reasonable timescale.

If detention is appropriate, an FNO will be detained until either deportation occurs, the FNO wins their appeal against deportation (see 55.12.2. for decisions which we are challenging), bail is granted by the Immigration and Asylum Chamber, or it is considered that release on restrictions is appropriate because there are relevant factors which mean further detention would be unlawful (see 55.3.2 and 55.20.5 below).

In looking at the types of factors which might make further detention unlawful, case owners should have regard to 55.1.4, 55.3.1, 55.9 and 55.10. **Substantial weight** should be given to the risk of further offending or harm to the public indicated by the subject's criminality. Both the likelihood of the person re-offending, and the seriousness of the harm if the person does re-offend, must be considered. Where the offence which has triggered deportation is included in the list here, the weight which should be given to the risk of further offending or harm to the public is **particularly substantial** when balanced against other factors in favour of release.

In cases involving these serious offences, therefore, a decision to release is likely to be the proper conclusion only when the factors in favour of release are particularly compelling. In practice, release is likely to be appropriate only in exceptional cases because of the seriousness of violent, sexual, drug-related and similar offences. Where a serious offender has dependent children in the UK, careful consideration must be given not only to the needs such children may have for contact with the deportee but also to the risk that release might represent to the family and the public.

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55.1.4. Implied Limitations on the Statutory Powers to Detain

In order to be lawful, immigration detention must be for one of the statutory purposes for which the power is given and must accord with the limitations implied by domestic and ECHR case law. Detention must also be in accordance with stated policy on the use of detention. Different policy provisions apply to the detention of children (see paragraphs 55.9.3 and 55.9.4 below).

55.1.4.1. Article 5 of the ECHR and domestic case law

Article 5(1) of the ECHR provides:

“Everyone has the right to liberty and security of person”

No one shall be deprived of his liberty save in the circumstances specified in Article 5(1) (a)-(f) and in accordance with a procedure prescribed by law. Article 5(1) (f) states that a person may be arrested or detained to prevent his effecting an unauthorised entry into the country, or where action is being taken against them with a view to deportation or extradition.

To comply with Article 5 and domestic case law, the following should be borne in mind:

a) The relevant power to detain must only be used for the specific purpose for which it is authorised. This means that a person may only be detained under immigration powers for the purpose of preventing his unauthorised entry or with a view to his removal (not necessarily deportation). Detention for other purposes, where detention is not for the

purposes of preventing unauthorised entry or effecting removal of the individual concerned, is **not** compatible with Article 5 and would be unlawful in domestic law (unless one of the other circumstances in Article 5(1)(a) to (e) applies);

b) The detention may only continue for a period that is reasonable in all the circumstances for the specific purpose;

c) If before the expiry of the reasonable period it becomes apparent that the purpose of the power, for example, removal, cannot be effected within that reasonable period, the power to detain should not be exercised; and

d) The detaining authority (be it the immigration officer or the Secretary of State), should act with reasonable diligence and expedition to effect removal (or whatever the purpose of the power in question is).

Article 5(4) states that everyone who is deprived of his liberty shall be entitled to take proceedings by which the lawfulness of his detention is decided speedily by a court. This Article is satisfied by a detainee's right to challenge the lawfulness of a decision to detain by habeas corpus or judicial review in England and Wales, or by judicial review in Scotland.

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55.1.4.2. Article 8 of the ECHR

Article 8(1) of the ECHR provides:

"Everyone has the right to respect for private and family life…."

Article 8 is a qualified right. Interference with the right to family life is permissible under Article 8(2) if it is (i) in accordance with the law; (ii) for a legitimate aim and (iii) proportionate. In family cases, the right extends to every member of the household and there should be consideration given to whether there is any interference with the rights of each individual and, if there is, whether it is lawful and proportionate to the legitimate aim.

It may be necessary on occasion to detain the head of the household or another adult who is part of the care arrangements for children, thus separating a family. Depending on the circumstances of the case, this may represent an interference with Article 8 rights.

It is well established that the interests of the State in maintaining an effective immigration policy for the economic well-being of the country and for the prevention of crime and disorder, justifies interference with rights under Article 8(1). It is therefore arguable that a decision to detain which interferes with a person's right to family life in order to enforce immigration control and maintain an effective immigration policy pursues a legitimate aim and is in accordance with the law.

It is only by considering the needs and circumstances of each family member that a determination can be made as to whether the decision is, or can be managed in a way so that it is, proportionate.

Home Office staff should be clear and careful when deciding that the decision to detain (and thereby interfere with family life) was proportionate to the legitimate aim pursued. Assessing whether the interference is proportionate involves balancing the legitimate aim in Article 8(2) against the seriousness of the interference with the person's right to respect for their family life.

The assessment must also have regard to the need to safeguard and promote the welfare of children. Even though the decisions may have been taken to avoid detaining the children with their head of family, or other adult who is part of their care arrangements, in the interest of their welfare, the impact of the separation must be considered carefully. Any information concerning the children that is available or can reasonably be obtained must be considered. The conclusion reached will depend on the specific facts of each case and will therefore differ in every case. Regular reviews of detention should consider proportionality with regard to each individual, including any new information that is obtained.

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55.2. Power to detain

The power to detain an illegal entrant, seaman deserter, port removal or a person liable to administrative removal (or someone suspected to be such a person) is in paragraph 16(2) of Schedule 2 to the 1971 Act (as applied by section 10(7) of the Immigration and Asylum Act 1999). Paragraph 16(2) states:

"If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10 or 12 to 14, that person may be

detained under the authority of an immigration officer pending a) a decision whether or not to give such directions; b) his removal in pursuance of such directions".

Section 62 of the Nationality, Immigration and Asylum Act 2002 introduced a free-standing power for the Secretary of State (i.e. an official acting on the Secretary of State's behalf) to authorise detention in cases where the Secretary of State has the power to set removal directions.

The power to detain a person who is subject to deportation action is set out in paragraph 2 of Schedule 3 to the 1971 Act, and section 36 of the UK Borders Act 2007 (automatic deportation). This includes those whose deportation has been recommended by a court pending the making of a deportation order, those who have been served with a notice of intention to deport pending the making of a deportation order, those who are being considered for automatic deportation or pending the making of a deportation order as required by the automatic deportation provisions, and those who are the subject of a deportation order pending removal. **Detention in these circumstances must be authorised at a minimum of higher executive officer (HEO) level in criminal casework** (see 55.5.2)**.**

Detention can only lawfully be exercised under these provisions where there is a realistic prospect of removal within a reasonable period. The decision to detain may have been taken under circumstances where an individual claimed to have a family life in the UK but there was no information reasonably available to allow independent verification or consideration. In such cases, information must be gathered as soon as possible and consideration given at the initial and subsequent detention reviews.

In cases where a family life in the UK is known to be subsisting and detention will result in the family being separated, the separation must be authorised by an assistant director on the basis of a written consideration of the welfare of any children involved.

(The power to authorise the detention of a person who may be required to submit to examination, or further examination under paragraph 2 or 2A of Schedule 2 to the 1971 Act, pending his examination and pending a decision to give or refuse him leave to enter/cancel his leave to enter, is in paragraph 16(1) and (1A) of Schedule 2 to the 1971 Act. There is also a limited power to detain a person who is subject to further examination on embarking from the UK for up to 12 hours only pending the completion of the examination under paragraph 16(1B). These powers are not relevant to enforcement cases).

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55.3. Decision to detain (excluding criminal casework cases)

1. There is a presumption in favour of temporary admission or temporary release - there must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.

2. All reasonable alternatives to detention must be considered before detention is authorised.

3. Each case must be considered on its individual merits, including consideration of the duty to have regard to the need to safeguard and promote the welfare of any children involved.

55.3.A. Decision to detain – criminal casework cases

As has been set out above, public protection is a key consideration underpinning our detention policy. Where a foreign national offender meets the criteria for consideration of deportation, the presumption in favour of temporary admission or temporary release may well be outweighed by the risk to the public of harm from re-offending or the risk of absconding, evidenced by a past history of lack of respect for the law. However, detention will not be lawful where it would exceed the period reasonably necessary for the purpose of removal or where the interference with family life could be shown to be disproportionate.

In assessing what is reasonably necessary and proportionate in any individual case, the caseworker must look at all relevant factors to that case and weigh them against the particular risks of re-offending and of absconding which the individual poses. In balancing the factors to make that assessment of what is reasonably necessary, the Home Office distinguishes between more and less serious offences. A list of those offences which the Home Office considers to be more serious is set out in the list accessible here.

More serious offences

A conviction for one of the more serious offences is strongly indicative of the greatest risk of harm to the public and a high risk of absconding. As a result, the high risk of public harm carries

particularly substantial weight when assessing if continuing detention is reasonably necessary and proportionate. So, in practice, it is likely that a conclusion that such a person should be released would only be reached where there are exceptional circumstances which clearly outweigh the risk of public harm and which mean detention is not appropriate.

Caseworkers must balance against the increased risk, including the particular risk to the public from re-offending and the risk of absconding in the individual case, the types of factors normally considered in non-FNO detention cases. For example, if the detainee is mentally ill or if there is a possibly disproportionate impact on any dependent child under the age of 18 from continued detention.

Caseworkers are reminded that what constitutes a 'reasonable period' for these purposes may last longer than in non-criminal cases, or in less serious criminal cases, particularly given the need to protect the public from serious criminals due for deportation.

Less serious offences

To help caseworkers to determine the point where it is no longer lawful to detain, a set of criteria are applied which seek to identify, in broad terms, the types of cases where continued detention is likely to become unlawful sooner rather than later by identifying those who pose the lowest risk to the public and the lowest risk of absconding. These provide guidance, but all the specific facts of each individual case still need to be assessed carefully by the caseworker.

As explained above, where the person has been convicted of a serious offence, the risk of harm to the public through re-offending and risk of absconding are given substantial emphasis and weight. While these factors remain important in assessing whether detention is reasonably necessary where a person has been convicted of a less serious offence, they are given less emphasis than where the offence is more serious, when balanced against other relevant factors.

Again, the types of other relevant factors include those normally considered in non-FNO detention cases, for example, whether the detainee is mentally ill or whether their release is vital to the welfare of child dependants.

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55.3.1. Factors influencing a decision to detain

All relevant factors must be taken into account when considering the need for initial or continued detention, including:

- What is the likelihood of the person being removed and, if so, after what timescale?
- Is there any evidence of previous absconding?
- Is there any evidence of a previous failure to comply with conditions of temporary release or bail?
- Has the subject taken part in a determined attempt to breach the immigration laws? (For example, entry in breach of a deportation order, attempted or actual clandestine entry).
- Is there a previous history of complying with the requirements of immigration control? (For example, by applying for a visa or further leave).
- What are the person's ties with the UK? Are there close relatives (including dependants) here? Does anyone rely on the person for support? If the dependant is a child or vulnerable adult, do they depend heavily on public welfare services for their daily care needs in lieu of support from the detainee? Does the person have a settled address/employment?
- What are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which might afford more incentive to keep in touch than if such factors were not present? (See also 55.14).
- Is there a risk of offending or harm to the public (this requires consideration of the likelihood of harm **and** the seriousness of the harm if the person does offend)?
- Is the subject under 18?
- Does the subject have a history of torture?
- Does the subject have a history of physical or mental ill health?

(See also sections 55.3.2 – Further guidance on deciding to detain in criminal casework cases, 55.6 - detention forms, 55.7 – detention procedures, 55.9 - special cases and 55.10 – persons considered unsuitable for detention).

Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified.

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55.3.2. Further guidance on deciding to detain in criminal casework cases

55.3.2.1 This section provides further guidance on assessing whether detention is or continues to be within a reasonable period in criminal casework cases where the individual has completed their custodial sentence and is detained following a court recommendation or decision to deport, pending deportation, or under the automatic deportation provisions of the UK Borders Act 2007. It should be read in conjunction with the guidance in 55.3.1 above, with **substantial weight** being given to the risk of further offending and the risk of harm to the public.

Whilst as a matter of practice, the need to protect the public has the consequence that criminal casework cases may well be detained pending removal, caseworkers must still carefully consider all relevant factors in each individual case to ensure that there is a realistic prospect of removal within a reasonable period of time.

In family cases, each individual must be considered to see if there is interference with their Article 8 rights and, if so, whether it is proportionate. For example, thought should be given to whether it is appropriate to detain family members due to be deported or removed with the foreign national offender and, if so, when – please see chapter 45 for cases where one or more family member(s) is under the age of 18. An up to date record of convictions must be obtained from the police national computer (PNC) in order to inform decisions to detain or maintain detention in criminal casework cases. Please also see 55.8 regarding detention reviews and 55.20.5 for instructions on managing contact where a criminal casework case is released on restrictions. Where a time served foreign national offender has a conviction for an offence on this list, **particularly substantial weight** should be given to the public protection criterion in 55.3.1 above when considering whether release on restrictions is appropriate.

In cases involving these serious offences, therefore, a decision to release is likely to be the proper conclusion only when the factors in favour of release are particularly compelling because of the significant risk of harm to the public posed by those convicted of violent, sexual, drug-related and other serious offences. In practice, release is likely to be appropriate only in exceptional cases. This does not mean, however, that individuals convicted of offences on the list can be detained indefinitely and, regardless of the effects of detention on their dependants.

All relevant factors (see 55.3.1) must be considered when assessing whether there is a realistic prospect of removal within a reasonable timescale. See 55.3.2.4 to 55.3.2.14 for more detail on the way to approach the application of the factors in 55.3.1 in criminal casework cases.

55.3.2.2 Any decision not to detain or to release a time served foreign national offender on restrictions must be agreed at grade 7 (assistant director) level and authorised at strategic director level. Cases should be referred on the relevant form, which should cover all relevant facts in the case history, including any reasons why bail was refused previously.

If it is proposed to release a serious criminal to rejoin a family including dependent children under the age of 18, advice should have been sought from the Office of the Children's Champion and it is likely that a referral to the relevant local authority children's service will be necessary.

55.3.2.3 Please see 55.20.5 regarding contact management arrangements for those subject to release on restrictions.

Decisions to maintain detention where the FNO has provided evidence of a family life in the UK require a consideration of Article 8 issues and, if the decision results in a family separation (i.e. rest of the family will not be reunited with the FNO in detention), it should be countersigned at grade 7 (assistant director) level. Similarly, decisions to release high risk offenders on welfare grounds should be subject to director level approval before a submission is sent to the strategic director.

Application of the factors in 55.3.1 to criminal casework cases

Imminence

55.3.2.4 In all cases, caseworkers should consider on an individual basis whether **removal is**

imminent. If removal is imminent, then detention or continued detention will usually be appropriate. As a guide, and for these purposes only, removal could be said to be imminent where a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place in the next four weeks.

Cases where removal is not imminent due to delays in the travel documentation process in the country concerned may also be considered for release on restrictions. However, where the FNO is frustrating removal by not co-operating with the documentation process, and where that is a significant barrier to removal, these are factors weighing strongly against release.

Where a family has been separated and removal is imminent, consideration needs to be given to whether and, if so, how to reunite the family (see chapter 45 for cases involving children under the age of 18). If the reunification is to take place in the detention estate (i.e. the remaining family members are to be detained), it should be planned in advance with welfare staff at the removal centre. If it is to take place at the airport, then the caseworker should plan the event with the escort staff to minimise upset to any children involved.

Risk of absconding

55.3.2.5 If removal is not imminent, the caseworker should consider the **risk of absconding**. Where the person has been convicted of a more serious offence appearing on this list, then this may indicate a high risk of absconding. An assessment of the risk of absconding will also include consideration of previous failures to comply with temporary release or bail. Individuals with a long history of failing to comply with immigration control or who have made a determined attempt to breach the UK's immigration laws would normally be assessed as being unlikely to comply with the terms of release on restrictions. Examples of this would include multiple attempts to abscond or the breach of previous conditions, and attempts to frustrate removal (not including the exercise of appeal rights).

Also relevant is where the person's behaviour in prison or immigration removal centre (IRC) (if known) has given cause for concern. The person's family ties in the UK and their expectations about the outcome of the case should also be considered and attention paid to the requirement to have regard to the need to safeguard and promote the welfare of any children involved. The greater the risk of absconding, the more likely it is that detention or continued detention will be appropriate. Where the individual has complied with attempts to re-document them but difficulties remain due to the country concerned, this should not be viewed as non-compliance by the

individual.

Risk of Harm

55.3.2.6 **Risk of harm to the public** will be assessed by the National Offender Management Service (NOMS) unless there is no Offender Assessment System (OASYS) or pre-sentence report available. There will be no licence and OASYS report where the sentence is less than 12 months. NOMS will only be able to carry out a meaningful risk assessment in these cases where a pre-sentence report exists (details of which can be obtained from the prison) or where the subject has a previous conviction resulting in a community order.

Case owners should telephone the Offender Manager for an update in cases where the risk assessment has been obtained less than six months before (for example in a bail application). Where NOMS can provide an assessment, it can be obtained directly from the offender manager in the Probation Service in the same way that information is obtained in bail cases and should be received within three days.

The bail process instruction includes details on how to contact the offender manager and identify the probation area's single point of contact (SPOC). The relevant form should be completed and sent by fax or email to the offender manager with a copy in all cases to the SPOC. A record should be kept of the date the form is sent and the date it is returned.

The completed form will be returned to the case owner by the offender manager once the assessment is complete. In cases of query, offender managers should be referred, in the first instance, to Probation Circular 32/2007 which includes a copy of the reference form and explains that criminal casework may seek information when considering detention. Further reference to NOMS will also be essential in cases where it is decided to end detention.

55.3.2.7 Individual cases of difficulty in obtaining licences, identifying offender managers or obtaining risk assessments which cannot be resolved by contact with the Prison Service (for the licence) or the Probation Service Single Point of Contact (for obtaining the risk assessment) should be referred to the team leader and/or the assistant director. If the problem cannot be resolved in the team, then the assistant director should refer the case to the process team using the process team inbox.

The process team will follow up queries centrally with NOMS and provide advice on further action. In every case where the subject would have been the subject of a licence (sentences of 12 months or longer, sentences for shorter periods adding up to 12 months or longer, or offenders under 22 years or age) a risk assessment should be requested from the relevant offender manager and cases should not be taken forward without a reply from the offender manager being obtained.

55.3.2.8 Where NOMS are unable to produce a risk assessment and the offender manager advises that this is the case, case owners will need to make a judgement on the risk of harm based on the information available to them. Factors relevant to this will be the nature of the original offence, any other offences committed, record of behaviour in prison and or IRC and general record of compliance. A PNC check should always be made. Where there is a conviction for an offence on the list here, the nature of the offence is such that the person presents a high risk on the table below.

Such high risk offences should be given particularly substantial weight when assessing reasonableness to detain. Those with a long record of persistent offending are likely to be rated in the high or medium risk. Those with a low level, one-off conviction and, with a good record of behaviour otherwise are likely to be low risk.

55.3.2.9 Where possible the NOMS assessment will be based on OASYS and will consist of two parts-as follows-

i. A risk of harm on release assessed as low, medium, high or very high (that is, the seriousness of harm if the person offends on release)
ii. The likelihood of re-offending, assessed as low, medium or high.

A marking of high or very high in **either** of these areas should be treated as an assessment of a high risk of harm to the public.

55.3.2.10 In cases marked medium or low in either or both category the following table should be used to translate the double assessment produced by NOMS into a single assessment for our purposes, this gives greater weight to the risk (i.e. seriousness) of harm than to the risk of re-offending.

Seriousness of harm if offends on release	VH	VH	VH	H	H	H	M	M	M	L	L	L
Likelihood of re-offending	H	M	L	H	M	L	H	M	L	H	M	L
Overall assessment	H	H	H	H	H	H	H	M	M	H	L	L

VH =Very high, H=High, M=Medium, L=Low

55.3.2.11 Those assessed as low or medium risk should generally be considered for management by rigorous contact management under the instructions in 55.20.5. Any particular individual factors related to the profile of the offence or the individual concerned must also be taken into consideration and may indicate that maintaining management by rigorous contact management may not be appropriate in an individual case.

In cases involving serious offences on the list here, a decision to release is likely to be the proper conclusion only when the factors in favour of release are particularly compelling. In practice, release is likely to be appropriate only in exceptional cases because of the seriousness of violent, sexual, drug-related and similar offences.

55.3.2.12 Where the NOMS assessment is not based on an OASYS report NOMS will endeavour to provide other information on risk of harm and likelihood of re-conviction, stating their sources. The Offender Group Reconviction Scale (OGRS) may be one source of risk reconviction information provided. It estimates the statistical probability that offenders, with a given history of offending, will be reconvicted of a standard list offence within two years of release if sentenced to custody. It does not define the probability that a named offender will be reconvicted.
OGRS uses an offender's past and current history of standard list offences only. There may be cases however, when offender managers are unable to provide any risk information-see paragraph 55.3.2.8 for action in these cases.

General additional considerations relating to bail applications

55.3.2.13 In cases where the individual has previously been refused bail by the Immigration and Asylum Chamber, the opinions of the immigration judge will be relevant. If bail was refused due to the risk of absconding or behavioural problems during detention, this would be an indication

that the individual should not normally be released unless circumstances have changed. If bail was refused due to lack of sureties, the case owner might want to recommend release providing all the other criteria in this section indicate release is appropriate.

55.3.2.14 Where the case owner thinks an individual who has applied for bail is appropriate for release on bail the case owner should:

- refer to the strategic director for confirmation that the individual meets the criteria and should be released;
- not oppose bail;
- prepare a bail summary explaining that the Home Office does not oppose release on bail but asking that restrictions be applied (electronic monitoring and reporting twice a week).

The above list of factors is not exhaustive and the caseworker should consider all relevant factors when deciding whether it is lawful to detain – whether removal will take place within a reasonable period.

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55.4. Not in use

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55.5. Levels of authority for detention

Although the power in law to detain an illegal entrant rests with the immigration officer (IO), or the relevant non-warranted immigration caseworker under the authority of the Secretary of State, in practice, an officer of at least chief immigration officer (CIO) rank, or a HEO caseworker, must give authority. Detention must then be reviewed at regular intervals (see 55.8). For cases involving the separation of a family, refer to 45.6 (cases involving dependants under the age of 18) or 45.7 (other families).

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55.5.1. Authority to detain an illegal entrant or person served notice of administrative removal

An illegal entrant or person served with notice of administrative removal can be detained on the authority of a CIO or HEO (but see 55.5.3 and 55.8).

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55.5.2. Authority to detain persons subject to deportation action by criminal casework

The decision as to whether a person subject to deportation action should be detained under Immigration Act powers is taken at a minimum of HEO level in criminal casework. Where an offender, who has been recommended for deportation by a court or who has been sentenced to at least 12 months imprisonment, is serving a period of imprisonment which is due to be completed, the decision on whether he should be detained under Immigration Act powers (on completion of his custodial sentence) pending deportation must be made at HEO level in criminal casework in advance of the case being transferred to criminal casework.

A person should not be detained under immigration powers at the same time that they are detained under an order or sentence of a court. Therefore the sensible course is for any immigration decision to detain to be expressed as taking effect once any existing detention ends. This is sometimes referred to as ‘dual detention’. It is important in criminal cases to monitor the offender's release date for service of further detention/restriction forms at the appropriate time. Criminal casework staff should consider with prison and probation staff whether a prisoner has a substantive family life in the UK and if so should follow the relevant procedure.

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55.5.3. Authority to detain - special cases

Detention in the following circumstances must be authorised by an officer of **at least** the rank stated:

- Sensitive cases: inspector/senior executive officer (SEO);
- EEA nationals (see EIG chapter 50 EEA): CIO / HEO
- Spouses of British citizens or EEA nationals: CIO / HEO (see 55.9.2);
- Unaccompanied young persons, under 18: initially, an inspector/SEO but as soon as possible by an assistant director. The decision to detain in such exceptional cases will be taken in accordance with the policy set out in paragraph 55.9.3.
- Unaccompanied children who are to be returned to an EU Member State under the Dublin Regulation or, in the case of both asylum and non-asylum applicants, to their home country: assistant director. See paragraph 55.9.3 for criteria for detaining in these exceptional circumstances;

- In criminal casework cases, an FNO under the age of 18 who has completed a custodial sentence: Ministerial authorisation and the advice of the independent Family Returns Panel on the safeguarding aspects of the case. See paragraph 55.9.3 for criteria for detaining in these exceptional circumstances;

- Families with minor children: In-country ensured returns and criminal casework cases – inspector/SEO on the advice of the Family Returns Panel (see Chapter 45);

- Detention in police cells for longer than two nights: inspector/SEO.

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55.6. Detention forms

Written reasons for detention should be given in all cases at the time of detention and thereafter at monthly intervals (in this context, every 28 days). Recognising that most people are detained for just a few hours or days, initial reasons should be given by way of a checklist similar to that used for bail in a magistrate's court.

The forms IS 91RA 'Risk Assessment' (see 55.6.1), IS91 'Detention Authority' (see 55.6.2), IS91R 'Reasons for detention' (see 55.6.3) and IS91M 'Movement notification' (see 55.6.4) replace all of the following forms:

The old IS91, IS150A, IS150B, IS160, IS161, IS166, IS167, IS91D, IS91E, IS91E (Annex) and

IS91 (Fingerprinting).

Criminal casework has a number of specific forms: IS91 RA Part A CCD is the criminal casework equivalent of the IS 91 RA. The ICD 1913 is sent in place of the IS91R and the ICD 1913AD covers detention in automatic deportation cases.

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55.6.1. Form IS 91RA Risk assessment

Once it has been identified that the person is one who should be detained, consideration should be given to what, if any, level of risk that person may present whilst in detention. Immigration officers (IOs) or persons acting on behalf of the Secretary of State should undertake the checks detailed on form IS91RA part A 'Risk Factors' (in advance, as far as possible, in a planned operation/visit when it is anticipated detention will be required).

The results of these checks should be considered by the IO or person acting on behalf of the Secretary of State along with information available regarding other aspects of behaviour (as detailed on the form) which may present a risk, and the conclusions regarding each aspect identified.

Where, under the ensured returns process, it is proposed to detain any child under the age of 18 with their parents or guardians, (see chapter 45 and section 55.9.4 below), the caseworker must actively search for any information relevant to the requirement to have regard to the need to safeguard and promote their welfare. Such a search is likely to involve a request for information from a local authority children services and a primary care trust. In health matters, the permission of the family is needed to access information. Any safeguarding or welfare issues relating to children under the age of 18 should be recorded on the family welfare form (see chapter 45).

It is vital to the integrity of the detention estate that all potential risk factors detailed on the IS 91RA form are addressed, with the form being annotated appropriately. Conclusions should be recorded as to whether or not the individual circumstances may present a potential area of risk. Amplifying notes must be added in the 'comments' section as appropriate and the form must be signed and dated.

Once detention space is required the IS91RA must be faxed to the detainee escorting and

population management unit (DEPMU). DEPMU staff will assess risk based upon the information provided on the IS91RA part A and decide on the detention location appropriate for someone presenting those risks and/or needs. The issue of an IS91 'Detention Authority' will be authorised with the identified risks recorded in the 'risk factors' section of this form.

In cases where the potential risk factors cannot be addressed in advance they should be undertaken immediately and the IS91RA part A despatched as above. However, it may not always be possible to do this if the potential detainee has, for example, been arrested by the police or picked up in the field and either an IO cannot immediately attend or the checks cannot be completed due to the lateness of the hour.

In such cases it will be appropriate to issue an IS91 to the police, as below, with the ‘risk factors’ section of the form completed as far as possible. However, in such circumstances the IS91RA part A should be completed and forwarded to DEPMU as soon as possible and, in all cases, no later than 24 hours after entry into detention at a police station and always before entry into the immigration detention estate is sought.

Risk assessment is an ongoing process. Should further information become available to the immigration compliance and enforcement (ICE) team or caseworker, which impacts upon potential risk (either increasing or decreasing risk) during a detainee’s detention, that information should be forwarded to DEPMU using form IS91RA part C. On receipt of this form (which can also be completed by other Home Office or removal centre management/medical staff) DEPMU will reassess risk and reallocate detention location as appropriate. Any alteration in their assessment of risk will require a new IS91 to be issued on which up-to-date risk factors will be identified. The ICE team or caseworker must fax this new IS91 to the detention location on receiving DEPMU’s reassessment of alteration in potential risk.

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55.6.2. Form IS91 Authority to detain

Once DEPMU has decided on detention location they will forward an IS91RA part B to the detaining office detailing the detention location and the assessment of risk. This must be attached to form IS91 and served by the IO or person acting on behalf of the Secretary of State on the

detaining agent. This allows for the subject to be detained in the detaining agent's custody under Immigration Act powers. The IO or person acting on behalf of the Secretary of State must complete the first three sections of the form, transferring the assessment of risk as notified by DEPMU onto section 3, complete the first entry of section 4 transfer record and sign and date the form on page 1.

The detaining agent completes the further entries on section 4 of the form, the Transfer Record. The IO or person acting on behalf of the Secretary of State must staple a photograph of the detainee to the form and authenticate this by signing and dating it before handing the form, in a clear plastic pouch, to the detaining agent.

Detaining agents have been instructed not to accept detainees without the correct documentation. The only exception to this will be when there is no Home Office presence at a police station or prison. In these circumstances, a copy of the IS91, complete with photograph, will need to be faxed or emailed. In such cases, DEPMU will advise as to where the original IS91 should be sent.

In cases where the IS91 is faxed or emailed in advance of knowing whether the person in custody will be charged, bailed or released without charge, the IO or person acting on behalf of the Secretary of State must specify whether the form should be served irrespective of the outcome or only be served in the event of a particular outcome. For example, if the intention is for the person to be detained only if the police or other agency plan to release him/her without charge, this should be made explicit. A request for the form to be destroyed unused if the person is charged or bailed should also be made explicit.

Form IS91 is issued once and only once for any continuous period of detention, irrespective of how many detaining agents there are during the course of a person's detention. The exceptions are: where there is alteration in risk factors when DEPMU will authorise the issue of a new IS91, which should be sent to the detention location to be attached to the original form; and in criminal casework cases if the IS91 is re-issued when a deportation order has been signed.

Where there is a change in the detaining agent, for example from the police to the escort contractor, it is for the first detaining agent to complete the Transfer Record on the form and forward it to the second detaining agent along with the detainee. Form IS91 must be issued for each person detained including for each child/young person. The IO or person acting on behalf

of the Secretary of State must complete all sections of the form as indicated. The completed form should then be handed to the detaining agent (for example, the escorting contractor). The detaining agent will not accept a detainee without correct original documentation.

IS91s are to be returned by the final detaining agency to the detention cost recovery unit (DCRU) of the Border Force resources directorate, 9th Floor, Lunar House (Long Corridor). Any IS91s that are returned to an ICE team at the end of a period of detention must be forwarded to DCRU without delay.

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55.6.3. Form IS91R Reasons for detention

This form is in three parts and must be served on every detained person, including each child, at the time of their initial detention. The IO or person acting on behalf of the Secretary of State must complete all three sections of the form. The IO or person acting on behalf of the Secretary of State must specify the power under which a person has been detained, the reasons for detention and the basis on which the decision to detain was made.

In addition there must be a properly evidenced and fully justified explanation of the reasoning behind the decision to detain placed on file in all detention cases. This should complement the IS 91R form, though is separate from it. The detainee must also be informed of his bail rights and the IO or person acting on behalf of the Secretary of State must sign, both at the bottom of the form and overleaf, to confirm the notice has been explained to the detainee (using an interpreter where necessary) and that he has been informed of his bail rights.

It should be noted that the reasons for detention given could be subject to judicial review. It is therefore important to ensure they are always **justified and correctly stated by the IO or person acting on behalf of the Secretary of State who is completing the form**. A copy of the form (fully completed and signed on both sides) must be retained on the caseworking file. If any of the reasons for detention given on the form IS91R change it will be necessary to prepare and serve a new version of the form. Again, any such changes must be **fully justified and correctly stated** by the IO or person acting on behalf of the Secretary of State who is completing the form.

It is important that the detainee understands the contents of the IS91R. If he does not

understand English, officers should ensure that the form's contents are interpreted. Failure to do so could lead to successful challenge under the Human Rights Act (Article 5(2) of the ECHR refers).

The five possible reasons for detention are set out on form IS91R and are listed below. The IO or person acting on behalf of the Secretary of State must tick **all** the reasons that apply to the particular case and, as indicated above, ensure that a fully justified explanation is retained on file setting out why the reasons ticked apply in the particular case:

- You are likely to abscond if given temporary admission or release.
- There is insufficient reliable information to decide on whether to grant you temporary admission or release.
- Your removal from the UK is imminent.
- You need to be detained whilst alternative arrangements are made for your care. Your release is not considered conducive to the public good*.

*Where this box is ticked in criminal casework cases, case owners should additionally indicate whether the offence was more or less serious.

Thirteen factors are listed, which will form the basis of the reasons for the decision to detain. The IO or person acting on behalf of the Secretary of State must tick all those that apply to the particular case:

- You do not have enough close ties (for example, family or friends) to make it likely that you will stay in one place.
- You have previously failed to comply with conditions of your stay, temporary admission or release.
- You have previously absconded or escaped.
- You have used or attempted to use deception in a way that leads us to consider that you may continue to deceive.
- You have failed to give satisfactory or reliable answers to an immigration officer's enquiries.
- You have not produced satisfactory evidence of your identity, nationality or lawful basis to be in the UK
- You have previously failed, or refused to leave the UK when required to do so.
- You are a young person without the care of a parent or guardian.
- Your health gives serious cause for concern on grounds of your own wellbeing and/or public

health or safety.

- You are excluded from the UK at the personal direction of the Secretary of State.
- You are detained for reasons of national security, the reasons are/will be set out in another letter.
- Your previous unacceptable character, conduct or associations.
- I consider this reasonably necessary in order to take your fingerprints because you have failed to provide them voluntarily.

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55.6.4. Form IS91M Movement notification

This form will only be used in very few cases where neither the detention nor the movement of a detainee is being arranged via DEPMU. The form must be completed and used to notify both the detaining agent and the escorting service provider of the proposed move.

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55.7. Detention procedures

55.7.1. Procedures when detaining an illegal entrant or person served with notice of administrative removal

- Obtain the appropriate authority to detain;
- issue IS 98 and 98A (bail forms) and advise the person of his right to apply for bail;
- conduct 'risk assessment' procedures as detailed in paragraph 55.6.1
- complete IS91 in full for the detaining authority;
- complete and serve form IS91R on the person being detained, explaining its contents to the person (via an interpreter if necessary);

- confirm detention to DEPMU as soon as possible and they will allocate a reference number;
- complete IS93 for the port/ immigration compliance and enforcement (ICE) team casework file;
- always attach a 'detained' flag, securely stapled, to the port/ICE team casework file;
- review detention as appropriate.

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55.8. Detention reviews

Initial detention must be authorised by a CIO/HEO or inspector/SEO (but see section 55.5). In all cases of persons detained solely under Immigration Act powers, continued detention must as a minimum be reviewed at the points specified in the appropriate table below. At each review, robust and formally documented consideration should be given to the removability of the detainee. Furthermore, robust and formally documented consideration should be given to all other information relevant to the decision to detain.

Monthly reviews should be conducted using the detention review template (ICD3469 or criminal casework equivalent). Additional reviews may also be necessary on an ad hoc basis, for example, where there is a change in circumstances relevant to the reasons for detention. Where detention involves or impacts on children under the age of 18, reviewing officers should have received training in children's issues (at least Tier 1 of Keeping Children Safe) and must demonstrably have regard to the need to safeguard and promote the welfare of children.

Rule 9 of the Detention Centre Rules 2001 sets out the statutory requirement for detainees to be provided with written reasons for detention at the time of initial detention, and thereafter monthly (in this context, monthly means every 28 days). The written reasons for continued detention at the one month point and beyond should be based on the outcome of the review of detention.

Apart from the statutory requirement above, detention should also be reviewed during the initial stages. This does not apply in criminal casework cases where detainees come from prison, or remain there on completion of custodial sentence, and their personal circumstances have already

been taken into account by the Home Office when the original decision to detain was made.

Detention reviews are necessary in all cases to ensure that detention remains lawful and in line with stated detention policy at all times. Detention reviews must be carried out at prescribed points throughout the period a person remains detained under Immigration Act powers, whether the person is held in the immigration detention estate or elsewhere, for example, secure hospital or prison.

Table 1, below, sets out the minimum requirements in respect of the specific stages and levels at which reviews must be conducted.

Reviews due to be carried out during weekends or bank holidays may be completed early. However, this will have an impact on subsequent reviews as the interval between monthly reviews must not exceed 28 days.

The review of detention involving third country unit (TCU) and criminal casework (CC) cases are subject to different arrangements which are outlined in Tables 2 and 3 respectively.

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Table 1: Review of detention (non-criminal casework/ non-third country unit (TCU) cases)

Review Period	**Review Authorised by[1]:**
24 hours	Inspector/SEO[2]
7 days	CIO/HEO
14 days	Inspector/SEO
1st monthly	Inspector/SEO
2nd monthly	Inspector/SEO
3rd monthly	Inspector/SEO
4th monthly	Inspector/SEO
5th monthly	Inspector/SEO
6th monthly	Assistant director
7th monthly	Assistant director

[1] Including those covering the grades indicated on HRA/TCA
[2] Assistant director for EEA cases.

Review Period	Review Authorised by[1]:
8th monthly	Assistant director
9th monthly	Deputy director
10th monthly	Deputy director
11th monthly	Deputy director
12th and subsequent monthlies	Director

If there is a significant/material change in circumstances in between reviews during the initial stages of detention, an inspector/SEO must conduct a review. Where there is a significant/material change in circumstances during later stages of detention, a review must be conducted by the relevant grade for the review period at the point of the change.

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Table 2: Review of detention in TCU cases

Review Period	Review Authorised by[3]:
Within 24 hours of entry into TCU process	CIO/HEO
7 days	CIO/HEO
14 days	CIO/HEO
21 days	CIO/HEO
1st monthly	Inspector/SEO
2nd monthly	Inspector/SEO
3rd monthly	Inspector/SEO
4th monthly	Inspector/SEO
5th monthly	Inspector/SEO
6th monthly	Assistant director
7th monthly	Assistant director
8th monthly	Assistant director
9th monthly	Deputy director
10th monthly	Deputy director
11th monthly	Deputy director
12th and subsequent monthlies	Director

[3] Including those covering the grades indicated on HRA/TCA

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Criminal casework cases

There is no requirement for adult detention to be reviewed during the early stages in criminal casework cases. Reviews should be conducted monthly (for review purposes this means every 28 days) at the levels indicated in Table 3, below.

Table 3: Review of detention in criminal casework cases

Review Period	Review Authorised by[4]:
1st monthly	SEO/Inspector
2nd monthly	Assistant director
3rd monthly	HEO/CIO
4th monthly	SEO/Inspector
5th monthly	HEO/CIO
6th monthly	HEO/CIO
7th monthly	Assistant director
8th monthly	HEO/CIO
9th monthly	SEO/Inspector
10th monthly	Assistant director
11th monthly	Deputy director
12th monthly	Director
13th monthly	SEO/Inspector
14th monthly	Assistant director
15th monthly	Deputy director
16th monthly	SEO/Inspector
17th monthly	Assistant director
18th monthly	Director
19th monthly	SEO/Inspector
20th monthly	Assistant director
21st monthly	Deputy director

[4] Including those covering the grades indicated on HRA/TCA

Review Period	Review Authorised by[4]:
22nd monthly	SEO/Inspector
23rd monthly	Assistant director
24th monthly	Director
Post-24th monthly	Return to cycle beginning 13 months

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55.8A. Rule 35 – Special illnesses and conditions

Rule 35 of the Detention Centre Rules 2001 sets out requirements for healthcare staff at removal centres in regards to any detained person:

- whose health is likely to be injuriously affected by continued detention or any conditions of detention;
- suspected of having suicidal intentions; and
- for whom there are concerns that they may have been a victim of torture.

Healthcare staff are required to report such cases to the centre manager and these reports are then passed, via Home Office contact management teams in centres, to the office responsible for managing and/or reviewing the individual's detention.

The purpose of Rule 35 is to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention. The information contained in the report needs to be considered in deciding whether continued detention is appropriate in each case.

Upon receipt of a Rule 35 report, caseworkers must review continued detention in light of the information in the report (see 55.8 – detention reviews) and respond to the centre, within two working days of receipt, using the appropriate Rule 35 pro forma. For more information see related link: Application of Detention Centre Rule 35 – 17-2012.

If the detainee has an asylum or human rights (HR) claim (whether concluded or ongoing), consideration must be given to Detention Rule 35 process.

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55.9. Special cases

55.9.1. Detention of women

Pregnant women should not normally be detained. The only exception to this general rule is:

- where removal is imminent and medical advice does not suggest confinement before the due removal date.

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55.9.2. Spouses/Civil Partners of British citizens or EEA nationals – non-criminal casework cases

Immigration offenders who are living with their settled British spouses/civil partners may only be detained with the authority of an inspector/SEO in the relevant caseworking section. Where strong representations for temporary release continue to be received, the decision to detain must be reviewed by an assistant director as soon as is practicable. Where there are dependent children under the age of 18, special consideration must be given to the requirement to have regard to the need to safeguard and promote children's welfare in line with the guidance given above.

If an offender is married to or in a civil partnership with an EEA national, detention should not be considered unless there is strong evidence available that the EEA national spouse/civil partner is no longer exercising treaty rights in the UK, or if it can be proved that the marriage/civil partnership was one of convenience and the parties had no intention of living together as husband and wife/civil partners **from the outset of the marriage or civil partnership.** For further guidance, refer to chapter 53.4 and 53.4.1.

In criminal casework cases, the fact that the FNO is the spouse or civil partner of a British citizen or EEA national should not prevent detention.

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55.9.3. Unaccompanied young persons

As a general principle, even where one of the statutory powers to detain is available in a particular case, unaccompanied children (that is, persons under the age of 18) must not be detained other than in very exceptional circumstances. If unaccompanied children are detained, it should be for the shortest possible time, with appropriate care. This may include detention overnight but a person detained as an unaccompanied child must not be held in an immigration removal centre in any circumstances. This includes age dispute cases where the person concerned is being treated as a child.

The very exceptional circumstances in which it might be appropriate to detain unaccompanied children are set out below. In all cases, the decision-making process must be informed by and take account of the duty to have regard to the need to safeguard and promote the welfare of children under section 55 of the Borders, Citizenship and Immigration Act 2009:

55.9.3A Alternative arrangements for care and safety

This exceptional measure is intended solely to deal with unexpected situations where it is necessary to detain unaccompanied children very briefly for their care and safety pending alternative arrangements being made. For example, collection by parents or relatives, by appropriate adult carers or friends, or by local authority children's services. It must not be used for other purposes. Efforts to secure alternative care arrangements in such cases should be made expeditiously.

55.9.3B Criminal casework cases

In criminal casework cases, detention of an FNO under 18 may be authorised where it can be shown that the FNO poses a serious risk to the public and a decision to deport or remove has been taken. This is subject to ministerial authorisation and the advice of the Family Returns Panel in respect of safeguarding matters. The place of detention for these FNOs would be a Youth Justice Board facility.

55.9.3C Returns to EU Member State or home country

Unaccompanied children who are to be returned to an EU Member State under the Dublin Regulation or, in the case of both asylum and non-asylum applicants, to their home country may be detained in order to support their removal with appropriate escorts. Such detention will occur only on the day of the planned removal to enable the child to be properly and safely escorted to their flight and/or to their destination. The use of detention powers in such a case is solely for escorting purposes and will not involve overnight stays at IRCs or STHFs. Detention in such a case must be authorised by an assistant director.

An unaccompanied child must not be detained for any other purpose, including for the purpose of a pending removal (other than in the circumstances set out at 55.9.3B and 55.9.3C above).

Unaccompanied children may only be detained in a place of safety as defined in the Children and Young Persons Act 1933 (for England and Wales) or the Children (Scotland) Act 1995 (for Scotland). For Northern Ireland 'place of safety' is defined as: a home provided under Part VII of the Children (Northern Ireland) Order 1995; any police station; any hospital or surgery; or any other suitable place, the occupier of which is willing temporarily to receive a person under the age of 18.

Where an individual detained as an adult is subsequently accepted as being aged under 18, they should be released from detention as soon as appropriate arrangements can be made for their transfer into local authority care or other appropriate care arrangements.

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55.9.3.1. Individuals claiming to be under 18

The guidance in this section must be read in conjunction with the Assessing Age Asylum Instruction (even in non-asylum cases). You may also find it useful to consult Detention Services Order 14/2012 on managing age dispute cases in the detention estate.

The Home Office will accept an individual as under 18 (including those who have previously presented themselves as an adult) unless one or more of the following categories apply (please note this does not apply to individuals previously sentenced by the criminal courts as an adult):

A. There is credible and clear documentary evidence that they are 18 or over.

B. A Merton compliant age assessment by a local authority is available stating that they are 18 years of age or over.

C. Their physical appearance / demeanour very strongly suggests that they are **significantly** over 18 year of age and no other credible evidence exists to the contrary.

D. The individual:

- prior to detention, gave a date of birth that would make them an adult and/or stated they were an adult; and
- only claimed to be a child **after** a decision had been taken on their asylum claim; and
- only claimed to be a child **after** they had been detained; and
- has not provided credible and clear documentary evidence proving their claimed age; and
- does not have a Merton compliant age assessment stating they are a child; and
- does not have an unchallenged court finding indicating that they are a child; and
- physical appearance / demeanour very strongly suggests that they are 18 years of age or over.

(all seven criteria within category D must apply).

If an individual claims to be a child in detention the decision on whether to maintain detention or release should be made as promptly as possible.

If one or more of the above categories apply, the following actions, where appropriate, should be completed:

- Only if **C** or **D** apply: Before a decision is taken, the assessing officer's countersigning officer (who is at least a CIO / HEO must be consulted to act as a 'second pair of eyes'. They must make their own assessment of the individual's age. If the countersigning officer agrees, the individual should be informed that their claimed age is not accepted.
- **All cases:** Form IS.97M must be completed, signed by the countersigning officer, served on the individual and a copy sent to DEPMU. Form BP7 (ASL.3596) must also be completed, signed and held on file.
- **All cases:** The individual's date of birth within the 'Person Details' screen on CID must be updated to reflect the Home Office's assessed date of birth – **not** the individual's claimed date of birth. Failure to complete this action will result in DEPMU refusing to allocate detention space in adult accommodation. For further guidance refer to section '3.3 Updating the individual's case file and CID' of the Assessing age AI.
- **All cases:** If officers receive relevant **new** evidence, they should promptly review any

previous decision to treat an individual as an adult.

Individual found to be a child

If none of the above categories apply (A-D), the individual must not be detained or must be released from detention into the care of a local authority and treated as a child, in accordance with the Processing an asylum application from a child AI. Care should be taken to ensure the safety of the individual during any handover arrangements, preferably by agreement with the local authority.

Individuals previously sentenced by the criminal courts as an adult

If an individual claims to be a child in detention but was previously sentenced by the criminal courts as an adult, there is no credible evidence to support their claim to be a child and detention is considered appropriate (having regard to the prospects of removal, the risk of absconding, and the risk posed to the public), a local authority should be requested to conduct a Merton compliant age assessment and submit the report to the Home Office as soon as possible. The individual's detention should be maintained until a final decision on their age has been made.

It is appropriate to treat these individuals differently from others because they have previously presented themselves as an adult during the criminal court procedure and any custodial sentence will have been served in an adult prison. Due to the imperative to protect the public from harm, and after careful consideration, it has been determined that they should not be released until it is clear that the Home Office's policy for the detention of adults does not apply.

Recording the age assessment process

All responses from the individual, local authorities or legal representatives must be noted and retained on file, since these may have a bearing on future appeal hearings.

Section 55 of the Borders, Citizenship and Immigration Act 2009 and the assessing age detention policy

The assessing age detention policy has in-built protections to ensure it is compliant with the section 55 duty. The threshold that must be met for individuals to enter or remain in detention following a claim to be a child is a high one and is only met if the benefit of doubt afforded to all

individuals prior to any assessment of their age is made is then displaced because the individual has met one or more of the categories listed at the start of section 55.9.3.1.

If an individual claims to be a child in detention they will be appropriately managed and a risk assessment of the individual including consideration of the facilities of the IRC (for example, only permitting limited observed contact with adults and/or segregating the individual from adult detainees as appropriate) will be conducted whilst a prompt decision on their age is made. It is necessary to appropriately protect individuals at this point in the process because it ensures they are not exposed to risks which might compromise their safety or welfare in the meantime. Officers should also refer to '2.2 Section 55 of the Borders, Citizenship and Immigration Act 2009' of the Assessing age AI.

Whilst this policy is set at a high threshold and compliant with the section 55 duty, the Home Office continually monitors the case details of individuals detained under this policy to ensure that, if necessary, the policy could be promptly amended to avoid the detention of children.

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55.9.4. Families with children under the age of 18

Plans for the ensured return of families with children under the age of 18, including criminal casework cases, should follow the ensured returns process set out in Chapter 45, including referral to the Family Returns Panel for advice. The options for ensured returns include, as a last resort, the use of pre-departure accommodation (see 45b). Stays at pre-departure accommodation are limited to a normal maximum of 72 hours but may, in exceptional circumstances and subject to Ministerial authority, be extended up to a total of seven days.

In some criminal casework cases, mothers with infant children may, if appropriate and in line with advice from the Family Returns Panel, continue to be detained in a prison mother and baby unit at end of sentence and pending deportation. This is subject to the same time limits as above.

There may be **rare** occasions on which it would be appropriate to use Tinsley House to accommodate a family instead of pre-departure accommodation. These are as follows:

1. Where a family presents risks which make the use of pre-departure accommodation inappropriate (see 45b). Such a proposal would need to be referred to the Family Returns Panel for advice and would, in addition, require Ministerial authorisation. The same time limits as for pre-departure accommodation apply.

2. Where criminal casework is returning a mother and baby from a prison mother and baby unit during the early removal scheme (ERS) period but it is not practicable or desirable, owing to time or distance constraints, to transfer mother and infant direct from prison to the airport for removal. Tinsley House may be used to accommodate the family on the night before their flight. This is because it would not be appropriate to separate mother and baby, and the mother cannot be moved to non-detained or pre-departure accommodation during the ERS period since she continues to be a serving prisoner who can only be released from prison for the purpose of removal. If Tinsley House is to be used in these circumstances, the criminal casework case owner must liaise with the family returns unit (FRU) in good time before the proposed removal to ensure that accommodation is suitable and available. FRU will require a copy of the Family Welfare Form before the booking can be confirmed. Should the removal fail, the mother and child will be returned to the prison.

3. Where after reuniting a single parent foreign national offender with their child at the airport for removal, either straight from prison custody or immigration detention, the removal does not proceed. For this reason, the criminal casework case owner should always seek to retain the involvement of the person who has been caring for the child until the flight departs so that they can step in to take care of the child again until the removal can be rearranged. However, where this is not possible and it is not appropriate to release the parent, the family unit at Tinsley House may be used to accommodate the parent and child until alternative, community-based arrangements for the care of the child are made (e.g. with local authority Children's Services). Director level authority must be obtained before Tinsley House is used in these circumstances. The time limits above apply but, in most cases, the aim should be for the child's stay to be for no more than one night. As a contingency, FRU should be advised in advance of cases where criminal casework is reuniting a family at the airport and it is possible that accommodation at Tinsley House may be needed should the removal fail.

The latter two categories of cases do not constitute ensured return for the purposes of the family returns process so they do not need to be referred to the Family Returns Panel for

advice. However, FRU will report these cases to the Panel retrospectively to enable them to maintain broad oversight of the Home Office's use of detention in respect of families.

Forms IS91 (Authority to detain) and IS91R (Reasons for detention) (or their criminal casework equivalents) must be issued for each person detained, including for each child.

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55.9.5 EEA Nationals

EEA nationals and their family members should **not** be detained whilst a decision to administratively remove is pending [see chapter 50 (EEA)].

HMI / SEO authority must be given for the removal. Following the decision to administratively remove (service of the 151A EEA), individuals may be detained with the authority of a CIO / HEO, where it is decided on balance that detention is necessary (eg if an individual is suspected of actively engaging in criminality or there is a clear risk of absconding) **and** the individual meets the Home Office criteria for detention. An HMI / SEO should review detention at the 24-hour point.

Regulation 19(3)(b) provides an anticipatory power of detention for cases being considered for deportation, meaning that EEA nationals and their family members who meet the criteria may be detained whilst a decision on deport is pending with criminal casework (CC). **Should CC decide not to proceed with deportation, detention may only continue lawfully if we proceed with administrative removal instead AND have served an IS 151A EEA.**

55.10. Persons considered unsuitable for detention

Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.

In criminal casework cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise

normally indicate that a person was unsuitable for detention.

The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:

- Unaccompanied children and young persons under the age of 18 (see 55.9.3 above).
- The elderly, especially where significant or constant supervision is required which cannot be satisfactorily managed within detention.
- Pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this.
- Those suffering from serious medical conditions which cannot be satisfactorily managed within detention.
- Those suffering from serious mental illness which cannot be satisfactorily managed within detention (in criminal casework cases, please contact the specialist mentally disordered offender team). In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act.
- Those where there is independent evidence that they have been tortured.
- People with serious disabilities which cannot be satisfactorily managed within detention.
- Persons identified by the competent authorities as victims of trafficking (as set out in Chapter 9, which contains very specific criteria concerning detention of such persons).

If a decision is made to detain a person in any of the above categories, the caseworker must set out the very exceptional circumstances for doing so on file.

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55.10.1. Criteria for detention in prison

NOMS and the Home Office have a service level agreement governing the provision of bed spaces within prisons. Under that agreement, NOMS make a number of bed spaces available for use by the Home Office to hold immigration detainees. It is for the Home Office to determine how those bed spaces are used and the type of detainees who are held in them.

The normal expectation is that the prison beds made available by NOMS will be used to hold

time-served FNOs **before** any consideration is given to transferring such individuals to the IRC estate. This position will apply if there are free spaces among the beds provided by NOMS and even if the criteria or risk factors outlined below are not presented by the FNOs concerned. More generally, decisions to allocate specific detainees, whether time-served FNOs or otherwise, to prison accommodation will be based on the presence of one or more of the risk factors or criteria below.

In the case of the following individuals, the normal presumption will be that they should remain in, or be transferred to, prison accommodation and they will be transferred to an IRC only in very exceptional circumstances:

- **National Security** – for example, where there is specific, verifiable intelligence that a person is a member of a terrorist group or has been engaged in or planning terrorist activities.

- **Criminality** – those detainees who have been involved in serious offences involving the importation and/or supply of class A drugs and/or those convicted of sexual offending involving a minor.

- **Specific Identification of Harm** - those detainees who have been identified in custody as posing a risk of serious harm to minors, and those identified in custody as being subject to harassment procedures (that is, individuals subject to the formal procedures under Prison Service Order 4400, preventing them from contacting their victim(s) whilst in custody).

In the case of the following individuals, they will usually be transferred to or remain in prison accommodation, subject to some exceptions:

- **Criminality** – those detainees who are subject to notification requirements on the sex offenders register. Exceptions to this category would include individuals sentenced to less than 12 months for a sexual offence, who may be considered for transfer to an IRC on a case-by-case basis, or individuals subject to notification requirements on the sex offenders register who have otherwise been assessed by the Home Office as being suitable for transfer.

- **Security** – where the detainee has escaped from prison, police or immigration custody or escort, or planned or assisted others to do so.

- **Control** – engagement in, planning or assisting others to engage in or plan serious disorder, arson, violence or damage whilst in prison, police or immigration custody.

The following individuals may be unsuitable for transfer to an IRC and DEPMU staff must assess their suitability for transfer on a case by case basis:

- **Behaviour during custody** – where an immigration detainee's behaviour whilst in either an IRC or prison custody makes them unsuitable for the IRC estate. For example, numerous proven adjudications whilst in prison for violence or incitement to commit serious disorder, which could undermine the stability of the IRC estate, or clear evidence of such conduct whilst in an IRC. (Detainees who were originally convicted of a violent offence may nevertheless be considered for transfer to an IRC depending on the nature of that offence and provided their behaviour whilst in prison custody has not given rise to concerns).

- **Health Grounds** – where a detainee is undergoing in-patient medical care in a prison. Transfer will only take place when an IRC healthcare bed becomes available, provided the individual is medically fit to be moved and their particular needs can be met at the IRC in question. Separately to the issue of transferring individuals held in prison, detainees held in IRCs who are refusing food and/or fluid may be transferred to prison medical facilities, if this is considered necessary to manage any resulting medical conditions.

(Note: The existence of any of the above risk factors indicates that a detainee should be held in prison accommodation rather than an IRC but the list is not exhaustive and DEPMU staff should also satisfy themselves that no other risks exist which would make it inappropriate for the detainee to be held in an IRC, rather than a prison.)

The normal expectation is that any remaining prison bed spaces made available under the agreement with NOMS after allocation of prison beds to individuals, presenting one or more of the criteria or risk factors above, will be filled by time-served FNOs not falling into the above categories. Subject to risk assessment, such individuals will be placed on a waiting list, operated by DEPMU, for transfer to an IRC but will remain in prison accommodation pending that transfer.

The transfer of such individuals to IRCs will take place only where the prison beds they are occupying are required either by individuals (FNO or otherwise) falling into one or more of the categories above or by more recently detained time-served FNOs (that is, FNOs detained under

Immigration Act powers on completion of or release from custodial sentence). In the absence of the criteria or risk factors set out above, the length of time that an FNO has been held in a prison bed solely as an immigration detainee will be the main factor in deciding when to transfer to an IRC. In other words, priority for transfer to an IRC will be given to those FNOs who have been held in prison beds the longest.

Separately from the use of the prison beds made available to the Home Office under the agreement with NOMS, and in the interests of maintaining security and control in the Home Office detention estate as a whole, a cap is placed on the total number of time-served FNOs who may be held in the detention estate at any one time. The cap may also be used as part of the day to day management of the Home Office detention estate in order to meet changing operational priorities for the use of IRC beds, which will have a consequence for the number of beds that will be available for allocation to time-served FNOs at any one time. As such, the level at which the cap is set is not static and will change as necessary to meet those priorities, as well as in the interests of security and control of the estate.

Where the current level of the cap is reached, time-served FNOs will continue to be held in prison accommodation, even in the event that the prison bed spaces made specifically available to the Home Office by NOMS are full: the expectation in such circumstances is that additional bed spaces would be sought from NOMS.

If transfer to an IRC is agreed, it should be effected as soon as reasonably practicable. Reasons for deciding not to transfer an individual must be recorded, as must the reasons for any delay in effecting agreed transfers.

Any individual may request a transfer from prison accommodation to an IRC. Prompt and evidenced consideration must be given to such a request and, if rejected by DEPMU, the individual concerned will be given written reasons for this decision.

If DEPMU decide that a detainee currently held in an IRC or short-term holding facility is not appropriate for that accommodation they will refer them to the population management unit (PMU) of NOMS, who will consider their allocation to a prison. In the case of a detainee in Scotland, transfer may either be to a prison bed made available under the agreement with NOMS or, with the agreement of the Scottish Prison Service, to a prison bed in Scotland, as appropriate. Detainees transferred to prison accommodation as a result will be given written reasons for their

transfer. Detainees will not be referred for transfer on medical or care grounds.

Time-served FNOs in Scotland will normally be transferred to a prison bed made available under the agreement with NOMS or to an IRC, as appropriate, as soon as practicable after release from sentence. In some cases, the individuals concerned may, if appropriate, and with the agreement of the Scottish Prison Service, remain in prison in Scotland.

A person normally considered unsuitable for an IRC may, exceptionally, be detained in an IRC for a short period of time in order, for example, to facilitate their removal where a flight leaves early and the individual needs to be held close to the airport, or to facilitate an interview with a consular official as part of a documentation exercise. Such instances are subject to the agreement of a DEPMU SEO. Full details must initially be detailed on the IS91RA part A and entered on the 'risk factors' section of form IS91 served on the detaining agent (see 55.6 above).

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55.11. ‘Dual’ detention

55.11.1. Detention of illegal entrants and those subject to administrative removal who are facing or have been convicted of criminal offences

Whilst detention on criminal charges does not affect a person’s liability to removal as an illegal entrant or a person liable to administrative removal, it is not the practice to remove the person where criminal charges are extant. Officers must not seek to influence police decisions about whether or not to pursue criminal matters.

Where an illegal entrant or person subject to administrative removal is convicted of a criminal offence and recommended for deportation, this should be considered by criminal casework before removal is enforced. In the event of an illegal entrant/person subject to administrative removal being convicted of a serious offence but not recommended for deportation by the Court,

criminal casework may wish to consider non-conducive deportation under section 3(5)(a) of the Immigration Act 1971.

There is no immigration power to detain where a person is already detained under an order or sentence of a court, or is remanded in custody. Therefore the sensible course is for any immigration decision to detain to be expressed as taking effect once any existing detention ends. Such a person is not exempt from the arrangements for release on temporary licence (home leave) (see 55.19).

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55.11.2. Detention pending criminal proceedings

There is no bar to detaining a person under Immigration Act powers where the person is on police bail pending enquiries and has not yet been charged. Such a person will cease to be eligible for detention under Immigration Act powers in practice if he is detained by a court in the criminal proceedings once charged.

Where an illegal entrant or person served with notice of administrative removal is granted bail by the court pending trial, there is no bar to continued detention under the 1971 Act, but full account must be taken of the circumstances in which bail was granted and an inspector/SEO must authorise such detention.

Where an illegal entrant or person served with notice of administrative removal is remanded in custody awaiting trial but it is not necessary to detain him under immigration powers, serve IS96 granting him temporary release to the place of detention.

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55.11.3. Immigration detention in deportation cases

Paragraph 2(1) of Schedule 3 to the 1971 Act provides the power to detain a person who has been court recommended for deportation in the period following the end of his sentence pending the making of a deportation order.

Paragraph 2(2) of Schedule 3 provides the power to detain a person who has not been recommended for deportation by a court but who has been served with a notice of intention to deport (an appealable decision) in accordance with section 105 of the Nationality, Immigration and Asylum Act 2002, pending the making of a deportation order. Under paragraph 2(3) of Schedule 3 to the 1971 Act, where a deportation order is in force against any person, they may be detained pending their removal or departure from the UK.

Under section 36 of the UK Borders Act 2007, a person may be detained while consideration is given to whether the automatic deportation provisions of the Act apply and, if they do apply, pending the making of the deportation order.

However, a person should not be detained under immigration powers at the same time that they are detained under an order or sentence of a court. Therefore the sensible course is for any immigration decision to detain to be expressed as taking effect once any existing detention ends. It is also important in criminal cases to monitor the offender's release date for service of further detention/restriction forms at the appropriate time.

There is no bar to detaining a person under Immigration Act powers where the person is on police bail pending enquiries and has not yet been charged. Such a person will cease to be eligible for detention under Immigration Act powers in practice if he is detained by a court in the criminal proceedings once charged.

Where a person subject to deportation action is granted bail by a court pending trial for a criminal offence, there is no bar to detention under Immigration Act powers. However, full account must be taken of the circumstances in which bail was granted and an inspector/SEO must authorise such detention.

Where an FNO to be transferred to immigration detention has been the sole or main carer of children and has been separated from them through a custodial sentence, careful consideration needs to be given to how, when and where the FNO will be reunited with the children if the children are also subject to deportation as dependants, or are to accompany the deportee on deportation.

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55.12. Co-ordination of detention

Detention space is allocated via regional detention gatekeepers through the detention co-ordinators based at DEPMU which is staffed 24 hours a day.

The DEPMU CIO/HEO has the authority to:

- refuse to accept any person/family for detention in the immigration detention estate;
- refuse to accept any person for transfer by the escorting contractor;
- arrange for a detainee to be moved in order to meet local demands or to provide more secure accommodation;
- decide on the priority of tasks to be handled by the escorting contractor.

Ports/ICE teams should initially approach their local business area detention co-ordinator for approval to use one of the ring-fenced beds. When this approval has been given, DEPMU should be faxed the following information:

- IS89 Request for Detention form, including the detainee's full name, with family name in CAPITAL LETTERS;
- all risk factors on form IS91RA, part A;
- any relevant references – port/ICE team, Home Office, prison, immigration and asylum chamber, previous removal centre;
- a contact name and telephone number so that DEPMU can inform the port/ICE team of where the detainee has been placed.

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55.12.1. Not in use

55.12.2. Detention after an appeal has been allowed

If a detainee wins an appeal, but the Home Office wishes to challenge the immigration judge's decision, it is sometimes considered necessary to maintain detention until the challenge is heard. While it may be justifiable to continue detention in the short term pending such a challenge,

especially if there is considered to be a risk of the person absconding or a risk of harm to the public, care should be taken to ensure detention on this basis does not continue beyond a reasonable time period.

Detention after an appeal has been allowed is not automatic and temporary release should always be considered. Any decision on what constitutes a reasonable period of time should be on a case by case basis. As with any case, detention and associated risk factors should be reviewed regularly to decide whether the detainee's circumstances have changed, and whether the person still presents a risk of absconding.

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55.13. Places of detention

Persons detained under Immigration Act powers may be detained in any place of detention named in the Immigration (Places of Detention) Direction 2014. This includes police cells, immigration removal centres, prisons or hospitals. Unaccompanied children or young persons under the age of 18 may only be in held in a place of safety (see paragraph 55.9.3). As a matter of policy, families with children under the age of 18 may be held in non-residential short-term holding facilities (holding rooms), pre-departure accommodation and the family unit at Tinsley House immigration removal centre.

Some facilities, such as police cells (but see 55.13.2) are only suitable for detention for up to five days continuously (seven if removal directions are set for implementation within 48 hours of the 5th day). The Immigration (Places of Detention) Direction 2014 does not prevent a person already detained for the specific period in time-limited accommodation from being re-detained, but this must never be used as a device to circumvent the time limits on the use of short term holding facilities.

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55.13.1. Present accommodation

The immigration detention estate* currently comprises places at the following locations:

Removal Centres

Centre	Population
Brook House	Males only
Campsfield House	Males only
Colnbrook	Males only
Dover	Males only
Dungavel	Males/females/families with no children under the age of 18
Harmondsworth	Males only
Haslar	Males only
Morton Hall	Males only
The Verne	Males only
Tinsley House	Males/families, including those with children under the age of 18
Yarl's Wood	Females/families with no children under the age of 18/males

Residential

Short term holding facilities are located at:

Larne House, Northern Ireland
Pennine House, Manchester

Pre-Departure Accommodation

Cedars

Northern Ireland

Adults who are detained in Northern Ireland are normally moved immediately to Larne House STHF or, when a police and criminal evidence (PACE) Act arrest and detention in a police cell has been necessary, as soon as practicable after the detainee is released from police custody. Individuals may be held in police cells until transfer to Larne House can be effected.

Detainees may be held at Larne House for up to seven days when removal directions have been set to take place within that period and, whenever possible, will be removed directly via Northern Ireland airports within this period. Where removal will not take place within seven days of a person being detained at Larne House, the maximum stay at Larne House will be up to five days, during which time the detainee will be moved to an IRC in Great Britain if their detention is to

continue.

FNOs who have been released from sentence in Northern Ireland will normally be moved to a Home Office immigration detention facility or NOMS accommodation, as appropriate, within 24 hours of their release, or as soon as practicable thereafter.

Prison Service Accommodation

See 55.10.1

* 'detention estate' is a general term covering removal centres, short term holding facilities, pre-departure accommodation, and holding rooms at reporting centres, ports and airports

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55.13.2. Detention in police cells

Detainees should preferably only spend one day in police cells, with a normal maximum of two days. In exceptional cases, a detainee may spend up to five days continuously in a police cell (seven days if removal directions have been set for within 48 hours of the fifth day) if, for instance, the person is awaiting transfer to more suitable Home Office or Prison Service accommodation **and** the police are content to maintain detention. Such detention must be authorised by an inspector/SEO, who must take into account the Home Office duty of care for detainees and the likelihood that police cells do not provide adequate facilities for this purpose in the long term.

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55.14. Detention for the purpose of removal

In cases where a person is being detained because their removal is imminent, the lodging of a suspensive appeal, or other legal proceedings that need to be resolved before removal can proceed, will need to be taken into account in deciding whether continued detention is appropriate. Release from detention will not be automatic in such circumstances: there may be other grounds justifying a person’s continued detention, for example a risk of absconding, risk of

harm to the public or the person's removal may still legitimately be considered imminent if the appeal or other proceedings are likely to be resolved reasonably quickly. An intimation that such an appeal or proceedings may or will be brought would not, of itself, call into question the appropriateness of continued detention. (See chapter 60 for separate guidance on Judicial Review).

Following the death in 1993 of Joy Gardner while being detained for deportation, the then Home Secretary instituted a review of procedures in cases where the police are involved in assisting the Home Office with the removal of people under Immigration Act powers (the Joint Review of Procedures in Immigration Removal Cases). One of the provisions introduced immediately after the report of the Joint Review was issued was that there should be a period of at least one to two days between detention and the proposed removal of an offender. Only in exceptional cases will removal proceed on the day of arrest and this must be authorised by an assistant director (See section 2 of chapter 60 – Notice of Removal).

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55.15. Detention in national security cases

When contacted by the relevant unit that deals with national security cases with a request to detain, staff will be provided with a copy of the notice sent to the person saying that he will be detained and setting out the reasons for his detention. This notice will alert staff to the fact that the person is being detained in the interests of national security and is therefore to be detained in Prison Service accommodation. Staff should ensure that Section 3 of form IS91 is completed when issued to the Prison Service authorities and that in addition to any other information put on this form, the following wording is inserted:

"(Name) has been detained under powers contained in the Immigration Act 1971 and the Home Secretary has personally certified that his detention is necessary for reasons of national security. (Name) should not be transferred from HM Prison (name of place of detention) to another Prison Service establishment or place of detention without prior reference to the Home Office section named on this form."

Should the Prison Service contact the ICE team because they are considering transferring the detainee to another prison, that office should advise the prison authorities to contact the

population management unit of NOMS indicating that they, in turn, should consult the caseworking officer from the relevant unit for background information, before the detainee is moved.

These cases are particularly sensitive and it is essential that the above procedure be followed.

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55.16. Incidents in the detention estate

DEPMU must be kept informed of all serious incidents in any removal centre, short-term holding facility, holding room or under escort, such as deaths, incidences of self harm, escapes, attempted escapes, food/fluid refusals and any other potentially high-profile occurrence. Home Office immigration enforcement staff at all removal centres are responsible for reporting such incidents to detention operations. DEPMU staff are responsible for providing reports in respect of incidents which take place whilst under escort, at short term holding facilities and holding rooms.

In centres holding children, special care should be taken to report incidents because of their vulnerability. Any such incidents must be dealt with appropriately and swiftly, following the procedure set out in local safeguarding policies.

Detailed instructions on the reporting of incidents to detention operations are issued separately to staff at DEPMU and at all removal centres.

Additionally, consideration should be given to whether such actions may prompt reassessment of potential risk in which case form IS91RA part C should be sent to DEPMU as under 55.6.1 above.

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55.17. Bed guards

All requests for bed guards must be made to the DEPMU CIO/HEO.

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55.18. Notification of detention to High Commissions and Consulates

All persons who are detained should be asked, by the Home Office detaining officer (including when the individual has been detained initially by the police), if they wish to contact their High Commission or Consulate. Those who wish to do so should be given the appropriate telephone number. When a person is likely to be detained for more than 24 hours he should be asked if he wishes his High Commission or Consulate to be notified of his detention. If he does, then form IS94 should be sent by email or fax to the appropriate representative of the High Commission or Consulate. Contact details are available in the London Diplomatic List, accessible via the following link to the Foreign & Commonwealth Office website. The appropriate section of form IS93E must be completed to indicate that the notification has been sent.

Notification of detention to High Commissions and Consulates is the responsibility of the detaining officer at the ICE team or port.

The UK has a bilateral consular convention relating to detention with a number of countries (listed below). The convention imposes an obligation on detaining authorities to notify the consular representative of a detainee even if the detainee has not requested this. When a national of such a country is likely to be detained for more than 24 hours, **and there is or has been no asylum claim or suggestion a claim might be forthcoming**, the appropriate High Commission or Consulate must be notified by the detaining officer, on form IS94 sent by email or fax. The detainee must be notified of this disclosure.

A consular representative should, if the person detained agrees, be permitted to visit, converse privately with and arrange legal representation for him.

Communications from the person detained to his High Commission or Consulate should be forwarded without delay.

55.18.1. List of countries with which the UK has bilateral consular conventions relating to detention

Austria
Belgium
Bosnia-Herzegovina
Bulgaria
China
Croatia
Cuba
Czech Republic
Kosovo
Mexico
Mongolia
Montenegro
Netherlands
Norway
Poland
Romania

Denmark
Egypt
France
Germany
Greece
Hungary
Italy
Japan
Russia
Serbia
Slovenia
Spain
Sweden
Ukraine
USA
Uzbekistan

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55.19. Home leave (release on temporary licence) for prisoners subject to removal action

The grant of home leave (release on temporary licence) for a person serving a custodial sentence is normally at the discretion of the Prison Governor.

When a Governor wishes to allow a prisoner home leave, but the detainee is subject to 'dual' detention under Schedule 2 of the 1971 Act, he should contact a CIO or HEO at the port or ICE team that authorised detention, giving 10 days notice of the decision to allow for any representations to be made as to why the prisoner should not be released. However, as the person is still a serving prisoner, the final decision rests with the Governor, even if an IS91 has been served.

Where a prisoner has been court recommended for deportation, has already been notified of a decision to make a deportation order, or may be liable to automatic deportation, the Governor requires the permission of criminal casework for the person to be released. Prisons should make such requests directly to criminal casework but any received by ports/ICE teams should be forwarded for the attention of a senior caseworker.

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55.20. Temporary admission, release on restrictions and temporary release (bail)

A person who is liable to detention under the powers in the Immigration Acts may, as an alternative to detention, be granted temporary admission or release on restrictions. The policy is that there is a presumption in favour of granting temporary admission or release on restrictions

and that detention is used sparingly other than in cases where the deportation criteria are met, where it will be appropriate in many cases. Another alternative to detention is the granting of bail, which is covered separately in Chapter 57. The fundamental difference between temporary admission/release on restrictions and bail is that the former can be granted without the person concerned having to be detained, while the latter can only be granted once an individual has been detained and has applied for bail.

The power to grant temporary admission to illegal entrants and persons served with notice of administrative removal who are liable to detention under paragraph 16 is set out in paragraph 21(1) and (2) to Schedule 2 of the Immigration Act 1971. This provides that the grant of temporary admission in illegal entry or administrative removal cases may be subject to such restrictions (on residence, employment and reporting to the police or an IO) as may be notified to him in writing by an IO. It follows that IOs, with the authority of a CIO, are able to grant temporary admission in all illegal entry and administrative removal cases liable to detention under paragraph 16, apart from where the person is detained on embarkation. Port removal cases are covered in Chapter 31 of the Immigration Directorate Instructions.

A person who is the subject of deportation action who is detained or liable to detention may be placed on a restriction order, under paragraph 2(5) of Schedule 3 to the 1971 Act. This provides for similar conditions to be attached to the grant of release on restrictions in deportation cases to those in illegal entry and administrative removal cases, with the exception that it is for the Secretary of State to notify in writing any conditions attached to their release.

IOs may, under the authority of a designated Inspector, serve papers granting release on restrictions to a person who has been served with a notice of intention to deport by an ICE team at the request of the relevant caseworking section, normally criminal casework. However only a person with delegated authority (that is, designated Inspectors - see chapter 54) may sign any restriction order or amendment to a restriction order.

Caseworkers in the relevant section (who act on behalf of the Secretary of State) may grant release on restrictions to a person served with a notice of intention to deport under section 3(5), who have been recommended for deportation by a court, who are being considered for automatic deportation, or who are detained pending the making of a deportation order under the automatic deportation provisions or who are subject to a deportation order.

The ICE team that served the notice of illegal entry or administrative removal should deal with variations to the conditions attached to the grant of release on restrictions in illegal entry and administrative removal cases. In deportation cases, variations should be notified by caseworkers in the relevant section. This is irrespective of whether or not the notice of intention to deport was served by an IO under the delegated authority arrangements.

When considering the release of families who have been detained with their children, the timing of the release may be important. The release should, where possible, be planned in such a way that it takes effect either in the morning, which will ensure that children are rested and thus better able to deal with the journey and settling into the release address, or at a time which would at least allow the family to reach their destination that same day. Consideration of the timing of release should take into account the age(s) of the child(ren) and the distance the family will have to travel.

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55.20.1. Employment restrictions

See chapter 23.9

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55.20.2. Reporting restrictions

Persons subject to reporting restriction should not be required to report to police stations if they could report to an immigration reporting centre instead. Immigration reporting centres which contain holding rooms are currently established at:

- Becket House (London);
- Capital Building (Liverpool);
- Dallas Court (Manchester);
- Drumkeen House (Northern Ireland);
- Eaton House (Heathrow);
- Electric House (Croydon);
- Festival Court (Glasgow);
- Loughborough;

- Lunar House (Croydon);
- Sanford House (Birmingham);
- Vulcan House (Sheffield);and
- Waterside Court (Leeds).

Where reporting to a police station is considered essential, this should not be more frequently than monthly (unless authorised by an inspector/SEO in exceptional circumstances) **and the police station must be informed**. In non-criminal casework cases, if the case remains unresolved after three years and the offender has abided by the terms of his or her temporary admission or release on restrictions, lift reporting restrictions (unless removal is imminent). In criminal casework cases, reporting should continue until removal or another decision is made on the case. A failure to attend by an offender will be reported by the police to the ICE team for appropriate action. **When a case has been resolved, the appropriate police station must be informed.**

It is possible to impose reporting restrictions on unaccompanied children or young persons under 18 years of age, however reference should be made to section 4.3 of chapter 45(a) before doing so.

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55.20.3. Failing to comply with the terms attached to a grant of temporary admission, release on restrictions or bail

A person who fails to comply without reasonable excuse with the terms attached to the grant of temporary admission, release on restrictions or bail commits an offence under section 24(1)(e) of the Immigration Act 1971. A decision on whether to charge a person or prosecute currently rests with the Crown Prosecution Service.

Further information on failure to comply, absconding and prosecution can be found in Ch 19 of EIG.

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55.20.4. Procedures when granting temporary admission to an illegal entrant or person served notice of administrative removal

- serve form IS96, informing the subject of his release and the restrictions imposed upon him;
- serve form IS106, the release order, on the detaining agent;
- advise the detention co-ordinator of release where they have been notified of the initial detention.

Please see Chapter 31 of the Immigration Directorate Instructions for guidance on port removal cases.

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55.20.5. Procedures when releasing deportation cases on restrictions

55.20.5.1 When releasing FNOs on Restriction Orders, case owners should follow the instructions below. This version of the process has been produced specifically for cases where detention or continued detention cannot be justified throughout the time it takes to effect deportation (please see 55.3). Case owners should continue to follow the process set out in the criminal casework bail guidance when dealing with all other FNO bail applications.

55.20.5.2 You can find the relevant reporting centre using the ICE finder.

Individuals will be required to report twice weekly and may be subject to electronic monitoring.

55.20.5.3 Prisoners will normally be released to a private address that they will have given the prison. If the FNO is still on licence, the offender manager should be consulted about the suitability of any address provided and special action must be taken if the FNO is a sex offender who has provided a release address where any children under 18 live – see criminal casework MAPPA guidance for details for action to take in these cases.

When the case owner has confirmed that a prisoner is to be released on restrictions, they must do a PNC check (see PC 2/06) to ensure that we are aware of all offences prior to release and

then fax the contractors who will do a check on the property to ensure that it is suitable. This takes 24 hours. Case owners must check for MAPPA status and inform contractors of that status where applicable before tagging is carried out.

55.20.5.4 When the check on the property is done, the paperwork (see 55.20.5.7 below) can go to the removal centre or prison who will issue the prisoner with a travel warrant which will allow him to make his own way to his accommodation. Within 24 hours of release the contractors will contact the individual to commence the electronic monitoring.

55.20.5.5 If the prisoner's address is deemed unsuitable for tagging or he meets the criteria for release but is unable to provide an address, they may be released to asylum accommodation. The individual does not need to be an asylum seeker to be released into asylum accommodation. In this instance the case owner should contact the appropriate asylum support team to arrange for accommodation. They will liaise with the accommodation providers to find a suitable property for the individual and contact the contractors to arrange for the property to be checked for suitability for tagging. If the property is deemed suitable then they will advise the case owner of the release address.

55.20.5.6 There is no need for the case owner to arrange transport to the asylum property as the prison/IRC will issue a travel warrant for the journey. Vouchers will be issued to individuals to cover food and other basic costs.

55.20.5.7 Case owners must prepare the following paperwork (available on the DocGen):

- ICD 0343 – Restriction Order
- ICD 106 – Notifies the Prison/IRC to release the subject
- IS270 – Electronic Monitoring Factsheet.

Once the documents have been signed, they should be faxed to the holding centre. Copies should be sent to the place to which the individual is due to report.

If the individual is due to report to a police station which doesn't have an IO present, the case owner will need to send the station an ISE301.

Copies of all these documents should be kept on file.

Once the holding centre confirms that they have the paperwork the subject can be released.

Note: It is only possible for criminal casework case owners to update CID once DEPMU have received notification that release has been approved and closed their CID screen down. It is important that CID is updated as soon as possible after release and the criminal casework case owner should contact DEPMU where there are delays.

55.20.5. 8 The offender manager **must** be notified in advance of the release date by phone. Offender manager details should be on the licence which will be on the file. If there is not a copy of the licence on file then the prison should be contacted.
Notification of the outcome should also be sent in writing by email or fax and copied to the relevant Probation Area SPOC.

55.20.5.9 Case owners are responsible for ensuring that when prisoners are released, electronic monitoring arrangements are in place.

55.20.5.10 Whilst released on restrictions the individual must comply with the restrictions set out in the ICD.0343 and electronic monitoring rules.

Electronic Monitoring can be breached as follows:

- At the induction stage
- Absence for part of a monitoring period
- Absence for an entire monitoring period
- Attempts to remove or tamper with equipment.

55.20.5.11 Case owners are also responsible for ensuring that they check on CID (and if necessary by phoning the relevant ICE team) to check that the individual is complying with reporting restrictions and take action if a breach of the restriction orders takes place. The appropriate action to take in such cases is set out in the guidance: non detained cases, contract management and absconders.

55.20.5.12 It may be necessary to organise the re-detention of individuals for example where contact is not properly maintained, electronic monitoring fails or where removal is imminent. Full instructions on the process on how to re-detain a person can be found in the guidance on detention.

55.20.5.13 Once re-detention has been confirmed:

- Ensure the proper reasons for detention notification has been issued (a copy should be placed on the file) - See detention guidance.
- Update CID.
- Fax an EM6 to the contractor to request that they cease electronic monitoring. This is important as until they receive notification to stop EM, contractors will continue to charge for their services.
- Notify the High Commission or Consulate. - See detention guidance.
- Commence the detention review process. - See detention guidance.
- Notify the Offender Manager. - See detention guidance.

55.20.5.14 For cases where re-detention is authorised but cannot be effected, see criminal casework process guidance: Non detained cases, contact management and absconders.

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Revision History

Date change published	Officer/Unit	Specifics of change	Authorised by;	Version number after change (this chapter)
		OEM Revision		1
		Detention of ex-FNPs & general update		2
4/11/08	DSPU	(i) Fast track asylum processes (ii) Detention of unaccompanied children	(i) Brian Pollett (ii) Phil Woolas	3
22/01/09		Detention of ex-FNPs	Alan Kittle	4
09/03/09	DSPU	Title of list of offences annex (relating to 55.3.2.1) - name change; addition of 55.8A & amendment of 55.10.1	Alan Kittle	5
09/06/09	DSPSPU	Amendments to 55.6.3, 55.8, 55.9.3.1, 55.10, 55.13.1 & 55.18	DS Director	6
26/11/09	DSPSPT	General update to take account of s.55 duty	DS Director	7
21/01/10	GLAD CAT - E	55.8, 55.9.4, FDU authority for detention release.	CAT– E Deputy Director	8
02/03/10	DSPSPT	Addition to 55.10.1	DS Director	9
26/08/10	DSPSPT	Amendment to 55.10; Horizon links updated	DS Director	10
26/10/10	DSPSPT	Amendments to 55.10.1 and 55.13.1	DS Director	10.1
23/12/10	DSPSPT	Amendments to 55.8 (Table 3 – CCD detention review schedule	CDG Strategic Director	11
01/03/11	DSPSPT	Amendments to 55.5.3, 55.8, 55.9.3, 55.9.4, 55.12 – Ensured return of families with children.	DS Director	12
24/01/12	DSPSPT	Amendments to 55.9.4, 55.10.1, 55.13.1 and general update of terms such as FNPs and AIT.	DS Director/CDG Strategic Director	13
20/04/12	D – CST	Amendments to 55.1.1, 55.5.3, 55.6.3, 55.9.3 and 55.11.2.	Director, Returns Directorate	14
25/04/12	EID	Link at 55.20.3 to Ch 19 Absconders		15
14/11/12	DPT/OPRU	Amendment to 55.9.3.1		16
29/05/13	DPT/OPRU	Amendment to 55.10.1 re: food/fluid refusal	Director, OPRU	17
27/08/13	DPT/OPRU	Amendments to 55.1, 4, 5, 6, 8, 9, 10, 12, 13, 16, 18 and 55.20	Director, OPRU	18
02/12/13	DPT/OPRU	Clarification re: review templates in 55.8		18.1
17/01/14	DPT/OPRU	Correction of typo in the heading of 55.3		18.2
01/05/14	DPT/IBPD	Addition of requirement to read ‘assessing age’ AI to 55.9.3.1		18.3
30/01/15	DPT/IBPD	Minor changes to add clarity to 55.1.3 and 55.3.1. Amendments to 55.8 (addition of information and changes to detention review schedules). Minor change to clarify 55.9.1. New section 55.9.5 (EEA nationals).	Director, Criminality and Enforcement Policy	19
06/07/15	DPT/IBPD	Removal of references to DFT, following its suspension.	Director, Asylum and Family Policy	19.1
30/09/15	EOP/IBPD	Lowering of authority for EEA cases to align with EIG Ch 50(EEA)	Director, Criminality and Enforcement Policy	19.2

23/10/15	CPT/IBPD	Replaced duplicate information in 55.1.2 with links to up to date criminality guidance.	Gd7, Criminality Policy Team	19.3

Annex A

Bournemouth Commitment

Drugs Offences (excluding simple possession)

Misuse of Drugs Act 1971 (c.38)

1. s. 4(2) or (3) (production and supply, including offer to supply, of controlled drugs);
2. s. 20 (assisting in or inducing commission outside United Kingdom of an offence punishable under a corresponding law);
3. s. 5(3) (possession with intent to supply)
4. s.19 (incitement)
5. s.6 (cultivation of cannabis).
6. s.8(a) (occupying or managing premises where the production or attempted production of a controlled drug is knowingly permitted on those premises)
7. s. 8(b) (occupying or managing premises where the supply, or attempted supply, of or the offer to supply a controlled drug is knowingly permitted on those premises)

Customs and Excise Management Act 1979 (c.2)

8. s. 50(2) or (3) (improper importation)
9. s. 68 (1) and (2) (improper exportation),
10. s.170 (fraudulent evasion)

in connection with a prohibition or restriction on importation or exportation having effect by virtue of section 3 of the Misuse of Drugs Act 1971 (c. 38);

Other Laws

11. s. 19 of Criminal Justice (International Co-operation) Act 1990 (using ship for illicit traffic in controlled drugs);
12. .s.12 of the Criminal Justice (International Co-operation) Act 1990 (manufacture or supply of substance specified in Schedule 2 to that Act). (Note: this offence relates to drug precursors as opposed to controlled drugs as defined by the Misuse of Drugs Act 1971]
13. s.1 of the Criminal Law Act 1977 (c. 45) or Article 9 of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 (S.I. 1983 1120 (N.I. 13)), or in Scotland at common law, of **conspiracy to commit** any of the offences listed at para 1-12 above;
14. s.1 of the Criminal Attempts Act 1981 (c. 47) or Article 3 of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983, or in Scotland at common law, of **attempting to commit** any of the offences listed at para 1-12 above;
15. Part 2 Serious Crime Act 2007 **(encouraging and assisting) any of the offences listed at para 1-12 above** *;

16. Common law offences (includes **aiding, abetting, counselling or procuring** the commission of any of the offences listed above at para 1-12 above);

* yet to be commenced by MOJ

Crimes Where Release From Immigration Detention Or At The End Of Custody Would Be Unlikely

Violence Against The Person

Murder

Manslaughter

Infanticide (Applies to infants aged under 12 months killed by the mother while of disturbed mind)

Homicide (Comprises murder, manslaughter and infanticide)

Attempted murder

Intentional destruction of a viable unborn child. Applies to the unborn child “capable of being born alive”. Previously termed “ Child destruction”.

Causing death by dangerous driving. (Limited to causing death by reckless driving between 1977 and 1991)

Causing death by careless driving when under the influence of drink or drugs.

More serious wounding or other act endangering life. (Includes, amongst other offences, wounding with intent to do grievous bodily harm (section 18 of the Offences against the Person Action 1861)).

Causing death by aggravated vehicle taking.

Other Violence Against The Person

Threat or conspiracy to murder.

Causing or allowing death of a child or vulnerable person.

Endangering a railway passenger.

Endangering life at sea. (some offences included)

Less serious wounding, including:

Wounding, inflicting grievous bodily harm, and assault occasioning actual bodily harm. This means non-intentional GBH is included as well as all assaults involving minor injury.

Other possession of weapons.

Other firearm offences.

Other knife offences.

Harassment.

Includes the summary offences of

Harassment;

Harassment, alarm or distress;

Fear or provocation of violence; and

Putting people in fear of violence

Racially or religiously aggravated less serious wounding

Racially or religiously aggravated harassment

Cruelty to and neglect of children.

Abandoning a child under the age of two years.

Child abduction.

Procuring illegal abortion.

Assault without injury on a constable.

Assault without injury including:

Common assault and battery: includes involving no injury.

Racially or religiously aggravated assault without injury.

Sexual Offences

All those who are currently on the sex offenders register, either for the current crime or any previous crime

Most serious sexual crime

Indecent assault on a male-with effect from May 2004 split into:

Sexual assault on a male aged 13 and over

Sexual assault on a male child under 13.

Rape of a female-with effect from May 2004 split into:

Rape of a female aged 16 and over.

Rape of a female child under 16.

Rape of a female child under 13.

Rape of a male-with effect from May 2004 split into:

Rape of a male aged 16 and over.

Rape of a male child under 16.

Rape of a male child under 13.

Indecent assault on a female-with effect from May 2004 split into:

Sexual assault on a female aged 13 and over.

Sexual assault on a female child under 13.
Unlawful sexual intercourse with a girl under 13-up until May 2004.
Sexual activity involving a child under 13-with effect from May 2004.
Unlawful sexual intercourse with a girl aged under 16 – repealed with effect from May 2004.
Causing sexual activity without consent – with effect from May 2004.
Sexual activity involving a child under 16 – with effect from May 2004.
Sexual activity etc. with a person with a mental disorder – with effect from May 2004.
Abuse of children through prostitution and pornography – with effect from May 2004.
Trafficking for sexual exploitation – with effect from May 2004.
Gross indecency with a child – repealed with effect from May 2004.

Other sexual offences

Buggery – repealed with effect from May 2004.
Gross indecency between males – repealed with effect from May 2004.
Incest or familial sexual offences - previously termed " Familial sexual offences".
Exploitation of prostitution.
Abduction of a female – repealed with effect from May 2004. Previously termed "Abduction".
Soliciting of women by men.
Abuse of position of trust of a sexual nature – with effect from May 2004. Previously termed "Abuse of trust" and Abuse of position of trust".
Sexual grooming – with effect from May 2004.
Other miscellaneous sexual offences.

Robbery

Key elements of the offence of robbery (section 8 of the Theft Act 1968) are stealing and the use of force immediately to do so, and in order to do so.
All offences.

Burglary

(Entering a building as a trespasser in order to steal)
All offences relating to domestic property

Other Theft offences

Profiting from or concealing knowledge of the proceeds of crime.

Criminal damage

Arson

Drug Offences

All drug offences except minor possession

Other Miscellaneous offences

Blackmail

Kidnapping

Treason

Riot

Violent disorder

Absconding from lawful custody

Home Office

Regulation 24AA of the Immigration (European Economic Area) Regulations 2006

Version 3.0

07 January 2016

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Section 1: introduction

Purpose

1.1 This guidance explains to case owners how to consider certifying the removal of an EEA national under regulation 24AA of the Immigration (European Economic Area) Regulations 2006. This guidance applies to any EEA national or non-EEA national with enforceable EU law rights, where a decision has been taken to remove under regulation 19(3)(b) of the EEA Regulations and the person could appeal or has a pending appeal against that decision.

Regulations

1.2 Regulation 24AA of the EEA Regulations came into force on 28 July 2014. It reads:

> **"Human rights considerations and interim orders to suspend removal**
>
> **24AA.** (1) This regulation applies where the Secretary of State intends to give directions for the removal of a person ("P") to whom regulation 24(3) applies, in circumstances where—
>
> (a) P has not appealed against the EEA decision to which regulation 24(3) applies, but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); or
>
> (b) P has so appealed but the appeal has not been finally determined.
>
> (2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).
>
> (3) The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.
>
> (4) If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken, except—
>
> (a) where the expulsion decision is based on a previous judicial decision;

(b) where P has had previous access to judicial review; or

(c) where the removal decision is based on imperative grounds of public security.

(5) In this regulation, “finally determined” has the same meaning as in Part 6.”

1.3 Regulation 29AA came into force on the same date and reads:

Temporary admission in order to submit case in person

29AA. (1) This regulation applies where—

(a) a person ("P") was removed from the United Kingdom pursuant to regulation 19(3)(b);

(b) P has appealed against the decision referred to in sub-paragraph (a);

(c) a date for P's appeal has been set by the First Tier Tribunal or Upper Tribunal; and

(d) P wants to make submissions before the First Tier Tribunal or Upper Tribunal in person.

(2) P may apply to the Secretary of State for permission to be temporarily admitted (within the meaning of paragraphs 21 to 24 of Schedule 2 to the 1971 Act, as applied by this regulation) to the United Kingdom in order to make submissions in person.

(3) The Secretary of State must grant P permission, except when P's appearance may cause serious troubles to public policy or public security.

(4) When determining when P is entitled to be given permission, and the duration of P's temporary admission should permission be granted, the Secretary of State must have regard to the dates upon which P will be required to make submissions in person.

(5) Where—

(a) P is temporarily admitted to the United Kingdom pursuant to this regulation;
(b) a hearing of P's appeal has taken place; and
(c) the appeal is not finally determined,

P may be removed from the United Kingdom pending the remaining stages of the redress procedure (but P may apply to return to the United Kingdom to make submissions in person during the remaining stages of the redress procedure in accordance with this regulation).

(6) Where the Secretary of State grants P permission to be temporarily admitted to the United Kingdom under this regulation, upon such admission P is to be treated as if P were a person refused leave to enter under the 1971 Act for the

purposes of paragraphs 8, 10, 10A, 11, 16 to 18 and 21 to 24 of Schedule 2 to the 1971 Act.

(7) Where Schedule 2 to the 1971 Act so applies, it has effect as if—

(a) the reference in paragraph 8(1) to leave to enter were a reference to admission to the United Kingdom under these Regulations; and

(b) the reference in paragraph 16(1) to detention pending a decision regarding leave to enter or remain in the United Kingdom were to detention pending submission of P's case in person in accordance with this regulation.

(8) P will be deemed not to have been admitted to the United Kingdom during any time during which P is temporarily admitted pursuant to this regulation.]

Background

1.4 The Immigration (European Economic Area) (Amendment) (No.2) Regulations 2014 amended the Immigration (European Economic Area) Regulations 2006 so that an appeal against a deportation decision under regulation 19(3)(b) of the EEA Regulations will suspend removal proceedings, unless the SSHD has exercised her discretion to certify removal. The SSHD can certify removal if the person's deportation before the conclusion of any appeal proceedings would not give rise to a real risk of serious irreversible harm or otherwise be unlawful under section 6 of the Human Rights Act 1998. If removal has been certified, it will only then be suspended if the person subject to removal has made an application to the courts for an interim order to suspend removal proceedings (e.g. judicial review) and that application has not yet been determined, or a court has made an interim order to suspend removal.

1.5 The application of a regulation 24AA certificate does not prevent a person from lodging an appeal from within the UK; rather, by amending regulation 29 of the EEA Regulations, it limits the suspensive effect of that appeal. So, whilst a person may lodge an appeal in-country, the lodging of such an appeal does not suspend removal from the UK, provided the removal is certified. The amended EEA Regulations also do not impact on the period allowed for voluntary departure, and a person liable to deportation pursuant to the EEA Regulations still has one month in which to leave the UK voluntarily before removal is enforced, although the one month period to leave voluntarily will not apply in certain cases, including where the person is detained pursuant to the sentence or order of any court (regulation 24(6)(c)).

1.6 Regulation 24AA applies to:

- a person who appeals in time against an EEA deportation decision, where that appeal has not been finally determined
- a person who has not appealed against an EEA deportation decision but would be entitled to do so from within the UK (this does not include out of time appeals)

1.7 The amended EEA Regulations also allow a person who was deported under regulation 19(3)(b) before his or her appeal was finally determined to apply from outside the UK for permission to re-enter the UK solely in order to make submissions in person at his or her appeal hearing (regulation 29AA).

1.8 The Nationality, Immigration and Asylum Act 2002 was also changed on 28 July 2014 to allow non-suspensive appeals in certain non-EEA cases, although the power is different. Separate guidance is available for those cases: guidance on section 94B of the Nationality, Immigration and Asylum Act 2002.

Case law

1.9 As explained above, regulation 24AA is similar to section 94B of the Nationality, Immigration and Asylum Act 2002. The leading judgment on section 94B is Kiarie and Byndloss v SSHD [2015] EWCA Civ 1020, which was handed down by the Court of Appeal on 13 October 2015. This guidance has been updated to reflect the changes made to the section 94B guidance as a result of the judgment in Kiarie and Byndloss.

Section 55 duty

1.10 The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK, means that a child's best interests are a primary consideration in deportation cases. Specific guidance on section 55 in the context of regulation 24AA is set out in section 3 of this guidance.

Section 2: cases not suitable for regulation 24AA certification

2.1 A case cannot be certified under regulation 24AA where removal for a limited period pending the outcome of an appeal would be unlawful under section 6 of the Human Rights Act 1998.

2.2 A case does not need to be certified under regulation 24AA where the appeal made under the EEA Regulations is based only on grounds that have already been determined in another appeal and therefore regulations 26(4) and 26(5) apply.

Regulation 26(4) states:

> "A person may not bring an appeal under these Regulations on a ground certified under paragraph (5) or rely on such a ground in an appeal brought under these Regulations."

Regulation 26(5) states:

> "The Secretary of State or an immigration officer may certify a ground for the purposes of paragraph (4) if it has been considered in a previous appeal brought under these Regulations or under section 82(1) of the Nationality, Immigration and Asylum Act 2002" ("the 2002 Act").

2.3. Decisions to remove pursuant to regulation 19(3)(b) where the person is serving a determinate-length sentence where release is at the discretion of the Parole Board will not normally be suitable for regulation 24AA certification. This includes those who were:

- sentenced in accordance with the Discretionary Conditional Release Scheme (DCR) under the Criminal Justice Act 1991
- given an Extended Sentence for Public Protection (EPP)
- given an Extended Determinate Sentence (EDS)

2.4 The list of cases in 2.3 above is not exhaustive. These cases are not normally suitable for regulation 24AA certification because applying regulation 24AA to these cases may be counterproductive.

The Parole Board will have made a decision about release based on the person's removal rather than the possibility that he or she may return to the UK if any appeal is successful. Consequently, there would be no provision to recall to prison in the event of such return even if the Parole Board would otherwise have deemed it to be appropriate, or to impose licence conditions. These cases are not excluded from the scope of certification under regulation 24AA.

Extradition cases are not normally suitable for certification on the grounds that the person will be unable to return for their hearing and may be unable to conduct their

case from abroad while in custody. Consideration must be given to all such cases on an individual basis about whether or not it is appropriate to apply regulation 24AA.

2.5 Where the person is a child (under the age of 18), the decision to remove under regulation 19(3)(b) will have considered regulation 21(4)(b) which means that either there are imperative grounds of public security or removal is in the child's best interests. Such decisions will not normally be suitable for regulation 24AA certification. Nevertheless, children are not excluded from the scope of certification under regulation 24AA and case owners must consider all such cases on an individual basis and having regard to the children's duty under section 55 of the Borders, Citizenship and Immigration Act 2009 (see Section 55 children's duty guidance) as to whether it is appropriate to apply regulation 24AA.

2.6 Decisions to remove pursuant to regulation 19(3)(b) where the person has a permanent right to reside and the person has not been sentenced to a period of imprisonment of at least 4 years will not normally be suitable for regulation 24AA certification. Consideration of whether or not it is appropriate to certify must be given to all cases on an individual basis.

2.7 Where a decision has to be served to file because the person's whereabouts are not known, the case is not suitable for certification under regulation 24AA.

Section 3: regulation 24AA consideration process

3.1 The government's policy is that the removal process should be as efficient and effective as possible. Case owners must therefore consider whether regulation 24AA certification is appropriate in all cases where removal is pursued under regulation 19(3)(b), unless it is a case to which section 2 of this guidance applies (and indeed certification should also be considered in relation to the cases set out at paragraphs 2.3 to 2.7 of this guidance).

3.2 In doing so, case owners must consider all relevant factors in the round, and in particular:

- the best interests of any children who may be, or it is claimed may be, affected by the decision to remove, in compliance with section 55
- whether there is a real risk of serious irreversible harm to the person being removed pending the outcome of any appeal they may bring
- whether there is a real risk of serious irreversible harm to any individual, for example family members, that the person to be removed claims would be affected by their removal pending the outcome of any appeal
- if there is not a real risk of serious irreversible harm to the person to be removed or anyone else that such person claims would be affected by their removal, would that person's removal pending the outcome of any appeal breach their rights under the European Convention on Human Rights (ECHR) for any other reason
- whether there would be a breach of the ECHR rights of any individual, for example family members, that the person to be removed claims would be affected by their removal pending the outcome of any appeal
- where the person to be removed makes representations or provides evidence as to procedural unfairness, whether a non-suspensive appeal would be procedurally unfair in the particular circumstances of the case
- any request the person to be removed makes for discretion to be exercised in their favour
- whether it is appropriate in all the circumstances to certify the case so that the appeal is non-suspensive of removal

3.3 The fact that it has been decided in an individual case that removal would not breach the ECHR does not mean that the case owner can be satisfied that removal for a limited period pending the outcome of any appeal would not breach that person's human rights. They are separate considerations. When considering

whether removal pending the outcome of any appeal would breach the ECHR, case owners should assess the question on the basis that the person's appeal will succeed and consider whether serious irreversible harm or a breach of ECHR rights would be caused by that temporary removal from the UK.

3.4 For further human rights guidance see Considering human rights claims and Criminality guidance for Article 8 ECHR cases. As explained above, guidance must be applied in the context of temporary removal pending the outcome of an appeal rather than long-term removal.

3.5 In considering whether to certify a case under regulation 24AA, case owners must have regard to all known circumstances and consider all relevant information. This means any evidence submitted specifically about the prospect of a non-suspensive appeal (for example, in response to a notice of liability to deportation, a decision to make a deportation order or a section 120 notice) and any evidence that is already on file or submitted in any other context. Any reference to 'available information' below refers to such evidence. For the avoidance of doubt, information that would only be available if the case owner undertakes additional research or makes additional enquiries is not 'available information' and does not need to be sought. However, if it is sought on the basis of the individual circumstances of the case, it should then form part of the consideration.

Section 55 duty

3.6 When considering whether to certify a case pursuant to regulation 24AA, the best interests of any child under the age of 18 whom the available information suggests may be affected by the removal decision must be a primary consideration. Case owners must carefully consider all available information and evidence to determine whether or not it is in the child's best interests for the person liable to removal under regulation 19(3)(b) to be able to remain in the UK until the conclusion of any appeal. This is particularly relevant in considering whether removal pending the outcome of any appeal would cause serious irreversible harm to the child. The case owner must also consider whether those interests are outweighed by the reasons in favour of certification in the individual case, including the public interest in effecting removal quickly and efficiently.

3.7 Case owners must carefully assess the quality of any evidence provided in relation to a child's best interests. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions about a child's best interests or copies of documents.

3.8 For further guidance in relation to the section 55 duty, see:

- Section 55 children's duty guidance
- Introduction to children and family cases
- Criminality guidance for Article 8 ECHR cases

Removal pending appeal and the Human Rights Act 1998

3.9 Case owners can only certify under regulation 24AA if satisfied that removal pending the outcome of any appeal would not be unlawful under section 6 of the Human Rights Act. This means that case owners need to consider whether removing a person before his or her appeal is finally determined would breach the ECHR.

3.10 The following steps set out how to consider whether requiring a person to appeal from outside the UK would breach the ECHR:

3.11 Which articles has the person raised either explicitly or implicitly, as grounds against removing him or her from the UK? The most common types of claims are based on Article 8 (right to respect for private and family life) and Article 6 (right to a fair trial, which also includes the right to participate in civil proceedings such as family court proceedings), but case owners need to be alert to any Convention rights which may be engaged by removal pending the outcome of an appeal.

3.12 When considering whether removing a person before his or her appeal is finally determined would breach the ECHR, case owners must consider whether removal for that limited period of time until the appeal is concluded would result in a real risk of serious irreversible harm. The serious irreversible harm test is derived from the test applied by the European Court of Human Rights (ECtHR) in immigration cases to determine whether to issue a ruling under rule 39 of the Rules of Court, preventing a signatory State from removing a foreign national from its territory. In the context of regulation 24AA, the test for certification is that removal pending the outcome of any appeal would not be unlawful under section 6 of the Human Rights Act and the absence of a real risk of serious irreversible harm is only one relevant factor.

3.13 The term ‘real risk’ is a relatively low threshold. It has the same meaning as when used to decide whether removal would breach Article 3 of the ECHR. As explained in Considering human rights claims, in practice this is the same standard of proof as in asylum cases – a reasonable degree of likelihood. See section 5.2 of Assessing credibility and refugee status for further guidance on the standard of proof.

3.14 The terms ‘serious’ and ‘irreversible’ must be given their ordinary meanings. ‘Serious’ indicates that the harm must meet a minimum level of severity, and ‘irreversible’ means that the harm would have a permanent or very long-lasting effect.

3.15 It will not normally be enough for the evidence to demonstrate a real risk of harm which would be either serious or irreversible – it needs to be both serious and irreversible.

3.16 If the person claims that removal, or removal pending the conclusion of any appeal, would breach Article 8 of the ECHR, case owners must consider the effect of removal not only on the person liable to removal, but also on any other person whom

the available evidence suggests will be affected by the person's removal (for example, immediate family members such as a partner and/or children).

3.17 By way of example, in the following scenarios where a person is removed before his or her appeal is determined, it is unlikely, in the absence of additional factors, that there would be a real risk of serious irreversible harm, or that there would otherwise be a breach of the ECHR, while a non-suspensive appeal is in progress (case owners must note that this is an indicative list and not prescriptive or exhaustive):

- a person will be separated from his or her partner for several months while appealing against the removal decision
- there is no current subsisting family relationship with a child and although a family court case is in progress to obtain access there is no evidence that the case could not be pursued while the person is abroad
- a child or partner is undergoing treatment for a medical condition in the UK that can be satisfactorily managed through medication or other treatment and does not require the person liable to removal to act as a carer
- a person has strong private life ties to a community that will be disrupted by deportation (eg. a job, a mortgage, a prominent role in a community organisation etc)

3.18 The following are examples (as with the preceding paragraph, indicative only and not prescriptive or exhaustive) of when removal pending the outcome of any appeal might give rise to a real risk of serious irreversible harm or otherwise breach the ECHR:

- the person has a genuine and subsisting relationship with a partner or parental relationship with a child who is seriously ill and requires full-time care, and there is credible evidence that no one else could provide that care
- the person being removed is the sole carer of a British citizen child who is at school and the child would have no choice but to accompany the parent to live abroad until any appeal is concluded, resulting in a significant interruption to his or her education
- the person to be deported is subject to a court order for a trial period of contact with his or her child, the outcome of that trial period will determine the future contact between that person and the child, and that future contact could affect the outcome of the appeal – if removal pending the outcome of the appeal would prevent that person undertaking the trial period of contact, this may amount to serious irreversible harm
- the person has a serious medical condition and medical treatment is not available, or would be inaccessible to the person, in the country of return, such that removal pending appeal gives rise to a risk of a significant deterioration in the person's health (note the conclusion of the Court of Appeal in the Secretary of State for the Home Department v Dumliauskas and others [2015] EWCA Civ 145 at [53]: "in the absence of evidence, it is not to be assumed that medical services and support for, by way of example, reforming drug addicts, are materially different in other Member States from those available here.")

- there is credible evidence that the person would, due to reasons outside his or her control, be prevented from exercising his or her right to an appeal (effectively or at all) against the removal decision – for example, where the person suffers from a serious mental health condition or serious physical disability that would prevent them from effectively pursuing their appeal without the support of their carers in the UK (and where they will not be able to access the necessary assistance from abroad). See also procedural protection below.

3.19 In considering whether there is a real risk of serious irreversible harm or removal pending the outcome of any appeal would otherwise breach the ECHR, case owners need to have regard to all known circumstances and to consider all relevant information. This includes any evidence submitted specifically about the prospect of a non-suspensive appeal (for example, in response to a notice of liability to deportation, a decision to make a deportation order or a section 120 notice) and any evidence that is already on file or submitted in any other context.

3.20 Case owners must carefully assess the quality and substance of any evidence available. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions or copies of documents. There is no prescribed evidence to be submitted, but examples of relevant evidence might include:

- where a person claims that they or a family member have a medical condition, a signed and dated letter on letter-headed paper from the GP or other medical professional responsible for providing care setting out relevant details including diagnosis, treatment, prognosis and fitness to travel
- a family court order or similar showing that family court proceedings have been instigated, are in progress or have been completed
- birth, marriage or civil partnership certificates
- documentary evidence from official sources demonstrating long-term co-habitation, etc

3.21 In the context of an Article 8 claim, case owners must also consider the public interest in requiring a person to appeal from abroad. The Court of Appeal held in Kiarie and Byndloss v SSHD [2015] EWCA Civ 1020:

> "44. In general terms, and subject to specific factors such as risk of reoffending, it may be thought that less weight attaches to the public interest in removal in the context of section 94B, when the only question is whether the person should be allowed to remain in the United Kingdom for an interim period pending determination of any appeal, than when considering the underlying issue of deportation for the longer term. But the very fact that Parliament has chosen to allow removal for that interim period, provided that it does not breach section 6 of the Human Rights Act, shows that substantial weight must be attached to that public interest in that context too: Parliament has carried through the policy of the deportation provisions of the UK Borders Act 2007 into section 94B. In deciding the issue of proportionality in an article 8 case, the public interest is not a trump card but it is an important consideration in favour of removal".

3.22 Although the Court of Appeal was considering section 94B, the principle applies equally to regulation 24AA, because both provisions are considering the proportionality of removal within the context of section 6 of the Human Rights Act 1998.

Human rights procedural protection

3.23 ECHR rights, such as Article 8, have a procedural aspect which means that a breach of that right can arise where there is no effective procedural protection. Procedural protection means access to an effective remedy by way of a mechanism to challenge a refusal decision. Whether a person has an effective remedy is relevant to whether it is lawful to certify a case under regulation 24AA. If a non-suspensive appeal means that the person cannot access a fair and effective appeal process, removal pending the final determination of the appeal will be a breach of section 6 of the Human Rights Act and the case cannot be certified under regulation 24AA.

3.24 A non-suspensive appeal may be less advantageous to the person. That does not mean that it would be a breach of their Convention rights. An effective remedy does not require the appellant to have access to the best possible appellate procedure or even to the most advantageous procedure available. It requires access to a procedure that meets the essential requirements of effectiveness and fairness. The question to be answered is whether the non-suspensive appeal can be determined effectively and without obvious unfairness.

Process and consideration

3.25 When a notice of liability to deportation is served, the person is invited to make representations as to why they should not be removed prior to the final determination of their appeal. If no representations are made the case owner does not need to consider whether a non-suspensive appeal will meet the procedural requirements. Case owners do not need to make proactive enquiries, or proactively to investigate the circumstances of a person to establish whether they can have a fair and effective non-suspensive appeal. It is for the person to raise those points.

3.26 If representations are made about why a person's appeal should be suspensive of removal, they must be carefully considered. If, notwithstanding such representations, the claim is certified under regulation 24AA, that consideration must be set out in the decision letter. Where representations about a non-suspensive appeal are made, the principles under which they must be considered are that:

- a non-suspensive appeal is generally fair
- the person is entitled to lodge an appeal, with or without legal representation, before they leave the UK
- regulation 24(6) provides that a person who is liable to removal pursuant to regulation 19(3)(b) shall be allowed one month to leave the UK voluntarily beginning on the date of the decision to remove them before removal is

enforced, although the one month period to leave voluntarily will not apply in certain cases, including where the person is detained pursuant to the sentence or order of any court. A person could use this time to make arrangements for the continuation of the appeal even though they will leave the UK before it is determined, including but without limitation by giving instruction to a legal representative or seeking assistance from family members in the UK

- oral evidence from the appellant and/or attendance at the appeal by the appellant are not generally required for an appeal to be fair and effective

- regulation 29AA provides that a person whose case is certified under regulation 24AA may apply for temporary admission to the UK in order to attend the appeal hearing in person (see section 5 for further guidance on re-entry to attend the appeal hearing in person, and on regulation 29AA)

- the SSHD is entitled to rely on the specialist immigration judges within the tribunal system to ensure that the person is given effective access to a remedy against the decision

3.27 The person may make representations to the effect that, despite the powers of the Tribunal to secure a fair and effective appeal, their personal circumstances mean that they would not be able to access a fair and effective remedy.

Examples of the steps the Tribunal could take to ensure a fair and effective appeal where the appellant is outside the UK (for example, if the person does not make an application under regulation 29AA for temporary admission to the UK in order to attend the appeal hearing in person, or if such an application is refused on the basis that their appearance may cause serious troubles to public policy or public security) are to:

- consider whether the appeal can be fairly determined without the appellant giving oral evidence, including considering any written evidence submitted by the appellant, documentary evidence and oral or written evidence from family members, friends and others

- consider an application from the appellant to give oral evidence via video-link, Skype or telephone and make the necessary arrangements to overcome any practical difficulties if it considers that such evidence is necessary for the fair determination of the appeal

- summon the appellant to attend as a witness – the Tribunal may take this step if it has decided that it is necessary for the appellant to give oral evidence in the appeal in order for it to be fairly determined and it is not possible to receive evidence by video-link or other means of electronic communication, or if the Tribunal decides for some other reason that the appellant must attend the appeal in person in order for it to be fairly determined. A summons does not amount to an enforceable direction to the SSHD to permit the appellant to return to the UK. However if the SSHD does not permit the appellant to return to the UK in these circumstances, the Tribunal may draw inferences in the

appellant's favour. Moreover, any decision not to return the appellant to the UK in these circumstances may be vulnerable to challenge by judicial review on basis that it is unreasonable.

3.28 The following are examples of representations that will not, without more, amount to personal circumstances which mean that the powers of the Tribunal will be insufficient to secure a fair and effective appeal:

- a desire to participate in the proceedings, including to give oral evidence or to attend the appeal
- an inability to communicate with ease with family members or legal representatives to prepare the appeal
- the cost, availability or reliability of internet or telephone use in the country to which the person is to be removed
- complexity of legal proceedings and inability to afford legal representation;
- the cost, availability or reliability of video-link, for the purpose of participating in and/or giving oral evidence at the appeal, in the country to which the person is to be removed
- the person is disabled to the extent that they cannot instruct legal representatives or liaise with family members or others who will give evidence in the appeal, but the person has family members or others who can assist them in the country to which they are to be removed

3.29 The following are examples of representations that may amount to personal circumstances which mean that the powers of the Tribunal will be insufficient to secure a fair and effective appeal:

- the person is disabled or otherwise personally incapable of giving instructions to legal representatives or communicating with family members or others who will give evidence in the appeal, and there is no one who can assist the person with such instructions or communications in the country to which they are to be removed
- the accepted absence of a route by which the person could return to the UK if the Tribunal considered that his or her presence at the appeal was necessary for it to be fair

This list is not exhaustive. Case owners should discuss with their senior caseworker any case where they are considering not certifying under regulation 24AA as a result of representations about procedural fairness.

Discretion

3.30 If satisfied that there is not a real risk of serious irreversible harm and that removal pending the outcome of any appeal would not otherwise breach the ECHR, case owners must consider whether there is any other compelling reason not to certify. Regulation 24AA is a discretionary power, meaning that it does not have to be applied in all cases where removal pending the outcome of any appeal would not breach the ECHR. In each individual case, case owners must be satisfied that it is appropriate in all the circumstances to certify. Exercising discretion should be

considered where the person is not currently removable. It would be counterproductive to certify if the person could not then leave the UK to exercise a right of appeal, for example there is no realistic prospect of an acceptable travel document or other return information required for biometric returns being available.

3.31 Case owners must consider any request to exercise discretion not to certify, even in the event that removal pending the outcome of any appeal would not breach the ECHR. But in the absence of specific representations, and where there are no particular factors that would justify the exercise of discretion, it is not necessary to give reasons in the decision letter for not exercising discretion in favour of a person liable to removal pursuant to regulation 19(3)(b).

Timing of certification

3.35 A certificate under regulation 24AA should be applied after a removal decision is made under regulation 19(3)(b). Only once both decisions have been undertaken (and depending on the outcome of those assessments) should the case owner consider removal directions. Regulation 24AA is clear that a certification decision must be made before any consideration is given to the setting of removal directions.

3.36 It is possible to certify under regulation 24AA at any stage in the process as long as the person has not exhausted their appeal rights. In practice, this means that if a case is not certified at the initial decision stage, and either party challenges the decision of the First-tier Tribunal (or that of the Upper Tribunal), the case owner must consider whether it is appropriate to certify the case before it is heard by the Upper Tribunal (or the Court of Appeal).

3.37 In this situation, case owners must consider whether it is appropriate in all the circumstances, including the factors set out in this guidance, to certify, including the public interest in effecting removal as quickly as possible, the stage the appeal has reached, the reasons for not certifying when the decision to remove was made and any other relevant factors. If, for example, the only reason for not certifying was that a travel document was not available, and one has since been obtained, the question of whether to certify should be considered again in line with this guidance.

3.38 If it is decided to certify at any stage after the person has lodged an appeal, the case owner must provide prompt written notification to both the person to be removed (or their legal representative) and the relevant Court or Tribunal.

Peer review process

3.39 All decision letters which certify a case under regulation 24AA should be subject to a peer review process prior to service of the decision. The peer review can be conducted by another case owner, a senior caseworker or a chief caseworker as deemed appropriate by the casework unit and must be recorded in CID notes and on the case file.

3.40 Decisions not to certify under regulation 24AA should also be subject to a peer review process which can be by way of conversation or consideration minute as long as the review is recorded in CID notes and on the case file.

Reasons for decision

3.41 Reasons for the certification decision, including decisions not to certify, and a record of the peer review must be clearly set out in CID notes and on the case file. This is because a decision to certify (whether it is made at the same time as the decision to remove, or later on in the appeal process) can be challenged by judicial review and the Home Office may be required to provide records of each stage of the decision-making process.

Decisions served to file

3.42 Where a decision has to be served to file because the person's whereabouts are not known, case owners should not certify under regulation 24AA. Should the person later come to light, the question of whether to certify can be considered in line with this guidance. See 'Serving decisions on file' for guidance on service to file

Decisions not to certify

3.43 A decision not to certify a case under regulation 24AA is not a concession that the SSHD is satisfied that removal pending the outcome of any appeal would give rise to a real risk of serious irreversible harm or otherwise be unlawful under section 6 of the Human Rights Act.

Section 4: interim orders

4.1 Regulation 24AA establishes that removal may not be enforced if:

- the person has made an application for an interim order to suspend removal proceedings (for example, through judicial review)
- that application has not yet been determined, or has been determined in favour of the applicant

4.2 Regulation 24AA lists certain exemptions where an application for an interim order will not suspend removal proceedings (as established by Article 31(2) of the Free Movement Directive (2004/38/EC)). An application for an interim order will not suspend removal proceedings if either:

- the notice of a decision to make a deportation order is based on a previous judicial decision
- the person has had previous access to judicial review
- the removal decision is based on imperative grounds of public security

4.3 If the person is removed from the UK pursuant to regulation 19(3)(b) at any stage after the person has lodged an appeal then the case owner must notify the relevant Court or Tribunal.

4.4 Where a Court or Tribunal makes an interim order suspending removal, removal will not be possible even if one of the criteria outlined in paragraph 4.2 are met. In these circumstances, case owners should contact Litigation Operations (Criminality, Detention and International) to arrange making an application to the court which granted the interim relief to have the effect of the interim order lifted.

Section 5: appeals

Appeals lodged from within the UK

5.1 Where a removal decision is taken pursuant to regulation 19(3)(b) of the EEA Regulations, the person can lodge an appeal against that decision while still in the UK, provided the relevant time limits are met. The lodging of an appeal does not suspend removal (subject to limited exceptions – see section 4 of this guidance). A person can also lodge an appeal against a decision taken pursuant to regulation 19(3)(b) from outside the UK provided the relevant time limits are met.

Re-entry to present appeal in person

5.2 Article 31(4) of the Free Movement Directive (2004/38/EC) states that, "Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory".

5.3 Regulation 29AA reflects the requirements of Article 31(4), and establishes a process whereby a person who has lodged an appeal against a removal decision and who has been removed from the UK may apply from outside the UK for permission to be temporarily admitted to the UK solely for the purpose of making submissions in person at his or her appeal hearing.

5.4 Case owners must ensure that the person is notified of the means by which he or she can make such an application. Caseworkers should use the following wording unless it is necessary to do otherwise:

> "Pursuant to regulation 29AA of the Immigration (European Economic Area) Regulations 2006 (as amended) you may apply from outside the UK for permission to re-enter the UK in order to make submissions in person at your appeal hearing, if you meet the following conditions:
>
> - you appealed within time against the notice of a decision to make a deportation order;
> - you were removed from the UK pursuant to regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 before your appeal was finally determined;
> - a date for your appeal has been set; and
> - you want to make submissions before the First-tier Tribunal or Upper Tribunal in person.
>
> You should not apply for permission to re-enter unless you have been given a date for your appeal hearing by the Immigration and Asylum Tribunal, and you should provide us with evidence of the date of your appeal hearing.

It is your responsibility to notify the relevant Tribunal of your location and contact details and to update the Tribunal in the event of any changes to your location and contact details.

If you meet these criteria then you may apply for permission to re-enter the UK. You can make this application by contacting Immigration Enforcement at [insert email address].

Permission may not be granted if the Secretary of State considers that your presence would cause serious troubles to public policy or public security.

You must apply for permission in advance of attempting to re-enter the UK or you will be refused admission at the UK border.

If permission is granted, it will be a temporary admission pursuant to Schedule 2 to the Immigration Act 1971. If you were removed under the Early Removal Scheme then you will be recalled to prison if you are admitted to the UK before the expiry of your sentence. In any other case you are liable to be held in immigration detention for the duration of your stay.

You must leave the UK immediately after your appeal hearing or you will be enforcedly removed.

In the case of any subsequent hearing at which you wish to submit your case in person, you must apply again for permission to re-enter.

Any return to the United Kingdom is entirely at your own cost. If you have insufficient funds (through any available means) to return to the United Kingdom (by any available mode of transport) to attend your appeal in person (were permission to be granted) then the Home Office may consider whether assistance can be made available to you, though this will only be considered in the event that permission is granted and only if documentary evidence demonstrating inability to fund return (through any means) or destitution is provided."

5.5 Under regulation 29AA the Secretary of State must grant such permission, except where the person's re-admission for the purpose of appearing and making submissions at their appeal hearing may cause serious troubles to public policy or public security. The Secretary of State's power to detain an individual upon their return to the UK for the purpose of attending their hearing cannot be seen to limit any "serious troubles to public policy or public security" that individual may cause.

5.6 Where permission has been granted under regulation 29AA for a person to return to the UK to attend their appeal hearing in person, the case owner must consider any application for financial assistance that is made. Financial assistance may be given if there is evidence that:

- the person is unable to fund their return (including the cost of leaving the UK again after the appeal hearing)
- there are no family members, friends or others who are able to assist

- the absence of funds creates a real and genuine barrier to return which would otherwise take place

Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions or copies of documents.

Successful appeals

5.7 Where a person's non-suspensive appeal succeeds, the deportation order will normally be revoked and the person may make arrangements to return to the UK.

5.8 If requested, consideration must be given to whether the Home Office should pay for the person's journey back to the UK.

5.9 In considering whether to pay for the person's journey back to the UK, regard should be had to the following factors:

- the quality of the Home Office's decision to remove pursuant to regulation 19(3)(b)
- whether the appeal was allowed on the basis of evidence or information that the person failed to submit to the Home Office in advance of their removal, despite a section 120 warning or other opportunity, and if so, whether there is any reasonable explanation for this
- whether there is compelling evidence that if the Home Office does not pay for the return journey the person would be unable to return to the UK

5.10 There is no prescribed evidence to be submitted, but examples of relevant evidence might include bank statements for the person and any family members. Case owners should also take into account any evidence pertaining to the financial circumstances of the person and any family members which was already available prior to deportation, and consider the person's general credibility.

5.11 Where it is considered that the Home Office should pay for the journey back to the UK, financial authority must be obtained and signed off at a sufficiently senior level within Criminal Casework, usually Assistant Director.

Section 6: change record

Changes from last version of this guidance

Version	Author(s)	Date	Change References
1.0	LS (CPT)	28/07/2012	First draft.
2.0	LC (CPT)	20/10/2014	Added section 1: introduction; added section 2: when not to certify; added section 5: re-entry to present appeal in person; added section 6: successful appeals; added section 7: change record.
3.0	LC / AO (FMMCU)	23/12/2015	Amendments made following changes to the EEA Regulations on 6 April 2015 and the judgment in Kiarie and Byndloss [2015] EWCA Civ 1020.

LAND BADEN-WÜRTTEMBERG v TSAKOURIDIS

BEFORE THE COURT OF JUSTICE (GRAND CHAMBER)

(C-145/09)

(Presiding, Skouris; Bonichot P.C., Svaby P.C.; Tizzano, Cunha Rodrigues (Rapporteur), Rosas, Malenovsky, Lohmus, Levits, Caoimh, Bay Larsen and Berger JJ.) Bot A.G.: November 23, 2010

[2011] 2 C.M.L.R. 11

Deportation orders; EU law; Germany; Public policy; Rights of entry and residence; Supply of drugs

H1 *Freedom of movement—free movement of persons—arts 16 and 28 Directive 2004/38—EU citizen having permanent right of residence in Member State—enhanced rights based on 10 years' residence—criminal conviction—drug trafficking—expulsion decision—serious grounds of public policy or public security—interruptions to 10-year residence period—absence from host Member State—duration and frequency of absences—justification of expulsion decision—imperative grounds of public security—seriousness of threat—internal and external security of Member State—legitimate aim of combating drug trafficking—social and economic danger—balance between exceptional threat to public security and fundamental rights of individual—proportionality of interference—use of drug justifying special measures against foreign nationals.*

H2 Reference from the *Verwaltungsgerichtshof Baden-Württemberg* (Germany) for a preliminary ruling under art.234 EC (now art.267 TFEU).

H3 The appellant in the main proceedings, T, was born in Germany in 1978 and had an unlimited residence permit in that country. In 2004, he worked in Greece for approximately six months before returning to Germany. In 2005 he returned to Greece to work and was arrested there pursuant to an international arrest warrant issued in Germany. He was transferred to Germany in 2007. T had previous criminal convictions for offences of assault. In 2007 he was convicted on eight counts of drug trafficking as part of an organised group and sentenced to six-and-a-half years' imprisonment. In 2008, the German administrative authorities determined that T had lost the right of entry and residence in Germany on the basis of national legislation which provided for the loss of such rights in the event of a person being sentenced to five years' imprisonment or more, as a consequence of which his expulsion from the State was justified on "imperative grounds of public security" under domestic law and art.28(3) of Directive 2004/38. In T's case, it was held that his personal conduct represented a genuine threat to public policy and that there was a real risk of his reoffending. Moreover, the authorities determined that

T's recent stay of several months in the territory of his Member State of origin meant that he would have no difficulty integrating himself there after his expulsion from Germany. T brought proceedings challenging the decision of the administrative authorities. The referring court ruled that a criminal conviction was not in itself a sufficient ground for the loss of right of entry and residence of an EU citizen, and that where person had resided in a State for more than 10 years the loss of such rights could only be ordered on imperative grounds of public security, which was a narrower concept than that of public policy and covered only the internal and external security of a Member State. The referring court accordingly stayed the proceedings and asked the Court for a preliminary ruling as to (i) to what extent absences from the host Member State during the 10-year period preceding the expulsion decision prevented a person from enjoying the enhanced protection laid down in art.28(3)(a) of the Directive; (ii) whether offences such as those of which T was convicted were covered by the concept of "imperative grounds of public security" for the purposes of art.28(3) or "serious grounds of public policy or public security" for the purposes of art.28(2).

Held:

Expulsion on grounds of public policy or public security

H4 Article 28(1) of Directive 2004/38 provided that, before taking an expulsion decision on grounds of public policy or public security, the host Member State had to take account in particular of considerations such as how long the individual concerned had resided on its territory, his or her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his or her links with the country or origin. Under art.28(2), EU citizens or their family members, irrespective of nationality, who had the right of permanent residence in the territory of the hose Member State pursuant to art.16 of the Directive could not be the subject of an expulsion decision "except on serious grounds of public policy or public security". In the case of EU citizens who had resided in the host Member State for the previous 10 years, art.28(3) considerably strengthened their protection against expulsion by providing that such a measure might not be taken except where the decision was based on "imperative grounds of public security, as defined by Member States". [26]–[28]

Circumstances capable of interrupting 10-year residence period

H5 Article 28(3) of the Directive was silent as to the circumstances which were capable of interrupting the period of 10 years' residence for the purposes of the acquisition of the right to enhanced protection laid down in that provision. As to whether absences from the host Member State during that period prevented the acquisition of such rights, an overall assessment had to be made of the person's situation on each occasion at the precise time when the question of expulsion arose. The national authorities responsible for applying art.28(3) were required to take all the relevant factors into consideration in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State. It had to be ascertained whether those absences involved the transfer to another State of the centre of the personal, family

or occupational interests of the person concerned. In addition to those factors, the fact that the person in question had been the subject of a forced return to the host Member State in order to serve a term of imprisonment there and the time spent in prison might be taken into account as part of the overall assessment required for determining whether the integrating links previously forged with the host Member State had been broken. [29], [32]–[34]

Justification of expulsion decision

H6 If the national court were to conclude that the appellant's absences from the host Member State were not such as to prevent him from enjoying enhanced protection, it would then have to examine whether the expulsion decision was based on imperative grounds of public security within the meaning of art.28(3). If it were concluded that a person such as the appellant who had acquired a right of permanent residence in the hose Member State did not satisfy the residence condition laid down in art.28(3), an expulsion measure could be justified on "serious grounds of public policy or public security" as laid down in art.28(2). [36]–[37]

Imperative grounds of public security

H7 The concept of "imperative grounds of public security" presupposed not only the existence of a threat to public security, but also that such a threat was of a particularly high degree of seriousness. Public security covered both a Member State's internal and external security and could be affected by a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful co-existence of nations, or a risk to military interests. [41], [43]–[44]

Sirdar v Secretary of State for Defence (C-273/97) [1999] E.C.R. I-7403; [1999] 3 C.M.L.R. 559; *Kreil v Germany* (C-285/98) [2000] E.C.R. I-69; [2002] 1 C.M.L.R. 36; *Albore, Re* (C-423/98) [2000] E.C.R. I-5965; [2002] 3 C.M.L.R. 10; *Dory v Germany* (C-186/01) [2003] E.C.R. I-2479; [2003] 2 C.M.L.R. 26; *Campus Oil Ltd v Minister for Industry and Energy* (72/83) [1984] E.C.R. 2727; [1984] 3 C.M.L.R. 544; *Fritz Werner Industrie-Ausrüstungen GmbH v Germany* (C-70/94) [1995] E.C.R. I-3189; *Commission of the European Communities v Greece* (C-398/98) [2001] E.C.R. I-7915, followed.

Objective of combating drug trafficking as part of organised group

H8 It did not follow that objectives such as the fight against crime in connection with dealing in narcotics as part of an organised group were necessarily excluded from the concept of public policy. In view of the devastating effects of crimes linked to drug trafficking, it was stated in recital 1 to Framework Decision 2004/757 that illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the European Union, and to the legal economy, stability and security of the Member States. Since drug addiction represented a serious evil for the individual and was fraught with social and economic danger to mankind, trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it. [45]–[47]

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Wolf v Hauptzollamt Düsseldorf (221/81) [1982] E.C.R. 3681; [1983] 2 C.M.L.R. 170, followed; *Aoulmi v France* (50278/99) (2008) 46 E.H.R.R. 1, considered.

Balance between exceptional threat to public security and fundamental rights of individual

H9 In the application of Directive 2004/38, a balance had to be struck between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision was to be made, by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity, and, if appropriate, the risk of reoffending on the one hand, and, on the other hand, the risk of compromising the social rehabilitation of the EU citizen in the State in which he had become genuinely integrated, which was not only in his interest but also in that of the European Union in general. The sentence passed had to be taken into account as one element in that complex of factors. A sentence of five years' imprisonment could not lead to an expulsion decision, as provided for in the national law at issue, without those factors being taken into account, which was for the national court to verify. [50]–[51]

Orfanopoulos v Land Baden-Württemberg (C-482/01 & C-493/01) [2004] E.C.R. I-5257; [2005] 1 C.M.L.R. 18; *R. v Bouchereau* (30/77) [1977] E.C.R. 1999; [1977] 2 C.M.L.R. 800, followed.

Proportionality of interference with fundamental rights to legitimate aim of protecting public security

H10 To assess whether the interference contemplated was proportionate to the legitimate aim pursued, in the present case the protection of public security, account had to be taken in particular of the nature and seriousness of the offence committed, the duration of residence of the person concerned in the host Member State, the period which had passed since the offence was committed and the conduct of the person concerned during that period, and the solidity of the social, cultural and family ties with the host Member State. In the case of an EU citizen who had lawfully spent most or even all of his childhood and youth in the host Member State, very good reasons would have to be put forward to justify the expulsion measure. [53]

Maslov v Austria (1638/03) (2008) 47 E.H.R.R. 20, considered.

Use of drugs justifying special measures against foreign nationals

H11 Given that a Member State might, in the interests of public policy, consider that the use of drugs constituted a danger for society such as to justify special measures against foreign nationals who contravened its laws on drugs, it had to follow that dealing in narcotics as part of an organised group was a fortiori covered by the concept of "public policy" for the purposes of art.28(2) of the Directive. [54]

Criminal proceedings against Calfa (C-348/96) [1999] E.C.R. I-11; [1999] 2 C.M.L.R. 1138, followed.

H12 **Cases referred to in the judgment:**

1 *Albore, Re* (C-423/98) [2000] E.C.R. I-5965; [2002] 3 C.M.L.R. 10
2 *Aoulmi v France* (50278/99) (2008) 46 E.H.R.R. 1

3 *Campus Oil Ltd v Minister for Industry and Energy* (72/83) [1984] E.C.R. 2727; [1984] 3 C.M.L.R. 544
4 *Commission of the European Communities v Greece* (C-398/98) [2001] E.C.R. I-7915; [2001] 3 C.M.L.R. 62
5 *Criminal proceedings against Calfa* (C-348/96) [1999] E.C.R. I-11; [1999] 2 C.M.L.R. 1138
6 *Dory v Germany* (C-186/01) [2003] E.C.R. I-2479; [2003] 2 C.M.L.R. 26
7 *Fritz Werner Industrie-Ausrüstungen GmbH v Germany* (C-70/94) [1995] E.C.R. I-3189
8 *Gintec International Import-Export GmbH v Verband Sozialer Wettbewerb eV* (C-374/05) [2007] E.C.R. I-9517; [2008] 1 C.M.L.R. 31
9 *Kreil v Germany* (C-285/98) [2000] E.C.R. I-69; [2002] 1 C.M.L.R. 36
10 *Maslov v Austria* (1638/03) (2008) 47 E.H.R.R. 20
11 *McB v E* (C-400/10 PPU) [2011] 1 F.L.R. 518
12 *Metock v Minister for Justice, Equality and Law Reform* (C-127/08) [2008] E.C.R. I-6241; [2008] 3 C.M.L.R. 39
13 *Orfanopoulos v Land Baden-Württemberg* (C-482/01 & C-493/01) [2004] E.C.R. I-5257; [2005] 1 C.M.L.R. 18
14 *R. v Bouchereau* (30/77) [1977] E.C.R. 1999; [1977] 2 C.M.L.R. 800
15 *Secretary of State for Work and Pensions v Lassal* (C-162/09) [2011] 1 C.M.L.R. 31
16 *Sirdar v Secretary of State for Defence* (C-273/97) [1999] E.C.R. I-7403; [1999] 3 C.M.L.R. 559
17 *Wolf v Hauptzollamt Düsseldorf* (221/81) [1982] E.C.R. 3681; [1983] 2 C.M.L.R. 170

H13 **Further cases referred to by the Advocate General:**

1 *Adoui v Belgium* (115/81 & 116/81) [1982] E.C.R. 1665; [1982] 3 C.M.L.R. 631
2 *ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)* (C-283/05) [2006] E.C.R. I-12041; [2007] I.L.Pr. 4
3 *Association Eglise de scientologie de Paris v The Prime Minister* (C-54/99) [2000] E.C.R. I-1335
4 *Belgium v Royer* (48/75) [1976] E.C.R. 497; [1976] 2 C.M.L.R. 619
5 *Bonsignore, Cologne v Oberstadtdirektor of the City of Cologne* (67/74) [1975] E.C.R. 297; [1975] 1 C.M.L.R. 472
6 *Boscher Studer et Fromentin Scp v British Motors Wright SA* (C-239/90) [1991] E.C.R. I-2023; [1994] 3 C.M.L.R. 410
7 *Commission of the European Communities v Finland* (C-54/05) [2007] E.C.R. I-2473; [2007] 2 C.M.L.R. 33
8 *Commission of the European Communities v France* (C-265/95) [1997] E.C.R. I-6959
9 *Commission of the European Communities v Germany* (C-441/02) [2006] E.C.R. I-3449
10 *Commission of the European Communities v Spain* (C-503/03) [2006] E.C.R. I-1097
11 *Criminal proceedings against Heinonen* (C-394/97) [1999] E.C.R. I-3599; [2000] 2 C.M.L.R. 1037
12 *Criminal proceedings against Leifer* (C83/94) [1995] E.C.R. I-3231

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13 *Criminal proceedings against Placanica* (C-338/04, C-359/04 & C-360/04) [2007] E.C.R. I-1891; [2007] 2 C.M.L.R. 25
14 *Falco Privatstiftung v Weller-Lindhorst* (C-533/07) [2009] E.C.R. I-3327
15 *Firma E. Merck v Hauptzollamt Hamburg-Jonas* (292/82) [1983] E.C.R. 3781
16 *Inspecteur van de Belastingdienst Douane, district Rotterdam v Sea-Land Service Inc* (C-430/99 & C-431/99) [2002] E.C.R. I-5235
17 *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) [1986] E.C.R. 1651; [1986] 3 C.M.L.R. 240
18 *Kvaerner Plc v Staatssecretaris van Financien* (C-191/99) [2001] E.C.R. I-4447; [2001] 3 C.M.L.R. 2
19 *Mastromatteo v Italy* (37703/97), judgment of October 24, 2002, ECHR
20 *Ministre de l'Intérieur v Oteiza Olazabal* (C-100/01) [2002] E.C.R. I-10981; [2005] 1 C.M.L.R. 49
21 *Ministre des Finances v Richardt* (C-367/89) [1991] E.C.R. I-4621; [1992] 1 C.M.L.R. 61
22 *Omega Spielhallen- und Automatenaufstellungs GmbH v Bundesstadt Bonn* (C-36/02) [2004] E.C.R. I-9609; [2005] 1 C.M.L.R. 5
23 *R. v Secretary of State for the Home Department Ex p. Shingara* (C-65/95 & C-111/95) [1997] E.C.R. I-3343; [1997] 3 C.M.L.R. 703
24 *R. v Thompson (Ernest George)* (7/78) [1979] E.C.R. 2247; [1979] 1 C.M.L.R. 47
25 *Rutili v Ministre de l'Intérieur* (36/75) [1975] E.C.R. 1219; [1976] 1 C.M.L.R. 140
26 *Test Claimants in the Thin Cap Group Litigation v Inland Revenue Commissioners* (C-524/04) [2007] E.C.R. I-2107; [2007] 2 C.M.L.R. 31
27 *van Duyn v Home Office* (41/74) [1974] E.C.R. 1337; [1975] 1 C.M.L.R. 1
28 *Yves Rocher GmbH, Re* (C-126/91) [1993] E.C.R. I-2361

H14 **Legislation referred to by the Court:**
Directive 2004/38, arts 16 , 28(1), 28(2), 28(3)
Framework Decision 2004/757, recital 1

H15 *M. Schenk*, acting as Agent, for Land Baden-Württemberg.
K. Frank, Rechtsanwalt, for Mr Tsakouridis.
M. Lumma, *J. Möller* and *C. Blaschke*, acting as Agents, for the German Government.
L. Van den Broeck, acting as Agent, for the Belgian Government.
B. Weis Fogh, acting as Agent, for the Danish Government.
L. Uibo, acting as Agent, for the Estonian Government.
R. Somssich, *M. Fehér* and *K. Veres*, acting as Agents, for the Hungarian Government.
E. Riedl, acting as Agent, for the Austrian Government.
M. Dowgielewicz, acting as Agent, for the Polish Government.
L. Seeboruth and *I. Rao*, acting as Agents, and *K. Beal*, Barrister, for the United Kingdom Government.
D. Maidani and *S. Grünheid*, acting as Agents, for the European Commission.

OPINION[1]

AG1 By this reference for a preliminary ruling, the *Verwaltungsgerichtshof* (Higher Administrative Court) Baden-Württemberg (Germany) asks the Court of Justice to specify the conditions for granting protection against expulsion under art.28(3)(a) of Directive 2004/38.[2] That provision states that an expulsion decision may be taken against a Union citizen who has resided on the territory of the host Member State for the previous 10 years only on imperative grounds of public security.

AG2 In particular, the Court is asked whether the expression "imperative grounds of public security" must be understood to include only considerations connected with the protection of the Member State and its institutions, and whether repeated and prolonged absences from the territory of the host Member State affect the calculation of the 10-year period required for the purposes of obtaining protection against expulsion.

AG3 In this opinion, I shall propose that the Court rule that art.28(3)(a) of Directive 2004/38 is to be interpreted as meaning that the expression "public security" does not have only the narrow sense of a threat to the internal or external security of the host Member State or the protection of its institutions, but also covers serious threats to a fundamental interest of society such as the values essential to the protection of its citizens, characterised by that State by means of the offences it establishes for their protection.

AG4 I shall also point out to the Court the specific conditions which, in my view, must be fulfilled for the competent national authority to be able lawfully to take an expulsion decision, in particular in a situation such as that described in the main proceedings, in which the decision follows the enforcement of a criminal sanction.

AG5 I shall also explain to the Court the reasons why I think that, in general, temporary absences which do not undermine the strong link between the Union citizen and the host Member State—a matter which it is for the national court to determine—do not affect calculation of the 10-year period required under art.28(3)(a) of Directive 2004/38.

AG6 I shall also say that, on the other hand, an absence of more than 16 months from the territory of the host Member State which, as in the present case, ended only with the enforced return of the Union citizen following a legal decision taken by the competent authorities of that State may, in my view, cause that citizen to lose the right to enhanced protection provided for in that article insofar as it reflects the breaking of the strong link between that citizen and that State, which it is for the national court to define.

I—Legal framework

A—Primary law

AG7 Article 3(2) TEU is worded as follows:

[1] Opinion of A.G. Bot, delivered on June 8, 2010.

[2] Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96 [2004] OJ L158/77 and corrigenda in [2005] OJ L197/34.

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> "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."

B—Directive 2004/38

AG8 Before the entry into force of Directive 2004/38, there were several directives and regulations concerning the free movement of persons and the right of residence of European nationals. This directive consolidated and simplified the relevant Union legislation.

AG9 The directive removes the obligation of Union citizens to obtain a residence permit, introduces a right of permanent residence for those citizens and limits the possibility for Member States to restrict residence within their territory by the nationals of other Member States.

AG10 Accordingly, art.16(1) of Directive 2004/38 provides that Union citizens who have resided in the host Member State for a continuous period of five years shall have the right of permanent residence there. Article 16(3) of the directive states that continuity of residence shall not be affected by, inter alia, temporary absences not exceeding a total of six months a year.

AG11 According to art.16(4) of the directive, the right of permanent residence, once acquired, shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

AG12 Union citizens are also protected against expulsion. Directive 2004/38 strictly circumscribes the extent to which Member States may restrict the right of Union citizens to enter and reside, based directly on the relevant case law of the Court of Justice.

AG13 Accordingly, under art.27(1) of the directive, Member States may restrict that right on grounds of public policy, public security or public health, excluding grounds invoked to serve economic ends.

AG14 Reproducing the criteria laid down by the Court of Justice, art.27(2) of the directive provides that measures taken on grounds of public policy or public security are to comply with the principle of proportionality[3] and must be based exclusively on the personal conduct of the individual concerned by the expulsion decision.[4] It is stated that previous criminal convictions shall not in themselves constitute grounds for taking such measures. Moreover, the personal conduct of the individual subject to an expulsion decision must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.[5]

AG15 Article 28 of Directive 2004/38, concerning protection against expulsion, is worded as follows:

> "1 Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided

[3] *Adoui v Belgium* (115/81 & 116/81) [1982] E.C.R. 1665; [1982] 3 C.M.L.R. 631.
[4] *Bonsignore, Cologne v Oberstadtdirektor of the City of Cologne* (67/74) [1975] E.C.R. 297; [1975] 1 C.M.L.R. 472.
[5] *R. v Bouchereau* (30/77) [1977] E.C.R. 1999; [1977] 2 C.M.L.R. 800.

on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2 The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3 An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

C—The German legislation

AG16 The Law on the Freedom of Movement of Union Citizens (Freizügigkeitsgesetz/EU) of 30 July 2004[6] transposes the provisions of Directive 2004/38 into the German legal order. In particular, para.6(1) of the FreizügG/EU provides that the loss, by a Union citizen, of the right to enter and reside in Germany may be determined only on grounds of public policy, public security or public health. According to para.6(2) of the FreizügG/EU, criminal convictions which have not yet been erased from the central register may be taken into account in order to justify the expulsion decision, provided that the circumstances underlying those convictions reveal personal conduct which represents a present threat to public policy, on the basis that this must be a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

AG17 Paragraph 6(3) of the FreizügG/EU states that, for the purposes of an expulsion decision, it is necessary to take account of considerations such as how long the individual concerned has resided on German territory, his/her age, state of health, family and economic situation, social and cultural integration in Germany and the extent of his or her links with their country of origin.

AG18 Under para.6(4) of the FreizügG/EU, loss of the right to enter and reside in Germany may be determined, after a right to permanent residence has been acquired, only on serious grounds.

AG19 According to para.6(5) of the FreizügG/EU, so far as concerns Union citizens and members of their family who have resided in Germany for the last 10 years and so far as concerns minors, the determination under para.6(1) of the FreizügG/EU may be made only on imperative grounds of public security. That rule does not apply to minors where loss of the right of residence is necessary in the minor's interest. Imperative grounds of public security are present only where the person concerned has been finally sentenced on account of one or more intentional criminal acts to a period of imprisonment or youth detention of at least five years or a

[6] BGBl. 2004 I, p.1950, as most recently amended by the Law of 26 February 2008 (BGBl. 2008 I, p.215, "the FreizügG/EU").

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detention order was made at the time of his last final conviction, where the security of the Federal Republic is affected or where the person concerned is a terrorist risk.

II—Facts and the main proceedings

AG20 Mr Tsakouridis, who is a Greek national, was born in Germany on March 1, 1978. He has always lived in Germany and went to school in that Member State. Since October 2001, he has held a German residence permit of unlimited duration.

AG21 Mr Tsakouridis was sentenced to fines in 1998 for possession of a prohibited item, in 1999 for a dangerous assault, and in 2000 and 2002 for intentional assault involving the threat or use of force.

AG22 From March 2004 until the middle of October 2004, Mr Tsakouridis ran a crêpe stall in Rhodes (Greece). He then returned to Germany and worked there from December 2004. In the middle of October 2005, he went to Greece again and continued running his crêpe stall.

AG23 On November 22, 2005, the *Amtsgericht* (District Court) Stuttgart issued an international arrest warrant against Mr Tsakouridis. He was arrested in Rhodes on November 19, 2006 and transferred to Germany on March 19, 2007.

AG24 By judgment of August 28, 2007, the *Landgericht* (Regional Court) Stuttgart sentenced Mr Tsakouridis to imprisonment of six years and six months for prohibited drug dealing involving more than insubstantial amounts on eight occasions as part of a criminal gang. It is clear from information provided at the hearing that Mr Tsakouridis is currently on conditional release.

AG25 By order of August 19, 2008, the *Regierungspräsidium* (regional administration) Stuttgart determined that Mr Tsakouridis had lost the right to enter and reside in Germany and threatened to expel him to Greece.

AG26 The *Regierungspräsidium Stuttgart* considered that, in the light of the judgment delivered by the *Landgericht Stuttgart* on August 28, 2007, the five-year prison sentence threshold has been exceeded, giving rise to imperative grounds of public security within the meaning of para.6(5) of the FreizügG/EU. The *Regierungspräsidium Stuttgart* also considered that Mr Tsakouridis's personal conduct constitutes a present threat to public policy, since the drugs offences committed by him were exceptionally serious and there is a real risk of reoffending. The court added that society has a fundamental interest in the effective combating of drugs-related crime, which is particularly damaging to the social fabric. The *Regierungspräsidium Stuttgart* also considered that, in view of the fact that Mr Tsakouridis has recently spent time in Greece, he would not find it difficult to adapt to the way of life there.

AG27 On September 17, 2008, Mr Tsakouridis brought an action against that decision of August 19, 2008 before the *Verwaltungsgericht* (Administrative Court). Noting that the *Landgericht Stuttgart*, in its judgment of August 28, 2007, had held that Mr Tsakouridis was only a minor participant in the criminal gang and had been involved in the crime in order to support his family, and considering that he had grown up and gone to school in Germany, and that there was therefore no threat to public policy within the meaning of para.6(1) of the FreizügG/EU, and noting also that he has a very close relationship with his father who lives in Germany, the *Verwaltungsgericht* held the determination that Mr Tsakouridis's right to enter and reside in Germany was lost to be disproportionate.

AG28 By judgment of November 24, 2008, that court therefore annulled the decision of the *Regierungspräsidium Stuttgart* on the ground that, in the case of a Union citizen, the loss of the right to enter and reside can be determined only on grounds of public policy, public security or public health, and that a criminal conviction alone cannot justify such a loss. The court adds that there must be a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

AG29 The *Verwaltungsgericht* also states that, since Mr Tsakouridis has lived in Germany for more than 10 years and did not lose the right of permanent residence owing to his stays in Greece, para.6(5) of the FreizügG/EU applied, meaning the loss of the right of residence could be determined only on imperative grounds of public security. However, those grounds were not present in this case, because the concept of public security covers only the internal and external security of a Member State and is therefore narrower than the concept of public policy. Mr Tsakouridis may constitute a major threat to public policy but not in any sense to the existence of the Member State or its institutions or the survival of the population.

AG30 The *Land Baden-Württemberg* brought an appeal against that judgment before the *Verwaltungsgerichtshof Baden-Württemberg*.

III—The questions referred for a preliminary ruling

AG31 The *Verwaltungsgerichtshof Baden-Württemberg* decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> "(1) Is the concept of 'imperative grounds of public security' employed in Article 28(3) of Directive 2004/38 … to be interpreted as meaning that only irrefutable threats to the external or internal security of the Member State can justify an expulsion [decision], that is, only to the existence of the State and its essential institutions, their ability to function, the survival of the population, external relations and peaceful relations between nations?
> (2) Under what conditions can the right to enhanced protection against expulsion achieved following 10 years of residence in the host Member State laid down in Article 28(3)(a) of Directive 2004/38 subsequently be lost? Is the condition for the loss of the right of permanent residence laid down in Article 16(4) of the directive to be applied mutatis mutandis in that context?
> (3) If the question in point 2 above is to be answered in the affirmative and Article 16(4) of [the directive] to be applied mutatis mutandis: is the enhanced protection against expulsion lost by lapse of time alone, irrespective of the reasons for the absence?
> (4) Also if the question in point 2 above is to be answered in the affirmative and Article 16(4) of [Directive 2004/38] to be applied: can an enforced return to the host Member State in the context of criminal proceedings before expiry of the two-year period have the effect of maintaining the right to increased protection against expulsion, even where following that return the fundamental freedoms cannot be exercised for some time?"

IV—Analysis

AG32 By its first question, the national court asks the Court of Justice whether it is necessary to draw a distinction between the concept of public security and the concept of public policy and whether the former is to be interpreted more narrowly

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than the latter, meaning that only an expulsion decision against a Union citizen who represents a threat to the very existence of a Member State and its institutions may be regarded as an expulsion decision based on imperative grounds of public security.

AG33 By its second, third and fourth questions, the national court asks, in essence, whether repeated absences from the host Member State and the enforced return of the Union citizen to that territory in connection with criminal proceedings may affect the right to enhanced protection provided for in art.28(3)(a) of Directive 2004/38.

A—Preliminary observations

AG34 The preliminary observations will relate to two points, namely the spirit and structure of the system established by Directive 2004/38, and the horizontal nature of the fundamental principles of criminal law.

1 The spirit and structure of the system established by Directive 2004/38

AG35 Pursuant to recital 3 in the preamble to Directive 2004/38, the purpose of the directive is to simplify and strengthen the right of free movement and residence of all Union citizens.

AG36 Freedom of movement of persons is one of the fundamental freedoms of the internal market, as stated in art.45 of the Charter of Fundamental Rights of the European Union. Initially for the benefit of workers, freedom of movement within the Union was subsequently extended to Union citizens, whatever their status and whether or not they pursued an economic activity. Citizenship of the Union therefore gives every Union citizen the right to enter and reside on the territory of the Member States, subject to the restrictions expressly provided for in the final subparagraph of art.20(2) TFEU.

AG37 Naturally, this right to freedom of movement must be exercised in compliance with the laws of each Member State. Accordingly, under art.27(1) of Directive 2004/38, a Member State may restrict the freedom of movement of Union citizens in its territory on grounds of public policy, public security or public health. However, since that restriction on the freedom of movement undermines a fundamental principle of Union law, the conditions for applying it are strictly circumscribed.[7]

AG38 In fact, as we have already seen, art.28 of the directive establishes an enhanced protection for Union citizens and, in certain cases, for the members of their family.

AG39 Accordingly, art.28(1) of the directive provides that, where a Member State takes an expulsion decision against a Union citizen on grounds of public policy or public security, it must first take account of a series of considerations such as how long the citizen concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his or her links with their country of origin.

AG40 Under art.28(2) of Directive 2004/38, where a Union citizen or a member of his family has acquired a right of permanent residence on the territory of the host

[7] See inter alia *van Duyn v Home Office* (41/74) [1974] E.C.R. 1337; [1975] 1 C.M.L.R. 1 at [18], and *Commission of the European Communities v Germany* (C-441/02) [2006] E.C.R. I-3449 at [34] and the case law cited therein.

Member State, that State may not take an expulsion decision against those persons except on serious grounds of public policy or public security.

AG41 Finally, according to art.28(3)(a) of the directive, only imperative grounds of public security may justify an expulsion decision against a Union citizen who has resided in the host Member State for the 10 years preceding that decision.

AG42 Reading those three paragraphs, we notice at once that the length of residence is a decisive factor in granting enhanced protection against expulsion of the Union citizen.

AG43 That is explained by the fact that the Union legislature considered that the length of residence showed a degree of integration into the host Member State.[8] The longer the residence in that State, the closer the links with that State are assumed to be.

AG44 An expulsion decision taken against a Union citizen who has exercised his right to freedom of movement and is genuinely integrated into the host Member State may therefore cause him serious harm.[9]

AG45 That is why the citizen enjoys a degree of protection against expulsion which is enhanced according to the level of integration into the host Member State. The system described establishes the premiss that the level of integration depends on the length of residence. The longer the residence, the higher the level of integration is presumed to be and the more comprehensive will be the protection afforded against expulsion.[10]

2 The horizontal nature of the fundamental principles of criminal law

AG46 The particular features of the present case require not only that the decision contemplated by the *Regierungspräsidium Stuttgart* comply with the conditions laid down by Directive 2004/38, but that, since it is a decision taken as a consequence of a criminal conviction and after it has been enforced, it observe the fundamental principles concerning the function of criminal sanctions.

AG47 Although it is not disputed that the method of interpretation legitimately used by the Court leaves room, where appropriate, for a specific interpretation in the light of the purpose of each directive in order to ensure its effectiveness, fundamental rights and principles cannot be applied differently according to the area in which they are found, if they are not to lose their fundamental character. That fundamental character of a right or principle constitutes, on the contrary, a common standard from which, in the area of freedom, security and justice, questions connected, inter alia, with citizenship of the Union may not be excluded.

AG48 The idea, mooted since ancient times by theologians, philosophers and theorists, that a criminal sanction must contribute to the rehabilitation of the convicted person, is nowadays a principle which is shared and confirmed by all modern legal systems, including those of the Member States.[11] Also, in 2006, the Council of Ministers adopted a recommendation on the European Prison Rules[12] which provides that

[8] See the Proposal for a European Parliament and Council directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2001) 257 final).
[9] See recital 23 of Directive 2004/38.
[10] See recital 24 of the directive.
[11] For example, in Germany, the function of reintegration into society performed by the prison sentence is established in art.2 of the Law on the execution of sentences of imprisonment (Strafvollzugsgesetz). In Spain, art.25(2) of the 1978 Constitution provides that terms of imprisonment and detention measures are geared to re-education and social rehabilitation. In Italy, the third paragraph of art.27 of the 1948 Constitution provides that punishment must not involve inhuman treatment and must be designed to re-educate the convicted person.
[12] Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, adopted on January 11, 2006.

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"[a]ll detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty".[13] The International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly and signed in New York on December 16, 1966, also provides, in art.10(3), that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation".

AG49 The European Court of Human Rights has also held that:

> "[o]ne of the essential functions of a prison sentence is to protect society, for example by preventing a criminal from re-offending and thus causing further harm. At the same time, the Court recognises the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment. From that perspective it acknowledges the merit of measures—such as temporary release—permitting the social reintegration of prisoners."[14]

AG50 Observance of the principle that criminal sanctions must have the function of rehabilitation is indissociable from the concept of human dignity and, as such, I am of the opinion that it belongs to the family of general principles of Union law.

AG51 For the abovementioned reasons, I will now draw the Court's attention to the special features of the present case, which concerns an expulsion decision intended to be taken following a parole measure, which is a means of enforcing a criminal sanction based on reintegration.

AG52 In the light of all the abovementioned factors, the question is now whether Mr Tsakouridis, who was born and has lived half his life in Germany, may be expelled from Germany on the grounds that he was sentenced to a term of imprisonment of six years and six months for drug-trafficking as part of an organised gang.

B—The concept of imperative grounds of public security

AG53 By its first question, the national court is asking, in essence, whether, under art.28(3)(a) of Directive 2004/38, the reasons why Mr Tsakouridis is the subject of an expulsion decision may be regarded as imperative grounds of public security.

AG54 By that question, the national court is seeking in fact to find out whether it is necessary to draw a distinction between the concept of public security and the concept of public policy, and whether the former is to be interpreted more narrowly than the latter, meaning that only an expulsion decision against a Union citizen who represents a threat to the very existence of a Member State and its institutions may be regarded as an expulsion decision based on imperative grounds of public security.

AG55 For the reasons I shall give below, I do not believe that the concept of public security is to be interpreted exclusively in a narrow sense which refers only to the protection of a Member State or its institutions.

AG56 There is a certain amount of case law of the Court concerning the concept of public security. During the 1980s and 1990s it had to examine on several occasions whether a Member State could justify a barrier to the free movement of goods on grounds of public security.[15] Similarly, the Court has had to rule whether national

[13] See Part I, point 6, of the Appendix to that recommendation.
[14] See European Court of Human Rights, judgment of October 24, 2002, *Mastromatteo v Italy* (37703/97) at [72].
[15] See *Campus Oil Ltd v Minister for Industry and Energy* (72/83) [1984] E.C.R. 2727; [1984] 3 C.M.L.R. 544; *Ministre des Finances v Richardt* (C-367/89) [1991] E.C.R. I-4621; [1992] 1 C.M.L.R. 61; and *Criminal proceedings against Leifer* (C-83/94) [1995] E.C.R. I-3231.

measures which discriminated against women could be justified on grounds relating to the protection of the public security of a Member State.[16]

AG57 In all those cases, the Court accepted that the national measure which hindered the free movement of goods or discriminated against women could be justified on grounds of public security. However, the Court never specified the content of that concept, but merely stated that, within the meaning of art.30 EC, the concept covers both the internal and external security of a Member State.[17]

AG58 The concept of external security clearly concerns a Member State's security in its relations with other States. In *Criminal proceedings against Leifer* (C-83/94), in which what was at issue was a measure making the sale of chemical products to Iraq subject to obtaining a licence, the Court stated that the risk of a serious disturbance to foreign relations or to the peaceful co-existence of nations may affect the security of a Member State.[18]

AG59 On the other hand, the concept of internal security is more difficult to define. Is it necessary to draw a clear distinction between that concept and the concept of public policy, as the national court suggests, or are the two concepts in reality if not indissociable, at least intimately connected?

1 The concepts of public policy and public security

AG60 The Court has held that the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and that it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty.[19] It has also stated that no scale of values is imposed upon the Member States for assessing conduct contrary to public policy.[20]

AG61 In that regard, it should be pointed out that, under art.3(2) TEU, the free movement of persons is to be ensured in conjunction with appropriate measures with respect to the prevention and combating of crime. The purpose of the Union is to create, inter alia, a secure area. In order to achieve that objective, each Member State has, first and foremost, the fundamental duty of watching over that secure area on its own territory.

AG62 Therefore, Member States remain, in principle, free to determine the requirements of public policy and public security in the light of their national needs.[21]

AG63 Accordingly, the Court has held that the concept of public policy includes, inter alia, the prevention of violence in large urban centres,[22] prevention of the sale of stolen cars,[23] protection of the right to mint coinage[24] or respect for human dignity.[25]

[16] *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) [1986] E.C.R. 1651; [1986] 3 C.M.L.R. 240.
[17] See *Richardt* [1992] 1 C.M.L.R. 61 at [22]; *Leifer* [1995] E.C.R. I-3231 at [26]; and also *Kreil v Germany* (C-285/98) [2000] E.C.R. I-69; [2002] 1 C.M.L.R. 36 at [17].
[18] See [28] and [29] of the judgment.
[19] *van Duyn* [1975] 1 C.M.L.R. 1 at [18], and *Rutili v Ministre de l'Intérieur* (36/75) [1975] E.C.R. 1219; [1976] 1 C.M.L.R. 140 at [28].
[20] See *Adoui* [1982] 3 C.M.L.R. 631 at [8].
[21] *Rutili* [1976] 1 C.M.L.R. 140 at [26], and *Association Eglise de scientologie de Paris v The Prime Minister* (C-54/99) [2000] E.C.R. I-1335 at [17].
[22] *Bonsignore* [1975] 1 C.M.L.R. 472.
[23] *Boscher Studer et Fromentin Scp v British Motors Wright SA* (C-239/90) [1991] E.C.R. I-2023; [1994] 3 C.M.L.R. 410.
[24] *R. v Thompson (Ernest George)* (7/78) [1979] E.C.R. 2247; [1979] 1 C.M.L.R. 47.
[25] *Omega Spielhallen- und Automatenaufstellungs GmbH v Bundesstadt Bonn* (C-36/02) [2004] E.C.R. I-9609; [2005] 1 C.M.L.R. 5.

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AG64 From the point of view of national security, the Court acknowledged in *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) that the ban on carrying arms applicable to women in the Northern Ireland Police force was justified on grounds of public security, since they might become a more frequent target in a context of serious internal disturbances.[26]

AG65 However, in my view, that judgment is an exception because, in most of the cases relating to public policy and public security in which it has been called upon to give a ruling, the Court does not make a clear distinction between those two concepts.[27]

AG66 That lack of distinction is even more obvious in the judgment in *Ministre de l'Intérieur v Oteiza Olazabal* (C-100/01).[28] In that case, the Court held that prevention of the activity of an armed and organised group may be regarded as falling within the maintenance of public security.[29] However, it is from the point of view of public policy that the Court goes on to examine whether the expulsion order made against the protagonist in that case was justified.

AG67 Moreover, the very wording of art.27(2) of Directive 2004/38, which reproduces the case law concerning public policy,[30] seems to confuse the two concepts. That provision states that measures taken *on grounds of public policy or public security* are to comply with the principle of proportionality and are to be based exclusively on the personal conduct of the individual concerned, and that such conduct must represent a genuine, present and sufficiently serious threat affecting *one of the fundamental interests of society*. In my view, it is that concept of a fundamental interest of society which is the common denominator of the two concepts.

AG68 Therefore, even though, in the light of the case law of the Court and in particular the judgments in *Johnston* [1986] 3 C.M.L.R. 240 and *Oteiza Olazabal* [2005] 1 C.M.L.R. 49, it is clear that a State's internal security is connected with the fight against terrorism, it is difficult or even artificial to confine the concepts of public policy and public security each to a definition with an exhaustive content.

AG69 That is all the more evident because, as we have seen, the Member States are free to determine public policy and public security requirements in accordance with their national needs. They retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security on their territory and enjoy a margin of discretion in determining, according to particular social circumstances and to the importance attached by those States to a legitimate objective under Union law, the measures which are likely to achieve results.[31]

AG70 Indeed, although it is true that the Court has competence to ensure compliance with a right as fundamental as the right to enter and reside in a Member State, the fact remains that it is for the Member States alone to assess the threats to public policy and public security on their own territory.[32]

[26] See [35] and [36] of the judgment, See also *Sirdar v Secretary of State for Defence* (C-273/97) [1999] E.C.R. I-7403; [1999] 3 C.M.L.R. 559 at [17].
[27] See, inter alia, *Bonsignore* [1975] 1 C.M.L.R. 472; *Belgium v Royer* (48/75) [1976] E.C.R. 497; [1976] 2 C.M.L.R. 619; and *R. v Secretary of State for the Home Department Ex p. Shingara* (C-65/95 & C-111/95) [1997] E.C.R. I-3343; [1997] 3 C.M.L.R. 703.
[28] *Ministre de l'Intérieur v Oteiza Olazabal* (C100/01) [2002] E.C.R. I-10981; [2005] 1 C.M.L.R. 49.
[29] See [35] of the judgment.
[30] *Rutili* [1976] 1 C.M.L.R. 140 at [28] .
[31] *Commission of the European Communities v France* (C-265/95) [1997] E.C.R. I-6959 at [33], and *Criminal Proceedings against Heinonen* (C-394/97) [1999] E.C.R. I-3599; [2000] 2 C.M.L.R. 1037 at [43].
[32] See to that effect *van Duyn* [1975] 1 C.M.L.R. 1 at [18].

AG71 In that regard, it is clear that the Union legislature, in accordance with the case law of the Court of Justice, wished to leave a certain discretion to the Member States with regard to the content of the concept of public security. Accordingly, art.28(3)(a) of Directive 2004/38 states that the expulsion decision must be based on imperative grounds of public security "as defined by Member States".

AG72 Consequently, whereas, for some Member States, the threat of armed independence groups on their territory compromises their internal security, for others, it is the fight against the scourge of drug-trafficking by organised gangs which becomes a priority in ensuring security on their territory.

AG73 Indeed, although the Court has included the fight against drug-trafficking in the concept of public policy,[33] I am of the opinion that, very often, that kind of trafficking constitutes a direct threat to the physical safety of the population simply because drug-traffickers do not hesitate to organise themselves into armed gangs, causing urban violence.

AG74 In my view there is a real difference between a person who buys drugs for his personal consumption, acting contrary to public policy in that way, and a person who participates in a trafficking network, with all the attendant dangers for the physical safety of the population.

AG75 The same applies in other spheres, such as for example child pornography. Although, when a person looks at paedophile photographs on the internet, public policy is unquestionably undermined, a higher threshold is crossed when he participates in the paedophile ring which produced those photographs.

AG76 The fact that the Court has acknowledged that the campaign against various forms of criminality linked to alcohol consumption seeks to safeguard internal security[34] confirms that analysis. In *Criminal proceedings against Heinonen* (C-394/97), the Finnish Government had justified its measure restricting the importation of alcohol by the fact that the consumption of alcohol in Finland, which had increased significantly, had inter alia made drunk driving common, caused violence to increase in both frequency and seriousness, and led illegal markets to appear and multiply.[35]

AG77 In my opinion, public security must therefore be understood to include not only the security of the Member State and its institutions, but also all the measures designed to counteract serious threats to the values essential to the protection of its citizens.

AG78 I therefore consider that the grounds regarded by the Court as included in the concept of public policy may equally be covered by the concept of public security.

AG79 The effect of that is not, however, to reduce the safeguards which circumscribe the taking of an expulsion decision against a Union citizen.

AG80 Thus, where a Union citizen has resided on the territory of the host Member State for the 10 years preceding the expulsion decision, only *imperative grounds* of public security, in accordance with the definition I have given in point AG77 of this Opinion, may justify such a decision.

[33] See *Criminal proceedings against Calfa* (C-348/96) [1999] E.C.R. I-11; [1999] 2 C.M.L.R. 1138, and *Orfanopoulos v Land Baden-Württemberg* (C-482/01 & C-493/01) [2004] E.C.R. I-5257; [2005] 1 C.M.L.R. 18.
[34] *Heinonen* [2000] 2 C.M.L.R. 1037 at [43].
[35] *Heinonen* [2000] 2 C.M.L.R. 1037 at [18].

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2 The concept of "imperative grounds of public security" within the meaning of article 28(3) of Directive 2004/38

AG81 Although the Court has recognised numerous interests as being imperative grounds of general interest,[36] the concept of imperative grounds has not been given a separate definition.

AG82 However, the Court has already held that a measure designed to protect public security is an overriding reason in the general interest,[37] in the same way as public policy and public health.

AG83 Furthermore, it should be pointed out that art.4(8) of Directive 2006/123[38] defines overriding reasons as:

> "reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety [and] public health."

AG84 Although, by its very nature, a ground of public security is an overriding reason, I think that the use of that expression is in fact designed to indicate that the reasons justifying the national measure at issue must be necessary and proportionate.

AG85 Where a national measure infringes fundamental freedoms, the Court has always concerned itself with determining whether that measure was justified, whether it was necessary for achieving the desired objective and whether there were not less restrictive means of achieving that objective.[39]

AG86 In the particular case of a measure restricting a person's right to enter and reside on grounds of public policy or public security, the Court has held that the competent national authorities must carry out a proportionality test, bearing in mind that such a measure may be justified on those grounds only if it is necessary for the protection of the interests which it is intended to guarantee and only insofar as those objectives cannot be attained by less restrictive measures.[40]

AG87 The competent national authorities must therefore take into account, in their assessment of where the fair balance lies between the legitimate interests in issue, the particular legal position of persons subject to Union law and the fundamental nature of the principle of the free movement of persons.[41]

AG88 Similarly, according to art.27(2) of Directive 2004/38, only the personal conduct of the individual concerned may provide grounds for his expulsion, and justifications

[36] For an inexhaustive list, see inter alia, on fair trading and consumer protection, *Re Yves Rocher GmbH* (C-126/91) [1993] E.C.R. I-2361; on the cohesion of the tax system, *Test Claimants in the Thin Cap Group Litigation v Inland Revenue Commissioners* (C-524/04) [2007] E.C.R. I-2107; [2007] 2 C.M.L.R. 31; on the protection of consumers and of public order with regard to gaming, *Criminal proceedings against Placanica* (C-338/04, C-359/04 & C-360/04) [2007] E.C.R. I-1891; [2007] 2 C.M.L.R. 25; and, on road safety, *Commission of the European Communities v Finland* (C-54/05) [2007] E.C.R. I-2473; [2007] 2 C.M.L.R. 33.

[37] See, inter alia, *Inspecteur van de Belastingdienst Douane, district Rotterdam v Sea-Land Service Inc* (C-430/99 & C-431/99) [2002] E.C.R. I-5235 at [39] and [41].

[38] Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.

[39] See, inter alia, in respect of the free movement of goods, *Boscher* [1994] 3 C.M.L.R. 410 at [22] and [23]; in respect of the freedom to provide services, *Omega* [2005] 1 C.M.L.R. 5 at [36]; and, in respect of the free movement of persons, *Oteiza Olazabal* [2005] 1 C.M.L.R. 49 at [43].

[40] *Oteiza Olazabal* [2005] 1 C.M.L.R. 49 at [43]. See, as regards the free movement of capital, *Eglise de scientology* [2000] E.C.R. I-1335 at [18], and, as regards the free movement of goods, *Omega* [2005] 1 C.M.L.R. 5 at [36].

[41] *Orfanopoulos* [2005] 1 C.M.L.R. 18 at [96]. See also the Communication from the Commission to the Council and the European Parliament on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health (COM(1999) 372 final).

that are isolated from the particulars of the case or that rely on considerations of general prevention are not acceptable.[42]

AG89 Finally, also according to that provision, the threat to public security represented by that conduct must be a present threat.[43] In that regard, the Court has held that the requirement of the existence of a present threat must, as a general rule, be satisfied at the time of the expulsion.[44]

AG90 As we have seen in points AG37–AG44 of this Opinion, Directive 2004/38 provides for protection against expulsion, a protection which is enhanced according to the length of residence of the Union citizen. Article 28(3) of the directive constitutes the final stage of protection and therefore the strongest.

AG91 Therefore, in view of the position of that paragraph in the structure of art.28 of Directive 2004/38 and in the light of the length of time the Union citizen concerned has resided in the host Member State, I consider that the level of justification required when assessing proportionality must be high.

AG92 I also note that, under art.28(3)(b) of Directive 2004/38, minors enjoy the same level of protection as persons who have resided in the host Member State for the 10 years preceding the expulsion decision. That clearly shows that such a decision may be adopted only as an exception, having regard to the extreme seriousness of the conduct alleged.

AG93 It is therefore for the competent national authority, and if appropriate the national court, to satisfy themselves that the decision to expel the Union citizen is based on reasons which relate specifically to the facts of each case and the seriousness of the threat to persons.

AG94 In the present case, which concerns an expulsion decision applicable on the expiry of the criminal sanction imposed, I consider that the proportionality test takes on a special significance which requires the competent authority to take account of factors showing that the decision adopted is such as to prevent the risk of re-offending.

AG95 In my view, when that authority takes an expulsion decision against a Union citizen following the enforcement of the criminal sanction imposed, it must state precisely in what way that decision does not prejudice the offender's rehabilitation. Such a step, which relates to the individualisation of the sanction of which it is an extension, seems to me to be the only way of upholding the interests of the individual concerned as much as the interests of the Union in general. Even if he is expelled from a Member State and prohibited from returning, when released the offender will be able, as a Union citizen, to exercise his freedom of movement in the other Member States. It is therefore in the general interests that the conditions of his release should be such as to dissuade him from committing crimes and, in any event not risk pushing him back into offending.

AG96 In the main proceedings, the classification of the offence and the nature of the sanction imposed are indicators to be taken into account in assessing the fundamental nature, for society, of the interest protected. Similarly, the sanction imposed compared to the maximum possible sentence and Mr Tsakouridis's involvement in the drug-trafficking which led to his sentence are, in my view, further objective factors which will help the national court to determine the degree

[42] See, inter alia, *Bonsignore* [1975] 1 C.M.L.R. 472 at [5] and [6].
[43] *Bouchereau* [1977] 2 C.M.L.R. 800 at [28], and *Commission of the European Communities v Spain* (C-503/03) [2006] E.C.R. I-1097 at [44].
[44] *Orfanopoulos* [2005] 1 C.M.L.R. 18 at [78] and [79].

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of seriousness of his conduct. Conversely, in order to achieve that fair balance, it is also necessary to weigh up Mr Tsakouridis's personal circumstances, such as, for example, the fact that his family resides in the host Member State, that he carries on an economic activity in that State and that he has links with his State of origin, as well as the effects produced or the information provided, regarding the degree of reintegration or the risk of re-offending, by the aid, advice and surveillance measures which accompanied his conditional release. The failure of those measures may justify the envisaged expulsion.

AG97 Therefore, in the light of all the foregoing considerations, in my opinion art.28(3)(a) of Directive 2004/38 is to be interpreted as meaning that the concept of public security does not have only the narrow sense of a threat to the internal or external security of the host Member State or to the existence of its institutions, but also covers serious threats to a fundamental interest of society such as the values essential to the protection of its citizens, characterised by that State by means of the offences it establishes for their protection.

AG98 It is for the competent national authority which takes the expulsion decision to give specific reasons for doing so on the basis of factual and legal circumstances which meet those criteria.

AG99 Furthermore, where, as in the present case, the expulsion decision is taken on the expiry of the criminal sanction imposed, the competent national authority must state in what respect that decision is not contrary to the rehabilitation function of the sanction.

C—The length of residence condition

AG100 By the second, third and fourth questions, the national court wishes to know, in essence, whether Mr Tsakouridis may enjoy enhanced protection even though his residence in Germany during the 10 years preceding the expulsion decision was interrupted by absences from that territory and his return to it is the consequence of a legal decision.

AG101 Under art.28(3)(a) of Directive 2004/38, enjoyment of that protection is subject to having lived in the host Member State for the 10 years preceding the expulsion decision. However, that article is silent as regards the effects which absences from that territory during that period might have on the right to enhanced protection.

AG102 Therefore, the national court raises the question whether it is necessary to apply mutatis mutandis the conditions for the grant and loss laid down in art.16 of that directive insofar as concerns the right of permanent residence.

AG103 Accordingly, the acquisition of enhanced protection would not be prevented by temporary absences which do not exceed a total of six months a year[45] and the right to enhanced protection could be lost only through absence from the host Member State for a period exceeding two consecutive years.[46]

AG104 The views of the governments of the Member States which have submitted written observations in this case differ on this point.

AG105 According to the Danish and Hungarian Governments, temporary absences from the host Member State have no effect provided that links with that State are not broken. The Danish Government considers that art.16(4) Directive 2004/38 may be applied mutatis mutandis, whereas the Hungarian Government considers that

[45] See art.16(3) of Directive 2004/38.
[46] See art.16(4) of that directive.

that provision may play an indicative role in the assessment of the loss of the link with the host Member State.

AG106 The UK Government takes the view that a Union citizen enjoys enhanced protection where he has acquired a right of permanent residence on the territory of the host Member State after a period of residence of five years and has subsequently resided lawfully in that State during a further five-year period.

AG107 According to the Belgian Government, no transposition mutatis mutandis is possible. It considers that, once a Union citizen has left the host Member State, his right to enhanced protection is lost, and no exception is allowed.

AG108 The Polish Government and the European Commission also both consider that an application mutatis mutandis of art.16(4) of Directive 2004/38 is not possible. According to the Polish Government, the loss of enhanced protection is justified only by the breaking of all links with the host Member State. The Commission considers that it is necessary to examine whether the Union citizen's interests are still centred in the host Member State. In that case, short absences should not affect calculation of the length of residence.

AG109 In my view, having regard to the structure of art.28(3)(a) of Directive 2004/38, it is not possible to apply art.16(4) of the directive to it mutatis mutandis. I consider that it is the retention of a strong link with the host Member State which will be decisive.

AG110 As we have seen, the wording of art.28(3)(a) of Directive 2004/38 does not make it clear what would be the consequence of absences from the host Member State on the benefit or loss of enhanced protection.

AG111 According to settled case law, where the wording of a provision of Union law does not make it possible to determine exactly how that provision should be construed, it is necessary to take account of the scheme and objectives of the legislation of which it is part.[47]

AG112 Consequently, the questions raised by the national court are to be answered taking into account the context of the provision at issue, and the broad logic and objectives of Directive 2004/38.

AG113 Citizenship of the Union confers on every citizen of the Union a fundamental right to move and reside freely within the territory of the Member States.[48] The aim of the directive is to simplify and strengthen that right[49] so that Union citizens can move between Member States in the same way as nationals of a Member State moving around or changing their place of residence or job in their own country.[50]

AG114 The intention of the Union legislature is thus that Union citizens, after residing for several years on the territory of a Member State other than their Member State of origin, should feel genuinely integrated into their host State.

AG115 Since expulsion from the host Member State may seriously harm such citizens, as we have seen the Union legislature has introduced a mechanism based on the principle of proportionality, to afford protection against expulsion.[51]

[47] See to this effect *Falco Privatstiftung v Weller-Lindhorst* (C-533/07) [2009] E.C.R. I-3327 at [19] and [20]. See also *Firma E. Merck v Hauptzollamt Hamburg-Jonas* (292/82) [1983] E.C.R. 3781 at [12]; *Kvaerner Plc v Staatssecretaris van Financien* (C-191/99) [2001] E.C.R. I-4447; [2001] 3 C.M.L.R. 2 at [30]; and *ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)* (C-283/05) [2006] E.C.R. I-12041; [2007] I.L.Pr. 4 at [16] and [22].

[48] See recital 1 in the preamble to Directive 2004/38.

[49] See recital 3 in the preamble to Directive 2004/38.

[50] See the proposal for a directive referred to in fn.8.

[51] See recital 23 of Directive 2004/38.

AG116 As the length of residence is a factor in integration, the Union legislature drafted art.28 of Directive 2004/38 in such a way that the longer the period of residence in the host Member State, the stricter are the grounds on which that State may adopt an expulsion decision.

AG117 Under art.28(1) of that directive, the host Member State may take an expulsion decision on grounds of public policy or public security against a Union citizen who does not have the right of permanent residence.[52] Union citizens who have acquired a right of permanent residence cannot be the subject of such a decision except on *serious grounds* of public policy or public security, in accordance with art.28(2) of Directive 2004/38. Finally, under art.28(3)(a) of the directive, if the Union citizen has resided in the host Member State for the 10 years preceding the expulsion decision, the decision can be based only on *imperative grounds* of public security.

AG118 I note, therefore, that the greater the degree of integration of Union citizens into the host Member State, having regard to the length of time they have resided in that State, the greater must be the degree of protection against expulsion.[53]

AG119 It seems to me that there must therefore be a link between the level of integration into that State and the level of protection afforded.

AG120 The Union legislature started from the presumption that a long period of residence in the host Member State shows a high level of integration. I therefore consider that, after at least 10 years' presence in the host Member State, integration may be presumed complete.

AG121 In my view, that level of integration, which is required at the final stage of protection against expulsion, cannot allow for absences from the host Member State which may break the close link between the Union citizen and that State.

AG122 However, it is impossible to impose a complete prohibition on absences on the Union citizen. It would be contrary to the objective of the free movement of persons pursued by Directive 2004/38[54] to discourage Union citizens from exercising their freedom of movement on the ground that a mere absence from the host Member State may affect their right to enhanced protection against expulsion.

AG123 I therefore consider that temporary absences for work purposes or for holidays should not affect the period required at the highest level of protection against expulsion. Such absences do not appear to me likely to affect the close links between a Union citizen and the host Member State.

AG124 On the other hand, I consider that an absence of more than 16 months, such as that in the present case, may cause the loss of the enhanced protection granted under art.28(3)(a) of Directive 2004/38 and that, therefore, it is not possible to apply mutatis mutandis art.16(4) of the directive.

AG125 In the present case, the national court indicates that Mr Tsakouridis was absent from Germany, on the first occasion, from March 2004 until the middle of October 2004, that is for approximately six-and-a-half months and, on the second occasion, from the middle of October 2005 until March 2007, that is, a little over 16 months.

AG126 As regards Mr Tsakouridis's first absence, the file shows that he left in order to carry out what appears to be seasonal employment in Greece.

AG127 I consider that it may be conceded that an absence for that reason did not affect the period required for obtaining enhanced protection under art.28(3)(a) of Directive

[52] I should point out that, under art.16(1) of the directive, the right of permanent residence is acquired following residence for a continuous period of five years in the host Member State.
[53] See recital 24 in the preamble to Directive 2004/38.
[54] See recital 2 in the preamble to that directive.

2004/38. In my view, it is then necessary to determine whether the link between the Union citizen concerned and the host Member State is still as strong, by checking for example on his return to that State whether he maintained links with members of his family also established in that State, whether he kept a home there or whether he took up long-term employment within a reasonable period.

AG128 In contrast, Mr Tsakouridis's second absence, from the middle of October 2005 until March 2007, which was interrupted not of his own accord but because he was subject to an enforced return to the host Member State following a legal decision, interrupted the 10-year period. I consider that such an absence shows, in actual fact, that the Union citizen established himself in another Member State and that, therefore, the link between him and the host Member State is no longer as strong and may even be totally broken.

AG129 In the light of the foregoing, I consider it unlikely that Mr Tsakouridis may rely on the right to enhanced protection provided for in art.28(3)(a) of Directive 2004/38.

AG130 It should also be pointed out that Union citizens, whatever their length of residence in the host Member State, are not deprived of protection against expulsion.[55] Furthermore, art.32(1) of the directive provides that persons excluded may submit an application for lifting of the exclusion order after a reasonable period and, in any event, after three years from enforcement of the final exclusion order which cannot, under any circumstances, be imposed for life.[56]

AG131 In the light of the foregoing, I consider that art.28(3)(a) of Directive 2004/38 is to be interpreted as meaning that, as a general rule, temporary absences which do not undermine the strong link between the Union citizen and the host Member State—a matter which it is for the national court to determine—do not affect calculation of the 10-year period required under art.28(3)(a) of Directive 2004/38.

AG132 On the other hand, an absence of more than 16 months from the territory of the host Member State which, as in the present case, ended only with the enforced return of the Union citizen following a legal decision taken by the competent authorities of that State, is likely to cause that citizen to lose the right to enhanced protection provided for in art.28(3)(a) of Directive 2004/38 insofar as it reflects the breaking of the strong link between that citizen and that State, which it is for the national court to define.

V—Conclusion

AG133 In the light of all the foregoing considerations, I propose that the Court give the following reply to the *Verwaltungsgerichtshof Baden-Württemberg*:

Article 28(3)(a) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, is to be interpreted as meaning:

- the concept of public security does not have only the narrow sense of a threat to the internal or external security of the host Member State or to the existence of its institutions, but also covers serious threats to a fundamental interest of society such as the values essential to the protection of its citizens, characterised by that State by means of the offences it establishes for their protection;

[55] See art.28(1) and (2) of Directive 2004/38.

[56] See recital 27 in the preamble to that directive. See also the judgment in *Calfa* [1999] 2 C.M.L.R. 1138 at [18] and [29].

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- it is for the competent national authority which takes the expulsion decision to give specific reasons for doing so on the basis of factual and legal circumstances which meet those criteria;
- where, as in the present case, the expulsion decision is taken on the expiry of the criminal sanction imposed, the competent national authority must state in what respect that decision is not contrary to the rehabilitation function of the sanction;
- temporary absences which do not undermine the strong link between the Union citizen and the host Member State—a matter which it is for the national court to determine—do not affect calculation of the 10-year period required in art.28(3)(a) of Directive 2004/38; and
- an absence of more than 16 months from the territory of the host Member State which, as in the present case, ended only with the enforced return of the Union citizen following a legal decision taken by the competent authorities of that State, is likely to cause that citizen to lose the right to enhanced protection provided for in art.28(3)(a) of Directive 2004/38, insofar as it reflects the breaking of the strong link between that citizen and that State, which it is for the national court to define.

JUDGMENT

1 This reference for a preliminary ruling concerns the interpretation of arts 16(4) and 28(3)(a) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96 [2004] OJ L158/77, and corrigenda [2004] OJ L229/35, and [2005] OJ L197/34.

2 The reference has been made in proceedings between Land Baden-Württemberg and Mr Tsakouridis, a Greek national, concerning the decision of that Land determining the loss of his right of entry and residence in the Federal Republic of Germany and the threatened decision to expel him.

Legal context

Directive 2004/38

3 Recital 3 in the preamble to Directive 2004/38 states:

> "Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens."

4 According to recital 22 in the preamble to that directive:

> "The Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health. In order to ensure a tighter definition of the circumstances and procedural

safeguards subject to which Union citizens and their family members may be denied leave to enter or may be expelled, this Directive should replace Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health [[1963–1964] OJ English Special Edition, p.117), as amended by Council Directive 75/35 of 17 December 1974 [1975] OJ L14/14]."

5 According to recitals 23 and 24 in the preamble to the directive:

"(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the [EC] Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.

(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989."

6 Article 16 of the directive provides:

"1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

…

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years."

7 Article 27(1) and (2) of the directive provide:

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"1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."

8 Under art.28 of the directive:

"1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

9 Article 32(1) of the directive provides:

"Persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which has been validly adopted in accordance with Community law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.

The Member State concerned shall reach a decision on this application within six months of its submission."

National legislation

10 Paragraph 6 of the Law on general freedom of movement of citizens of the Union (Gesetz über die allgemeine Freizügigkeit von Unionsbürgern) of 30 July 2004 (BGBl. 2004 I, p.1950), as amended by the Law amending the Federal Police Law and other laws (Gesetz zur Änderung des Bundespolizeigesetzes und anderer Gesetze) of 26 February 2008 (BGBl. 2008 I, p.215) ("the FreizügG/EU"), provides:

> "(1) Loss of the right under Paragraph 2(1) may, without prejudice to Paragraph 5(5), be determined and the certificate of the Community-law right of residence or permanent residence withdrawn and the residence card or permanent residence card revoked only on grounds of public policy, security or health (Articles 39(3) and 46(1) of the Treaty on the European Community). Entry may also be refused on the grounds mentioned in the first sentence. A determination on grounds of public health may be made only if the illness occurs within the first three months from entry.
>
> (2) The fact of a criminal conviction does not in itself suffice as grounds for the decisions or measures referred to in subparagraph 1. Only criminal convictions which have not yet been deleted in the federal central register may be taken into account, and only insofar as the circumstances on which they are based disclose personal conduct which constitutes a present threat to public policy. There must be a real and sufficiently serious threat which affects a fundamental interest of society.
>
> (3) When a decision under subparagraph 1 is taken, account must be taken in particular of the duration of the person concerned's residence in Germany, his age, his state of health, his family and economic situation, his social and cultural integration in Germany, and the extent of his ties to his State of origin.
>
> (4) After the acquisition of the right of permanent residence, a determination under subparagraph 1 may be made only on serious grounds.
>
> (5) In the case of Union citizens and their family members who have resided in Germany for the previous 10 years, and in the case of minors, a determination under subparagraph 1 may be made only on imperative grounds of public security. In the case of minors, this does not apply if the loss of the right of residence is necessary for the best interests of the child. Imperative grounds of public security can exist only if the person concerned has been sentenced by a binding judgment to imprisonment or youth custody of at least five years for one or more intentional criminal offences or a preventive detention order was made at the time of the last binding conviction, if the security of the Federal Republic of Germany is affected, or if the person concerned gives rise to a terrorist risk.
>
> …"

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The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Mr Tsakouridis was born in Germany on March 1, 1978. In 1996 he obtained a secondary school leaving certificate. Since October 2001 he has had an unlimited residence permit in Germany. From March to mid-October 2004 he ran a pancake stall on the island of Rhodes in Greece. He then returned to Germany, where he worked from December 2004. In mid-October 2005 he went to Rhodes and resumed running the pancake stall. On November 22, 2005 the *Amtsgericht Stuttgart* (Local Court, Stuttgart) issued an international arrest warrant against him. On November 19, 2006 he was arrested on Rhodes, and he was transferred to Germany on March 19, 2007.

12 Mr Tsakouridis has the following criminal record. The *Amtsgericht Stuttgart-Bad Cannstatt* (Local Court, Stuttgart-Bad Cannstatt) sentenced him to several fines, namely on October 14, 1998 for possession of a prohibited object, on June 15, 1999 for dangerous assault, and on February 8, 2000 for intentional assault and compulsion. The *Amtsgericht Stuttgart* also fined him on September 5, 2002 for compulsion and intentional assault. Finally, he was convicted by the *Landgericht Stutttgart* (Regional Court, Stuttgart) on August 28, 2007 on eight counts of illegal dealing in substantial quantities of narcotics as part of an organised group, and sentenced to six years and six months' imprisonment.

13 By decision of August 19, 2008, the *Regierungspräsidium Stuttgart* (Regional Administration, Stuttgart), after hearing Mr Tsakouridis, determined that he had lost the right of entry and residence in Germany and informed him that he was liable to be the subject of an expulsion measure to Greece, without setting a time-limit for a voluntary departure. As grounds, the *Regierungspräsidium Stuttgart* stated that the threshold of five years' imprisonment had been crossed by the judgment of the *Landgericht Stuttgart* of August 28, 2007, so that the measures in question were justified on "imperative grounds of public security" within the meaning of art.28(3)(a) of Directive 2004/38 and para.6(5) of the FreizügG/EU.

14 According to the *Regierungspräsidium Stuttgart*, the personal conduct of Mr Tsakouridis represented a genuine threat to public policy. The offences committed by him in relation to dealing in narcotics were very serious and there was a real risk of reoffending. He had clearly been prepared to take part in illegal dealing in narcotics for financial reasons. He had been indifferent to the problems caused by that dealing for drug addicts and society in general. There was a fundamental interest of society in effectively combating, by all available means, crime connected with dealing in narcotics, which was particularly harmful from the social point of view.

15 The *Regierungspräsidium Stuttgart* also observed that Mr Tsakouridis was unwilling or unable to comply with the existing legal order. He had committed offences with an exceptionally high criminal intent. Possible impeccable behaviour while serving his sentence did not make it possible to conclude that there was no risk of reoffending. Since the conditions for the application of para.6 of the FreizügG/EU were satisfied, the decision was within the discretion of the authorities. Mr Tsakouridis's personal interest in not losing his right of entry and residence because of his long lawful residence in Germany did not outweigh the predominant public interest in fighting against crime connected with dealing in narcotics. There was a very high probability that he would commit further offences.

16 In the opinion of the *Regierungspräsidium Stuttgart*, since in the course of recent years Mr Tsakouridis had spent several months in the territory of his Member State of origin, it was not to be expected that he would encounter difficulties of integration there after being expelled from German territory. The risk of reoffending also justified the interference with his right of free access, as a citizen of the Union, to the German labour market. There were no measures less restrictive than or equally appropriate as the measures imposed, and those measures did not interfere with already established economic means of existence.

17 In view of the seriousness of the offences found to have been committed, the *Regierungspräsidium Stuttgart* considered that the interference with Mr Tsakouridis's private and family life was justified in the interests of the prevention of disorder and of further crimes for the purposes of art.8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950, and no equivalent private and family interests could be discerned which would require the expulsion measure to be waived on grounds of proportionality.

18 On September 17, 2008 Mr Tsakouridis brought proceedings before the *Verwaltungsgericht Stuttgart* (Administrative Court, Stuttgart) against the decision of the *Regierungspräsidium Stuttgart* of August 19, 2008, relying on the fact that most of his family were living in Germany. In addition, it could be seen from the judgment of the *Landgericht Stuttgart* of August 28, 2007 that he was only a subordinate member of the gang. As he had been brought up in Germany and attended school there, there was no threat within the meaning of para.6(1) of the FreizügG/EU. He had a close relationship with his father, who lived in Germany and regularly visited him in prison. He had surrendered to the police voluntarily, which showed that he would no longer represent a threat to public policy after having served his sentence, so that the determination of the loss of his right of entry and residence in Germany was disproportionate. Finally, his mother, who was currently living with her daughter in Australia, would return to live definitively with her husband in Germany in spring 2009.

19 By judgment of November 24, 2008, the *Verwaltungsgericht Stuttgart* annulled the decision of the *Regierungspräsidium Stuttgart* of August 19, 2008. According to that court, a criminal conviction does not in itself suffice as grounds for the loss of the right of entry and residence of a Union citizen, as that loss presupposes a real and sufficiently serious danger which affects a fundamental interest of society within the meaning of para.6(2) of the FreizügG/EU. In addition, in the context of the transposition of art.28(3) of Directive 2004/38, a determination of the loss of the right of entry and residence under para.6(1) of the FreizügG/EU could be made, in a case such as that of Mr Tsakouridis who had resided in Germany for over 10 years, only on imperative grounds of public security, as follows from the first sentence of para.6(5) of that law. The *Verwaltungsgericht Stuttgart* observed that Mr Tsakouridis had not lost his right of permanent residence as a result of his stays on Rhodes, the first sentence of para.6(5) not requiring uninterrupted residence in Germany for the previous 10 years.

20 The *Verwaltungsgericht Stuttgart* held that there were no "imperative grounds of public security" within the meaning of the last sentence of para.6(5) of the FreizügG/EU to justify expulsion. Public security covered only the internal and external security of a Member State, and was accordingly narrower than the concept of public policy, which also covered domestic criminal law. That the minimum

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sentence mentioned in the last sentence of para.6(5) of the FreizügG/EU was exceeded did not make it possible to conclude that there were imperative grounds of public security for the purposes of expulsion. Mr Tsakouridis might possibly represent a substantial threat to public policy, but not to the existence of the State and its institutions or the survival of the population. Nor was any such matter relied on by the *Regierungspräsidium Stuttgart*.

21 The *Verwaltungsgerichtshof Baden-Württemberg* (Higher Administrative Court of Baden-Württemberg), hearing an appeal against the judgment of the *Verwaltungsgericht Stuttgart* of November 24, 2008, decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

> "1. Is the expression 'imperative grounds of public security' used in Article 28(3) of Directive 2004/38 … to be interpreted as meaning that only irrefutable threats to the external or internal security of the Member State can justify an expulsion, that is, only to the existence of the State and its essential institutions, their ability to function, the survival of the population, external relations and the peaceful co-existence of nations?
> 2. Under what conditions can the right to enhanced protection against expulsion achieved following 10 years of residence in the host Member State laid down in Article 28(3)(a) of Directive 2004/38 subsequently be lost? Is the condition for the loss of the right of permanent residence laid down in Article 16(4) of the directive to be applied *mutatis mutandis* in that context?
> 3. If Question 2 is answered in the affirmative and Article 16(4) of the directive applies *mutatis mutandis*: is the enhanced protection against expulsion lost by lapse of time alone, irrespective of the reasons for the absence?
> 4. Also if Question 2 is answered in the affirmative and Article 16(4) of the directive applies *mutatis mutandis*: is an enforced return to the host Member State in the context of criminal proceedings before expiry of the two-year period capable of maintaining the right to enhanced protection against expulsion, even where following that return the fundamental freedoms cannot be exercised for a considerable time?"

Consideration of the questions referred

Questions 2 to 4

22 By Questions 2–4, which should be considered first, the referring court asks essentially to what extent absences from the host Member State during the period referred to in art.28(3)(a) of Directive 2004/38, that is, during the 10 years preceding the decision to expel the person concerned, prevent that person from enjoying the enhanced protection laid down in that provision.

23 According to the Court's case law, Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty, and it aims in particular to strengthen that right, so that Union citizens cannot derive less rights from that directive than from the instruments of secondary

legislation which it amends or repeals (see *Metock v Minister for Justice, Equality and Law Reform* (C-127/08) [2008] E.C.R. I-6241; [2008] 3 C.M.L.R. 39 at [59] and [82], and *Secretary of State for Work and Pensions v Lassal* (C-162/09) [2011] 1 C.M.L.R. 31 at [30]).

24 According to recital 23 in the preamble to Directive 2004/38, the expulsion of Union citizens and their family members on grounds of public policy or public security can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State.

25 That is why Directive 2004/38, as follows from recital 24 in the preamble, establishes a system of protection against expulsion measures which is based on the degree of integration of those persons in the host Member State, so that the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be.

26 In this context, art.28(1) of that directive provides generally that, before taking an expulsion decision on grounds of public policy or public security, the host Member State must take account in particular of considerations such as how long the individual concerned has resided on its territory, his or her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his or her links with the country of origin.

27 Under art.28(2), Union citizens or their family members, irrespective of nationality, who have the right of permanent residence in the territory of the host Member State pursuant to art.16 of the directive cannot be the subject of an expulsion decision "except on serious grounds of public policy or public security".

28 In the case of Union citizens who have resided in the host Member State for the previous 10 years, art.28(3) of Directive 2004/38 considerably strengthens their protection against expulsion by providing that such a measure may not be taken except where the decision is based on "imperative grounds of public security, as defined by Member States".

29 Article 28(3)(a) of Directive 2004/38, while making the enjoyment of enhanced protection subject to the person's presence in the Member State concerned for 10 years preceding the expulsion measure, is silent as to the circumstances which are capable of interrupting the period of 10 years' residence for the purposes of the acquisition of the right to enhanced protection against expulsion laid down in that provision.

30 Starting from the premise that, like the right of permanent residence, enhanced protection is acquired after a certain length of residence in the host Member State and can subsequently be lost, the referring court considers that it may be possible to apply by analogy the criteria in art.16(4) of Directive 2004/38.

31 While recitals 23 and 24 in the preamble to Directive 2004/38 certainly refer to special protection for persons who are genuinely integrated into the host Member State, in particular when they were born there and have spent all their life there, the fact remains that, in view of the wording of art.28(3) of that directive, the decisive criterion is whether the Union citizen has lived in that Member State for the 10 years preceding the expulsion decision.

32 As to the question of the extent to which absences from the host Member State during the period referred to in art.28(3)(a) of Directive 2004/38, namely the 10 years preceding the decision to expel the person concerned, prevent him from

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enjoying enhanced protection, an overall assessment must be made of the person's situation on each occasion at the precise time when the question of expulsion arises.

33 The national authorities responsible for applying art.28(3) of Directive 2004/38 are required to take all the relevant factors into consideration in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State. It must be ascertained whether those absences involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned.

34 The fact that the person in question has been the subject of a forced return to the host Member State in order to serve a term of imprisonment there and the time spent in prison may, together with the factors listed in the preceding paragraph, be taken into account as part of the overall assessment required for determining whether the integrating links previously forged with the host Member State have been broken.

35 It is for the national court to assess whether that is the case in the main proceedings. If that court were to reach the conclusion that Mr Tsakouridis's absences from the host Member State are not such as to prevent him from enjoying enhanced protection, it would then have to examine whether the expulsion decision was based on imperative grounds of public security within the meaning of art.28(3) of Directive 2004/38.

36 It should be recalled that, in order to provide the national court with an answer which will be of use to it and enable it to determine the case before it, the Court may find it necessary to consider provisions of EU law which the national court has not referred to in its questions (see, to that effect, *Gintec International Import-Export GmbH v Verband Sozialer Wettbewerb eV* (C-374/05) [2007] E.C.R. I-9517; [2008] 1 C.M.L.R. 31 at [48]).

37 If it were concluded that a person in Mr Tsakouridis's situation who has acquired a right of permanent residence in the host Member State does not satisfy the residence condition laid down in art.28(3) of Directive 2004/38, an expulsion measure could in an appropriate case be justified on "serious grounds of public policy or public security" as laid down in art.28(2) of Directive 2004/38.

38 In the light of the foregoing, the answer to Questions 2–4 is that art.28(3)(a) of Directive 2004/38 must be interpreted as meaning that, in order to determine whether a Union citizen has resided in the host Member State for the 10 years preceding the expulsion decision, which is the decisive criterion for granting enhanced protection under that provision, all the relevant factors must be taken into account in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State, reasons which may establish whether those absences involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned.

Question 1

39 In view of the answer which has been given to Questions 2–4, Question 1 must be understood to the effect that the referring court seeks essentially to know whether and to what extent criminal offences in connection with dealing in narcotics as part

of an organised group can be covered by the concept of "imperative grounds of public security", should that court conclude that the Union citizen concerned enjoys the protection of art.28(3) of Directive 2004/38, or the concept of "serious grounds of public policy or public security", should it conclude that that citizen enjoys the protection of art.28(2) of that directive.

40 It follows from the wording and scheme of art.28 of Directive 2004/38, as explained in [24]–[28] above, that by subjecting all expulsion measures in the cases referred to in art.28(3) of that directive to the existence of "imperative grounds" of public security, a concept which is considerably stricter than that of "serious grounds" within the meaning of art.28(2), the EU legislature clearly intended to limit measures based on art.28(3) to "exceptional circumstances", as set out in recital 24 in the preamble to that directive.

41 The concept of "imperative grounds of public security" presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words "imperative reasons".

42 It is in this context that the concept of "public security" in art.28(3) of Directive 2004/38 should also be interpreted.

43 As regards public security, the Court has held that this covers both a Member State's internal and its external security (see, inter alia, *Sirdar v Secretary of State for Defence* (C-273/97) [1999] E.C.R. I-7403; [1999] 3 C.M.L.R. 559 at [17]; *Kreil v Germany* (C-285/98) [2000] E.C.R. I-69; [2002] 1 C.M.L.R. 36 at [17]; *Re Albore* (C-423/98) [2000] E.C.R. I-5965; [2002] 3 C.M.L.R. 10 at [18]; and *Dory v Germany* (C-186/01) [2003] E.C.R. I-2479; [2003] 2 C.M.L.R. 26 at [32]).

44 The Court has also held that a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful co-existence of nations, or a risk to military interests, may affect public security (see, inter alia, *Campus Oil Ltd v Minister for Industry and Energy* (72/83) [1984] E.C.R. 2727; [1984] 3 C.M.L.R. 544 at [34] and [35]; *Fritz Werner Industrie-Ausrüstungen GmbH v Germany* (C-70/94) [1995] E.C.R. I-3189 at [27]; *Albore* [2002] 3 C.M.L.R. 10 at [22]; and *Commission of the European Communities v Greece* (C-398/98) [2001] E.C.R. I-7915; [2001] 3 C.M.L.R. 62 at [29]).

45 It does not follow that objectives such as the fight against crime in connection with dealing in narcotics as part of an organised group are necessarily excluded from that concept.

46 Dealing in narcotics as part of an organised group is a diffuse form of crime with impressive economic and operational resources and frequently with transnational connections. In view of the devastating effects of crimes linked to drug trafficking, Council Framework Decision 2004/757/JHA of October 25, 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [2004] OJ L335/8 states in recital 1 that illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the Union, and to the legal economy, stability and security of the Member States.

47 Since drug addiction represents a serious evil for the individual and is fraught with social and economic danger to mankind (see, to that effect, inter alia, *Wolf v Hauptzollamt Düsseldorf* (221/81) [1982] E.C.R. 3681; [1983] 2 C.M.L.R. 170 at [9], and *Aoulmi v France* (50278/99) (2008) 46 E.H.R.R. 1 at [86]), trafficking in

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narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it.

48 It should be added that art.27(2) of Directive 2004/38 emphasises that the conduct of the person concerned must represent a genuine and present threat to a fundamental interest of society or of the Member State concerned, that previous criminal convictions cannot in themselves constitute grounds for taking public policy or public security measures, and that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention cannot be accepted.

49 Consequently, an expulsion measure must be based on an individual examination of the specific case (see, inter alia, *Metock* [2008] 3 C.M.L.R. 39 at [74]), and can be justified on imperative grounds of public security within the meaning of art.28(3) of Directive 2004/38 only if, having regard to the exceptional seriousness of the threat, such a measure is necessary for the protection of the interests it aims to secure, provided that that objective cannot be attained by less strict means, having regard to the length of residence of the Union citizen in the host Member State and in particular to the serious negative consequences such a measure may have for Union citizens who have become genuinely integrated into the host Member State.

50 In the application of Directive 2004/38, a balance must be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision is to be made (see, inter alia, *Orfanopoulos v Land Baden-Württemberg* (C-482/01 & C-493/01) [2004] E.C.R. I-5257; [2005] 1 C.M.L.R. 18 at [77]–[79]), by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity, and, if appropriate, the risk of reoffending (see, to that effect, inter alia, *R. v Bouchereau* (30/77) [1977] E.C.R. 1999; [1977] 2 C.M.L.R. 800 at [29]), on the one hand, and, on the other hand, the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which, as the A.G. observes in point 95 of his Opinion, is not only in his interest but also in that of the European Union in general.

51 The sentence passed must be taken into account as one element in that complex of factors. A sentence of five years' imprisonment cannot lead to an expulsion decision, as provided for in national law, without the factors described in the preceding paragraph being taken into account, which is for the national court to verify.

52 In that assessment, account must be taken of the fundamental rights whose observance the Court ensures, insofar as reasons of public interest may be relied on to justify a national measure which is liable to obstruct the exercise of freedom of movement for persons only if the measure in question takes account of such rights (see, inter alia, *Orfanopoulos* [2005] 1 C.M.L.R. 18 at [97]–[99]), in particular the right to respect for private and family life as set forth in art.7 of the Charter of Fundamental Rights of the European Union and art.8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see, inter alia, *McB v E* (C-400/10 PPU) [2011] 1 F.L.R. 518 at [53], and *Maslov v Austria* (1638/03) (2008) 47 E.H.R.R. 20 at [61] et seq.).

53 To assess whether the interference contemplated is proportionate to the legitimate aim pursued, in this case the protection of public security, account must be taken

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in particular of the nature and seriousness of the offence committed, the duration of residence of the person concerned in the host Member State, the period which has passed since the offence was committed and the conduct of the person concerned during that period, and the solidity of the social, cultural and family ties with the host Member State. In the case of a Union citizen who has lawfully spent most or even all of his childhood and youth in the host Member State, very good reasons would have to be put forward to justify the expulsion measure (see, to that effect, in particular, *Maslov v Austria* (2008) 47 E.H.R.R. 20 at [71]–[75]).

54 In any event, since the Court has held that a Member State may, in the interests of public policy, consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs (see *Criminal proceedings against Calfa* (C-348/96) [1999] E.C.R. I-11; [1999] 2 C.M.L.R. 1138 at [22], and *Orfanopoulos* [2005] 1 C.M.L.R. 18 at [67]), it must follow that dealing in narcotics as part of an organised group is a fortiori covered by the concept of "public policy" for the purposes of art.28(2) of Directive 2004/38.

55 It is for the referring court to ascertain, taking into consideration all the factors mentioned above, whether Mr Tsakouridis's conduct is covered by "serious grounds of public policy or public security" within the meaning of art.28(2) of Directive 2004/38 or "imperative grounds of public security" within the meaning of art.28(3) of that directive, and whether the proposed expulsion measure satisfies the conditions referred to above.

56 In the light of the foregoing, the answer to Question 1 is that, should the referring court conclude that the Union citizen concerned enjoys the protection of art.28(3) of Directive 2004/38, that provision must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of "imperative grounds of public security" which may justify a measure expelling a Union citizen who has resided in the host Member State for the preceding 10 years. Should the referring court conclude that the Union citizen concerned enjoys the protection of art.28(2) of Directive 2004/38, that provision must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is covered by the concept of "serious grounds of public policy or public security".

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

R1 On those grounds, the Court (Grand Chamber) HEREBY RULES:

Article 28(3)(a) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96 must be interpreted as meaning that, in order to determine whether a Union citizen has resided in the host Member State for the 10 years preceding the expulsion decision, which is the decisive criterion for granting enhanced protection

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under that provision, all the relevant factors must be taken into account in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State, reasons which may establish whether those absences involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned.

Should the referring court conclude that the Union citizen concerned enjoys the protection of art.28(3) of Directive 2004/38, that provision must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of "imperative grounds of public security" which may justify a measure expelling a Union citizen who has resided in the host Member State for the preceding 10 years. Should the referring court conclude that the Union citizen concerned enjoys the protection of art.28(2) of Directive 2004/38, that provision must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is covered by the concept of "serious grounds of public policy or public security".

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A

Court of Appeal

*Regina (Nouazli) *v* Secretary of State for the Home Department

[2013] EWCA Civ 1608

B

2013 Nov 12; Dec 10

Moore-Bick, Briggs, Christopher Clarke LJJ

European Union — Freedom of movement — Persons — Algerian national with right of residence in United Kingdom as spouse of EEA national detained pending decision whether or not to remove him — Whether administrative detention pending decision on removal incompatible with right to freedom of movement or C *constituting unlawful discrimination on grounds of nationality — Immigration (European Economic Area) Regulations 2006 (SI 2006/1003), regs 19(3), 24(1) (as amended by Immigration (European Economic Area) (Amendment) Regulations 2009 (SI 2009/1117), reg 2, Sch 1, paras 6, 10, 17) — FEU Treaty, art 18FEU — Parliament and Council Directive 2004/38/EC, art 27*

The claimant, an Algerian national who had a right of residence in the United D Kingdom as the spouse of an EEA national, was convicted of numerous criminal offences. The Secretary of State notified the claimant of a decision to make a deportation order against him under regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006[1]. When the claimant sought judicial review of that decision the Secretary of State responded by withdrawing her decision and agreeing to reconsider the matter. The Secretary of State subsequently issued a fresh notice of a decision to deport the claimant. The First-tier Tribunal allowed the claimant's appeal against that decision. The claimant pursued his application for E judicial review in respect of his detention, originally in custody and subsequently on bail subject to conditions as to residence, reporting and tagging, between the original notification and the tribunal's decision. It was the Secretary of State's case that the claimant had been lawfully detained pursuant to regulation 24(1) of the 2006 Regulations, pending a decision on whether to remove him under regulation 19(3), until the making of the second decision, and pursuant to regulation 24(3) thereafter. The claimant contended (i) that the restrictions on freedom of movement and F residence of EU citizens and their family members authorised by article 27(1) of Parliament and Council Directive 2004/38/EC[2] did not extend to detention pending a decision on deportation, and (ii) that regulation 24(1) of the 2006 Regulations discriminated against EEA nationals and their family members on grounds of nationality, contrary to article 18FEU of the FEU Treaty[3], in that other foreign nationals were only liable to be detained under Schedule 3 to the Immigration Act 1971 after they had been served with notice of a decision to make a deportation order G against them. The judge dismissed the claim.

On the claimant's appeal—

Held, dismissing the appeal, (1) that administrative detention in connection with deportation necessarily affected the right of freedom of movement enjoyed by EU citizens and their family members, by restricting the liberty of the detainee and preventing him from exercising his right to travel to other member states, and was also liable to deter EEA nationals from entering and residing in the member state in

H

[1] Immigration (European Economic Area) Regulations 2006, regs 19(3), 24(1)(3), as amended: see post, para 5.

[2] Parliament and Council Directive 2004/38/EC, art 27: see post, para 7.

[3] FEU Treaty, art 18FEU: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

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question; that, however, article 27(1) of Parliament and Council Directive 2004/38/EC was cast in general terms capable of applying to any measures restricting freedom of movement which could be justified by reference to the provisions of the Directive, and in principle detention pending a decision on removal could be justifiable on the grounds of public policy or public security within the terms of article 27(1); and that, accordingly, detention under regulation 24(1) of the Immigration (European Economic Area) Regulations 2006 was not incompatible with the Directive, provided that the requirement of proportionality and other safeguards contained in article 27 and reflected in regulation 21 of the 2006 Regulations were met (post, paras 11, 16, 17, 32, 33).

(2) That article 18FEU of the FEU Treaty was concerned only with the way in which citizens of the European Union were treated in member states other than those of which they were nationals, and not with discrimination as between EEA nationals and nationals of other states; that, moreover, the respective provisions for detention of EEA nationals and other foreign nationals had to be viewed in the wider context of the different legal regimes governing their removal, between which there was no direct comparison; and that, therefore, detention under regulation 24(1) of the 2006 Regulations did not involve unlawful discrimination on the grounds of nationality within the meaning of article 18FEU (post, paras 26, 28, 29, 32, 33).

R v Pieck (Case 157/79) [1981] QB 571, ECJ and *Oulane v Minister voor Vreemdelingenzaken en Integratie* (Case C-215/03) [2005] QB 1055, ECJ distinguished.

Decision of Eder J [2013] EWHC 567 (Admin); [2013] 2 CMLR 1514 affirmed.

The following cases are referred to in the judgment of Moore-Bick LJ:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Garcia Avello v Belgian State (Case C-148/02) [2004] All ER (EC) 740, ECJ
Jones v MBNA International Bank (unreported) 30 June 2000, CA
Messner, Criminal proceedings against (Case C-265/88) [1989] ECR 4209, ECJ
Oulane v Minister voor Vreemdelingenzaken en Integratie (Case C-215/03) [2005] QB 1055; [2005] 3 WLR 543, ECJ
R v Governor of Durham Prison, Ex p Hardial Singh [1984] 1 WLR 704; [1984] 1 All ER 983
R v Pieck (Case 157/79) [1981] QB 571; [1981] 2 WLR 960; [1981] 3 All ER 46, ECJ
Wijsenbeek, Criminal proceedings against (Case C-378/97) [1999] ECR I-6207, ECJ

The following additional cases were cited in argument:

Gambelli, Criminal proceedings against (Case C-243/01) [2003] ECR I-13031, ECJ
Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (Case C-55/94) [1996] ECR I-4165, ECJ

The following additional cases, although not cited, were referred to in the skeleton arguments:

Alpine Investments BV v Minister van Financien (Case C-384/93) [1995] All ER (EC) 543; [1995] ECR I-1141, ECJ
Commission of the European Communities v Federal Republic of Germany (Case C-269/07) [2009] ECR I-7811, ECJ
Data Delecta AB v MSL Dynamics Ltd (Case C-43/95) [1996] All ER (EC) 961, ECJ
Dhatt v McDonalds Hamburgers Ltd [1991] 1 WLR 527; [1991] ICR 238; [1991] 3 All ER 692, CA
Graff v Hauptzollamt Köln-Rheinau (Case C-351/92) [1994] ECR I-3361, ECJ
Orfanopoulos and Oliveri v Land Baden-Württemberg (Joined Cases C-482/01 and C-493/01) [2004] ECR I-5257, ECJ

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Österreichischer Gewerkschaftsbund v Republic of Austria (Case C-195/98) [2000] ECR I-10497, ECJ
R v Bouchereau (Case 30/77) [1978] QB 732; [1978] 2 WLR 250; 66 Cr App R 202, ECJ
R v Secretary of State for the Home Department, Ex p Salem [1999] 1 AC 450; [1999] 2 WLR 483; [1999] 2 All ER 42, HL(E)
R (Bhavyesh) v Secretary of State for the Home Department [2012] EWHC 2789 (Admin)
R (GI) v Secretary of State for the Home Department [2012] EWCA Civ 867; [2013] QB 1008; [2013] 2 WLR 1277; [2012] 4 All ER 987, CA
R (WL (Congo)) v Secretary of State for the Home Department [2011] UKSC 12; [2012] 1 AC 245; [2011] 2 WLR 671; [2011] 4 All ER 1, SC(E)
Royer, Criminal proceedings against (Case 48/75) [1976] ECR 497, ECJ
Ruiz Zambrano v Office national de l'emploi (Case C-34/09) [2012] QB 265; [2012] 2 WLR 886; [2011] All ER (EC) 491, ECJ

APPEAL from Eder J

By a claim form issued on 27 April 2012 the claimant, Rachid Nouazli, sought judicial review of the decision of the defendant, the Secretary of State for the Home Department, to deport him under regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 (as notified to him on 3 April 2012) and of his detention in custody pending deportation. In her acknowledgement of service dated 11 May 2012 the Secretary of State withdrew her decision to deport the claimant, stated that she would notify him of any decision to deport following consideration of any representations received, and maintained that in the meantime his continued detention remained lawful. On 16 May 2012, permission to proceed with the claim for judicial review was granted on the single ground that his detention was unlawful under EU law as being discriminatory on grounds of nationality contrary to article 18FEU of the FEU Treaty. On 31 May 2012 the claimant was granted bail on conditions of residence, reporting and tagging.

On 7 September 2012 the claimant received notification of a fresh decision to make a deportation order under regulation 19(3) of the 2006 Regulations. He appealed to the First-tier Tribunal (Immigration and Asylum Chamber) which allowed his appeal on 2 January 2013.

The claimant applied for permission to amend his grounds for seeking judicial review and the relief sought, so as to add, inter alia, a claim of incompatibility between regulation 24(1) of the 2006 Regulations and article 27(1) of Parliament and Council Directive 2004/38/EC (OJ 2004 L 158, p 77). Eder J granted permission for the amendments but dismissed the claim on 15 March 2013 [2013] 2 CMLR 1514.

By an appellant's notice filed on 5 July 2013 and pursuant to permission granted by the Court of Appeal (Elias LJ), the claimant appealed on the grounds, inter alia, that the judge had erred in law (1) in holding that article 27(1) of Directive 2004/38 was wide enough to include detention of any kind provided that it was done for one or more of the grounds stated therein and was proportionate; (2) in holding that regulation 24(1) of the 2006 Regulations was not incompatible with article 27(1) of Directive 2004/38; and (3) in holding that detention under regulation 24(1) of the 2006 Regulations was not unlawful under EU law and not discriminatory on grounds of nationality when compared to the detention of an alien in similar circumstances.

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The facts are stated in the judgment of Moore-Bick LJ.

Ramby De Mello and *Daniel Bazini* (instructed by *Lawrence Lupin Solicitors, Wembley*) for the claimant.

Jonathan Auburn (instructed by *Treasury Solicitor*) for the Secretary of State.

The court took time for consideration.

10 December 2013. The following judgments were handed down.

MOORE-BICK LJ

1 This is an appeal by Mr Rachid Nouazli against the order of Eder J [2013] 2 CMLR 1514 dismissing his claim for judicial review of the Secretary of State's decision to detain him while she considered making an order for his deportation to Algeria.

2 The appellant arrived in the United Kingdom in March 1996. In June 1997 he married a French citizen and in 1998 he was granted a right of residence as a family member of an EEA national. By the end of 2006 the appellant had been convicted on 28 occasions of 48 criminal offences. In addition he had failed on numerous occasions to comply with conditions imposed on him by the police, the courts and the immigration authorities. As a result, in January 2007 the Secretary of State decided to remove him, but he appealed against that decision and in November 2008 his appeal was allowed by the Asylum and Immigration Tribunal. However, the appellant continued to offend on numerous occasions and eventually on 25 January 2012 he was sentenced for an offence of theft to 20 weeks' imprisonment. His release date was 3 April 2012.

3 On 3 April 2012, just before the appellant was due to be released, he was served with notice of the Secretary of State's decision to make a deportation order against him under the Immigration (European Economic Area) Regulations 2006 on the grounds that he would pose "a genuine, present and sufficiently serious threat to the interests of public policy" if he were allowed to remain in the United Kingdom. On the same day he was handed a letter from the UK Border Agency informing him that he was to be detained under the powers contained in Schedule 3 to the Immigration Act 1971 pending his removal. The appellant was detained in custody between 3 April 2012 and 6 June 2012 when he was released on bail, subject to a reporting restriction and an electronic curfew.

4 On 7 September 2012 the appellant was served with a fresh notice that a decision had been taken to deport him, citing the same grounds as those previously relied on. Once again, he appealed and once again by a decision published on 2 January 2013 the First-tier Tribunal found in his favour. It was accepted before the judge that from 7 September 2012 until at least 2 January 2013 the appellant was to be regarded as having been detained.

The 2006 Regulations

5 The Secretary of State sought to justify the appellant's detention under regulations 19 and 24 of the 2006 Regulations, which lie at the heart of the present appeal. They provide, so far as material (as amended by regulation 2

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of and paragraphs 6, 10, 17(a) of Schedule 1 to the Immigration (European Economic Area) (Amendment) Regulations 2009):

"19. *Exclusion and removal from the United Kingdom*"

"(3) Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if— (a) that person does not have or ceases to have a right to reside under these Regulations; or (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21."

"24. *Person subject to removal*

"(1) If there are reasonable grounds for suspecting that a person is someone who may be removed from the United Kingdom under regulation 19(3)(b), that person may be detained under the authority of an immigration officer pending a decision whether or not to remove the person under that regulation . . ."

"(3) Where a decision is taken to remove a person under regulation 19(3)(b), the person is to be treated as if he were a person to whom section 3(5)(a) of the 1971 Act (liability to deportation) applied and section 5 of that Act (procedure for deportation) and Schedule 3 to that Act (supplementary provision as to deportation) are to apply accordingly."

Directive 2004/38/EC

6 The 2006 Regulations were designed to implement Parliament and Council Directive 2004/38/EC of 29 April 2004 (OJ 2004 L 158, p 77) which concerns the right of free movement and residence enjoyed by nationals of the member states of the European Union and members of their families. The broad objective of the Directive appears most clearly from the following passages:

"Whereas

"(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the member states . . .

"(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market . . ."

"(5) The right of all Union citizens to move and reside freely within the territory of the member states should . . . be also granted to their family members, irrespective of nationality."

"(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a member state on the basis of this Directive should enjoy, in that member state, equal treatment with nationals in areas covered by the Treaty . . ."

"*Article 1*

"*Subject*

"This Directive lays down: (a) the conditions governing the exercise of the right of free movement and residence within the territory of the member states by Union citizens and their family members; . . . (c) the

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limits placed on the rights set out in (a) . . . on grounds of public policy, public security or public health."

7 Since much of the argument in this case revolved around articles 24 and 27, it may be helpful to set out the material parts of them as well. They provide:

"*Article 24*

"*Equal treatment*

"1. . . . all Union citizens residing on the basis of this Directive in the territory of the host member state shall enjoy equal treatment with the nationals of that member state within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a member state and who have the right of residence or permanent residence."

"*Chapter VI*

"*Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health*

"*Article 27*

"*General principles*

"1. Subject to the provisions of this Chapter, member states may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

"2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures . . ."

The proceedings below

8 Before the judge the appellant identified, and was given leave to pursue, five separate questions, but in substance they came down to these: (i) whether as a family member of a national of a member state he was entitled to the protection of the Directive and if so, whether his detention pending removal following a conviction was unlawful because it contravened article 27(1); (ii) whether regulation 24(1) of the 2006 Regulations and section 36 of the UK Borders Act 2007 (which permits the detention of a person who has been convicted of an offence pending a decision on his deportation) are compatible with European Union law; and (iii) whether his detention under regulation 24(1) was unlawful because its exercise involved discrimination against him on grounds of nationality. As the judge emphasised, however, the appellant did not seek to argue that the decision to detain him was *Wednesbury* unreasonable (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), nor did he rely on any other aspects of his detention to contend that it was unlawful on either occasion.

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A 9 The judge rejected each of the appellant's grounds and dismissed his claim for judicial review. He held that the words "may restrict the freedom of movement" in article 27(1) of the Directive were wide enough to encompass detention of any kind (subject, of course, to the other requirements of that article), including detention pending a decision on deportation. He also rejected the argument that the appellant had been B subjected to unlawful discrimination because he did not consider that a comparison could properly be drawn between the position of EEA nationals and that of nationals of countries outside the EEA, which formed the foundation of the appellant's argument. (It was not disputed that since the appellant is a family member of an EEA national he is entitled to be treated as if he were himself an EEA national.)

C *Are the 2006 Regulations compatible with article 27?*

10 The first two grounds of appeal are that article 27(1) of the Directive does not permit administrative detention pending deportation and that therefore regulation 24(1) of the 2006 Regulations and section 36(1) of the 2007 Act are incompatible with it. The two points are closely related and it is convenient to consider them together.

D 11 The Directive as a whole is concerned with the right of citizens of the Union and their family members to move and reside freely within the territory of the member states. As the second recital makes clear, free movement of persons constitutes one of the fundamental freedoms of the internal market—see article 21FEU of the Treaty on the Functioning of the European Union ("the Treaty")—and it is with freedom of movement in that E sense that the Directive is concerned. Chapter VI of the Directive is concerned with restrictions on the right of entry and the right of residence imposed on grounds of public policy, public security and public health, as the heading makes clear. Read in that context it is, I think, clear that article 27 is primarily concerned with the right of member states to exclude from their territory citizens of the Union who would otherwise have the right to enter and reside there, a conclusion that is reinforced by articles 28 to 31. F However, administrative detention in connection with deportation necessarily affects the right of free movement, not only in the ordinary sense of restricting the liberty of the detainee, but in the broader sense of preventing him from exercising his right to travel to another member state. It is also liable to deter EEA nationals from entering and residing in the state in question. It seems to me, therefore, that article 27 is engaged by any G measures which interfere, or which may have the effect of interfering, with the right of free movement. However, it is framed in broad terms and not confined to measures which are directly linked to exclusion. The limits on the right to interfere with freedom of movement are those set out in article 27 itself. The circumstances which may present a danger to public security and public health, in particular, although perhaps of limited duration, may be such as to justify a temporary restriction on freedom of H movement short of expulsion. It would be surprising, in my view, if the Directive were not intended to accommodate situations of that kind. The safeguard lies in the limited grounds on which freedom of movement may be restricted and on the need for proportionality, at least when the grounds relied on are public policy or public security.

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12 Mr De Mello submitted, however, that article 27(1) is not broad enough to extend to detention pending a decision by the Secretary of State whether removal is justified on the grounds of public policy in the exercise of her powers under regulation 19(3)(b) of the 2006 Regulations. He submitted that if it had been intended to allow member states to detain EEA nationals pending a decision to remove them, the Directive would have made that clear. In particular, he argued that article 27 of the Directive does not permit the detention of a person who has been released from a term of imprisonment while a decision whether to remove him is taken and in that connection he drew our attention to a number of cases decided by the Court of Justice of the European Union, including *R v Pieck* (Case 157/79) [1981] QB 571 and *Oulane v Minister voor Vreemdelingenzaken en Integratie* (Case C-215/03) [2005] QB 1055.

13 In *R v Pieck* [1981] QB 571 the defendant, a national of the Netherlands, was given six months' leave of entry to this country. He failed to obtain a residence permit and stayed on after his leave had expired without obtaining one. As a result, he was charged with an offence of overstaying his leave to enter and was warned that if he were convicted the court would have the power to recommend his deportation. The magistrates referred three questions to the European Court of Justice, the third of which was whether an offence of that kind could properly be punished by imprisonment and a recommendation for deportation. The court held, at paras 15–20, that deportation was incompatible with the right granted by the Treaty to reside and work in any of the member states and that, although national authorities are entitled to impose penalties in respect of a failure to comply with provisions relating to residence permits, they are not justified in imposing a penalty so disproportionate to the gravity of the infringement that it becomes an obstacle to the free movement of persons, as would be the case with a sentence of imprisonment. Similar views were expressed in *Criminal proceedings against Messner* (Case C-265/88) [1989] ECR 4209 and *Criminal proceedings against Wijsenbeek* (Case C-378/97) [1999] ECR I-6207.

14 In the *Oulane* case [2005] QB 1055 a Frenchman was found hiding in a railway tunnel in the Netherlands. He could not establish his identity by production of a passport or identity card, but if he had been a citizen of the Netherlands he could have established his identity by any means available to him. He was arrested and detained with a view to deportation and subsequently brought proceedings against the Minister for unlawful detention. The European Court of Justice held that detention with a view to deportation made on the basis of a failure to present a valid identity card or passport when there was no threat to public policy constituted an unjustified restriction on the freedom to provide and receive services anywhere within the territory of the member states. It was therefore incompatible with article 49EU of the EU Treaty (now article 56FEU of the Treaty). The most important part of the judgment for present purposes is to be found in paras 41–44, in which the court held that a detention order with a view to deportation could be made only in accordance with an express derogating provision, such as article 8 of Council Directive 73/148/EEC of 21 May 1973 (a forerunner of article 27), which allowed member states to place restrictions on the right of residence.

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A **15** These two cases support Mr De Mello's argument that provisions of national law may be incompatible with the right of free movement if their effect is to prevent or create an obstacle to the free movement of persons and that detention when there is no threat to public policy, public safety or public health constitutes an unjustified restriction on the right of free movement. On the other hand, the *Oulane* case supports the proposition that detention in connection with deportation can be justified if it can be B brought within the scope of article 27. One is therefore thrown back on the language of the Directive.

16 Although at several points in his argument Mr De Mello submitted that article 27 did not permit the detention of an EU national who had served a term of imprisonment pending a decision on his removal, I do not think that the question can be answered in such broad terms. The judge took C the view that in principle detention pending a decision on removal could be justifiable on the grounds of public policy or public safety and I think he was right to do so. As I have already observed, article 27(1) is cast in general terms and is capable of applying to any measures restricting freedom of movement which can be justified by reference to the provisions of the Directive. In my view the position is too clear to require a reference to the Court of Justice. I think his understandable concerns about the failure of D article 27 to limit the permissible period of detention are met by the requirement of proportionality, which provides a kind of protection similar to that which the case of *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704 and subsequent authorities afford in a purely domestic context.

17 For these reasons I agree with the judge that administrative detention E under regulation 24 of the 2006 Regulations is not incompatible with the Directive, provided that the safeguards for which it provides, which are themselves reflected in regulation 21, are met. The power in section 36(1) of the 2007 Act to detain those who have served a sentence of imprisonment can be exercised only for the purposes of implementing the provisions for automatic deportation contained in section 32(5), but that section is itself subject to the exceptions set out in section 33 and section 33(4) excludes F from the operation of section 32(5) the removal of a foreign criminal in breach of his rights under the EU treaties and other legislation. It follows that EEA nationals cannot be detained pending deportation or removed otherwise than in accordance with the 2006 Regulations.

The first period of detention

G **18** The third ground of appeal relates to the period from 3 April to 11 May 2012, during which the appellant was detained ostensibly under paragraph 2(2) of Schedule 3 to the Immigration Act 1971. Mr De Mello submitted that the appellant's detention was unlawful because the provision had no application to his case.

19 By a letter dated 29 March 2012 the Secretary of State asked the Governor of Wandsworth Prison, where the appellant was then serving his H sentence, to advise the appellant that she was considering whether to deport him on the grounds of public policy. He was to be told that he had 20 working days to submit any reasons why he should not be deported. It appears that this information was conveyed to the appellant on 3 April 2012. At that point he could expect no decision to be taken until the time

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allowed for him to make representations had expired. However, on the same day the appellant was served with a notice of a decision to make a deportation order against him under regulation 19(3)(b) of the 2006 Regulations and to make an order for his detention under regulation 24(3). Also on 3 April 2012 the appellant was given a letter, wrongly dated 29 March 2012, informing him that on 3 April 2012 he had been served with a notice of intention to make a deportation order against him and the reasons for doing so. A warrant for his detention had already been issued on 27 March 2012, to be executed only after notice of the decision to make a deportation order had been given to the appellant. The warrant stated that it had been issued under paragraph 2(2) of Schedule 3 to the 1971 Act. Between 3 April and 11 May 2012 the appellant was detained pursuant to that warrant.

20 The appellant's detention was vigorously challenged by his solicitors in a letter to the UK Border Agency dated 12 April 2012 on the grounds that he had not been allowed 20 working days to make representations opposing his deportation. Although a letter setting out the reasons for deportation was sent on 20 April 2012, the Secretary of State appears to have recognised that there was some force in the point, because in her summary grounds of defence in these proceedings filed on 11 May 2012 she purported to withdraw the decision to deport him. He was granted bail on 31 May and released from detention on 6 June 2012.

21 Mr De Mello submitted that the appellant's detention between 3 April and 11 May 2012 was unlawful because it had taken place in the exercise of the power under paragraph 2(2) of Schedule 3 to the 1971 Act, which did not apply to him. However, Mr Auburn objected that the appellant had not been given permission to pursue this argument below and for that reason it had not been considered by the judge. He submitted that the appellant should not be allowed to introduce it at this stage in the proceedings.

22 The judge [2013] 2 CMLR 1514, para 12 noted that Mr Auburn had accepted that the withdrawal of the notice of intention to make a deportation order against the appellant rendered that notice null and void ab initio and that as a result it was common ground that the appellant was to be regarded as having been detained from 3 April 2012 pursuant to regulation 24(1) rather than regulation 24(3) of the 2006 Regulations. That concession may well have paved the way for the appellant's other grounds of appeal, but I do not think that it went any further than that. At all events, when the judge summarised the main issues which the appellant sought to raise he did not include any reference to the argument which the appellant now wishes to advance. He did, however, include as the final issue the broadly worded question whether the appellant's detention was and remained unlawful. The judge answered that question in the negative.

23 The judgment is careful and detailed, but one finds in it nothing to indicate that the present argument based on paragraph 2(2) of Schedule 3 to the 1971 Act was pursued before the judge. His conclusion on the final issue was based on the conclusions he had reached on the earlier issues. To me that is in itself a powerful indication that the argument was not deployed below. In that section of his skeleton argument for the hearing before the judge which dealt with this issue Mr De Mello relied on the Secretary of State's alleged failure to comply with the requirements of regulation 21(5)

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(6) of the 2006 Regulations and article 27 of the Directive. He did not contend that the appellant's detention was unlawful by reason of the erroneous use by the Secretary of State of her powers under paragraph 2(2) of Schedule 3 to the 1971 Act. In those circumstances I do not think that it would be right to allow the appellant to take what is for all practical purposes a new point at this stage in the proceedings. As May LJ pointed out in *Jones v MBNA International Bank* (unreported) 30 June 2000, parties to litigation are entitled to know what issues they have to deal with and should not be required on appeal to face new challenges which were not raised in the court below. In general that is particularly true of proceedings for judicial review, which, in the absence of orderly case management, have a tendency to develop in ways that lack the degree of precision necessary to ensure fairness to both parties.

Unlawful discrimination

24 The appellant's fourth ground of appeal is that his detention under regulation 24(1) was unlawful because it discriminated against him on the grounds of nationality, contrary to article 18FEU of the Treaty.

25 Mr De Mello submitted that the position of EEA nationals in relation to detention pending removal under regulation 24(1) of the 2006 Regulations is less favourable than that of other foreign nationals, who by virtue of paragraph 2(2) of Schedule 3 to the 1971 Act can be detained pending deportation only after they have been notified of a decision to make a deportation order against them.

26 It is important to note at the outset that the comparison which Mr De Mello seeks to draw is between EEA nationals and third country nationals; he does not suggest that the legislation discriminates between EEA nationals of different member states (other than nationals of this country who cannot be deported). I accept that (except in the case of foreign criminals who have served a term of imprisonment of 12 months or more) foreign nationals who are not EEA nationals cannot be detained until they have been served with a notice of a decision to make a deportation order against them and that to that extent their position is more favourable than that of EEA nationals. However, I am unable to accept that that amounts to unlawful discrimination on the grounds of nationality within the meaning of article 18FEU of the Treaty.

27 In support of his argument Mr De Mello drew our attention to the case of *Garcia Avello v Belgian State* (Case C-148/02) [2004] All ER (EC) 740. The circumstances of that case, however, are far removed from those of the present. Mr Garcia Avello (a Spanish national) and his wife, Mrs Weber (a Belgian national), lived in Belgium. Their children held dual Belgian and Spanish nationality. Belgian law required them to take the surname of their father, so on their birth certificates they were given the name Garcia Avello. However, the custom in Spain is for children to take the first surname of each of their parents, which would result in the name Garcia Weber. An application was made for the children's birth certificates to be altered accordingly. The European Court of Justice held that the principle of non-discrimination enshrined in article 12 of the EU Treaty (now article 18FEU) required that different situations must not be treated in the same way. Accordingly, persons with dual nationality were entitled to be treated differently from persons with single nationality.

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28 The decision is unsurprising, but I do not think that it has any bearing on the present case. The case was concerned with the treatment of EU citizens of different nationalities, a comparison being drawn between those of single (Belgian) nationality and those of dual (Belgian/Spanish) nationality. It is not concerned with discrimination between those who are EEA nationals and those who are nationals of other states. Nothing in the judgment supports the conclusion that article 18FEU of the Treaty is concerned with questions of that kind. In my view this limb of Mr De Mello's argument proceeds on a false hypothesis based on a fundamental misunderstanding of the nature and effect of article 18FEU. Equality of treatment among EU nationals is one of the cornerstones of the European Union, but that article is not concerned with the way in which member states treat nationals of other countries who reside within their territories, provided that they do not undermine the laws of the Union. Consistently with the purpose of the Treaty, which is to establish the fundamental legal architecture of the Union, article 18FEU is concerned only with the way in which citizens of the Union are treated in member states other than those of which they are themselves nationals. The argument therefore falls down at the first hurdle.

29 However, the difficulties do not end there. In seeking to compare the position of EEA nationals with that of nationals of other countries Mr De Mello sought to focus exclusively on the Secretary of State's power of detention, but that is to view the matter too narrowly. As the judge pointed out, the provision for detention in each case forms part of a wider regime dealing with removal. Unlike nationals of other countries, nationals of the EEA are entitled to reside in this country and enjoy the protection from removal afforded by the Treaty and the Directive. They are subject to a different legal regime which cannot be directly compared to that which applies to other foreign nationals, who can be deported if the Secretary of State deems their removal to be conducive to the public good: see section 3(5)(a) of the 1971 Act. For both these reasons I agree with the judge that Mr De Mello's argument is fundamentally flawed and that there is no substance in this ground of appeal.

Unreasonable exercise of power

30 The appellant's final ground of appeal is that the Secretary of State exercised her powers under the 2006 Regulations unlawfully because she had no grounds for suspecting that the appellant was a person who might be removed from the United Kingdom apart from the fact of his convictions, which by virtue of regulation 21(5)(e) were incapable of justifying a decision to remove him. In my view this argument reflected an unduly restrictive approach to the construction of that regulation, the purpose of which is to preclude removal simply on the grounds that the person in question has criminal convictions, regardless of the conduct which has given rise to them. I think it highly unlikely that article 27(2) of the Directive, which is reflected in regulation 21(5)(e), was intended to prevent member states from removing persons who by their behaviour have demonstrated that they pose a significant threat to public policy or public safety simply because that behaviour has led to a criminal conviction. What matters for these purposes is the behaviour rather than the conviction. However, it is unnecessary to reach a final decision on that question since the appellant was not given

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permission to pursue the argument before the judge and did not do so. Indeed, as I have already noted, the judge recorded that he expressly accepted that he could not challenge the Secretary of State's decision on the grounds of irrationality. Mr De Mello told us that the concession to which the judge referred was limited to the existence of the facts set out in the UK Border Agency's letter of 20 April 2012 setting out at length the reasons for the decision to deport him. Whether that is so or not, the argument was not pursued before the judge and for the reasons indicated earlier it is not in my view open to the appellant to raise it at this stage.

31 For all these reasons I would dismiss the appeal.

BRIGGS LJ

32 I agree.

CHRISTOPHER CLARKE LJ

33 I also agree.

Appeal dismissed.

ALISON CRAIL, Barrister

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CO/17644/2013

Neutral Citation Number: [2015] EWHC 639 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 11 February 2015

B e f o r e:

MRS JUSTICE ELISABETH LAING

Between:
THE QUEEN ON THE APPLICATION OF KONDRAK

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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(Official Shorthand Writers to the Court)

Mr A Berry (instructed by Deighton Pierce Glynn Solicitors) appeared on behalf of the **Claimant**
Mr R Harland (instructed by Treasury Solicitors) appeared on behalf of the **Defendant**

J U D G M E N T
(As approved by the Court)

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1. MRS JUSTICE ELISABETH LAING: This is a claim for unlawful detention by the claimant, who is a citizen of Poland and thus of the European Union ("the EU"). The claimant was detained for nearly four months between 25 July 2013 and 23 December 2013, when Leggatt J ordered his release.

2. As well as challenging his detention, the claimant also challenges restrictions on employment imposed by the Secretary of State as a condition of his temporary admission in notices served in June of 2013 and in December of 2013. Those restrictions prevented him from working without specific permission from the defendant. In relation to that limb of the challenge, I can record that in his submissions on behalf of the Secretary of State this afternoon, Mr Harland conceded that those restrictions were unlawful, and subject to any further argument about relief, I would therefore quash them. I need say no more about them in the judgment other than to record that it does appear from the Secretary of State's relevant policy, and from the facts of this case, that those restrictions were imposed on the claimant in breach of that policy.

3. The claim in this case was lodged on 23 December 2013. As I have already recorded, on that day, the 23rd, Leggatt J ordered the claimant's release from immigration detention. Permission to apply for judicial review was granted by Helen Mountfield QC sitting as a Deputy Judge of the High Court on 25 February 2014, and an application by consent to amend grounds of claim to vacate the hearing list the for 15 July 2014 and for further case management directions was made by Michael Fordham QC sitting as a Deputy Judge of the High Court on 14 July 2014.

The Facts

4. The claimant was born on 25 March 1988. On 30 June 2011, he arrived in the United Kingdom and stayed with friends. At that stage, he had savings which he had earned in Poland and he lived on those. After two or three weeks, he moved to 15 Grayscroft Road, London SW16 5UP, and he then started to work in jobs in construction, being paid cash in hand. In October 2011, he moved to 107 Lewin Road, London SW16 6JX and continued to work on construction sites. Between May and October 2012 he had a job with JBL construction, and after October 2012 and until January 2013 he continued to work on the JBL site but as a self employed person rather than as an employee.

5. In January 2013, he was working on a building site in Hammersmith, but he moved out of the address in Lewin Road because he had rent problems and went to stay with a friend in Norbury. In February 2013, he had to leave the accommodation in Norbury and started to sleep rough in Victoria station while he looked for work. He then slept rough in a car park in Mitcham with other young men from Poland, Slovakia and Ukraine. In March 2013, he started to work at Chak 89 restaurant in Mitcham. He was also paid cash in hand for that work. He began to live at 29 Acacia Road, Mitcham CR4 1SF. In April 2013, he had an accident at work. He stabbed his hand with the prong of a fork. He was admitted to hospital for a few days and treated for that problem around about 23 April 2013, and he moved from 29 Acacia Road to live

with a friend called Zbigniew Soja. He returned to work at the Chak 89 restaurant, but was dismissed after three or four days, so that would be about mid May 2013.

6. Although he had accommodation, he kept in touch, according to his witness statement, with homeless people among whom he lived while he was street homeless. His solicitors on his behalf have gathered evidence in the form of various witness statements which support the outline of the facts which I have given so far, which is based upon his signed witness statement.

7. What then happened was that on 18 June he was encountered asleep in a car park. It appears from records disclosed by the defendant that he said that he had arrived in the United Kingdom on 29 June 2011 but had no identity card or passport. He said that he was employed at the Chak 89 restaurant and that he was paid cash in hand. At that stage that was not true. He was invited to an interview on 21 June 2013 by a "minded to administratively remove" letter, and he was asked to prove that he was exercising EU Treaty rights in the United Kingdom. On 23 June 2013 the claimant failed to go to that interview. He says in his witness statement that when he was told to go to the police station and interview he could not go on that day because he had a job painting and decorating.

8. On 25 June 2013, he was again encountered in a car park. The defendant considered that he had failed to show that he was exercising his EU Treaty rights and as a result it was considered by the defendant that he was a person who could be removed. Various documents were served on him. First, an IS15A (EEA) (notice to a person liable to remove); secondly, an IS151B (EEA) (decision to remove). This was a document that notified him of his right to appeal to the First Tier Tribunal, a right which the claimant did not exercise; thirdly, an IS15DTBN, notifying him that directions had been given for his removal. The IS151DTBN is a curious document, as it does not give removal directions for a specific date or time or to a specific place; fourthly, an IS96, which placed him on temporary admission in the United Kingdom and restricted his ability to work without specific permission from the Secretary of State.

9. On 3 July 2013, the claimant was arrested for a public order offence but no further action was taken in relation to that. On 10 July 2013, the claimant failed to report to the Croydon reporting centre as he had been required to in accordance with his conditions of temporary admission. On 25 July 2013, the claimant was arrested. He says that he was arrested in a café in a Mitcham and although on that day he was not employed, he was looking for a job. He was at that point detained under immigration powers. He was apparently served, although there may be a dispute about this, with an IS91R (reasons for detention) document, and he was moved to Brook House immigration removal centre and his case was allocated to the National Removals Command Capita team. Capita is a private company which is used by the Home Office for some tasks in relation to immigration detention, it appears.

10. After that, there were reviews of the claimant's detention. The first review occurred 24 hours after the detention. The second review occurred nine days after detention. There were no reviews either 14 days after detention nor 21 days after detention, nor 28

days after detention, nor were there any monthly reviews after that. The next time there was a review of his detention was in November.

11. On 3 August 2013, according to the defendant's records, it was considered that the claimant was removable on an EU letter subject to photographs and a biodata form being completed. A biodata form is a form which gives biographical details of a detainee such as the place where he was born, his father's and mother's name, and so on.

12. So there was no detention review until 16 November 2013. At that stage the claimant's case was allocated to the National Removals Command at Solihull, which is a Home Office team. On 22 November 2013, steps were taken to get a biodata form filled in in order to enable an EU letter to be used to accompany the claimant to Poland. The biodata form was left with him and he was photographed. The claimant says that he at that stage refused to complete the biodata form as he thought that he should never have been detained in the first place. On 10 December 2013, the claimant told the Home Office that he would not complete the biodata form until he had taken legal advice from a solicitor, according to the Home Office records. On 12 December 2013, he refused to be interviewed by an immigration officer. The Home Office on 12 December 2013 asked the Polish embassy to confirm the claimant's identity, and on 12 December 2013 the claimant's solicitors sent a letter before claim to the Home Office.

13. A monthly progress report was completed by the Home Office on 16 December 2013, and under the heading "Progress since last report" it said that it was taking longer than had been anticipated to secure a travel document because the claimant had refused to confirm details of his identity. According to this document, the claimant was to remain detained as there was reason to believe that he would fail to comply with conditions of temporary admission, he had failed to comply with previous conditions, he had failed to complete the biodata form and had not provided satisfactory evidence of his lawful basis of residence in the United Kingdom, and had not had close link ties to make it likely that he would stay in one place.

14. Mr Berry in his skeleton argument summarises the effect of the disclosure by the Home Office in this way: he says first of all that it shows that the claimant provided details of his employment at Chak 89 and of a residential address when he was at Mitcham police station on 21 June 2013 and that while he was detained, the claimant does not seem to have been provided with any access to legal advisers in order to take advice about whether his was lawful and/or about the defendant's plans to remove to Poland. As I have already indicated, there is a dispute about whether the IS9 was served on the claimant. If it was, that gave him details of how to get legal advice, but I do not need to resolve that dispute.

15. Mr Berry also says there is no evidence of any medical assessment having been made of the claimant when he was admitted to detention, rather to rule 34 of the Detention Centre Rules 2001. He says that the records do not show that authority for the giving of removal directions was obtained from an assistant director. The records show that no specific removal directions have ever been set giving directions for a particular flight on a particular date. He says that the detention reviews showed that no action at

all was taken in relation to the claimant's removal before late November 2013. He says that a note by a SEO on 22 November 2013 records that this was a case where no progress had been made due to an administrative failure in allocation.

16. Moreover, he says, the 11 December 2013 review acknowledges that the case had "fallen through the cracks" as removal directions "could have been set" as soon as the claimant was detained, but no reviews were carried out. The officer authorising that review noted on 12 December 2013 that the case had been poorly handled and that release would need to be considered if inquiries made to the Polish embassy that day did not receive a favourable response within a week.

17. He also notes from the defendant's records that on 3 and possibly on 18 August 2013, it was recorded that the claimant had threatened to harm himself. The 20 September GCID report notes that the claimant had told the welfare officer that he had not seen anyone about his case, that he did not want to go back to Poland, and that he wanted to know why he had been detained. It is recorded on the same date that the claimant's case had not yet been allocated within the removals team at Capita, and a case review only seems to have been completed on 16 November 2013.

18. Moreover, an internal email of 18 November 2013 states that due to "IT issues" the case had not been flagged up for follow up action and that the claimant had "remained detained without action" and that there had been "no detention reviews" and "no action much at all" from CID. That, Mr Berry points out, is consistent with the GCID record of 16 November 2013, which also notes that authority to remove needed to be obtained from an assistant director, and there is no evidence anywhere in the records that have been disclosed that this had been done.

19. On 16 November it was recorded that no removal directions had been set. The defendant did not give the claimant a biodata form to sign until 10 December 2013, and the claimant refused to sign that until he had spoken to his solicitor. The Polish embassy was not contacted about whether or not it would be prepared to receive the claimant back in the absence of a biodata form until 12 December 2013.

20. Finally, he says, there was no evidence from what has been disclosed by the defendant that the defendant considered granting temporary admission on 24 December 2013 without a prohibition on employment, and nor is there any evidence that the defendant considered whether to lift that restriction after that, despite letters from the claimant's solicitors on the topic, which the defendant ignored.

21. It will be apparent from what I have said so far that the defendant has disclosed a large number of documents in this case, but there has been no witness statement from the defendant explaining what has happened, and that means that there are a number of significant gaps in the evidence. In the light of the fact that the defendant has chosen not to produce a witness statement, I have felt it appropriate to draw inferences against the defendant on a number of matters.

22. Mr Berry referred in his skeleton argument to the decision of Sales J in Das v Secretary of State for the Home Department [2013] EWHC 682 (Admin). He referred to paragraphs 20 and 21 of that decision:

> "20. The Secretary of State did not put forward any witness statements to explain how the decision had been taken to detain the Claimant or what material had been to hand when that decision was taken. I was simply referred to the contemporaneous records maintained within the United Kingdom Border Agency ('UKBA'), and to the extent that they were unclear I had to try to piece together what had happened as best I could. This was particularly unsatisfactory, because there were significant issues on the facts whether the relevant officials who decided that the Claimant should be detained and that her detention should be continued made reference to Dr Sharma's report (it is clear that they did not have access to Dr Oyewole's report) and whether they took into account the Secretary of State's policy in paragraph 55.10.
>
> "21. Where a Secretary of State fails to put before the court witness statements to explain the decision-making process and the reasoning underlying a decision they take a substantial risk. In general litigation, where a party elects not to call available witnesses to give evidence on a relevant matter, the court may draw inferences of fact against that party: Wisniewski v Central Manchester Health Authority [1998] Lloyds Rep Med 223, 240; Herrington v British Railways Board [1972] AC 877, 930G-H (Lord Diplock); The Law Debenture Trust Corporation plc v Elektrim SA [2009] EWHC 1801 (Ch), [176]-[179]. The basis for drawing adverse inferences of fact against the Secretary of State in judicial review proceedings will be particularly strong, because in such proceedings the Secretary of State is subject to the stringent and well-known obligation owed to the court by a public authority facing a challenge to its decision, 'to co-operate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings' (Belize Alliance of Conservation Non-Governmental Organisations v The Department of the Environment [2004] UKPC 6; [2004] Env LR 761, at para. [86] per Lord Walker of Gestingthorpe; and see R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1409; [2002] All ER (D) 450 (Oct) at [50] per Laws LJ, and I v Secretary of State for the Home Department [2010] EWCA Civ 727, [50]-[55]).

I feel fortified in drawing such inferences as I feel appropriate by what Sales J, as he then was, said in Das.

The Legal Framework

23. The Treaty on the Functioning of the European Union ("TFEU") and Directive 2004/38/EC ("the Directive") are transposed into UK law by the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). These provide for rights of free movement of EU citizens and EEA nationals into and in the UK and for rights of residence in the United Kingdom. When the EU citizen or an EEA national arrives at a port or at the UK border, they have a right of admission to the United Kingdom if they produce a valid passport or identity card issued by an EU or EEA state. That right is reflected in regulation 11 subregulation 1 of the EEA Regulations, which transposes article 5 of the Directive. They do not require permission to enter the UK.

24. When EU citizens or EEA nationals are admitted to the United Kingdom, their passports are not stamped. After that, they have an initial right of residence for up to three months. That is reflected in regulation 13 subregulation 1 of the EEA Regulations. They are free to take work without permission -- see regulations 4(6) and 14 of the EEA Regulations -- and they do not require permission to remain in the United Kingdom. After three months, qualified persons, as defined by regulation 6 of the EEA Regulations, have what is called an extended right of residence, reflected in regulation 14 of the EEA Regulations. A qualified person includes a worker and a jobseeker. Both terms are defined in the EEA Regulations. As long as EU citizens or EEA nationals enjoy rights of residence conferred by EU law, they are not persons subject to immigration control who require leave to enter or remain; see section 7 of the Immigration Act 1988.

25. The claimant, as an EU citizen, has rights of free movement conferred by Article 21 of the TFEU, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect, provided that those limitations and conditions themselves are applied in compliance with the limits posed by EU law and in accordance with the general principles of that law, in particular the principle of proportionality; see Baumbast v Secretary of State (C-413/99) [2002] ECRI-07091 at paragraph 91.

26. Article 45 of TFEU confers on the claimant a right to work in the UK and Article 49 of TFEU gives him the right to be self employed in the UK. Restrictions on freedom of establishment are prohibited. By Regulation (EU) 492/11 Article 1, any national of a member state shall, irrespective of his place of residence, have the right to take up an activity as an employed person and to pursue such activity within the territory of another member state in accordance with provisions laid down by law, regulations, or administrative acts governing the employment of nationals of that state.

27. The Secretary of State may in some circumstances remove an EU citizen from the United Kingdom. That appears from regulation 19(3)(a) of the EEA Regulations. Regulation 19 is headed "exclusion and removal from the United Kingdom". Subregulation 19 reads as follows:

> "Subject to paragraphs 4 and 5, an EEA national who has entered the United Kingdom, or the family member of such national who has entered the United Kingdom, may be removed if- (a) that person does not have or

ceases to have a right to reside under these regulations."

Regulation 24(2) reads as follows:

> "Where a decision is taken to remove a person under regulation 19(3)(a)... The person is to be treated as if he were a person to whom section 10(1)(a) of the 1999 Act applies, and section 10 of that Act (removal of certain persons unlawfully in the United Kingdom) is to apply accordingly."

The 1999 Act which is referred to is the Immigration and Asylum Act 1999. Section 10(1)(a), as it was in force at the material time, provides that:

> "A person who is not a British citizen may be removed from the United Kingdom in accordance with directions given by an immigration officer if a having only limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave."

Section 10(7) provides that:

> "In relation to any such directions, paragraphs 10, 11, 16 and 18, 21 and 22 to 24 of schedule 2 to the 1971 Act (administrative provisions as to control on entry) apply as they apply in relation to directions given under paragraph 8 of that schedule."

Paragraph 16(2) of schedule 2 to the Immigration Act 1971, which is the 1971 Act referred to in section 10 of the 1999 Act, provides as follows:

> "If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10(a) or 12 to 14, that person may be detained under the authority of an immigration officer pending- (a) a decision whether or not to give such directions; (b) his removal in pursuance of such directions."

So that is the power to detain which is relevant in this case.

28. Pausing there, the language of paragraph 16(2) was amended by the 1999 Act so as to make clear that the power of detention does not depend on the establishment by the Secretary of State of a precedent fact, but can be exercised where there are reasonable grounds for suspecting that a person is a person in respect of whom removal directions may be given under one of the paragraphs that is referred to in paragraph 16(2).

29. The Secretary of State has a published policy governing the exercise of the power to detain. That policy is contained in a document called the Enforcement and Instructions Guidance. Chapter 50 of that deals at section 4 with "Considering TA [that is temporary admission] or detention of EEA nationals". Section 4 reads as follows:

> "Temporary admission should not be granted to an EEA national or their

> family members save for in the exception circumstances set out in regulation 22. In EEA administrative removal cases, the individual should not ordinarily be detained until the point of removal, ie until he/she needs to be taken to the airport following service of removal directions. To detain earlier would leave UKBA open to potential accusations of preventing the individual from exercising her/his Treaty rights. However, with the authority of an HMI/SEO, EEA nationals or their family members can exceptionally be detained where a decision has been taken to remove the person and it is decided upon balance that detention is necessary, ie to reduce the risk of absconding, and the individual meets the current UKBA criteria for detention. There should be no barriers to the subject's removal, and AD authority given for the removal, and AD should review detention at the 24-hour point."

"AD" stands for Assistant Director.

30. Chapter 55 of the EIG deals at paragraph 55.8 with detention reviews. It provides that in non-criminal casework, non-third country cases, there should be reviews after 24 hours, seven days, 14 days, 21 days, 28 days, and thereafter at monthly intervals. Rule 9 subrule 1 of the Detention Centre Rules 2001 provides:

> "Every detained person will be provided by the Secretary of State with written reasons for his detention at the time of his initial detention and thereafter monthly."

Subrule 2 provides that:

> "The Secretary of State shall, within a reasonable time following any request to do so by a detained person, provide that person with an update on the progress of any relevant matter relating to him."

31. Two decisions of the Supreme Court are relevant, which I shall refer to very briefly. The first decision is the decision in Lumba v Secretary of State for the Home Department [2011] UKSC 12; [2012] 1 AC 245. The second case is R (Kambadzi) v Secretary of State for the Home Department [2011] UKSC 23; [2011] 1 WLR 1299. I do not need to refer to either case in any detail. Lumba is authority for the proposition that a failure by the Secretary of State to follow her published policy is an error of law, and if she fails to follow the policy in a way that bears on the detention, that will make the detention unlawful. Kambadzi is authority for the proposition that a failure to carry out reviews in accordance with the published policy will make the detention unlawful. It does not necessarily follow from that that a breach of policy will result in an award of other than nominal damages; if the Secretary of State can show, notwithstanding the breach of policy, the detainee would have been detained anyway, the detainee is only entitled to nominal damages.

32. The Secretary of State draws my attention in particular to two points. First of all, Mr Harland draws attention to the fact that at various points in the history the claimant has not cooperated and that to some extent that is relevant to his initial detention and to the

length of his subsequent detention. He draws my attention in particular to a passage in a decision of Wei Ming Chen v Secretary of State for the Home Department [2002] EWHC 2797 (Admin):

> "... Non-cooperation may not be decisive. It is, however, a relevant, possibly highly relevant, factor. If that were not so, the purpose of these provisions could deliberately be defeated by a determined applicant. It would be open to such a person simply to sit there and do nothing until return was no longer a realistic prospect. Such a person might well then disappear, having been released into the community. That person may, moreover, be somebody convicted of most serious criminal offences (as has the applicant in this case). It cannot have been Parliament's intention that the Act could be frustrated in that way."

I note that Chen was a case about a person who had been convicted of a serious criminal offence and was resisting deportation. Mr Berry makes the point that Chen did not concern an EU national.

33. Mr Harland also invites me to take account of the distinction between mere administrative failure and unreasonableness amounting to illegality. He accepts that there have been real delays in the case, but he submits that to found a claim for damages for wrongful detention, it is not enough in retrospect that some part of the statutory process is shown to have taken longer than it should have done. He refers in that connection to R (Krasniqi) v Secretary of State for the Home Department [2011] EWCA Civ 1549 at paragraph 12.

Discussion

34. There is no doubt in this case that the Secretary of State had power to remove the claimant and consequently had power to detain. As I have already noted, the power to detain conferred by paragraph 16(2) of schedule 2 to the 1971 Act is conferred in subjective terms. The question is not whether the Secretary of State had such a power, but whether she exercised that power lawfully.

35. It seems to me that there are many problems with the detention in this case. I start with the initial exercise of the power to detain, and I return to the terms of section 4, chapter 50, of the EIG. It is clear from that part of the Secretary of State's published policy first of all that the Secretary of State would not normally detain an EEA national or an EU citizen until the point of removal, and that is clearly explained to mean the point where that person needs to be taken to the airport after removal directions have been served on him or her. Moreover, the policy spells out that the reason why this is the Secretary of State's policy is precisely in order to ensure that EU citizens and EEA nationals are not prevented from exercising their Treaty rights. That is the general position.

36. Pausing there, it is clear that the claimant in this case was not on the point of being needing to be taken to the airport when he was detained. No specific removal directions had been set or served on him and there was no flight ready for him.

37. That general policy is subject to an exception. I have already read out the terms of that exception, but there is no evidence that the terms of the exception were met in this case. First of all, there is no evidence that initial detention of the claimant was authorised by an HMI or SEO. Secondly, there is no evidence that the HMI or SEO had decided on balance that detention was necessary to reduce the risk of absconding. There is simply no reasoning to that effect in any of the documents that I have seen. Nor is there any assessment by an HMI or SEO whether the claimant met the current UKBA criteria for detention. There is no evidence that an AD had given authority for the claimant's removal in this case.

38. There is no evidence of a lack of barriers to his removal. In this case, the Secretary of State knew that the claimant did not have a passport or identity card, and therefore knew that it would be necessary for an EU letter to be prepared for the claimant. That in turn meant that the claimant would have to be photographed, and either that he would have to fill out a biodata form or that the Polish embassy would have to be approached in order for them to agree to the issuing of an EU letter without that data. Nor is there any evidence that the detention was reviewed at the 24-hour point, if one gets there.

39. For those reasons, in my judgment the initial detention of the claimant was unlawful, and I perhaps do not need to go any further than that. Would the claimant have been detained anyway, had the policy been followed? Well, in the absence of any evidence from the Secretary of State, I am simply not in a position to say whether he would have been detained or not in the circumstances, and I am not prepared, in the absence of evidence, to infer that he would have been.

40. Strictly speaking, it is not necessary for me to say anything in the light of that conclusion about the claimant's subsequent detention. Nonetheless, I will deal with it very briefly. It seems to me that at the very outside on the fact of this case it would have been reasonable to detain the claimant in order to obtain the agreement of the Polish embassy to an EU letter for a maximum of a week. The fact that he was detained for four months is inexplicable and I perhaps need to say no more than that.

41. Further, there were several breaches of the policy, so if I am wrong about the fact that he could have been detained at most for a further week, the policy about detention reviews was breached, he did not receive a review at the seven day point, and after that he received no review at the 14 day, 21 day, 28 day or at the monthly dates. It seems to me that the first breach of the review policy is sufficient to render the detention unlawful, and I cannot say that acting lawfully, the Secretary of State would have continued to detain had she reviewed the matter properly, because at the very outside this is a person whom I have found should not have been obtained on the facts for more than a week.

42. For those reasons, it is my decision that the claimant's detention was unlawful from the outset. If I am wrong about that, it was unlawful from the expiry of the first week; and if I am wrong about that, it was unlawful thereafter, because of the failure of the Secretary of State to review it in accordance with her policy.

I have already dealt with the challenge to the restrictions on work.

43. MRS JUSTICE ELISABETH LAING: I do not think I am going to be in a position to quantify damages. I think the simplest thing may be if you try and agree them, and if you cannot agree, you can come back and ask for it to be relisted.

44. MR BERRY: That would have been my contention in any event.

45. MRS JUSTICE ELISABETH LAING: Yes. Could you between you agree the terms of an order and if you could email it to my clerk, please, I can deal with that.

46. MR BERRY: I'm grateful.

47. MRS JUSTICE ELISABETH LAING: Good. Well thank you both very much for your very helpful and clear submissions and for enabling me to deal with it within the day.

48. MR BERRY: I'm grateful.

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A

Supreme Court

Regina (Lumsdon and others) *v* Legal Services Board

[2015] UKSC 41

2015 March 16;
B June 24

Lord Neuberger of Abbotsbury PSC,
Baroness Hale of Richmond DPSC,
Lord Clarke of Stone-cum-Ebony,
Lord Reed, Lord Toulson JJSC

Barrister — Professional standards — Regulation of court advocacy standards — Quality assurance scheme requiring judicial assessment of performance of criminal advocates — Whether scheme proportionate — Whether decision to
C *approve regulators' application to introduce scheme lawful — Principles applicable — Legal Services Act 2007 (c 29), s 3(3)(a) — Provision of Services Regulations 2009 (SI 2009/2999), reg 14(2)(b)(c) — Parliament and Council Directive 2006/123/EC, art 9(1)(b)(c)*

The Legal Services Board, established by the Legal Services Act 2007[1], exercised supervisory functions in respect of approved regulators of persons carrying on legal
D activities. Serious and continuing concerns as to the poor quality of some criminal advocacy led the regulator for the Bar to propose a self-certification scheme for criminal advocates. Subsequently that regulator made a joint application with the regulators for solicitors and legal executives for approval of alterations to their regulatory arrangements under the 2007 Act in order to give effect to a quality assessment scheme for advocates ("the QASA scheme"), the objective of which was to ensure that practitioners who appeared in criminal courts had the necessary
E competence. That was to be achieved by a comprehensive system whereby practitioners who wished to practice in criminal courts in England and Wales at levels above that of magistrates' courts and youth courts had to obtain prior accreditation through judicial assessment. In considering the proposed schemes the board noted (i) the regulators' duty under section 3(3)(a) of the 2007 Act to act with transparency, accountability and proportionality and to target only cases where action was necessary, and (ii) the concerns expressed about the standards of some criminal
F advocacy and its detrimental effect on individuals, the rule of law and public confidence. It rejected the self-certification scheme but approved the QASA scheme, having undertaken its own review of the evidence and of the history and development of that scheme to reassure itself that there was a firm rationale for it, and noted that it was subject to review to ensure that it remained a proportionate response to the risks posed by poor criminal advocacy. The claimants, who were criminal advocates, challenged the board's decision by way of judicial review on the ground, inter alia, that the scheme was contrary to regulation 14(b)(c) of the Provision of Services
G Regulations 2009[2], which implemented article 9(1)(b)(c) of Parliament and Council Directive 2006/123/EC,[3], since it failed to meet the prescribed conditions that the need for an authorisation scheme was justified by an overriding reason relating to the public interest and that the objective pursued could not be attained by means of a less restrictive measure. The board submitted that the scheme was not an authorisation scheme to which the Directive and the Regulations applied, but that in any event, it complied with article 9(1)(b)(c). The Divisional Court of the Queen's Bench
H Division, applying the four-stage analysis established in domestic case law in relation to justifying interferences with fundamental rights under the Human Rights Act

[1] Legal Sevices Act 2007, s 3: see post, para 7.
[2] Provision of Services Regulations 2009, reg 14: see post, para 5.
[3] Parliament and Council Directive 2006/123/EC, art 9(1): see post, para 85.

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1998, considered that the scheme was not disproportionate and dismissed the claim. On the claimants' appeal, the Court of Appeal considered that it was exercising a review jurisdiction and should not substitute its view for that of the decision-maker, who retained a margin of discretion, and that the decision whether a less obtrusive option would be appropriate was not one with which the court should interfere unless the decision-maker's judgment was manifestly wrong. It accordingly treated the issue of proportionality as primarily a matter for the board and, holding that the board had been entitled to conclude that the scheme was proportionate, dismissed the appeal.

On the claimants' appeal, on the single issue whether the board's decision was contrary to regulation 14(2)(b)(c) of the 2009 Regulations—

Held, (1) that, although the only interpreter of the principle of proportionality as it applied in European Union law was the Court of Justice of the European Union, the approach of which was nuanced and fact-sensitive, the way in which the principle was applied depended to a significant extent on the context; but that the principle of proportionality in European Union law was neither expressed nor applied in the same way as the principle of proportionality under the European Convention for the Protection of Human Rights and Fundamental Freedoms and, in particular, the four-stage analysis applicable in relation to the justification under domestic law of interferences with fundamental rights did not apply; that, assuming that Parliament and Council Directive 2006/123/EC and the Provision of Services Regulations 2009 applied to the QASA scheme, the principle of proportionality was given effect in article 9(1)(c) of the Directive, from which regulation 14(2)(c) of the 2009 Regulations was derived; that, having regard to the erroneous approach of the courts below to the principle of proportionality, the matter had to be reconsidered on a proper basis; that it was for the court to decide whether the scheme was proportionate, as part of its function in deciding on its legality; that in doing so, the court would approach the matter in the same way as the Court of Justice would approach an issue of enforcement; that article 9(1)(c) required the court to decide whether the board had established that the objectives pursued by the scheme, of protecting recipients of the services in question and of the sound administration of justice, could not be attained by means of a less restrictive scheme, and in particular by means of the self-certification scheme proposed by the Bar's regulator; that the decision did not involve the court in asking whether the board's judgment was "manifestly wrong" or "inappropriate" but required it to decide for itself, on the basis of the material before it, whether the condition in article 9(1)(c) was satisfied; and that in considering the question of necessity arising under article 9(1)(c) the court would take into account that member states were permitted to exercise a margin of appreciation as to the level of protection to be afforded to the public interest pursued and as to the choice of the means of protecting such an interest, so long as the means chosen were not inappropriate (post, paras 23, 26, 33, 93–98, 100, 108).

Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (Case C-55/94) [1996] All ER (EC) 189, ECJ applied.

R (Sinclair Collis Ltd) v Secretary of State for Health [2012[QB 394, CA considered.

Bank Mellat v HM Treasury (No 2) [2014] AC 700, SC(E) distinguished.

(2) Dismissing the appeal, that it was a matter for the exercise of the board's judgment whether it was appropriate that the core feature of the scheme, that all criminal advocates wishing to practise at one of the upper levels had to undertake judicial assessment at the outset, provided, as a precautionary measure, a high level of public protection with a corresponding burden on those affected by it; and that, since the board had conducted its own assessment of the risks to be addressed, noted the potentially serious consequences of the poor standards of advocacy and considered that a scheme applicable to criminal advocates generally was justified in view of those risks, its judgment that the self-certification scheme was unacceptable did not fall outside the appropriate margin of appreciation; that, since the only way

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of reducing the risks so as to provide the desired level of protection for all members of the public involved in criminal proceedings at an upper level was to provide the comprehensive assessment scheme approved by the board, the QASA scheme was proportionate to the objective, despite the inconvenience to competent members of the profession; and that, accordingly, the board had been entitled to approve it (post, paras 110–111, 114–117, 119).

Per curiam. Given the court's conclusion that the QASA scheme, even if it is in fact an authorisation scheme falling within the scope of the Directive, is compliant with article 9(1)(b)(c), it is unnecessary for the question whether the scheme does so fall, which does not appear to be straightforward, to be decided. If it were necessary to decide the point a reference to the Court of Justice might be appropriate (post, para 118).

Decision of the Court of Appeal [2014] EWCA Civ 1276; [2014] HRLR 803, CA affirmed on different grounds.

The following cases are referred to in the judgment of Lord Reed and Lord Toulson JJSC:

Alpine Investments BV v Minister van Financiën (Case C-384/93) EU:C:1995:126; [1995] All ER (EC) 543; [1995] ECR I-1141, ECJ

Apothekerkammer des Saarlandes v Saarland and Ministerium für Justiz, Gesundheit und Soziales (Joined Cases C-171/07 and C-172/07) EU:C:2009:316; [2009] All ER (EC) 1001; [2009] ECR I4171, ECJ

Asociación Profesional de Empresa Navieras de Líneas Regulares (Analir) v Administración General del Estado (Case C-205/99) EU:C:2001:107; [2001] ECR I-1271, ECJ

Bank Mellat v HM Treasury (No 2) [2013] UKSC 38; [2013] UKSC 39; [2014] AC 700; [2013] 3 WLR 179; [2013] 4 All ER 533, SC(E)

Bordessa, Criminal Proceedings against (Joined Cases (C-358/93 and C-416/93) EU:C1995:54; [1995] All ER (EC) 385; [1995] ECR I-361, ECJ

Bundesrepublik Deutschland v Deutsches Milch-Kontor GmbH (Case C-426/92) EU:C:1994:260; [1994] ECR I-2757, ECJ

Canal Satélite Digital SL v Administración General del Estado and Distribuidora de Televisión Digital SA (Case C-390/99) EU:C:2002:34; [2002] ECR I-607, ECJ

Commission of the European Communities v Grand Duchy of Luxembourg (Case C-319/06) EU:C:2008:350; [2009] All ER (EC) 1049; [2008] ECR I-4323, ECJ

Commission of the European Communities v Italian Republic (Case C-110/05) EU:C:2009:66; [2009] All ER (EC) 796; [2009] ECR I-519, ECJ

Commission of the European Communities v Italian Republic (Case C-518/06) EU:C:2009:270; [2009] ECR I-3491, ECJ

Commission of the European Communities v Kingdom of The Netherlands (Case C-41/02) EU:C:2004:762; [2004] ECR I-11375, ECJ

Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (Case C-55/94) EU:C:1995:411; [1996] All ER (EC) 189; [1995] ECR I-4165, ECJ

Geraets-Smits v Stichting Ziekerfonds VGZ; Peerbooms v Stichting CZ Groep Zorgverzerkeringen (Case C-157/99) EU:C:2001:404; [2002] QB 409; [2002] 2 WLR 154; [2003] All ER (EC) 481; [2001] ECR I-5473, ECJ

Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture, Media and Sport [2014] EWHC 3236 (Admin); [2015] 1 CMLR 751

Greenham and Abel, Criminal Proceedings against (Case C-95/01) EU:C:2004:71; [2005] All ER (EC) 903; [2004] ECR I-1333, ECJ

Jippes v Minister van Landbouw, Natuurbeheer em Visserij (Case C-189/01) EU:C:2001:420; [2001] ECR I-5689, ECJ

Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn (Case C-36/02) EU:C:2004:614; [2004] ECR I-9609, ECJ

R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa (Case C-331/88) EU:C:1990:391; [1990] ECR I-4023, ECJ

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R v Minister for Agriculture, Fisheries and Food, Ex p National Federation of Fishermen's Organisations (Case C-44/94) EU:C:1995:325; [1995] ECR I-3115, ECJ
R v Secretary of State for Health, Ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd (Case C-491/01) EU:C:2002:741; [2003] All ER (EC) 604; [2002] ECR I-11453, ECJ
R (Alliance for Natural Health) v Secretary of State for Health (Joined Cases C-154/04 and C-155/04) EU:C:2005:449; [2005] ECR I-6451, ECJ
R (British Sugar plc) v Intervention Board for Agricultural Produce (Case C-329/01) EU:C:2004:108; [2004] ECR I-1899, ECJ
R (International Air Transport Association) v Department for Transport (Case C-344/04) EU:C:2006:10; [2006] ECR I-403, ECJ
R (Sinclair Collis Ltd) v Secretary of State for Health [2011] EWCA Civ 437; [2012] QB 394; [2012] 2 WLR 304, CA
Reisebűro Broede v Sandker (Case C-3/95) EU:C:1996:487; [1996] ECR I-6511, ECJ
Revenue and Customs Comrs v Aimia Coalition Loyalty UK Ltd (formerly Loyalty Management UK Ltd) [2013] UKSC 15; [2013] 2 All ER 719; [2013] STC 784, SC(E)
Rosengren v Riksäklagaren (Case C-170/04) EU:C:2007:313; [2009] All ER (EC) 455; [2007] ECR I-4071, ECJ
Schmidberger Internationale Transporte und Planzűge v Republik Österreich (Case C-112/00) EU:C:2003:333; [2003] ECR I-5659, ECJ
Sinclair Collis Ltd v Lord Advocate [2012] CSIH 80; 2013 SC 221, Ct of Sess
Stoss v Wetteraukreis (Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07) EU:C:2010:504; [2011] All ER (EC) 644; [2010] ECR I-8069, ECJ
Upjohn Ltd v Licensing Authority Established under Medicines Act 1968 (Case C-120/97) EU:C:1999:14; [1999] 1 WLR 927; [1999] ECR I-223, ECJ

The following additional cases were cited in argument:

Aragonesa de Publicidad Exterior SA v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña (Joined Cases C-1/90 and C-176/90) EU:C:1991:327; [1991] ECR I-4151, ECJ
Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19; [2007] 1 WLR 1420; [2007] 3 All ER 1007, HL(NI)
Commission of the European Communities v French Republic (Case C-89/09) EU:C:2010:772; [2010] ECR I-12941, ECJ
Commission of the European Communities v Italian Republic (Case C-465/05) EU:C:2007:781; [2007] ECR I-11091, ECJ
Commission of the European Communities v Kingdom of Belgium (Case C-355/98) EU:C:2000:113; [2000] ECR I-1221, ECJ
Government of the French Community and Walloon Government v Flemish Government (Case C-212/06) EU:C:2008:178; [2009] All (EC) 187; [2008] ECR I-1683, ECJ
Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167; [2007] 2 WLR 581; [2007] 4 All ER 15, HL(E)
Illinois State Board of Elections v Socialist Workers Party (1979) 440 US 173
Oakley Inc v Animal Ltd (Secretary of State for Trade and Industry intervening) [2005] EWCA Civ 1191; [2006] Ch 337; [2006] 2 WLR 294, CA
Pérez and Gómez v Consejería de Salud y Servicios Sanitarios (Joined Cases C-570/07 and C-571/07) EU:C:2010:300; [2010] ECR I-4629, ECJ
R v Secretary of State for Health, Ex p Eastside Cheese Co [1999] 3 CMLR 123, CA
R (Bibi) v Secretary of State for the Home Department (Liberty intervening) [2013] EWCA Civ 322; [2014] 1 WLR 208; [2013] 3 All ER 778, CA

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A *R (Countryside Alliance) v Attorney General* [2007] UKHL 52; [2008] AC 719; [2007] 3 WLR 922; [2008] 2 All ER 95, HL(E)
R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)
R (Hemming) (trading as Simply Pleasure Ltd) v Westminster City Council [2013] EWCA Civ 591; [2013] PTSR 1377, CA
R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening) [2014] UKSC
B 38; [2015] AC 657; [2014] 3 WLR 200; [2014] 3 All ER 843, SC(E)
R (ProLife Alliance) v British Broadcasting Corpn [2003] UKHL 23; [2004] 1 AC 185; [2003] 2 WLR 1403; [2003] 2 All ER 977, HL(E)
R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills [2014] EWCA Civ 1080; [2014] PTSR 1387, CA
Säger v Dennemeyer & Co Ltd (Case C-76/90) EU:C:1991:331; [1991] ECR I-4221, ECJ
C *Sanz de Lera, Criminal Proceedings against* (Joined Cases C-163/94, C-165/94 and C-250/94) EU:C:1995:451; [1995] ECR I-4821, ECJ

APPEAL from the Court of Appeal

By a claim form dated 6 September 2013 the claimants, Katherine Lumsdon, Rufus Taylor, David Howker QC and Christopher Hewertson, sought judicial review by way of (1) an order to quash a decision made on
D 26 July 2013 by the defendant, the Legal Services Board, to approve the application made by the regulators, the Bar Standards Board, the Solicitors Regulation Authority and the ILEX Professional Standards Board, to introduce the Quality Assurance Scheme for Advocates pursuant to Schedule 4 to the Legal Services Act 2007, and (2) a declaration that the scheme was unlawful. On 20 January 2014 the Divisional Court of the Queen's Bench Division (Sir Brian Leveson P, Bean and Cranston JJ)
E dismissed the claim [2014] EWHC 28 (Admin).

By an appellant's notice the claimants appealed. By a judgment dated 7 October 2014, the Court of Appeal (Lord Dyson MR, Fulford and Sharp LJJ) dismissed the appeal [2014] EWCA Civ 1276; [2014] HRLR 803.

The claimants appealed by permission of the Supreme Court (Lord Neuberger of Abbotsbury PSC, Lord Sumption and Lord Toulson JJSC)
F granted on 12 February 2015 and limited to the issue whether the Board's decision was contrary to regulation 14 of the Provision of Services Regulations 2009. The issues, as stated in the statement of facts and issues agreed between the parties, were as follows. (1) Had the defendant board erred in law in concluding that the Regulations did not apply to the Quality Assurance Scheme for Advocates? In particular was that scheme an "authorisation scheme" within the meaning of regulation 4 of the
G Regulations? If the scheme was an authorisation scheme, was it nevertheless excepted from the scope of regulation 14 by regulation 6(3)(4) and/or regulation 14? (2) If the Reguations applied to the scheme, was the test of justification under regulation 14(2) materially different from the proportionality analysis applied by the Court of Appeal? (3) If the Regulations did apply (i) could it none the less be shown that, on the evidence, the need for
H the scheme was justified by an overriding reason relating to the public interest, and that the objective pursued could not be attained by means of a less restrictive measure, in particular, because inspection after commencement of the service activity would take place too late to be genuinely effective.

The three regulators and the Law Society of England and Wales were interested parties.

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The facts are stated in the judgment of Lord Reed and Lord Toulson JJSC. A

Tom de la Mare QC, Mark Trafford QC, Tom Richards and *Jana Sadler-Forster* (instructed by *Baker & McKenzie LLP*) for the claimants.

Nigel Giffin QC and *Martin Chamberlain QC* (instructed by *Field Fisher Waterhouse*) for the defendant board.

Timothy Dutton QC and *Tetyana Nesterchuk* (instructed by *Bevan Brittan LLP*) for the Bar Standards Board. B

The other interested parties did not appear and were not represented.

The court took time for consideration.

24 June 2015. **LORD REED** and **LORD TOULSON JJSC** (with whom **LORD NEUBERGER OF ABBOTSBURY PSC, BARONESS HALE OF RICHMOND DPSC** and **LORD CLARKE OF STONE-CUM-EBONY JSC** agreed) handed down the following judgment. C

1 The Legal Services Board ("the Board") was established by the Legal Services Act 2007 ("the 2007 Act"). It exercises supervisory functions in relation to approved regulators of persons carrying on legal activities, including the Bar Standards Board ("BSB"), the Solicitors Regulation Authority ("SRA") and the ILEX Professional Standards Board ("IPS"). D

2 This appeal concerns the lawfulness of the Board's decision on 26 July 2013 to grant a joint application by the BSB, SRA and IPS for approval of alterations to their regulatory arrangements, under Part 3 of Schedule 4 to the 2007 Act. The alterations gave effect to the Quality Assurance Scheme for Advocates ("the scheme"), which provides for the assessment of the performance of criminal advocates in England and Wales by judges. E

3 The appellants are barristers practising criminal law. They seek judicial review of the decision on a variety of grounds, all of which were rejected by the Divisional Court [2014] EWHC 28 (Admin) and the Court of Appeal [2014] HRLR 803 respectively. They were given permission to appeal to this court on the single question whether the decision was contrary to regulation 14 of the Provision of Services Regulations 2009 ("the Regulations"). F

The Regulations

4 The Regulations were made under section 2(2) of the European Communities Act 1972, in order to implement Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (OJ 2006 L 376, p 36) ("the Directive"). G

5 Regulation 14 provides, so far as material:

> "(1) A competent authority must not make access to, or the exercise of, a service activity subject to an authorisation scheme unless the following conditions are satisfied.
>
> "(2) The conditions are that— (a) the authorisation scheme does not discriminate against a provider of the service, (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest, and (c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because inspection after H

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A commencement of the service activity would take place too late to be genuinely effective."

6 Regulation 14 implements article 9(1) of the Directive, which is in almost identical terms. In particular, regulation 14(2)(b) reproduces verbatim article 9(1)(b) of the Directive, while regulation 14(2)(c) departs from article 9(1)(c) only by translating the Latin phrase used in the Directive,
B "an a posteriori inspection", into the less elegant English, "inspection after commencement of the service activity". It will be necessary to return to the Directive.

The 2007 Act

7 Finally, in relation to the domestic legislation, it is necessary to note
C section 3 of the 2007 Act:

"(1) In discharging its functions the Board must comply with the requirements of this section.

"(2) The Board must, so far as is reasonably practicable, act in a way— (a) which is compatible with the regulatory objectives, and (b) which the Board considers most appropriate for the purpose of meeting those
D objectives.

"(3) The Board must have regard to— (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and (b) any other principle appearing to it to represent the best regulatory practice."

E The principles set out in section 3(3)(a) are known as the "Better Regulation Principles".

The scheme

8 The details of the scheme are set out in the QASA Handbook and in separate sets of regulatory arrangements for the BSB, IPS and SRA. For
F barristers the relevant provisions are in the Handbook and the BSB QASA Rules. The object of the scheme is to ensure that those who appear as advocates in criminal courts have the necessary competence. The scheme was devised because of serious concern about the poor quality of some criminal advocacy. There was a general (although not universal) acceptance that there was a need for some form of quality assurance scheme involving assessment by the judiciary. The judgment of the Divisional Court [2014]
G EWHC 28 (Admin) gives a detailed history of how the scheme came to be developed (at paras 16–38) and a detailed description of the nature of the scheme (at paras 39–50).

9 In outline, the scheme classifies criminal cases at four levels. Magistrates' court and youth court work is within level 1. Trials at the Crown Court are at one of the upper levels, which are graded according to
H the seriousness and complexity of the work. Any advocate wishing to carry out work at one of the upper levels is required to register for provisional accreditation at the appropriate level. He must then be judicially assessed in at least two of his first three effective trials at that level. If he is assessed as "competent", he will be granted full accreditation at that level, which will be valid for five years. The assessment is carried out by the trial judge, against

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nine standards and a number of performance indicators set out in a criminal advocacy evaluation form.

10 If an advocate wishes to progress, for example from level 2 to 3, he must first be judicially assessed as "very competent" at level 2 in at least two out of three consecutive effective trials over a 12-month period. He must then obtain at least two evaluations as "competent" in his first three consecutive trials at level 3. If an advocate is refused accreditation at the level for which he has applied, he drops back to his previous level but can seek to work his way up again. There is no right of appeal against an individual assessment by a judge.

The BSB proposal of November 2012

11 Between December 2009 and July 2012 the BSB, SRA and IPS, acting together as a Joint Advocacy Group ("JAG"), issued a series of consultation papers which led to various amendments of the proposed scheme. After the fourth consultation, on 1 November 2012 the BSB proposed an alternative scheme under which advocates would register at the level which they thought appropriate for themselves and would be free to move up a level when they felt competent to do so. They would remain at their chosen level unless judicial concerns were raised about their competence through "monitoring referrals" or evaluations in a rolling programme of judicial assessment. The BSB argued that this would be a more proportionate method of quality assurance than a scheme which required a positive assessment before full accreditation at any of the higher levels, essentially because it would be less burdensome for the many advocates who were competent. In its paper explaining its proposal the BSB said that its approach had the benefit that "regulatory action is targeted at where there is the greatest risk" and that "Those who act within their competence and do not present a risk to the public or the wider regulatory objectives will therefore be subject to minimal oversight and administrative burdens".

12 The BSB's proposal met with opposition from the Board, SRA and IPS. The Board considered that judicial evaluation of all advocates wishing to practise at the upper levels was essential for the effectiveness of the scheme and that the BSB's proposal would add little to the pre-existing arrangements for judges to raise concerns with regulators, which had little impact on the problem. The response of the Board, SRA and IPS placed the BSB in a dilemma whether to continue to participate with the other members of JAG in a joint scheme or to devise a separate accreditation scheme for barristers. It decided for various reasons to continue to participate in a joint scheme involving prior accreditation and to negotiate various amendments on points of detail.

The decision under challenge

13 In the decision under challenge, the Board explicitly proceeded on the basis that the scheme was not an authorisation scheme within the meaning of the Regulations or the Directive. It did not consider how regulation 14, or article 9(1), would apply to the scheme in the event that it was properly classified as an authorisation scheme. The Board did however have regard to the Better Regulation Principles, in accordance with section 3(3)(a) of the 2007 Act.

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A **14** The Board noted that, in developing the scheme, it was the duty of the BSB and other approved regulators to have regard to the Better Regulation Principles. It was the BSB's duty to undertake the policy development and drafting of the arrangements. It was also their responsibility to provide in their application any relevant material which supported it, including evidence establishing the necessity for regulatory arrangements. The Board had itself undertaken a review of the history and B development of the scheme in order to reassure itself that there was a risk which needed to be addressed and that there was a firm rationale for the particular scheme proposed.

15 In that regard, the Board noted that concerns had been expressed over a long period of time about standards of criminal advocacy. A range of evidence pointed towards a risk, and in some places a pattern, of advocacy C not being of the required standard. This included some senior judicial comments, the findings of a study conducted by Cardiff University, and reports by Her Majesty's Crown Prosecution Service Inspectorate. The Board noted that poor advocacy could have a detrimental impact on victims, witnesses and defendants, and on public confidence in the rule of law and the administration of justice, and could also result in increased costs.

D **16** The Board stated that it had taken into account views disputing the need for a scheme, and opposing the details of the scheme proposed. It observed that much of the disagreement about the extent of low standards of criminal advocacy and the risks that this posed stemmed from the lack of consistent and measurable evidence available under the current arrangements. It recognised that, without a quality assurance framework in place, it would be very difficult to find conclusive evidence of quality E problems across criminal advocacy. It observed that it was important that those practising criminal advocacy were operating at least to a minimum imposed standard and that the risks associated with poor quality were addressed by means of a proportionate regulatory response.

17 The Board concluded that there was sufficient consistency of evidence and concern to warrant a scheme such as that proposed by the F application. The concerns and limited evidence suggested a real risk, and a pattern, of actual problems in standards across a wide range of criminal advocates, and almost nothing by way of evidence that quality was consistently good enough.

18 In relation to the principle that regulatory activities should be proportionate, the Board stated:

G "28. The Board considers that the proposed scheme has the potential to provide reliable and sustained evidence for approved regulators to measure and improve the quality of criminal advocacy over time. The Board further considers that it is important that where there is opportunity, through a proportionate and targeted mechanism of accreditation, for relevant approved regulators to measure and enhance the quality of criminal advocacy, they should do so. In that regard, the H Board concludes that the scheme is proportionate because it addresses the risk in a structured way that allows the scheme to be adjusted on the basis of evidence gained from its actual implementation. This is consistent with the Better Regulation Principles enabling a consistent, proportionate and targeted approach to Regulation.

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"29. The Board is further assured by the commitment from the applicants to review the scheme after two years. The Board understands from the application that this review will 'provide a comprehensive analysis of the scheme including the assessment of the performance of key processes'. The review will also assess whether the scheme promotes the regulatory objectives and improves criminal advocacy standards. With the experience and lessons gained from the operation of the scheme, the Board considers it should be possible to further calibrate it so that there continues to be a proportionate regulatory response to the risk posed from poor criminal advocacy. The Board will actively engage with the review in its oversight role."

19 The Board also noted that the JAG had consulted four times on the details of the scheme, and that aspects of it had been adjusted as a result of representations made during the consultation process. The Board stated, at para 30:

"The Board considers that, on balance, the applicants have responded to issues raised during consultation and have adjusted the scheme to make it proportionate and targeted without undermining its potential effectiveness."

The ground of challenge

20 As we have explained, the only question in this appeal is whether the decision was contrary to regulation 14 of the Regulations. The appellants argue that the scheme fails to meet the conditions set out in regulation 14(2)(b)(c), namely that "the need for an authorisation scheme is justified by an overriding reason relating to the public interest" and that "the objective pursued cannot be attained by means of a less restrictive measure". Since those provisions are derived from article 9(1)(b)(c) of the Directive, and must be interpreted so as to give effect to the Directive, it is common ground that the argument is in substance a submission that the scheme falls within the ambit of the Directive and fails to comply with article 9(1)(b)(c). We shall address the argument on that basis.

21 In response, the Board submits that the scheme does not fall within the ambit of the Directive (or, therefore, the ambit of the Regulations), and that in any event it complies with article 9(1)(b)(c). It is convenient to begin by considering the second of these submissions, on the hypothesis that the Directive is applicable to the scheme.

22 Before turning to that matter, however, it is desirable to consider more widely the EU principle of proportionality, to which article 9(1)(c) gives effect.

Proportionality in EU law

23 It appears from the present case, and some other cases, that it might be helpful to lower courts if this court were to attempt to clarify the principle of proportionality as it applies in EU law. That is the aim of the following summary. It should however be said at the outset that the only authoritative interpreter of that principle is the Court of Justice. A detailed analysis of its case law on the subject can be found in texts such as *Craig, EU Administrative Law* (2006) and *Tridimas, The General Principles of EU Law,* 2nd ed (2006). It has also to be said that any attempt to identify

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A general principles risks conveying the impression that the court's approach is less nuanced and fact-sensitive than is actually the case. As in the case of other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent on the context. This summary will range beyond the type of case with which this appeal is concerned, in order to demonstrate the different ways in which the
B principle of proportionality is applied in different contexts. It will provide a number of examples from the case law of the court, in order to illustrate how the principle is applied in practice.

24 Proportionality is a general principle of EU law. It is enshrined in article 5(4)EU of the Treaty on European Union ("TEU"): "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties." It is also
C reflected elsewhere in the EU treaties, for example in article 3(6)EU: "The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred on it in the Treaties." The principle has however been primarily and most fully developed by the Court of Justice in its jurisprudence, drawing on the administrative law of a number of member states.

25 The principle applies generally to legislative and administrative
D measures adopted by EU institutions. It also applies to national measures falling within the scope of EU law, as explained by Advocate General Sharpston in her opinion in *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* (Case C-427/06) [2009] All ER (EC) 113, para 69:

> E "For that to be the case, the provision of national law at issue must in general fall into one of three categories. It must implement EC law (irrespective of the degree of the discretion the member state enjoys and whether the national measure goes beyond what is strictly necessary for implementation). It must invoke some permitted derogation under EC law. Or it must otherwise fall within the scope of Community law because some specific substantive rule of EC law is applicable to the situation."

F The principle only applies to measures interfering with protected interests: *R (British Sugar plc) v Intervention Board for Agricultural Produce* (Case C-329/01) [2004] ECR I-1899, paras 59–60. Such interests include the fundamental freedoms guaranteed by the EU Treaties.

26 It is also important to appreciate, at the outset, that the principle of proportionality in EU law is neither expressed nor applied in the same way
G as the principle of proportionality under the European Convention on Human Rights. Although there is some common ground, the four-stage analysis of proportionality which was explained in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, paras 20, 72–76, in relation to the justification under domestic law (in particular, under the Human Rights Act 1998) of interferences with fundamental rights, is not applicable to proportionality in EU law.

H

The division of responsibility between the Court of Justice and national courts

27 Issues of proportionality may arise directly before the Court of Justice and be decided by that court, as for example when the legality of an

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EU measure is challenged in direct proceedings, or when enforcement proceedings are brought by the Commission against a member state in relation to a national measure. Issues of proportionality may also arise before national courts, as occurred in the present case.

28 According to the jurisprudence of the court, a national court may not declare an EU measure to be illegal. When, therefore, the validity of an EU measure is indirectly challenged before a national court on the ground of proportionality, the national court can refer the issue to the court for determination, and should do so if it considers the argument to be well founded (*R (International Air Transport Association) v Department for Transport* (Case C-344/04) [2006] ECR I-403, para 32) or, in the case of a final court, if the issue is other than acte clair.

29 On the other hand, when the validity of a national measure is challenged before a national court on the ground that it infringes the EU principle of proportionality, it is in principle for the national court to reach its own conclusion. It may refer a question of interpretation of EU law to the Court of Justice, but it is then for the national court to apply the court's ruling to the facts of the case before it. The court has repeatedly accepted that it does not have jurisdiction under the preliminary reference procedure to rule on the compatibility of a national measure with EU law: see, for example, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (Case C-55/94) [1996] All ER (EC) 189, para 19. It has explained its role under that procedure as being to provide the national court "with all criteria for the interpretation of Community law which may enable it to determine the issue of compatibility for the purposes of the decision in the case before it": *Gebhard,* para 19.

30 Nevertheless, where a preliminary reference is made, the Court of Justice often effectively determines the proportionality of the national measure in issue, by reformulating the question referred so as to ask whether the relevant provision of EU legislation, or general principles of EU law, preclude a measure of that kind, or alternatively whether the measure in question is compatible with the relevant provision of EU legislation or general principles. That practice reflects the fact that it can be difficult to draw a clear dividing line between the interpretation of the law and its application in concrete circumstances, and an answer which explains how the law applies in the circumstances of the case before the referring court is likely to be helpful to it. The practice also avoids the risk that member states may apply EU law differently in similar situations, or may be insufficiently stringent in their scrutiny of national measures. It may however give rise to difficulties if the court's understanding of the national measure, or of the relevant facts, is different from that of the referring court (as occurred, in a different context, in *Revenue and Customs Comrs v Aimia Coalition Loyalty UK Ltd (formerly Loyalty Management UK Ltd)* [2013] 2 All ER 719).

31 Where the proportionality principle is applied by a national court, it must, as a principle of EU law, be applied in a manner which is consistent with the jurisprudence of the court: as is sometimes said, the national judge is also a European judge.

32 The jurisprudence in relation to the principle of proportionality is however not without complexity. As will be explained, the principle has been expressed and applied by the court in different ways in different contexts. In order for national judges to know how the principle should be

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A applied in the cases before them, it is necessary for them to understand the nature and rationale of these differences, and to identify the body of case law which is truly relevant.

The nature of the test of proportionality

33 Proportionality as a general principle of EU law involves a
B consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. There is some debate as to whether there is a third question, sometimes referred to as proportionality stricto sensu: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits
C this question from its formulation of the proportionality principle. Where the question has been argued, however, the court has often included it in its formulation and addressed it separately, as in *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* (Case C-331/88) [1990] ECR I-4023.

34 Apart from the questions which need to be addressed, the other critical aspect of the principle of proportionality is the intensity with which
D it is applied. In that regard, the court has been influenced by a wide range of factors, and the intensity with which the principle has been applied has varied accordingly. It is possible to distinguish certain broad categories of case. It is however important to avoid an excessively schematic approach, since the jurisprudence indicates that the principle of proportionality is flexible in its application. The court's case law applying the principle in one context cannot necessarily be treated as a reliable guide to how the principle
E will be applied in another context: it is necessary to examine how in practice the court has applied the principle in the particular context in question.

35 Subject to that caveat, however, it may be helpful to describe the court's general approach in relation to three types of case: the review of EU measures, the review of national measures relying on derogations from general EU rights, and the review of national measures implementing EU
F law.

36 As a generalisation, proportionality as a ground of review of EU measures is concerned with the balancing of private interests adversely affected by such measures against the public interests which the measures are intended to promote. Proportionality functions in that context as a check on the exercise of public power of a kind traditionally found in public law. The court's application of the principle in that context is influenced by the nature
G and limits of its legitimate function under the separation of powers established by the Treaties. In the nature of things, cases in which measures adopted by the EU legislator or administration in the public interest are held by the EU judicature to be disproportionate interferences with private interests are likely to be relatively infrequent.

37 Proportionality as a ground of review of national measures, on the other hand, has been applied most frequently to measures interfering with
H the fundamental freedoms guaranteed by the EU Treaties. Although private interests may be engaged, the court is there concerned first and foremost with the question whether a member state can justify an interference with a freedom guaranteed in the interests of promoting the integration of the internal market, and the related social values, which lie at the heart of the EU

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project. In circumstances of that kind, the principle of proportionality generally functions as a means of preventing disguised discrimination and unnecessary barriers to market integration. In that context, the court, seeing itself as the guardian of the Treaties and of the uniform application of EU law, generally applies the principle more strictly. Where, however, a national measure does not threaten the integration of the internal market, for example because the subject matter lies within an area of national rather than EU competence, a less strict approach is generally adopted. That also tends to be the case in contexts where an unregulated economic activity would be harmful to consumers, particularly where national regulatory measures are influenced by national traditions and culture. An example is the Regulation of gambling, discussed in *Gibraltar Betting and Gaming Association Ltd v Secretary of State for Culture, Media and Sport* [2015] 1 CMLR 751.

38 Where member states adopt measures implementing EU legislation, they are generally contributing towards the integration of the internal market, rather than seeking to limit it in their national interests. In general, therefore, proportionality functions in that context as a conventional public law principle. On the other hand, where member states rely on reservations or derogations in EU legislation in order to introduce measures restricting fundamental freedoms, proportionality is generally applied more strictly, subject to the qualifications which we have mentioned.

39 Having provided that broad summary, it may be helpful to consider in greater detail the application of the principle of proportionality to EU and national measures in turn.

Measures of EU institutions

40 Where EU legislative or administrative institutions exercise a discretion involving political, economic or social choices, especially where a complex assessment is required, the court will usually intervene only if it considers that the measure is manifestly inappropriate. The general approach in such cases is illustrated by the judgment in *R v Secretary of State for Health, Ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (Case C-491/01) [2003] All ER (EC) 604, concerned with Community legislation harmonising national measures concerning the marketing of tobacco products:

> "122. As a preliminary point, it ought to be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it.
>
> "123. With regard to judicial review of the conditions referred to in the previous paragraph, the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called on to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."

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A **41** A further example of this approach is the judgment in *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa*. The case concerned Community legislation which prohibited the use of certain hormones in livestock farming, so as to address barriers to trade and distortions of competition arising from differences in the relevant national legislation of the member states: differences which reflected differing national assessments of the effects of the hormones on public health, and differing levels of consumer anxiety. The court stated:

B

> "13. The court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.
>
> "14. However, with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."

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E **42** As the court said in another similar case, "the criterion to be applied is not whether the measure adopted by the legislature was the only one or the best one possible but whether it was manifestly inappropriate": *Jippes v Minister van Landbouw, Natuurbeheer en Visserij* (Case C-189/01) [2001] ECR I-5689, para 83. The court has not explained how it determines whether the inappropriateness of a measure is or is not manifest. Its practice in some cases suggests that it is sufficient to establish that there is a clear and material error, in law, or in reasoning, or in the assessment of the facts, which goes to the heart of the measure. In other cases, the word "manifestly" appears to describe the degree of obviousness with which the impugned measure fails the proportionality test. In such cases, the adverb serves, like comparable expressions in our domestic law, to emphasise that the court will only interfere when it considers that the primary decision-maker has exceeded the generous ambit within which a choice of measures might reasonably have been made.

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43 In this context, therefore, the court does not in practice apply the "least onerous alternative" test in any literal sense, but instead considers whether the measure chosen is manifestly inappropriate. The court also made it clear in *Jippes* that the legality of an EU measure cannot depend on a retrospective check on a predictive assessment:

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> "Where the Community legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question." (para 84)

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44 It would however be a mistake to suppose that the "manifestly inappropriate" test means that the court's scrutiny of the justification for the measure is cursory or perfunctory. While the court will be slow to substitute its own evaluative judgment for that of the primary decision-maker, and will not intervene merely because it would have struck a different balance between countervailing considerations, it will consider in some depth the factual foundation and reasoning underlying that judgment.

45 The point can be illustrated by the *Fedesa* case. The proportionality of a blanket prohibition was challenged on the basis that the legislation was unsuitable to attain its objectives, since it was impossible to apply in practice and would lead to the creation of a black market in the prohibited hormones. It was also argued to be unnecessary, since the objective could be achieved by the dissemination of information. It was in addition argued to be disproportionate stricto sensu, since the financial losses imposed on the applicants would be disproportionate to the public benefit.

46 In relation to the first point, the court noted that, even if the presence of natural hormones in meat prevented the detection of prohibited hormones by tests on animals or on meat, other control methods could be used and had indeed been imposed by a supplementary measure. It was not obvious that the authorisation of hormones described as "natural" would be likely to prevent the emergence of a black market for dangerous but less expensive substances. Moreover, it was not disputed that any system of partial authorisation would require costly control measures whose effectiveness could not be guaranteed. It followed that the prohibition could not be regarded as a manifestly inappropriate measure. As to whether it was unnecessary, the applicants' argument was based on the false premise that the only objective of the measure was to allay consumer anxieties. Having regard to the requirements of public health, the removal of barriers to trade and distortions of competition could not be achieved merely by the dissemination of information. As to proportionality stricto sensu, the importance of the objectives pursued was such as to justify substantial negative financial consequences for certain traders.

47 In cases concerned with EU measures establishing authorisation procedures, for example for the use of particular substances, the court will also require that the procedures reflect principles of sound administration and legal certainty. For example, in *R (Alliance for Natural Health) v Secretary of State for Health* (Joined Cases C-154/04 and C-155/04) [2005] ECR I-6451, para 73 the court said:

> "Such a procedure must be accessible in the sense that it must be expressly mentioned in a measure of general application which is binding on the authorities concerned. It must be capable of being completed within a reasonable time. An application to have a substance included on a list of authorised substances may be refused by the competent authorities only on the basis of a full assessment of the risk posed to public health by the substance, established on the basis of the most reliable scientific data available and the most recent results of international research. If the procedure results in a refusal, the refusal must be open to challenge before the courts."

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A **48** Where a measure is challenged on the ground that it interferes with fundamental rights, article 52(1) of the EU Charter of Fundamental Rights is relevant:

> "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, B limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

Where a fundamental right is not absolute, the court has said that it must be viewed in relation to its social purpose:

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> "Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed": *British American Tobacco* [2003] All ER (EC) 604, para 149.

49 In the *British American Tobacco* case, one of the grounds of D challenge to the legislation was that it interfered with the fundamental right to property because of its impact on trademark rights. Having applied the "manifestly inappropriate test" to grounds of challenge directed at the suitability and necessity of the legislation, the court then turned to the rights-based argument, which it approached in the manner described. One of the contested aspects of the legislation was to require large health warnings on packets. Although the amount of space available for the display of E trademarks was consequently reduced, this did not prejudice the substance of the trademark rights, and was intended to ensure a high level of health protection. It was a proportionate restriction. The other contested aspect was the prohibition of certain descriptions (and hence of trademarks incorporating those descriptions) on the packaging, in order to protect public health. It remained possible for manufacturers to distinguish their F products by using other distinctive signs. In addition, the measure provided for a sufficient period of time between its adoption and the entry into force of the prohibition to enable the affected manufacturers to adapt. It was therefore proportionate.

National measures derogating from fundamental freedoms

G **50** It is necessary to turn next to measures adopted by the member states within the sphere of application of EU law. In that context, issues of proportionality have arisen most often in relation to national measures taken in reliance on provisions in the Treaties or other EU legislation recognising permissible limitations to the "fundamental freedoms": the free movement of goods, the free movement of workers, freedom of establishment, freedom to provide services, and the free movement H of capital. Compliance with the principle of proportionality is also a requirement of the justification of other national measures falling within the scope of EU law, including those which derogate from other rights protected by the Treaties, such as the right to equal treatment or non-discrimination, or fundamental rights such as the right to family life.

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51 The case law concerned with restrictions on the right of establishment and the provision of services is particularly relevant to the present case. The Treaty on the Functioning of the European Union ("TFEU") recognises permissible limitations to those rights which are justified on grounds of public policy, public security or public health: articles 52(1)FEU and 62FEU. Those concepts have undergone considerable analysis in the case law of the court.

52 The court's general approach in this context was explained in the *Gebhard,* caseconcerned with the provision of legal services:

> "national measures liable to hinder of make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it." (para 37)

53 The last two of these requirements correspond to the two limbs of the proportionality principle. In some more recent cases, the court has also emphasised other general principles of EU law, by requiring that procedures under the national measure should be compatible with principles of sound administration, such as being completed within a reasonable time and without undue cost, and also compatible with legal certainty, including the right to judicial protection.

54 The first of the conditions listed in *Gebhard* is relatively straightforward. In relation to the second condition, the court must identify the objective of the measure in question and determine whether it is a lawful objective which is capable of justifying a restriction on the exercise of a fundamental freedom. The Court of Justice has recognised a wide range of public interest grounds capable of justifying restrictions on the exercise of fundamental freedoms. Specifically in relation to legal services, the court has accepted that restrictions on freedom of establishment or the provision of services can be justified by the need to protect the interests of the recipients of those services, and by the public interest in the administration of justice. For example, in *Reisebüro Broede v Sandker* (Case C-3/95) [1996] ECR I-6511, para 38, the court stated that "the application of professional rules to lawyers, in particular those relating to organisation, qualifications, professional ethics, supervision and liability, ensures that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience".

55 In relation to the third and fourth conditions, the court must determine whether the measure is suitable to achieve the legitimate aim in question, and must then determine whether it is no more onerous than is required to achieve that aim, if there is a choice of equally effective measures. The position was summarised by Advocate General Sharpston at para 89 of her opinion in *Commission of the European Communities v Kingdom of Spain* (Case C-400/08) [2011] ECR I-1915, a case concerned with the right of establishment:

> "Whilst it is true that a member state seeking to justify a restriction on a fundamental Treaty freedom must establish both its appropriateness

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A and its proportionality, that cannot mean, as regards appropriateness, that the member state must establish that the restriction is the most appropriate of all possible measures to ensure achievement of the aim pursued, but simply that it is not inappropriate for that purpose. As regards proportionality, however, it is necessary to establish that no other measures could have been equally effective but less restrictive of the freedom in question."

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56 The justification for the restriction tends to be examined in detail, although much may depend on the nature of the justification, and the extent to which it requires evidence to support it. For example, justifications based on moral or political considerations may not be capable of being established by evidence. The same may be true of justifications based on intuitive common sense. An economic or social justification, on the other hand, may C well be expected to be supported by evidence. The point is illustrated by *Commission of the European Communities v Grand Duchy of Luxembourg* (Case C-319/06) [2009] All ER (EC) 1049, concerned with legislation which imposed on providers of services in Luxembourg, who were based in other member states, the mandatory requirements of Luxembourg's employment law. In addressing an argument that the measure ensured good labour D relations in Luxembourg, the court stated:

> "51. It has to be remembered that the reasons which may be invoked by a member state in order to justify a derogation from the principle of freedom to provide services must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that state, and precise evidence enabling its arguments to be substantiated . . .
>
> E
>
> "52. Therefore, in order to enable the court to determine whether the measures at issue are necessary and proportionate to the objective of safeguarding public policy, the Grand Duchy of Luxembourg should have submitted evidence to establish whether and to what extent the [contested measure] is capable of contributing to the achievement of that objective."

F **57** Where goods or services present known and serious risks to the public, the precautionary principle permits member states to forestall anticipated harm, without having to wait until actual harm is demonstrated. The point is illustrated by *Commission of the European Communities v Kingdom of the Netherlands* (Case C-41/02) [2004] ECR I-11375, which concerned a prohibition on the sale of foodstuffs fortified with additives, the justification being the protection of public health. The court held that the G existence of risks to health had to be established on the basis of the latest scientific data available at the date of the adoption of the decision. Although, in accordance with the precautionary principle, a member state could take protective measures without having to wait until the existence and gravity of the risks became fully apparent, the risk assessment could not be based on purely hypothetical considerations.

H **58** In a case concerned with an authorisation scheme designed to protect public health, the court required it to ensure that authorisation could be refused only if a genuine risk to public health was demonstrated by a detailed assessment using the most reliable scientific data available and the most recent results of international research: *Criminal Proceedings against Greenham and Abel* (Case C-95/01) [2005] All ER (EC) 903, paras 40–42.

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As in *Commission of the European Communities v Kingdom of the Netherlands,* the court acknowledged that such an assessment could reveal uncertainty as to the existence or extent of real risks, and that in such circumstances a member state could take protective measures without having to wait until the existence and gravity of those risks were fully demonstrated. The risk assessment could not however be based on purely hypothetical considerations. The approach adopted in these cases is analogous to that adopted in relation to EU measures establishing authorisation schemes designed to protect public health, as for example in the *Alliance for Natural Health* case, discussed earlier.

59 It is not, however, necessary to establish that the measure was adopted on the basis of studies which justified its adoption: see, for example, *Stoss v Wetteraukreis* (Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07) [2011] All ER (EC) 644, para 72.

60 Particularly in situations where a measure is introduced on a precautionary basis, with correspondingly less by way of an evidential base to support the particular restrictions imposed, it may well be relevant to its proportionality to consider whether it is subject to review in the light of experience.

61 The court has tended to examine closely (again, depending to some extent on the context) the question whether other measures could have been equally effective but less restrictive of the freedom in question. The point is illustrated by *Criminal Proceedings against Bordessa* (Joined Cases C-358/93 and C-416/93) [1995] All ER (EC) 385, which concerned a Spanish law requiring that exports of coins, banknotes or bearer cheques should be the subject of a prior declaration if the amount was below a specified limit, and of prior authorisation if the amount was above that limit. This interference with the free movement of capital was argued to be necessary in order to prevent tax evasion, money laundering and other offences. The court noted that the requirement of a prior declaration was less restrictive than that of prior authorisation, since it did not entail suspension of the transaction in question. It nevertheless enabled the national authorities to exercise effective supervision. The Spanish Government contended that it was only by means of a system of prior authorisation that non-compliance could be classified as criminal and hence criminal penalties imposed. That contention was however rejected by the court, on the basis that the Spanish Government had failed to provide sufficient proof that it was impossible to attach criminal penalties to the failure to make a prior declaration. It was therefore held that EU law precluded rules which made exports of coins, banknotes or bearer cheques conditional on prior authorisation, but not rules which made such exports conditional on a prior declaration.

62 In a different context, the point is also illustrated by *Bundesrepublik Deutschland v Deutsches Milch-Kontor GmbH* (Case C-426/92) [1994] ECR I-2757, where the systematic inspection of the composition and quality of skimmed milk powder intended for use as animal feed, in order to combat fraud, was held to be disproportionate on the basis that random checks would have sufficed.

63 The "less restrictive alternative" test is not however applied mechanically. In the first place, the court has made it clear that the burden of proof placed on the member state to establish that a measure is necessary

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A does not require it to exclude hypothetical alternatives. In *Commission of the European Communities v Italian Republic* (Case C-518/06) [2009] ECR I-3491, a case concerned with an obligation imposed on insurers, it stated at para 84:

> "Whilst it is true that it is for a member state which relies on an imperative requirement to justify a restriction within the meaning of the
B EC Treaty to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the member state to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions."

64 The court has also accepted that, where a relevant public interest is
C engaged in an area where EU law has not imposed complete harmonisation, the member state possesses "discretion" (or, as it has sometimes said, a "margin of appreciation") not only in choosing an appropriate measure but also in deciding on the level of protection to be given to the public interest in question. This can be seen, for example, in cases where the public interest relied on is the protection of human life and health, such as
D *Apothekerkammer des Saarlandes v Saarland and Ministerium für Justiz, Gesundheit und Soziales* (Joined Cases C-171/07 and C-172/07) [2009] All ER (EC) 1001, which concerned a rule restricting the ownership of pharmacies. The court stated, at para 19:

> "it is for the member states to determine the level of protection which they wish to afford to public health and the way in which that level is to be
E achieved. Since the level may vary from one member state to another, member states must be allowed discretion."

65 The court is therefore unimpressed, in areas of activity where member states enjoy this kind of discretion, by arguments to the effect that one member state's regulatory scheme is disproportionate because another's is less restrictive. Its focus is on the objectives pursued by the competent
F authorities of the member state concerned and the level of protection which they seek to ensure. This is illustrated by *Commission of the European Communities v Italian Republic* (Case C-110/05) [2009] All ER (EC) 796, concerned with a ban on a type of trailer, on the ground of road safety, where the court said:

> "61. In the absence of fully harmonising provisions at Community
G level, it is for the member states to decide on the level at which they wish to ensure road safety in their territory, whilst taking account of the requirements of the free movement of goods within the European Community . . .
>
> "65. With regard . . . to whether the said prohibition is necessary, account must be taken of the fact that, in accordance with the case law of the court referred to in para 61 of the present judgment, in the field of
H road safety a member state may determine the degree of protection which it wishes to apply in regard to such safety and the way in which that degree of protection is to be achieved. Since that degree of protection may vary from one member state to the other, member states must be allowed a margin of appreciation and, consequently, the fact that one

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member state imposes less strict rules than another member state does not mean that the latter's rules are disproportionate." A

In a context closer to that of the present case, the same approach can also be seen in *Alpine Investments BV v Minister van Financiën* (Case C-384/93) [1995] All ER (EC) 543, para 51, concerned with the Regulation of the provision of financial services.

66 This margin of appreciation applies to the member state's decision as to the level of protection of the public interest in question which it considers appropriate, and to its selection of an appropriate means by which that protection can be provided. Having exercised its discretion, however, the member state must act proportionately within the confines of its choice. A national measure will not, therefore, be proportionate if it is clear that the desired level of protection could be attained equally well by measures which were less restrictive of a fundamental freedom: see, for example, *Rosengren v Riksäklagaren* (Case C-170/04) [2009] All ER (EC) 455, para 43. B C

67 In applying the "less restrictive alternative" test it is necessary to have regard to all the circumstances bearing on the question whether a less restrictive measure could equally well have been used. These will generally include such matters as the conditions prevailing in the national market, the circumstances which led to the adoption of the measure in question, and the reasons why less restrictive alternatives were rejected. The court will be heavily reliant on the submissions of the parties for an explanation of the factual and policy context. D

68 In relation to authorisation schemes, the court has identified a number of considerations, including considerations relating to principles of good administration, which should be taken into account in determining the compliance of the scheme with the principle of proportionality. The following were mentioned in *Canal Satélite Digital SL v Administración General del Estado and Distribuidora de Televisión Digital SA* (Case C-390/99) [2002] ECR I-607: E

"35. First . . . if a prior administrative authorisation scheme is to be justified even though it derogates from such fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. F

"36. Second, a measure introduced by a member state cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same state or in another member state." G

"39. Third, a prior authorisation procedure will be necessary only where a subsequent control is to be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued."

"41. Finally, it should be noted that, for as long as it lasts, a prior authorisation procedure completely prevents traders from marketing the products and services concerned. It follows that, in order to comply with the fundamental principles of the free movement of goods and the freedom to provide services, such a procedure must not, on account of its duration, the amount of costs to which it gives rise, or any ambiguity as to H

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A the conditions to be fulfilled, be such as to deter the operators concerned from pursuing their business plan."

69 In other cases concerned with authorisation schemes, the court has also stipulated that the procedure should be easily accessible and capable of ensuring that the application will be dealt with objectively and impartially within a reasonable time, and that refusals to grant authorisation should be B capable of being challenged in judicial or quasi-judicial proceedings: see, for example, *Geraets-Smits v Stichting Ziekenfonds VGZ; Peerbooms v Stichting CZ Groep Zorgverzekeringen* (Case C-157/99) [2002] QB 409, para 90. Other conditions have been mentioned in relation to schemes with specific aims, such as the imposition of public service obligations: *Asociación Profesional de Empresa Navieras de Líneas Regulares (Analir) v Administración General del Estado* (Case C-205/99) [2001] ECR I-1271.

C 70 Where the justification for the national measure is the protection of fundamental rights, the court approaches the issue in the manner described earlier in para 48. *Schmidberger Internationale Transporte und Planzüge v Republik Österreich* (Case C-112/00) [2003] ECR I-5659, for example, concerned the Austrian government's failure to ban a demonstration on a motorway, on the ground of respect for the rights of freedom of expression D and freedom of assembly guaranteed by the Austrian constitution and the European Convention on Human Rights. The demonstration resulted in the motorway's closure for over a day, restricting the free movement of goods.

71 The court accepted that since fundamental rights were recognised in EU law, at para 74:

> "the protection of those rights is a legitimate interest which, in E principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods."

It noted, however, that neither the freedoms nor the rights were absolute. The right to free movement of goods could be subject to restrictions for the reasons laid down in the Treaty or for overriding reasons of public interest. F The rights to freedom of expression and freedom of assembly were, at para 79:

> "also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing G social need and, in particular, proportionate to the legitimate aim pursued."

The court continued:

> "80. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, H constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.
>
> "81. In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.

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"82. The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed on intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights."

Applying that approach, the court accepted that the action in question had been proportionate.

72 A similar approach can also be seen in *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (Case C-36/02) [2004] ECR I-9609, which concerned a German ban on electronic games involving simulated killing, on the ground that they infringed the guarantee of human dignity in the German Constitution. The ban was upheld by the court, which accepted that the circumstances which could constitute a justification on grounds of public policy could vary from one member state to another, and that the national authorities must be accorded a margin of discretion.

National measures implementing EU measures

73 Member states must also comply with the requirement of proportionality, and with other aspects of EU law, when applying EU measures such as Directives. As when assessing the proportionality of EU measures, to the extent that the Directive requires the national authority to exercise a discretion involving political, economic or social choices, especially where a complex assessment is required, the court will in general be slow to interfere with that evaluation. In applying the proportionality test in circumstances of that nature, the court has applied a "manifestly disproportionate" test: see, for example, *R v Minister of Agriculture, Fisheries and Food, Ex p National Federation of Fishermen's Organisations* (Case C-44/94) [1995] ECR I-3115, para 58. The court may nevertheless examine the underlying facts and reasoning: see, for example, *Upjohn Ltd v Licensing Authority Established under Medicines Act 1968* (Case C-120/97) [1999] 1 WLR 927, paras 34–35.

74 Where, on the other hand, the member state relies on a reservation or derogation in a Directive in order to introduce a measure which is restrictive of one of the fundamental freedoms guaranteed by the Treaties, the measure is likely to be scrutinised in the same way as other national measures which are restrictive of those freedoms. *Commission of the European Communities v Grand Duchy of Luxembourg,* cited earlier, concerned a national measure of that kind.

Sinclair Collis

75 It may be helpful at this point to say a word about *R (Sinclair Collis Ltd) v Secretary of State for Health* [2012] QB 394, which was followed by the Court of Appeal in the present case.

76 *Sinclair Collis* concerned a national measure restricting the free movement of goods. The justification put forward was the protection of public health. The issue was whether the measure was necessary, or whether the objective might have been achieved by a less restrictive measure. The relevant area of EU jurisprudence was therefore the body of case law concerning the proportionality of national measures restricting the free

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movement of goods in the interests of public health. As we have explained, that case law indicates that a measure of discretion is allowed to member states as to the level of protection of public health which they consider appropriate and as to the selection of an appropriate means of protection.

77 The judgments in the Court of Appeal, following the arguments of counsel as reported, focused primarily on the judgments of the Court of Justice in the *Fedesa* case [1990] ECR I-4023, *British American Tobacco* [2003] All ER (EC) 604 and *R v Minister of Agriculture, Fisheries and Food, Ex p National Federation of Fishermen's Organisations* [1995] ECR I-3115. As has been explained, the first and second of these cases were concerned with the question whether an EU measure was proportionate, while the third case was concerned with a national measure implementing EU requirements.

78 In their judgments, Arden LJ and Lord Neuberger of Abbotsbury MR correctly analysed these cases as yielding a "manifestly inappropriate" test. They then applied that test in the different context of a national measure restricting a fundamental freedom. In a dissenting judgment, Laws LJ correctly attached importance to case law concerned with national measures restricting the free movement of goods, but focused particularly on a case concerned with the maintenance of a national retail monopoly (*Rosengren v Riksäklagaren* [2009] All ER (EC) 455), in which the court found that the monopoly was unsuitable for attaining the ostensible aim of protecting health.

79 Those judgments might be contrasted with that delivered by the Lord Justice-Clerk (Carloway) in the parallel Scottish proceedings: *Sinclair Collis Ltd v Lord Advocate* 2013 SC 221. Lord Carloway rejected the submission that the question was whether the legislation was "manifestly inappropriate", stating, at para 56:

> "'manifestly inappropriate' is language used by the ECJ in relation to testing EU institution measures (or national measures implementing EU law) (see e g *R v Secretary of State for Health, Ex p British American Tobacco (Investments)* [2003] All ER (EC) 604, para 123). There the balance is between private and public interests. It is not applicable when testing the legitimacy of state measures against fundamental principles contained in the EU Treaties where the balance is between EU and state interests."

At the same time, Lord Carloway recognised that there was, at para 59:

> "a margin of appreciation afforded to the state not only in determining the general health objective of reducing smoking but also in selecting the manner in which the reduction in health risk is to be achieved."

Applying that approach, the Inner House arrived at the same conclusion as the majority of the Court of Appeal.

80 Lord Carloway also questioned the proposition, accepted by the Court of Appeal, that the strictness with which the EU proportionality principle was applied to a national measure restricting a fundamental freedom should depend on the identity of the national decision-maker (whether, for example, it was a minister or Parliament). Lord Carloway commented, at para 59:

> "the court has reservations about whether the margin can vary in accordance with the nature of the particular organ of the state which

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creates or implements the measure. It might appear strange if the manner in which a EU member state elects to organise government within its borders were capable of increasing or decreasing the margin of appreciation available to that state relative to measures challenged as infringing one of the EU Treaties' fundamental principles. The legality of a measure ought not to depend on whether a measure is passed by a central, national, provincial or local government legislature or determined by an official or subsidiary body under delegated authority from such a legislature."

81 There is force in the point made by Lord Carloway; and it is difficult to discern in the court's case law any clear indication that the identity or status of the national authority whose action is under review is a factor which influences the intensity of scrutiny. On the other hand, we would not rule out the possibility that whether, for example, a measure has been taken at the apex of democratic decision-making within a member state might, at least in some contexts, be relevant to an assessment of its proportionality, particularly in relation to the level of protection considered to be appropriate and the choice of method for ensuring it. It is however unnecessary to resolve that question for the purposes of the present appeal.

82 The Court of Appeal based its approach in the present case, and in particular its adoption of a test of whether the scheme was manifestly inappropriate, on the judgments of the majority of the Court of Appeal in *Sinclair Collis* [2012] QB 394. For the reasons we have explained, that aspect of the reasoning in those judgments (as distinct from the conclusion reached) is open to criticism.

The Directive

83 The Directive is underpinned by the freedom of establishment, and freedom to provide services, guaranteed by articles 49 and 56 respectively of the TFEU. As explained in recitals (6) and (7) to the Directive, barriers to those freedoms cannot be removed solely by relying on the direct application of the Treaty articles on a case by case basis. The Directive therefore establishes a general legal framework, based on the removal of barriers which can be dismantled quickly, and, for the others, the launching of a process of evaluation, consultation and harmonisation of specific issues, making possible the co-ordinated modernisation of national regulatory systems for service activities. As recital (30) to the Directive acknowledges, there existed prior to the Directive a considerable body of EU law on service activities. The recital states that the Directive "builds on, and thus complements, the Community acquis".

84 In particular, recital (54) states that the possibility of gaining access to a service activity should be made subject to authorisation only if that decision satisfies the criteria of non-discrimination, necessity and proportionality: "That means, in particular, that authorisation schemes should be permissible only where an a posteriori inspection would not be effective because of the impossibility of ascertaining the defects of the services concerned a posteriori, due account being taken of the risks and dangers which could arise in the absence of a prior inspection."

85 Turning to the substantive provisions of the Directive, Chapter III is concerned with freedom of establishment for providers of services. It is necessary to consider only Section 1, which is concerned with

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authorisations, and largely codifies the case law of the court, discussed earlier. The first provision in that section is article 9, paragraph 1 of which provides:

> "Member states shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied: (a) the authorisation scheme does not discriminate against the provider in question; (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest; (c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective."

86 The expression "authorisation scheme" is defined by article 4(6) as meaning

> "any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof".

A fuller description is set out in recital (39), covering

> "inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession".

87 The conditions set out in sub-paragraphs (a) to (c) of article 9(1) broadly reflect the court's case law, as stated for example in *Gebhard*. In relation to (b), "overriding reasons relating to the public interest" are defined by article 4(8) as meaning reasons recognised as such in the case law of the court, including inter alia public policy, the protection of consumers and recipients of services, and social policy objectives. Somewhat confusingly, a different and longer list of "overriding reasons relating to the public interest" is set out in recital (40), and a third list in recital (56). The former list includes safeguarding the sound administration of justice. As we have explained, that is a justification which has been recognised in the case law of the court, and therefore falls within the scope of article 4(8). It is also relevant to note recital (41), which concerns the concept of public policy, and states that, as interpreted by the Court of Justice, it covers protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society, and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults, and animal welfare.

88 In relation to the indication in sub-paragraph (c) that an authorisation scheme may be proportionate "in particular because an a posteriori inspection would take place too late to be genuinely effective", it is relevant also to note that recital (54), set out above, refers to the need to take account of the risks and dangers which could arise in the absence of a prior inspection.

89 Article 10 goes on to require authorisation schemes to be based on criteria which preclude the competent authorities from exercising their

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power of assessment in an arbitrary manner (paragraph 1), and which are non-discriminatory, justified by an overriding reason relating to the public interest, proportionate to that public interest objective, clear and unambiguous, objective, made public in advance, transparent and accessible: paragraph 2. In terms of paragraph 5, the authorisation must also be granted as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.

90 Article 11 prohibits an authorisation being for a limited period, except in particular circumstances. One of those circumstances is where a limited authorisation period can be justified by an overriding reason relating to the public interest. The ability of a member state to revoke authorisations, when the conditions for authorisation are no longer met, is recognised by article 11(4).

91 Article 13 lays down a number of requirements in relation to authorisation procedures. In summary, these include that the procedures are clear, made public in advance, and such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially (paragraph 1); that they are not dissuasive and do not unduly complicate or delay the provision of the service; that they are easily accessible, and that any charges are reasonable and proportionate to the cost of the authorisation procedures and do not exceed the cost of those procedures (paragraph 2); and that applicants are guaranteed to have their application processed as quickly as possible, and in any event within a reasonable period: paragraph 3.

92 The Directive was due to be implemented by 28 December 2009.

The issues arising under the Directive

93 The issues in the present case have been focused by reference to the requirements set out in article 9(1)(b)(c). It is not contended that the scheme fails to comply with any other provisions of the Directive. The arguments in relation to paras (b) and (c) overlap to the point of being practically indistinguishable.

94 The objectives identified as the "overriding reason relating to the public interest" justifying the need for the scheme, under article 9(1)(b), are the protection of consumers and other recipients of the services in question, and the sound administration of justice. There is no dispute about the legitimacy and importance of those considerations. The argument is about whether they are sufficient to justify the scheme in the form which has been approved by the Board. That depends essentially on whether the scheme satisfies the condition in article 9(1)(c).

95 The issue arising under article 9(1)(c) in the present case is not a straightforward question whether prior authorisation is necessary, or whether an a posteriori inspection would be adequate. The scheme is not a simple prior authorisation scheme, but involves a combination of provisional accreditation, based on self-certification, and subsequent assessment. The contentious element of the scheme is not the requirement, imposed on advocates wishing to practise at a level higher than level one, to register for provisional accreditation at the level at which they consider themselves to be practising. A requirement to register at a level on the basis of self-assessment is common to both the scheme and the BSB's alternative proposal. It is not argued that it presents any material obstacle to practice.

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The issue concerns the particular character and purpose of the judicial assessment which takes place after the advocate has been practising at the level in question on the basis of his or her self-assessment.

96 As was explained earlier, judicial assessment is automatic in relation to all advocates at Level 2 and above, and is carried out in order to decide whether full accreditation should be granted. Such accreditation is then valid for five years, following which its renewal is conditional on a further assessment. Progression to a higher level requires provisional accreditation at that level, on the basis of judicial assessment as "very competent" at the current level, followed by full accreditation at the higher level, based on further assessment. Under the BSB's alternative proposal, on the other hand, judicial assessment would take place only if concerns were raised about a particular advocate through monitoring referrals or evaluations completed in a rolling programme of judicial assessment. Advocates would otherwise remain at their self-assessed level, or move up a level when they felt competent to do so. The point is put in a nutshell in the parties' agreed statement of facts and issues:

> "The BSB proposal was therefore one which involved self-certification at a particular level, with the possibility of judicial assessment at that level to follow subsequently. QASA proposed self-certification for the purposes of initial, provisional accreditation at a particular level, followed by judicial assessment for the purposes of the BSB determining whether the advocate is entitled to maintain full accreditation at the existing level, or to progress to a higher level."

97 The issue under article 9(1)(c), therefore, is whether, in so far as the requirements of the scheme are more stringent than those of the BSB proposal, the objectives pursued cannot be attained by means of a less restrictive measure. As the Commission's *Handbook on Implementation of the Services Directive* (2007) states at para 6.1.1:

> "Member states should keep in mind that, in many situations, authorisation schemes can be . . . replaced by less restrictive means, such as monitoring of the activities of the service provider by the competent authorities . . ."

In essence, the appellants contend that this is such a situation.

98 It is clear from the case law of the court, summarised in paras 55–67, that consideration of that issue in a context of this kind requires scrutiny of the justification put forward for rejecting the less stringent alternative. A "manifestly inappropriate" or "manifest error" test is not appropriate in this context; but, as we have explained, that is not to say that no discretion is allowed to the primary decision-maker as to the level of protection which should be afforded to the public interest in question or as to the choice of a suitable measure.

The approach of the courts below

99 In considering the decisions of the courts below, it should be noted at the outset that the EU jurisprudence which we have discussed was not cited to those courts. Nor was it suggested to them that the proportionality principle in EU law differed in any material respect from that applicable under the Human Rights Act 1998.

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100 In considering the proportionality of the scheme, the Divisional Court [2014] EWHC 28 (Admin) referred at para 130 to the four-stage analysis of proportionality explained in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, paras 20, 72–76. That analysis was however concerned with the proportionality under the Human Rights Act of measures which involve the limitation of a fundamental right, rather than with proportionality as a principle of EU law. Attempting nevertheless to apply the *Bank Mellat* approach, the court accepted at stage one of the analysis that the scheme had an important objective, namely to ensure competent advocacy. At stage two, the court accepted that the scheme was a rational method of tackling incompetent advocacy. Stages three and four do not appear to have been explicitly addressed. The court noted that the BSB had considered whether a less intrusive scheme was possible, but had decided that the QASA scheme was the best way forward; that the cost to advocates of participating in the scheme would be very small; that judges would have to be trained before conducting assessments; and that the scheme would be reviewed within a short period. The court then expressed its conclusion that "we cannot regard the balance struck in the light of all these factors as being in any way disproportionate": para 132. This discussion did not apply the EU principle of proportionality, or address the requirement in article 9(1)(c) of the Directive (or regulation 14(2) of the Regulations) that "the objective pursued cannot be attained by means of a less restrictive measure".

101 The Court of Appeal began its consideration of proportionality by stating (para 102): "It is not for the court to decide whether QASA is disproportionate." We are unable to agree with that statement. It *is* for the court to decide whether the scheme is disproportionate. The court must apply the principle of proportionality and reach its own conclusion.

102 The Court of Appeal continued [2014] HRLR 803, para 102:

> "The court is not entitled simply to substitute its own views for those of the LSB: see *R (Sinclair Collis Ltd) v Secretary of State for Health* [2012] QB 394, at paras 19–23 (per Laws LJ, dissenting), paras 115–155 (per Arden LJ) and paras 192–209 (per Lord Neuberger MR). We remind ourselves that we are *reviewing* the proportionality of the LSB's decision. Even under a proportionality test, the decision-maker retains a margin of discretion, which will vary according to the identity of the decision-maker, and the subject matter of the decision, as well as the reasons for and effects of the decision. A decision does not become disproportionate merely because some other measure could have been adopted. We accept the submission of [counsel for the Board] that the decision-maker's view of whether some less intrusive option would be appropriate as an alternative is likewise not a question on which the court should substitute its own view, unless the decision-maker's judgment about the relative advantages and disadvantages is manifestly wrong." (emphasis in original)

103 For the reasons we have explained, the judgments of the Court of Appeal in *Sinclair Collis* do not provide reliable guidance as to the test to be applied in a context of the present kind. It is also difficult to see why, in the circumstances of the present case, the identity of the national decision-maker should affect the court's assessment of the compatibility of the scheme with EU law. A test of whether the decision-maker's judgment was "manifestly

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A wrong" has no place in the present context. A decision of the present kind *is* disproportionate if a less restrictive measure could have been adopted, provided that it would have attained the objective pursued.

104 The Court of Appeal considered the scheme in accordance with the approach it had described. It began, at para 103, by emphasising that the Board was the regulator charged by Parliament with the task of making the necessary assessments:

B

> "Having regard to the identity of the decision-maker and the nature and subject matter of the decision, we consider that the LSB is entitled to a substantial margin of discretion in relation to the question whether the decision was proportionate."

For the reasons we have explained, that was not the correct approach.

C **105** Addressing the argument that it had not been shown that there was no less intrusive means of achieving the aims pursued by the scheme, the Court of Appeal correctly observed that it was not the law that, unless the least intrusive measure was selected, the decision was necessarily disproportionate. Rather, the question was whether a less intrusive measure could have been used without unacceptably compromising the objective of

D improving the standards of advocacy in criminal courts: para 105. Addressing the argument that the BSB proposal would have been an equally effective and less onerous alternative to the scheme, the Court of Appeal stated, at para 107:

> "In our judgment, the LSB was entitled to reject this proposal for the reasons that it gave. It was not 'legally irrelevant' that the LSB considered

E that, for reasons of consistency and in order to promote competition, it was in the public interest to have one scheme for all advocates. That was not, however, the only reason why the LSB rejected the November alternative. It judged that it was in the public interest that there should be a *comprehensive* assessment scheme and that the evidence indicated that there was a need to make assessments *across the board*. This was a

F judgment that it reached after considering a massive amount of material on which it brought its expertise as a regulator to bear. In short, the LSB was of the view that a separate 'enhanced quality monitoring' scheme for barristers could not be adopted without unacceptably compromising the objective (in the best interests of the public) of having a single accreditation scheme for all advocates."

G **106** The problem with this reasoning is that, having earlier identified the objective as being to improve the standards of advocacy in the criminal courts, the court here treated the objective as being to have a single accreditation scheme for all advocates. That cannot however be a relevant objective for the purposes of the Directive. Having an authorisation scheme is not an objective in itself: it has to be justified by some (other) overriding reason relating to the public interest. The relevant objectives in the present

H case could only be the protection of consumers and recipients of services, and safeguarding the sound administration of justice. The application of a scheme on a consistent basis to all criminal advocates might be necessary in order for the scheme to achieve those objectives effectively. It might also be necessary in order for the scheme to comply with the requirement in

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article 9(1)(a) that it must not discriminate against the provider in question. The court did not however address those issues.

107 Treating proportionality as a matter primarily for the Board, the Court of Appeal concluded that the Board "addressed the issue of proportionality and was entitled to conclude that QASA was proportionate": para 111. Like the Divisional Court, the Court of Appeal made no reference to the specific requirement imposed by article 9(1)(c) of the Directive, or to the corresponding requirement in regulation 14(2)(c) of the Regulations.

108 In the circumstances, it is necessary for the matter to be reconsidered on the proper basis. In particular: (1) It is for the court to decide whether the scheme is proportionate, as part of its function in deciding on its legality. (2) In so doing it should approach the matter in the same way in which the Court of Justice would approach the issue in enforcement proceedings. (3) Article 9(1)(c) requires the court to decide, in the present case, whether the Board has established that the objectives pursued by the scheme, namely the protection of recipients of the services in question, and the sound administration of justice, cannot be attained by means of a less restrictive scheme, and in particular by means of the procedure set out in the BSB proposal. (4) That decision does not involve asking whether the Board's judgment was "manifestly wrong", or whether the scheme is "manifestly inappropriate". The court must decide for itself, on the basis of the material before it, whether the condition set out in article 9(1)(c) is satisfied. (5) In considering the question of necessity arising under article 9(1)(c), it should be borne in mind that EU law permits member states to exercise a margin of appreciation as to the level of protection which should be afforded to the public interest pursued. It also allows them to exercise discretion as to the choice of the means of protecting such an interest, provided that the means chosen are not inappropriate.

This court's analysis of the proportionality of the Board's decision

109 In their joint application for the Board's approval of the scheme, the BSB, SRA and IPS explained the rationale of the scheme in terms which concentrated on the need to ensure greater protection for the public in relation to criminal advocacy across the board. To that end they argued that the "systematic assessment and accreditation of the competence of advocates will provide consumers of criminal advocacy with tangible reassurance that their advocate has the necessary competence to handle their case". They described the proposed regulatory changes as a "risk managed" approach: "only those advocates that meet the requirements will be permitted to undertake criminal advocacy and those that are accredited can deal only with cases within their competence." And they argued that the scheme was proportionate to the objective:

> "27. Protecting the public interest and interest of consumers of criminal advocacy has been at the heart of the design and development of the Scheme.
>
> "28. The SRA, BSB and IPS believe that the proposed Scheme and regulatory changes are proportionate to the objective of protecting the interests of consumers of criminal advocacy. The proposed changes will ensure consistent and systematic assessment of competence of advocates

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A and result in advocates taking on only those cases in which they are competent to act."

110 As we have explained at para 14, the Board undertook its own assessment of whether there was a risk which needed to be addressed, and a firm rationale for the particular scheme proposed. The Board's conclusion that there was such a risk was based on a range of evidence, which we have
B summarised at para 15. It noted the potentially serious consequences of poor advocacy for those affected and for the administration of justice, as we have explained at para 15. In relation to the particular scheme proposed, the Board considered that a scheme applicable to advocates generally was justified in view of the gravity of the risk and the absence of evidence supporting the adoption of a more selective approach, as we have explained
C at paras 16–17. The Board also noted that the scheme was to be reviewed after two years, and that it could be adjusted on the basis of evidence gained from its implementation, as we have explained at para 18.

111 The Board did not consider that the scheme was an "authorisation scheme" within the Regulations, but it considered the issue of proportionality in a broad sense and concluded that "there is legitimate and sufficient concern about the quality of criminal advocacy and that the
D scheme proposed in the application is both proportionate and targeted". The evidence filed in these proceedings by the Board's chief executive is that the Board did not consider that there were equally effective ways of achieving the scheme's objective without adopting a scheme of that nature.

112 The Court of Appeal considered that the Board was entitled to judge that it was "in the public interest that there should be a *comprehensive*
E assessment scheme and that the evidence indicated that there was a need to make assessments *across the board*" (original emphasis), and it observed that the Board reached that judgment "after considering a massive amount of material on which it brought its expertise as a regulator to bear": para 107.

113 The appellants submitted that the reasoning of the Court of Appeal was faulty in that it failed to focus on whether an alternative scheme of the kind previously proposed by the BSB would be any less effective and that it
F rested on a suppressed, and unestablished, premise that the regulated professions represented by the BSB, SRA and IPS all presented the same risk profile, whereas a scheme of prior authorisation required separate analysis in relation to each category of service provider (barristers, solicitors and legal executives). The appellants further submitted that the BSB's own previous stance was evidence that it could not be demonstrated that the
G proposed scheme was the least burdensome way of achieving its objective.

114 The core feature of the scheme is that every criminal advocate without exception, who wishes to practise at one of the upper levels, must undertake judicial assessment at the outset. No criminal advocate, competent or incompetent, can slip through that net, and every client has the protection that whoever represents him in a case at an upper level will have been subject to such assessment.

H 115 A precautionary scheme of this kind provides a high level of public protection, precisely because it involves an individual assessment of each provider wishing to practise at an upper level, and it places a corresponding burden on those affected by it. Whether such a level of protection should be provided is exactly the sort of question about which the national decision

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maker is allowed to exercise its judgment within a margin of appreciation: see paras 64–65 above.

116 A self-certifying scheme of the kind proposed by the BSB in November 2012 presents a higher level of risk because of the possibility that an advocate may consider himself competent to practise at a level where he does not have the necessary competence, and even if his incompetence is later detected and reported to the regulator (of which there can be no certainty), for those who have had the misfortune of being poorly represented by him it will be a case of shutting the stable door after the horse has bolted. (To illustrate the uncertainty of detection, an advocate who appears infrequently at the upper levels may lack competence, possibly through not keeping up with the law, but will be correspondingly less likely to be assessed under a rolling programme than an advocate who appears more regularly.) It is perfectly true that the evidence did not enable the level of risk to be quantified with any approach to precision, but that did not preclude the Board from considering that it was unacceptable. We do not regard the judgment made by the Board in that regard as falling outside the appropriate margin of appreciation. Since the only way of reducing the risk, so as to provide the desired level of protection for all members of the public involved in criminal proceedings at an upper level, was to have a scheme of the kind proposed by the JAG, it follows that the scheme was proportionate to the objective, notwithstanding the inconvenience caused to competent members of the profession.

117 Although our reasoning process has been different from the courts below, we therefore agree with the Court of Appeal that a comprehensive assessment scheme was proportionate, and that the Board was entitled to grant the application of the BSB, SRA and IPS.

The scope of the Directive

118 There remains the question whether the scheme is in fact an authorisation scheme falling within the scope of the Directive. The answer to that question does not appear to us to be straightforward, and if it were necessary for this court to reach a decision on the point, we would be inclined to make a reference to the Court of Justice. Given our conclusion, however, that even if the scheme falls within the scope of the Directive, it is compliant with article 9(1)(b)(c), it is unnecessary for the question to be decided in these proceedings.

Conclusion

119 For these reasons we would dismiss the appeal.

Appeal dismissed.

DIANA PROCTER, Barrister

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Neutral Citation Number: [2015] EWCA Civ 1020
Case No: C2/2015/1004 and C4/2015/0213

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
Upper Tribunal Judge Kopieczek

AND ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
The Hon Mr Justice Males

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2015

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE ELIAS
and
LORD JUSTICE McCOMBE

- -

Between :

The Queen (on the application of Kevin Kinyanjui Kiarie)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

And between:

The Queen (on the application of Courtney Aloysius Byndloss)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -
- -

Richard Drabble QC and Joseph Markus (instructed by **Turpin Miller LLP**) for **Mr Kiarie**
Manjit Singh Gill QC, Ramby de Mello, Tony Muman and Jessica Smeaton (instructed by **J.M. Wilson Solicitors LLP**) for **Mr Byndloss**
Lord Keen of Elie QC (Advocate General for Scotland), Lisa Giovannetti QC and Susan Chan (instructed by **The Government Legal Department**) for the **Secretary of State**

Hearing dates : 23-24 September 2015

- -

Judgment

Lord Justice Richards :

1. These two appeals, which were heard together, concern the interpretation and application of section 94B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), as inserted by the Immigration Act 2014 ("the 2014 Act"). Where a person liable to deportation has had a human rights claim refused by the Secretary of State but has a right of appeal against that decision, section 94B empowers the Secretary of State to certify the claim if she considers that removal of the person pending the outcome of such an appeal would not be unlawful under section 6 of the Human Rights Act 1998. The effect of certification is that any appeal must be brought from outside the United Kingdom.

2. Both appellants are liable to deportation by reason of serious criminal offending. They each claimed that deportation would be in breach of their rights to private and/or family life under article 8 of the European Convention on Human Rights. In each case, the Secretary of State decided to make a deportation order, refusing the human rights claim and certifying the claim under section 94B. In the case of Mr Kiarie, the decision letter was dated 10 October 2014. In the case of Mr Byndloss, the original decision letter was dated 6 October 2014 but it was later superseded by a supplementary decision letter dated 3 September 2015, taking into account further evidence and representations.

3. The appellants brought judicial review proceedings to challenge the section 94B certifications. Mr Kiarie's claim was brought in the Upper Tribunal. Permission to apply for judicial review was refused by Upper Tribunal Judge Gill on the papers and by Upper Tribunal Judge Kopieczek on an oral renewal. Mr Byndloss's claim was brought in the Administrative Court. Permission to apply for judicial review was refused by Hickinbottom J on the papers and by Males J on an oral renewal. In each case, permission to appeal to the Court of Appeal was granted at an oral hearing before the Master of the Rolls and Underhill LJ. The formal question on the appeal, therefore, is whether the court or tribunal below ought to have granted permission to apply for judicial review. It was common ground before us, however, that if we took the view that such permission ought to have been granted, the appropriate course would be for us to grant permission, reserve the substantive judicial claim to ourselves and proceed to determine it on the basis of the relevant evidence before the court and the submissions we have heard.

4. There is no dispute that a decision to certify under section 94B is amenable to judicial review. Nor, in the event, is there any real dispute about the correct interpretation of section 94B, though that interpretation is not accurately reflected in the Secretary of State's guidance to caseworkers. The main issues in each case are whether, in allowing the appellant's removal pending determination of any appeal and requiring such an appeal to be brought from outside the United Kingdom, certification was in breach of (i) the procedural guarantees inherent in article 8 and/or (ii) the appellant's substantive rights under article 8. The first question focuses on the effectiveness and fairness of an out of country appeal in deportation cases. The second question focuses on the proportionality of any interference with the appellants' private and/or family life pending determination of an appeal.

5. The evidence before the court has grown substantially in the course of the proceedings and includes a substantial body of material filed at a very late stage. The

court received all the material *de bene esse* but, as explained below, I am satisfied that some of it is irrelevant to the issues we have to decide.

The legislation

6. Section 94B of the 2002 Act reads as follows:

> "**94B. Appeal from within the United Kingdom: certification of human rights claims made by persons liable to deportation**
>
> (1) This section applies where a human rights claim has been made by a person ('P') who is liable to deportation under –
>
> (a) section 3(5)(a) of the Immigration Act 1971 (Secretary of State deeming deportation conducive to public good) …
>
> …
>
> (2) The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of an appeal in relation to P's claim, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).
>
> (3) The grounds upon which the Secretary of State may certify a claim under subsection (2) include (in particular) that P would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed."

That section was brought into force with effect from 28 July 2014 and was in force at the date of each of the decisions to which these proceedings relate.

7. The effect of certification under section 94B is that any appeal against the decision on the human rights claim must be brought from outside the United Kingdom:

i) In relation to the period from 20 October 2014, that effect was clear on the face of the version of section 92 substituted by a provision of the 2014 Act brought into force on that date: section 92(3) of the substituted version provides that "In the case of an appeal under section 82(1)(b) (human rights claim appeal) where the claim to which the appeal relates was made while the appellant was in the United Kingdom, the appeal must be brought from outside the United Kingdom if – (a) the claim to which the appeal relates has been certified under … section 94B …".

ii) In relation to the period between 28 July and 20 October 2014, the period during which the original decision in each of the present cases was made, the same result was achieved by Article 4 of the Immigration Act 2014

(Commencement No.1, Transitory and Saving Provisions) Order 2014 and was thereafter maintained by Article 15 of the Immigration Act 2014 (Commencement No.3, Transitional and Savings Provisions) Order 2014.

I am appalled by the complexity of that legislative jigsaw but there is no dispute that the result is as stated.

The guidance

8. The Secretary of State has issued guidance to caseworkers on the application of section 94B. The version in force at the date of the original decision letters under challenge was Version 1, dated July 2014 and headed "Section 94B certification guidance for Non European Economic Area deportation cases". I pick out three points from it:

i) The guidance indicated, in paragraphs 3.2-3.3, that the Government was seeking initially to "test" the newly acquired power and that, for the initial test phase, certification should normally only be considered in circumstances where (i) the individual was aged 18 or over at the time of the deportation decision, and (ii) the individual "does not have a parental relationship … with a dependent child or children".

ii) It was made clear in paragraphs 3.5-3.6 that the power under section 94B should be used only after it had been decided that other certification powers, including the power to certify a claim under section 94 as "clearly unfounded", were not appropriate. What this means is that certification under section 94B would fall for consideration only in cases where the relevant human rights claim was accepted to be arguable and thus to engage a right of appeal.

iii) It was also made clear in paragraph 3.5 that it would not be appropriate to use the power in section 94B to certify claims made on the basis of article 2 or article 3, since removal in circumstances where a claim under those articles was not clearly unfounded would necessarily carry with it a real risk of serious irreversible harm.

iv) The general tenor of the guidance was that in every case the relevant question when deciding whether to certify was whether removal pending any appeal would create a real risk of serious irreversible harm. For example, paragraph 1.2 stated that section 94B "allows a human rights claim to be certified … where it is considered that the person liable to deportation would not, before the appeal process is exhausted, face a real risk of serious irreversible harm if removed to the country of return". Paragraph 3.9 stated that where all that remained in an appeals process was an article 8 claim "and there is not a real risk of serious irreversible harm, and the person is otherwise removable (e.g. a travel document is now available), it is likely that certification will be appropriate". The guidance contained nothing to direct the decision-maker to consider whether, apart from real risk of serious irreversible harm, removal pending determination of an appeal might be unlawful under section 6 of the Human Rights Act, in particular by reason of a breach of the person's rights under article 8 of the Convention.

9. Version 2 of the guidance, dated 20 October 2014 stated that the test phase had ended on 17 October and no longer applied. It made the same points about the relationship between other powers of certification and the power under section 94B, and to the effect that the section 94B power should not be used to certify claims under article 2 or article 3. There was an even greater concentration than in version 1 on the test of real risk of serious irreversible harm. For example:

> "3.2 The Government's policy is that the deportation process should be as efficient and effective as possible. Case owners should therefore seek to apply section 94B certification in all applicable cases where doing so would not result in serious irreversible harm.
>
> …
>
> 3.5 … In order for certification not to be possible, there must be a real risk of harm that would be both serious and irreversible.
>
> 3.6 By way of example, in the following scenarios where a person is deported before their appeal is determined it is unlikely, in the absence of additional factors, that there would be a real risk of serious irreversible harm while an out-of-country appeal is pursued ….
>
> 3.7 Although the serious irreversible harm test sets a high threshold, there may be cases where that test is met. Such cases are likely to be rare, but case owners must consider every case on its individual merits to assess the likely effect of a non-suspensive right of appeal …."

10. Version 2 also contained paragraphs on the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children, a topic to which I will return when considering submissions made by Mr Gill QC on the facts of Mr Byndloss's case.

11. The evidence before the court includes at least one later version of the guidance (Version 4, dated 29 May 2015) but there was no suggestion in argument that later versions were materially different from Version 2.

12. As will be explained below, the guidance contains an incomplete and misleading statement of the statutory test. On behalf of the Secretary of State, Lord Keen QC accepted that the guidance needs "clarification" and informed us of the intention to amend it following judgment in the present appeals. The problem goes beyond a need for clarification. The guidance is liable to mislead decision-makers into applying the wrong test. It is not, however, the direct subject of challenge in these proceedings. It is relevant only in so far as the erroneous approach in the guidance appears to have fed through into the original decisions under challenge, to which I now turn.

The decision in respect of Mr Kiarie

13. Mr Kiarie is a Kenyan national who was born on 28 December 1993 and is therefore now 21 years old. He came to the United Kingdom at the age of 3 and was subsequently granted indefinite leave to remain. Between September 2013 and May 2014 he was convicted of a number of offences, including an offence of possession of a class A drug with intent to supply, for which he was sentenced in January 2014 to a 24 month suspended sentence. In April and May 2014 he was convicted of two further offences of possession of drugs, and on the second of those occasions the 24 month suspended sentence was implemented in full. In sentencing him, the judge noted not only the further offending, but also that he had failed to perform any hours of the unpaid work required under the suspended sentence.

14. On 22 July 2014 he was notified of the Secretary of State's intention to make a deportation order against him pursuant to section 32(5) of the UK Borders Act 2007 unless he fell within any of the exceptions in section 33 of that Act. He was sent a questionnaire which he completed, relying on article 8.

15. He was not informed that consideration was being given to the exercise of the power under section 94B so as to allow his removal pending any appeal against deportation. As at the date of notification of the intention to make a deportation order, that was not surprising, since section 94B was not yet in force; but even after it had come into force, he was not told prior to the decision of 10 October 2014 (see below) that consideration was being given to its use in his case.

16. By letter dated 10 October 2014, he was informed of the Secretary of State's decision to make a deportation order against him for reasons given in the accompanying 9-page notice of decision. The notice referred to the public interest in favour of deportation for offending of the type and seriousness committed by Mr Kiarie. It considered his article 8 claim, which was based primarily upon the fact that he had spent the majority of his life in the United Kingdom and his parents, sister and younger brother were present here; but it concluded that the public interest in deporting him outweighed his right to private and family life.

17. There was then a section on certification under section 94B, which included the following:

> "45. Consideration has been given to whether your Article 8 claim should be certified under section 94B …. The Secretary of State has considered whether there would be a real risk of serious irreversible harm if you were to be removed pending the outcome of any appeal you may bring. The Secretary of State does not consider that such a risk exists. As outlined above, you do not meet any of the exceptions to deportation and there are no very compelling circumstances present in your case.
>
> 46. It is acknowledged that your parents and siblings are in the United Kingdom. However, any relationships you may have with family members can be continued through modern means of communication upon your return to Kenya. There is nothing

> to suggest that you would be unable to obtain employment in Kenya. You are 20 years old and have no serious medical conditions. Furthermore, any skills/qualifications you have gained in the United Kingdom can only serve to assist you in finding employment in Kenya and therefore it is considered that there would be no communication barriers upon your return.
>
> 47. For all the above reasons, it is not accepted that you face a real risk of serious irreversible harm if removed to Kenya while you pursue your appeal against deportation, should you choose to exercise that right.. Therefore, it has been decided to certify your Article 8 claim under section 94B and any appeal you may bring can only be heard once you have left the United Kingdom."

The decisions in respect of Mr Byndloss

18. Mr Byndloss is a Jamaican national born on 7 July 1980. He entered this country in June 2002 as a visitor and was subsequently granted indefinite leave to remain as the spouse of a British citizen. In May 2013 he was convicted of an offence of possession of class A drugs with intent to supply and was sentenced to 3 years' imprisonment.

19. On 21 June 2013 he was notified that the Secretary of State intended to make a deportation order against him pursuant to section 32(5) of the UK Borders Act 2007 unless he fell within any of the exceptions in section 33 of that Act. He was sent a questionnaire. By letter of 4 October 2013, his solicitor returned the questionnaire, partially completed, together with some additional material. The questionnaire gave brief details of Mr Byndloss's spouse and the eight children he claimed to have had by her and two other partners. The additional material included short letters from him and from the mothers of some of the children, together with birth certificates of six of the children.

20. By letter dated 6 October 2014, Mr Byndloss was informed of the Secretary of State's decision to make a deportation order against him for reasons given in the accompanying 9-page notice of decision. The notice examined the available information concerning his life in the United Kingdom and his relationship with his spouse, his other partners and the children, and concluded that he did not meet the requirements of any of the exceptions to deportation on the basis of private or family life. It stated that deportation would not be in breach of article 8 because the public interest in deportation outweighed his right to private and family life.

21. The notice continued with a section on certification under section 94B. It opened with a general description of the relevant power, and concluded:

> "Consideration has been given to whether your Article 8 claim should be certified under section 94B …. The Secretary of State has considered whether there would be a real risk of serious irreversible harm if you were to be removed pending the outcome of any appeal you may bring. The Secretary of State does not consider that such a risk exists. **Therefore, it**

> **has been decided to certify your Article 8 claim under section 94B and any appeal you may bring can only be heard once you have left the United Kingdom**" (emphasis in the original).

22. In the context of the judicial review challenge to that decision, Mr Byndloss submitted further evidence and made further representations, including witness statements from himself and from the mothers of some of the children.

23. That further material, together with the material originally provided, was taken into account in a 21-page supplementary decision letter dated 3 September 2015, some three weeks before the hearing of the appeal. The nature of the supplementary letter is apparent from its opening paragraphs:

> "This letter is supplementary to the decision that section 32(5) of the UK Borders Act applies, issued on 6 October 2014.
>
> Material from the letter of 6 October 2014 has been consolidated into this letter so that the Secretary of State's complete reasoning is contained in one document. However, a copy of the letter of 6 October 2014 is also enclosed for your reference."

24. The supplementary letter contains a detailed analysis of the material relevant to the substantive article 8 claim, again concluding that Mr Byndloss's deportation would not be in breach of article 8 because the public interest in deportation outweighs his right to private and family life. The section ends:

> "Whilst it is accepted that you have established Article 8 rights in the UK, with which your deportation constitutes an interference, it is considered that the decision to deport you is a proportionate one, for the reasons set out above".

25. That is followed by a section on certification under section 94B, in terms that are materially different from, and far more detailed than, those of the original decision of 6 October 2014. After an introductory paragraph, the section deals with the opportunity to make representations prior to any decision whether to certify:

> "From 20 October 2014, all foreign criminals who were notified of a decision to deport them from the UK were warned that in certain circumstances any appeal against an adverse decision could only be brought after they have left the UK. They were given the opportunity to make representations about why they should not be expected to appeal from abroad. The letter to you of 6 October 2014 was issued before that change in process and as such you have never been asked to submit such reasons in your case. It has always been open to you however, to make such submissions at any time in the 10 months since you were served with the decision to deport you. It is noted that you have been represented throughout this period.

> In your witness statement of 5 November 2014 at paragraphs 14 to 16, you set out the reasons why you should not be expected to appeal from abroad."

Those reasons are then summarised and considered. They relate essentially to alleged difficulties in conducting an appeal from overseas. The letter concludes that the matters referred to would not constitute a breach of the procedural guarantees provided by article 8.

26. The section continues:

> "Consideration has been given, on the basis of all information currently available, to whether the decision to certify your Article 8 claim under section 94B of the 2002 Act should be maintained. The Secretary of State has considered whether your removal pending the outcome of any appeal you may bring would be unlawful under section 6 of the Human Rights Act 1998 and whether there would be a real risk of serious irreversible harm to you or members of your immediate family before any appeal you may bring is finally concluded.
>
> The Secretary of State does not consider that your removal pending the outcome of any appeal would be unlawful under section 6 of the Human Rights Act 1998 and considers that there is no real risk of serious irreversible harm in your case. It is considered that your removal pending your appeal would be proportionate in all the circumstances. As explained in the decision dated 6 October 2014 and in this letter, you lived in Jamaica until you were 21 years old and there is no evidence that you would be unable to reintegrate or pursue a private life there. You speak English which is an official language of Jamaica and as such you will be able to communicate with others on your return. You are 35 years old with no apparent health concerns and you were living an independent life prior to imprisonment.
>
> The evidence you have provided does not demonstrate that it would be unlawful under section 6 of the Human Rights Act 1998 in respect of the Article 8 or other rights of your wife, your former partners or any of your children if you were removed pending the final outcome of any appeal you may bring. As explained in the decision dated 6 October 2014, it is not accepted that any of your children are dependent on you for their ability to reside in the UK, as they are British citizens and remain in the care of their respective mothers. As you were in prison and immigration detention from 10 May 2013 to 15 April 2015, in the event of your deportation the status quo in respect of your children would be maintained and there would be no disruption either to the effectiveness of their care or their day-to-day lives: as far as your children are concerned, their daily lives would continue in the ways to which they are

> accustomed – i.e. in the care of their respective mothers who play the parenting role in each of the children's daily lives. It is therefore concluded that you have made no meaningful, parental contribution to your children's daily lives and as such, your removal will not be unlawful under section 6 of the Human Rights Act in respect of the article 8 or other rights of your wife, former partners or children. On this basis, it is not accepted that your removal would cause harm that would meet a minimum level of severity, or would have a permanent or long lasting detrimental impact upon any of your claimed family members. Full consideration has been given to the Secretary of State's duty to promote and safeguard the welfare of children under s55 of the Borders, Citizenship and Immigration Act 2009. It is considered that your children's best interests would be served by them remaining in the UK in the care of their respective mothers in order that they should continue to pursue the lives that they are well accustomed to. Given that you play no meaningful parental role in any of the children's daily lives, it is not considered that the Secretary of State's statutory duty under s55 would be breached by not affording you an in-country right of appeal against the decision to refuse your Article 8 claim.
>
> Therefore, the decision of 6 October 2014 to certify your Article 8 claim under section 94B is maintained and, as previously explained, any appeal you may bring can only be heard once you have left the UK"

27. Since the date of the supplementary letter there has been what Lord Keen described as an avalanche of further evidence from Mr Byndloss, including various witness statements and an independent social worker's report. Lord Keen indicated that the Secretary of State would consider that further material and decide in due course whether it should affect the maintenance of the section 94B certification; but the supplementary letter of 3 September 2015 stands as the most recent decision for the purposes of the present appeal.

The refusal of permission in the court/tribunal below

28. I can deal very briefly with the reasons given at first instance for refusing permission to apply for judicial review. The arguments, and in Mr Byndloss's case the decision itself, have been developed and refined in the course of the appeals.

29. In the case of Mr Kiarie, Upper Tribunal Judge Kopieczek's judgment on the oral renewal, on 6 March 2015, concluded as follows:

> "7. In the circumstances, I am satisfied that the respondent was unarguably entitled to certify the human rights claim under Section 94B of the 2002 Act, concluding that there would not be a risk of serious irreversible harm if removed, pending his appeal against the decision to make a deportation order. I am not satisfied that there is anything in the particular

> circumstances of his case which arguably reveals that he would not be able fully to participate in the appeal with the assistance of his family in the UK. The arguability of the underlying Article 8 claim does not affect the lawfulness of the respondent's decision."

30. In the case of Mr Byndloss, Males J's judgment on the oral renewal, on 19 December 2014, addressed a challenge to the lawfulness of section 94B itself, which has since fallen away. He rejected a submission that an out of country appeal would seriously disadvantage Mr Byndloss, referring to authorities which have upheld the principle that an out of country appeal does provide an adequate safeguard and an effective remedy. He considered that the claim was unarguable.

Amenability to judicial review

31. As I have said, there is no dispute that a decision to certify under section 94B is amenable to judicial review. It should, however, be stressed that the issue on such a challenge is limited to the section 94B certification and does not extend to the deportation decision itself or to the related refusal of the person's human rights claim. Section 94B will arise for consideration only in cases where there is a right of appeal against the refusal of the human rights claim (see, for example, the summary of the Secretary of State's guidance at paragraph 8(ii) above). The section is concerned with the distinct question whether the person can lawfully be removed pending such an appeal. Moreover, there is obviously no right of appeal against the section 94B certification itself.

32. It follows from all this that the line of cases to the effect that, where a right of appeal exists against a removal decision, judicial review will not lie unless special or exceptional factors are in play (see e.g. *R (Lim and Siew) v Secretary of State for the Home Department* [2007] EWCA Civ 773, [2008] INLR 60, and *RK (Nepal) v Secretary of State for the Home Department* [2009] EWCA Civ 359, [2010] INLR 37) has no direct relevance in this context.

33. As to the applicable principles on judicial review of a decision under section 94B, the terms of the statute require the Secretary of State to form her own view on whether removal pending an appeal would breach Convention rights (see, further, the next section of this judgment). For that purpose, in an article 8 case such as the present, she has to make relevant findings of fact and conduct a proportionality balancing exercise in relation to the facts so found. In my judgment, her findings of fact are open to review on normal *Wednesbury* principles, applied with the anxious scrutiny appropriate to the context: compare *R (Giri) v Secretary of State for the Home Department* [2015] EWCA Civ 784, applying *R v Secretary of State for the Home Department, ex p. Khawaja* [1984] AC 74 and *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, and distinguishing between cases of precedent or jurisdictional fact (where the court has to decide the facts for itself) and cases where facts have to be found by the decision-maker in the exercise of a discretionary power conferred on him or her (and where those findings of fact are open to review on *Wednesbury* principles). But as to the assessment of proportionality, the decision of the Supreme Court in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 shows that the court is obliged to form

its own view, whilst giving appropriate weight (which will depend on context) to any balancing exercise carried out by the primary decision-maker.

The correct general approach to section 94B in the context of article 8

34. The central provision in section 94B is subsection (2): the power to certify arises only "if the Secretary of State considers that … removal of P to the country or territory to which P is proposed to be removed, pending the outcome of an appeal in relation to P's claim, *would not be unlawful under section 6 of the Human Rights Act 1998* …" (emphasis added). In other words, the Secretary of State cannot lawfully certify unless she considers that removal pending the outcome of an appeal would not be in breach of any of the person's Convention rights as set out in schedule 1 to the Human Rights Act.

35. By subsection (3), a *ground* for certification is that the person would not, before the appeals process is exhausted, face "a real risk of serious irreversible harm" if removed to the country or territory to which he or she is proposed to be removed. That ground does not, however, displace the statutory condition in subsection (2), nor does it constitute a surrogate for that condition. Even if the Secretary of State is satisfied that removal pending determination of an appeal would not give rise to a real risk of serious irreversible harm, that is not a sufficient basis for certification. She cannot certify in any case unless she considers, in accordance with subsection (2), that removal pending determination of any appeal would not be unlawful under section 6 of the Human Rights Act. That the risk of serious irreversible harm is not the overarching test was rightly accepted by Lord Keen on behalf of the Secretary of State at the hearing of the appeal.

36. It follows that the Secretary of State's guidance on section 94B (see paragraphs 8-11 above) is inaccurate and misleading in focusing as it does on the criterion of serious irreversible harm in subsection (3) and failing to focus on the central provision in subsection (2).

37. It is unnecessary in the circumstances to spend time discussing the criterion of serious irreversible harm, which is drawn from the jurisprudence of the ECtHR on the availability of interim measures under rule 39 of the Rules of Court (see, for example, *Mamatkulov v Turkey* (2005) 41 EHRR 25, at paragraphs 102-104 and 108). There may in practice be relatively few cases where removal for an interim period pending an appeal would be in breach of Convention rights in the absence of a risk of serious irreversible harm, but it is a possibility which must be focused on as a necessary part of the decision-making process.

38. Consideration must be given, in particular, to whether removal pending determination of an appeal would interfere with the person's rights under article 8 and, if so, whether removal for that interim period would meet the requirements of proportionality. Unless the decision-maker considers that there would be no such interference or that any such interference would be proportionate, the claim cannot lawfully be certified under section 94B.

39. The arguments in the present appeals relate to the procedural as well as the substantive rights afforded by article 8.

40. As to the procedural aspect, a central submission on behalf of the appellants is that an out of country appeal would not provide them with fair and effective involvement in the appellate process and would not meet the procedural guarantees inherent in article 8; or, at least, that the Secretary of State did not take the necessary steps to satisfy herself that the procedural guarantees of article 8 would be met by an out of country appeal before certifying under section 94B. I will consider this issue in the next section of the judgment.

41. As to the substantive aspect, both appellants point to the fact that the Secretary of State, whilst refusing their human rights claims, has accepted that the claims are arguable and should carry a right of appeal; and although one is concerned here with the position only during the interim period before an appeal can be determined, both appellants contend that their removal from the United Kingdom for that period would be an interference with their substantive rights under article 8. The details of this are examined later when assessing the lawfulness of each of the relevant decision letters.

42. The issue of proportionality needs to be examined in the context of the individual decisions, but certain general points can be made at this stage. Lord Keen emphasised the strong public interest in the deportation of foreign nationals who have committed serious criminal offences contrary to the laws of the United Kingdom. He referred to the judgment of Laws LJ in *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550, [2014] 1 WLR 998, which underlined the great weight to be attached to the deportation of foreign criminals when carrying out the article 8 balancing exercise. For example:

> "54. I draw particular attention to the provision contained in section 33(7) [of the UK Borders Act 2007]: 'section 32(4) applies despite the application of Exception 1 …', that is to say, a foreign criminal's deportation remains conducive to the public good notwithstanding his successful reliance on article 8. I said at para 46 above that while the authorities demonstrate that there is no rule of exceptionality for article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed."

43. A similar point is made in the judgment of this court, given by the Master of the Rolls, in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, [2014] 1 WLR 544, which concerned the provisions of the Immigration Rules governing deportation in an article 8 case. As was stated at paragraph 42 of the judgment (admittedly in the context of a family life claim by a person who established family life at a time when he knew it to be precarious):

> "42. … [In] approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be 'exceptional') is

> required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase 'exceptional circumstances' is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals."

44. In general terms, and subject to specific factors such as risk of reoffending, it may be thought that less weight attaches to the public interest in removal in the context of section 94B, when the only question is whether the person should be allowed to remain in the United Kingdom for an interim period pending determination of any appeal, than when considering the underlying issue of deportation for the longer term. But the very fact that Parliament has chosen to allow removal for that interim period, provided that it does not breach section 6 of the Human Rights Act, shows that substantial weight must be attached to that public interest in that context too: Parliament has carried through the policy of the deportation provisions of the UK Borders Act 2007 into section 94B. In deciding the issue of proportionality in an article 8 case, the public interest is not a trump card but it is an important consideration in favour of removal.

45. I should mention finally in this section that it is obvious from the wording of section 94B, and is common ground before us, that where the statutory condition in subsection (2) and the criterion in subsection (3) are met, the Secretary of State has a *discretion* whether to certify or not. The written submissions raised the question whether the existence of that discretion was appreciated by the Secretary of State in making the decisions. I am satisfied that it was, and the point seemed to fall away in oral argument. I therefore need say no more about it.

Whether an out of country appeals meets the procedural requirements of article 8

46. The appellants' case in respect of the procedural requirements of article 8 was developed by Mr Drabble QC on behalf of Mr Kiarie. His submissions were adopted, with only minor additions, by Mr Gill on behalf of Mr Byndloss.

47. The appellants' case rests on principles set out in the judgment of this court, given by the Master of the Rolls, in *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622, [2015] 1 WLR 2247. The relevant question in that case concerned the circumstances in which the procedural guarantees inherent in article 8 required the grant of legal aid in an immigration case involving a claim based on private and/or family life. The court concluded that for relevant purposes the standards set by article 8 were in practice the same as those set by article 6.

48. In relation to article 6, the judgment summarised the general principles as follows (with supporting references omitted):

> "46. The general principles established by the European Court of Human Rights are now clear. Inevitably, they are derived from cases in which the question was whether there was a breach of article 6.1 in proceedings which had already taken place. We accept the following summary of the relevant case law given by Mr Drabble: (i) the Convention guarantees rights that are practical and effective, not theoretical and illusory in

> relation to the right of access to the courts …; (ii) the question is whether the applicant's appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to present the case properly and satisfactorily …; (iii) it is relevant whether the proceedings taken as a whole were fair …; (iv) the importance of the appearance of fairness is also relevant: simply because an applicant can struggle through 'in the teeth of all the difficulties' does not necessarily mean that the procedure was fair …; and (v) equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent …."

At paragraph 56 the court described the critical question as being "whether an unrepresented litigant is able to present his case effectively and without obvious unfairness".

49. In relation to article 8, after consideration of the Strasbourg case law, the judgment aligned the relevant standards for practical purposes with those of article 6:

> "70. It is true that the test for article 8 as it is stated in the Strasbourg jurisprudence (whether those affected have been involved in the decision-making process, viewed as a whole, to a degree sufficient to provide them with the requisite protection of their interests) differs from the test for article 6.1 (whether there has been effective access to court). The article 8 test is broader than the article 6.1 test, but in practice we doubt whether there is any real difference between the two formulations in the context with which we are concerned. There is nothing in the Strasbourg jurisprudence to which our attention has been drawn which suggests that the European Court of Human Rights considers that there is any such difference. In practice, the court's analysis of the facts in the case law does not seem to differ as between article 6.1 and article 8. This is not surprising. The focus of article 6.1 is to ensure a fair determination of civil rights and obligations by an independent and impartial tribunal. Article 8 does not dictate the form of the decision-making process that the state must put in place. But the focus of the procedural aspect of article 8 is to ensure the effective protection of an individual's article 8 rights. To summarise, in determining what constitutes effective access to the tribunal (article 6.1) and what constitutes sufficient involvement in the decision-making process (article 8), for present purposes the standards are in practice the same.
>
> 71. As Ms Kaufmann submits, the significance of the cases lies not in their particular facts, but in the principles they establish, viz (i) decision-making processes by which article 8 rights are determined must be fair; (ii) fairness requires that individuals

> are involved in the decision-making process, viewed as a whole, to a degree that is sufficient to provide them with the requisite protection of their interests: this means that procedures for asserting or defending rights must be effectively accessible; and (iii) effective access may require the state to fund legal representation."

50. In relation to the provision of legal aid, the court said in paragraph 77 that deportation cases are of particular concern. A decision to deport will often engage an individual's article 8 rights, and where this occurs the individual will usually be able to say that the issues at stake for him are of great importance.

51. On the particular facts of Ms Gudanaviciene's case, which involved the application of the Immigration (European Economic Area) Regulations 2006 and issues relating to the welfare of her daughter, the court held that legal aid was required, because "without legal advice, [she] would not begin to know how to prepare her appeal, and in the absence of such preparation would be unable to present it effectively" (paragraph 91).

52. The issue in the present appeals does not relate to the availability of legal aid but to the effectiveness and fairness of an out of country appeal against the refusal of the appellants' human rights claims and the resulting decisions to deport them. It is submitted that in these cases an out of country appeal will not meet the procedural guarantees inherent in article 8. The appellants do not contend that an out of country appeal can never comply with article 8. They recognise, for example, that Parliament has provided for an out of country appeal as the norm in the case of refusal of entry clearance. They accept that even in the deportation context there may be straightforward cases where an appeal can proceed out of country in compliance with the procedural requirements of article 8, though they suggest that such cases will be few and far between. They submit, however, that the issues in the present cases are such that an out of country appeal would not meet the requirements of effectiveness and fairness, or at least that the Secretary of State was not in a position to satisfy herself at the time of certification under section 94B that an out of country appeal would meet those requirements.

53. In his skeleton argument, Mr Drabble conveniently set out four reasons why it is said that the decision to remove Mr Kiarie pending appeal, requiring him to bring any appeal from outside the United Kingdom, would deprive him of effective involvement in the appellate process and would result in unfairness.

54. The first reason is that out of country appeals are said to be generally less effective than in country appeals. Reliance is placed on the observations of Sedley LJ in *R (BA (Nigeria)) v Secretary of State for the Home Department* [2009] EWCA Civ 119, [2009] QB 686, at paragraph 21:

> "… The fact is that, especially but not only where credibility is in issue, the pursuit of an appeal from outside the United Kingdom has a degree of unreality about it. Such appeals have been known to succeed, but in the rarest of cases. The reason why the Home Office is insistent on removal pending appeal

> wherever the law permits it is that in the great majority of cases it is the end of the appeal."

Reference is also made to the observations of Collins J in *R (MK) Tunisia)) v Secretary of State for the Home Department* [2010] EWHC 2363 (Admin), as endorsed by the Court of Appeal in *R (E (Russia))* [2012] EWCA Civ 357, [2012] 1 WLR 3198, where Sullivan LJ said this at paragraph 43 of his judgment:

> "I endorse the view expressed by Collins J (a former President of the Immigration and Asylum Tribunal) in *MK* at first instance … that common sense indicates that a claimant who has to pursue an appeal while he is out of the country faces considerable disadvantages, particularly in the context of an appeal to SIAC …. "

Mr Drabble acknowledged that the particular features of an appeal to SIAC do not apply in this case but he submitted that Sullivan LJ's general observation remains valid.

55. The second reason put forward in Mr Drabble's skeleton argument is that the appellant would be faced with significant practical difficulties in procuring, preparing and presenting evidence for his appeal. He would not be present in the United Kingdom to begin and pursue the process of evidence gathering, including obtaining witness statements and documentary evidence to prove integration (school, social services) and rehabilitation (prison, probation); and he would be unable to present his case at the tribunal. The skeleton argument states that a video link is a possibility but could not be guaranteed.

56. Those and other points relevant to the procedural issue are developed in an extensive body of additional evidence and submissions before the court. A joint written note, agreed between all counsel, provides an outline of the out of country appellate procedure and gives details, in particular, of the guidance concerning video link conferencing (see *Nare (evidence by electronic means) Zimbabwe* [2011] UKUT 443 (IAC) and the Upper Tribunal's *Guidance Note (No.2 of 2013): Video link hearings*). A witness statement of Mr Kenneth Welsh, a senior Home Office official, filed on behalf of the Secretary of State provides detailed information on the appeals process and a number of matters. Certain passages of the statement were based inappropriately on information provided informally by tribunal judges and were not relied on by Lord Keen, but passages not so affected include information as to the availability of video link facilities and statistical information about appeals of various kinds and their success rates. Parts of Mr Welsh's evidence are criticised in turn in an appellants' joint written note in response to it. Witness statements of Mr Tom Giles, solicitor for Mr Kiaire, and of Mr Sanjeev Sharma, solicitor for Mr Byndloss, contain evidence as to the differences between deportation appeals and entry clearance appeals, the importance of an appellant's oral evidence in a deportation case, the limited availability and use of video conferencing facilities within the tribunal system and in locations overseas, the cost and difficulty for an appellant seeking to give evidence by video link, and a variety of related matters. There is also evidence from a number of other lawyers about their experiences in relation to video conferencing and use of Skype. It is not practical to go into the detail of that material, but I have read the material and have taken it into account.

57. The third reason given in Mr Drabble's skeleton argument is that removal pending appeal would have a clear impact on the overall fairness of the proceedings, including the appearance of fairness. The position of the out of country appellant, in a case the consequences of which could not be more serious, is contrasted with that of the Secretary of State, head of a well-resourced department of state, who pursues the appellant's deportation and will be represented at the hearing by a well-trained official or conceivably by counsel.

58. The fourth reason is said to be that requiring the appellant to pursue an appeal out of country would be likely to diminish his chances of success and, by parity of reasoning, to enhance the Secretary of State's prospects of successfully resisting the appeal. It is suggested that in Mr Kiarie's case the Secretary of State, by certifying under section 94B, would be able to resolve against him all the factors that must go in his favour in order to succeed on appeal. The basis of his article 8 claim on appeal would be the presence of very significant obstacles to his integration in Kenya, but if returned to Kenya pending appeal he would be compelled to integrate into society to some extent and to set down some ties in order to live and survive. He would also be prevented from preserving, developing and enjoying his private ties in the United Kingdom; and to the extent that he wished to maintain some connection, he would be required to use electronic and telephonic methods of communication, thereby, at least in part, proving the sufficiency of those methods of communication. In addition, removal pending appeal would take him away from the licensing regime into which he would be released from prison in the United Kingdom, depriving him of an important opportunity to prove his rehabilitation and reduced risk. All this is said to be acutely unfair to Mr Kiarie, and the fact that the Secretary of State can choose to "impose" that unfairness on him by certifying under section 94B is submitted to be the critical problem.

59. On behalf of the Secretary of State, Lord Keen's general response to those various points is that the appellants' out of country appeals will be determined by an independent, impartial and experienced specialist tribunal which will be mindful of its own obligations, as a public body, to ensure that they have the benefit of the procedural protections implicit in, and associated with, their substantive rights under article 8. The tribunals are under a duty to ensure that cases are dealt with justly and fairly. The judges are familiar with all of the difficulties which can arise in immigration appeals, whether brought from within or from outside the United Kingdom, and are acutely aware of the consequences of success or failure for individual appellants and their families. They are best placed to assess the requirements of justice and fairness in the particular circumstances of each case. All rules, practice directions and practice statements are made on the assumption that they will be applied and interpreted in accordance with the principles of natural justice and general public law.

60. Lord Keen further points out that a tribunal may be able fairly to determine an appeal without the appellant giving oral evidence. It will be able to consider any written evidence he submits, together with documentary evidence and oral and/or written evidence from family members, friends and others. An appellant can, if he wishes, instruct a legal representative in the United Kingdom to prepare and present the appeal, though the determination of an article 8 appeal is more likely to turn on the evidence of family and friends than on complex legal arguments. If an appellant

considers that oral evidence is needed, he can make an application to the tribunal to give that evidence via video-link, Skype or telephone; and, whatever the practical difficulties, the tribunal will have to make arrangements accordingly if it considers that evidence of that kind is necessary for the fair determination of the appeal. If in such a case it proves impossible to receive evidence by video link or other means of electronic communication, or if the tribunal otherwise considers that the appellant's attendance in person is necessary for the fair determination of the appeal, it can by summons require the appellant's attendance as a witness, pursuant to rule 15 of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 or a similar power in the Upper Tribunal. Such a summons would be tantamount to a direction (albeit not directly enforceable) to the Secretary of State to allow the appellant's return to the United Kingdom for the purpose of giving evidence; and in the interests of fairness the tribunal could draw such inferences as it thought fit in the appellant's favour if the Secretary of State did not accede to that course.

61. A further aspect of the argument on behalf of the Secretary of State is that out of country appeals against refusals of entry clearance have been a feature of the immigration appellate regime for several decades and, notwithstanding the cases cited by Mr Drabble that refer to their disadvantages, they have been consistently held to provide an effective remedy. They are generally based on written evidence from the appellant together with oral and/or written evidence from family members and/or friends in the United Kingdom. Some of them raise human rights issues. In so far as it is appropriate to measure effectiveness by success rates, the internal statistics for entry clearance human rights appeals in the 5-year period August 2010 to July 2015 show an average success rate of 37.5% and higher success rates for appeals from Kenya (Mr Kiarie's country of origin) and Jamaica (Mr Byndloss's country of origin).

62. In response to the complaint that requiring Mr Kiarie to return to Kenya pending determination of his appeal would unfairly undermine his argument that there are serious obstacles to his integration in Kenya, Lord Keen makes the obvious point that it cannot be unfair for the tribunal to take account of evidence that shows that the Secretary of State is correct in her view that given his age, state of health and education, he is likely to be able to establish social and cultural ties in Kenya and to gain employment there. There is no merit in the argument that because it might be more advantageous to the appellant if the tribunal had to speculate about his prospects of integration, it is somehow unfair for the tribunal to proceed on a better informed basis.

63. I accept the general thrust of the case advanced on behalf of the Secretary of State on this issue. More specifically, I would state my conclusions on the competing arguments as follows.

64. First, I accept that an out of country appeal will be less advantageous to the appellant than an in country appeal. But article 8 does not require the appellant to have access to the best possible appellate procedure or even to the most advantageous procedure available. It requires access to a procedure that meets the essential requirements of effectiveness and fairness. Entry clearance cases may often be more straightforward but they too can raise human rights issues, and experience in them shows that an out of country appeal is capable of meeting those requirements. Moreover, the available statistics regarding success rates in such cases paint a far more favourable picture for

appellants than was suggested by the observations of Sedley LJ in *R (BA (Nigeria)) v Secretary of State for the Home Department* (see paragraph 54 above).

65. The Secretary of State is entitled, in my view, to rely on the specialist immigration judges within the tribunal system to ensure that an appellant is given effective access to the decision-making process and that the process is fair to the appellant, irrespective of whether the appeal is brought in country or out of country. They will be alert to the fact that out of country appeals are a new departure in deportation cases, and they will be aware of the particular seriousness of deportation for an appellant and his family. All this can be taken into account in the conduct of an appeal. If particular procedures are needed in order to enable an appellant to present his case properly or for his credibility to be properly assessed, there is sufficient flexibility within the system to ensure that those procedures are put in place. That applies most obviously to the provision of facilities for video conferencing or other forms of two-way electronic communication or, if truly necessary, the issue of a witness summons so as to put pressure on the Secretary of State to allow the appellant's attendance to give oral evidence in person.

66. There are difficulties for any appellant, particularly an unrepresented defendant, in preparing evidence for an appeal and presenting it to the tribunal, but I do not accept that those difficulties will be so much greater where the appeal is brought out of country as to amount to a denial of effective participation in the decision-making process or to render the procedure unfair. In these days of electronic communications, an out of country appellant does not face serious obstacles to the preparation or submission of witness statements or the obtaining of relevant documents for the purposes of an appeal. He can instruct a lawyer in the United Kingdom if he has the funds to do so. If he does not have the funds to instruct a lawyer but the case is so complex that an appeal cannot properly be presented without the assistance of a lawyer, he will be entitled to legal aid under the exceptional funding provisions considered in *R (Gudanaviciene) v Director of Legal Aid Casework* (paragraphs 47-51 above). It was accepted by Mr Drabble that such entitlement would not be affected by the fact that the appellant has to bring the appeal from outside the United Kingdom.

67. It is said in evidence on behalf of Mr Kiarie that it would be necessary for him to obtain a report of a forensic psychiatrist in relation to risk of reoffending and that psychiatric assessments made with the use of video conferencing technology should be viewed with caution. I do not accept that it is necessary in the generality of cases to obtain an expert psychiatric report for the purpose: the risk of reoffending can generally be assessed on the basis of the sentencing remarks and the reports that were before the sentencing judge. But if a further report is required, the evidence does not in my view establish either that it has to be obtained in the United Kingdom or that, if a UK expert has to be instructed, an appropriate assessment cannot be made on the basis of video conferencing or other form of electronic communication, in addition to the relevant written material.

68. I agree with Lord Keen that there is no merit in the argument that Mr Kiarie's removal to Kenya would unfairly weaken his case on the appeal because he would have to integrate to some extent into society in Kenya and establish ties there. There would be no unfairness in the tribunal being able to receive evidence of the appellant's actual experience in Kenya, irrespective of whether that evidence supported the Secretary of

State's case or the appellant's case. The same goes for any evidence about the maintenance of contact and connections with the United Kingdom by the various means of communication available.

69. Accordingly, I reject the submission that an out of country appeal against a deportation decision would deprive the appellants of effective participation in the decision-making process and of a fair procedure. In reaching that conclusion I have also borne in mind Mr Drabble's point about the *appearance* of fairness. Despite the disadvantages to which an appellant would be subject, I do not accept that an out of country appeal would either be unfair or would appear to be unfair. Things can of course go wrong in practice in individual cases, but there is no basis for condemning an out of country appeal as inherently unfair.

70. Nor do I attach any significance in the circumstances to the fact that the requirement to bring an appeal from outside the United Kingdom is the result of the Secretary of State's own decision to certify under section 94B. A similar argument that it was wrong for the Secretary of State, as the respondent to an appeal, to impose a disadvantage on an appellant was rejected by the Master of the Rolls in *Lord Chancellor v Detention Action* [2015] EWCA Civ 840, at paragraph 48:

> "It is sufficient for me to say that, if (contrary to my view) the rules themselves are procedurally fair and enable an appellant to present his appeal fairly and justice to be achieved, then I do not consider that the fact that an appellant is in the fast track system as a result of the decision of the SSHD is relevant. *Ex hypothesi*, the decision of the SSHD has not impeded the ability of the appellant to present his case fairly and the FTT to decide the appeal justly."

That reasoning can be applied with equal force to an out of country appeal in a deportation case.

71. For all those reasons, the Secretary of State is entitled in my view to proceed on the basis that an out of country appeal will meet the procedural requirements of article 8 in the generality of criminal deportation cases. If particular reasons are advanced as to why an out of country appeal would fail to meet those requirements, they must be considered and assessed. But on the evidence before the court, I am satisfied in relation to each of the present appellants that certification under section 94B, requiring an appeal against the relevant deportation decision to be brought from outside the United Kingdom, is not a breach of the appellant's procedural rights under article 8.

The lawfulness of the certification decision in respect of Mr Kiarie

72. The decision dated 10 October 2014 to certify Mr Kiarie's human rights claim under section 94B, and the background to that decision, are described at paragraphs 13-17 above. In Mr Kiarie's case, there has been no supplementary decision letter.

73. In my judgment, the decision was flawed by reason of two legal errors:

i) First, Mr Kiarie was not informed in advance that consideration was being given to the certification of his claim under section 94B and he was not given a fair opportunity to make representations on the subject: he could not reasonably have been expected to make such representations in the absence of notice, given that the section was not even in force at the date when he was notified of the intention to make a deportation order against him. The course adopted was procedurally unfair.

ii) Secondly, the decision to certify, in line with the guidance, focused erroneously on the question of serious irreversible harm and failed to address the statutory question whether removal pending determination of an appeal would be in breach of section 6 of the Human Rights Act and, in particular, whether it would be in breach of Mr Kiarie's procedural or substantive rights under article 8. Thus, the decision was based on a legal misdirection.

74. I am satisfied, however, that neither of those errors was material. Procedural failings have to be viewed with caution and they will often invalidate a decision, but in this case I have no doubt that the decision would have been the same if the correct approach to section 94B had been adopted and account had been taken of the relevant material put forward on the appellant's behalf in these proceedings,.

75. I need say no more about the procedural aspect of article 8. For the reasons already given, the Secretary of State was entitled to conclude (and she would plainly have concluded) that it was compatible with the procedural guarantees provided by article 8 to require Mr Kiarie to bring an appeal against the deportation decision from outside the United Kingdom.

76. As to Mr Kiarie's substantive rights under article 8, it is necessary to say a little more about the reasoning that led to the refusal of his human rights claim. He did not have any children. He was not married or in a civil partnership or any relationship. His claim was based essentially on private life rather than family life. He was 20 years old at the time and had been in the United Kingdom since the age of 3 (which, as Mr Drabble pointed out, engaged the considerations set out by the ECtHR in *Maslov v Austria* [2009] INLR 47). Whilst the length of lawful residence in the United Kingdom was acknowledged, the decision letter did not accept that he was socially and culturally integrated into the United Kingdom despite his ability to speak English (his offending being said to be indicative of such lack of integration). It was not accepted that there would be very significant obstacles to his reintegration into Kenya, where English was a national or official language and where there was some evidence that he might have remaining relatives. He had no apparent health issues. His education and experiences in the United Kingdom might well assist him in establishing a career for himself in Kenya. Those and other matters were taken into account in reaching the conclusion that the public interest in deporting him outweighed his right to private and family life. Aspects of that analysis were then carried across into the reasoning set out in support of the certification under section 94B.

77. Recent witness statements from Mr Kiarie himself and from his mother seek to underline the difficulties he would face if removed to Kenya, but even if those statements are taken into account they do not appear to me to add materially to the

evidence that was before the Secretary of State at the time of the original decision or to affect the essential reasoning in that decision.

78. If the certification decision had focused on the wider question of breach of article 8, rather on the question of serious irreversible harm, I am satisfied that its conclusion would have been the same. Removal to Kenya pending determination of an appeal involves only a short-term interference with Mr Kaire's private life in the United Kingdom. The difficulties of integration in Kenya for that limited period do not appear to me to be serious obstacles to removal and do not therefore have great weight in the balance. By contrast, as discussed at paragraph 44 above, the public interest in removal of a person with Mr Kiarie's offending record carries substantial weight even in relation to removal pending an appeal. Taking everything into account, the balance appears to me to come down firmly in favour of the proportionality of removal for that interim period.

79. In recognition of the errors affecting the original decision and the importance of the issues canvassed before us, I would allow Mr Kiarie's appeal to the extent of granting permission to apply for judicial review; but I would reserve the substantive claim for judicial review to this court and, for the reasons given, I would dismiss that claim.

The lawfulness of the certification decisions in respect of Mr Byndloss

80. The original decision dated 6 October 2014 to certify Mr Byndloss's human rights claim under section 94B, and the background to that decision, are described at paragraphs 18-21 above. In my judgment, that decision was flawed by reason of the same two legal errors as affected the original decision in respect of Mr Kiaire, namely (i) procedural unfairness in failing to give an opportunity to make representations on the subject of certification, and (ii) an erroneous focus on the question of serious irreversible harm and a failure to address the statutory question whether removal pending determination of an appeal would be in breach of section 6 of the Human Rights Act and, in particular, whether it would be in breach of Mr Byndloss's procedural or substantive rights under article 8.

81. In Mr Byndloss's case, however, there is also the supplementary decision letter dated 3 September 2015, by which time he had had ample opportunity to put forward such further material as he wished to rely on to resist certification under section 94B. The supplementary decision letter is described at paragraphs 22-26 above. It took due account of the further material and provided detailed reasons for deciding to maintain the certification. If the decision reached in the supplementary letter is lawful, the errors in the original decision letter are immaterial. In the circumstances, it is plain that the focus of attention should now be on the supplementary letter.

82. That also makes it unnecessary to consider a further argument advanced by Mr Gill in relation to the original decision, to the effect that Mr Byndloss's case did not meet the criteria for consideration of certification in the initial test phase that ended on 17 October 2014 (see the guidance described at paragraphs 8(i) and 9 above). That argument falls away because the test phase had expired long before the supplementary decision letter.

83. The section in the supplementary decision letter on certification applies the correct legal approach towards section 94B, focusing on the question whether removal

pending an appeal would be unlawful under section 6 of the Human Rights Act and, in particular, whether it would be in breach of article 8. On that point, therefore, the error in the original decision letter is corrected.

84. The supplementary letter concludes that the requirement to bring an appeal from outside the United Kingdom would not be in breach of the procedural guarantees provided by article 8. For the reasons already given, that conclusion was in my view legally correct.

85. The letter goes on to examine the substantive position under article 8. In order to deal with that, and with the specific criticisms advanced in relation to it by Mr Gill, it is necessary to give more details of Mr Byndloss's reliance on article 8 as a ground for resisting deportation. He claimed to have family life in the United Kingdom with eight children: four by his wife (with whom he also claimed to have family life), three by a different partner, and one (a 7 year old girl to whom I will refer as T) by yet another partner.

86. In dealing with that claim, the letter examines in considerable detail, by reference to the relevant provisions of the Immigration Rules, the evidence relating to each group of children. It concludes *inter alia* that:

> "… whilst you are the biological father of at least seven children, you have no relationship with any of them whereby you provide a consistent or parental presence in their daily lives. There is nothing to demonstrate that you make any meaningful contribution in terms of practical, financial or emotional support and nothing to show that you play any part in taking decisions about the children's daily lives. The children's day to day needs are and will continue to be provided by their respective mothers."

In relation to T, to whose position Mr Gill drew particular attention, the letter points out that Mr Byndloss had not provided documentary evidence of her date of birth, and his representative had stated that a birth certificate had not been provided as Mr Byndloss was not listed as the father. There were letters from the mother stating that he was the father but there was no evidence to demonstrate that he was the biological father. He had not demonstrated that he was living with the mother or T as a family either before or at the point of his imprisonment. He had provided no evidence of any meaningful parental involvement in T's life. In any event, it was not accepted that it would be unduly harsh for T to live in Jamaica.

87. The reasoning also includes a lengthy section headed "Best interests of the children – section 55 of the Borders, Citizenship and Immigration Act 2009". It states that the section 55 duty has been taken into account and that the best interests of the children have been a primary consideration in making the decision. It also states:

> "In considering the best interests of your children, the Home Office has considered the following:
>
> Is there a genuine and subsisting parental relationship: for the reasons set out in the sections above which consider your

> relationship with your individual children, the Home Office does not accept that you have a genuine and subsisting parental relationship with any of your children. Specifically, you have not demonstrated that you had such a relationship prior to your imprisonment, that such a relationship was created or maintained during your imprisonment and no evidence has been provided as to your relationship with your children since your release.
>
> Are the children in question British Citizens or have they lived in the UK for a continuous period of 7 years: each child (apart from [T], whose nationality has not been verified) is a British citizen and has an unqualified right to remain in the United Kingdom.
>
> Would it be unduly harsh to expect the British Citizen children to leave the UK: in the event of your deportation, it is considered that the best interests of your children would be served by remaining in the UK in the care of their respective mothers. This would ensure the continuance of the daily family life that each child is well accustomed to, given that you do not fulfil a parenting role in their daily lives and there is no genuine and subsisting parental relationship between you and your children. However, it is also accepted that the question of whether any or all of the children should re-locate to Jamaica to be with you, with or without their respective mothers, is a matter for you and those mothers to decide. In the event that a decision was taken to relocate, it is noted that Jamaica has a functioning health and education system, such that the children's welfare could be sustained, with the support of their parents."

88. The letter goes on to consider the question of family life with a partner, in relation to which it is accepted that Mr Byndloss is still married but it is not accepted that the relationship is genuine and subsisting. It also considers the question of private life, before reaching the conclusion that the public interest in deportation outweighs his right to private and family life.

89. The various points considered in the context of the substantive claim under article 8 can be seen to feed in to the reasoning in support of the decision to certify under section 94B. The relevant part of the letter in respect of certification is set out at paragraph 26 above and is not repeated here.

90. On the face of it, the conclusion reached in the letter, that Mr Byndloss's removal pending appeal would not be in breach of his article 8 rights or those of his wife, his former partners or his children, is well reasoned and compelling. A central theme of Mr Gill's submissions, however, was that the decision failed to take proper account of the best interests of the children. It is necessary therefore to examine those submissions.

91. Mr Gill drew attention to important and well known passages in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, as further considered in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2013] 1 WLR 3690, concerning the best interests of children, the need to take those best interests into account as a primary consideration in assessing proportionality under article 8, and how such best interests are to be discovered. He submitted that the requisite consideration of children's best interests is missing from deportation cases such as *SS (Nigeria) v Secretary of State for the Home Department* (cited above) – a submission which, as it seems to me, fails to recognise the careful consideration given to the topic in Laws LJ's judgment in that case. All of that, however, appeared to be by way of background rather than being directly in issue in the present appeals.

92. As regards direct criticism of the supplementary decision letter, various matters are raised in a written "speaking note on irrationality" which Mr Gill handed in to the court during his oral submissions and which he relied on for those parts of his submissions which he did not have time to develop orally. The speaking note argues that the original decision was legally defective for various reasons and that the supplementary decision letter is legally defective (i) because it continues to rely on and seeks to add to the reasons in the original letter, which therefore "infect" the supplementary letter, and (ii) on additional grounds. It seems to me that the supplementary letter stands largely on its own feet, but in so far as the points of criticism levelled against the original decision can equally be levelled against the supplementary letter, I have thought it right to consider them, rather than limiting myself to the additional grounds of criticism directed specifically at the supplementary letter. I do not, however, intend to deal with all the individual points raised or to consider them *seriatim*. They can be grouped into broad categories.

93. First, various complaints are made about the treatment of the evidence, and it is submitted that the negative findings concerning Mr Byndloss's relationship with the children and the part he plays in their lives are contrary to the evidence and are unreasonable. This area needs to be treated with caution. Mr Byndloss has a right of appeal against the refusal of his human rights claim, and it will be for the tribunal to assess all the evidence on that appeal. I do not want to trespass into the territory of that appeal. It is sufficient for me to say that in my view the points made in respect of family life in the certification section of the supplementary letter have a sufficient evidential basis to them and are not open to successful challenge on grounds of perversity.

94. Secondly, it is said that there was a failure in various respects to carry out a proper analysis of the best interests of the children, in particular by failing to take account of relevant guidance or to act in accordance with it. Mr Gill referred to *Every Child Matters: Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children*" (November 2009), to a Home Office document, *Criminal casework: Introduction to children and family cases* (in a version valid from 28 July 2014), and to Immigration directorate instructions, *Chapter 13: criminality guidance in Article 8 ECHR cases* (Version 5.0, 28 July 2014). He submitted that none of this guidance is referred to in the guidance on certification under section 94B which was followed in the decision letters (though that guidance, from version 2 onwards, does draw attention to section 55 of the 2009 Act and refers

to additional relevant guidance on that provision). He submitted that there was a failure to make appropriate further inquiry and a failure to seek the assistance of a trained senior caseworker, who in a complex case should have sought advice in turn from criminal casework's "safeguarding children coordinators". Mr Gill also pointed to what was said by the Upper Tribunal in *MK (section 55 – Tribunal options) Sierra Leone* [2015] UKUT 00223 (IAC) about the duty to make further inquiry where a tribunal considers itself insufficiently informed to make a proper assessment of the best interests of a child.

95. Those various concerns seem to me to be misplaced. Having regard to the information provided by or on behalf of the appellant, the Secretary of State was entitled to proceed for the purposes of certification on the factual basis set out in the supplementary letter, and on that basis there was in my view simply no need for further inquiry, advice or consideration of the kind referred to by Mr Gill.

96. Mr Gill submitted further that the decisions do not ask the right question in relation to the children's best interests, namely whether it is in their best interests to remain in the United Kingdom with their father as well as their mother or, to put it another way, whether it is in their best interests for Mr Byndloss to remain in the United Kingdom. I do not accept the submission. It appears to me that the question of best interests, including the application of section 55 of the 2009 Act, is addressed appropriately and adequately in the certification section of the supplementary letter.

97. Mr Gill also criticised the passages in the decision letters as to whether it would be "unduly harsh" for the children to live in Jamaica. But those passages are not a determinative part of the reasoning in support of certification and do not in any event, in my view, involve any legal error in the consideration given to the best interests of the children.

98. A further submission is that the Secretary of State was wrong to proceed to the supplementary decision without waiting for further evidence which she was informed was in preparation and which has subsequently been filed. I see no force in that submission. Mr Byndloss had filed evidence long ago in support of his judicial review claim and had had ample opportunity to file whatever further evidence he wished to rely on. The Secretary of State was entitled to react to that evidence by a supplementary decision. She might have reacted more promptly than she did; but in any event, with the hearing of the appeal imminent, it was reasonable to proceed to a decision without waiting for further evidence.

99. I should make clear at this point that I accept Lord Keen's submission that the lawfulness of the supplementary decision must be assessed on the basis of the evidence before the Secretary of State at the time of that decision. The Secretary of State can give consideration in due course to the evidence produced subsequently by Mr Byndloss. The possibility that this might lead to a further decision which, if adverse to Mr Byndloss, might trigger a further judicial review claim was viewed with equanimity by Lord Keen. I reject a contention by Mr Gill that the court should decide the matter for itself on the basis of all the evidence now before the court. That would go beyond review of the Secretary of State's decisions and would involve a usurpation of her role as the person entrusted by Parliament with the power to certify under section 94B.

100. Mr Gill criticised the way the balancing exercise was carried out and appeared at one point to submit that there is no room for certification under section 94B where there is a meaningful relationship between the person to be deported and a child in the United Kingdom. The point can have no application to the present case, where, in the context of certification, the view reasonably taken on the evidence was that there was no sufficiently meaningful relationship between Mr Byndloss and any of the children. But I would reject the submission in any event. It runs contrary to authority in seeking to elevate children's best interests beyond a primary consideration in decision-making and to turn them into the paramount or determinative factor.

101. In relation to Mr Byndloss, I therefore conclude that although there were errors in the original decision, they are not material because the original decision was superseded by a supplementary decision that does not suffer from those errors and that set outs a lawful basis for the maintenance of the certification under section 94B. In the circumstances, I would adopt the same approach in this case as in relation to Mr Kiarie, by granting permission to apply for judicial review but reserving the substantive claim to this court and dismissing it.

Conclusion

102. I am conscious that I have not covered every point raised in argument. I have endeavoured, however, to address the main submissions on the central issues.

103. For the reasons given, I would allow both appeals to the limited extent of granting permission to apply for judicial review. In each case, however, I would reserve the substantive claim for judicial review to this court and would dismiss that claim.

Lord Justice Elias :

104. I agree.

Lord Justice McCombe :

105. I also agree.

Upper Tribunal
(Immigration and Asylum Chamber)

Gheorghiu (reg 24AA EEA Regs – relevant factors) [2016] UKUT 00024 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 18 November 2015

Decision & Reasons Promulgated

……

Before
THE HON MR JUSTICE BLAKE
UPPER TRIBUNAL JUDGE GOLDSTEIN

Between
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MIRCEA GHEORGHIU

Respondent

Representation:

For the Appellant: Ms A Fijiwala, Home Office Presenting Officer
For the Respondent: Mrs B Hamid counsel instructed by SBG Solicitors

When considering whether or not to suspend certification of EEA appeals pursuant to regulation 24AA of the Immigration (European Economic Area) Regulations 2006, the decision-maker should take into account inter alia:(i) the status of the EEA national; (ii) the impact of removal on family members; (iii) evidence of continuing risk to the public; and (iv) the role oral evidence may play.

DECISION AND REASONS

1. This is the Secretary of State's appeal from a decision of FtT Judge Trevaskis promulgated on 27 April 2015. He allowed the respondent's appeal from a decision of the Secretary of State to deport him pursuant to the Immigration (EEA) Regulations 2006.

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2. Mr Gheorghiu is a citizen of Romania who was born on 9 December 1968 and is now aged 46. He married Mihaela Gheorghiu on 14 February 1995. The couple have three children now aged 20, 19 and 15.

3. Mrs Gheorghiu gave evidence before the FtT and was accepted as a reliable witness. She stated that her husband first came to the United Kingdom in August 2002. It is common ground that he entered illegally and remained without leave. On 1st January 2007, Romania became part of the EU and transitional arrangements were made for workers. Mrs Gheorghiu states that her husband was legally working as a builder for various contractors on a self employed basis since January 2007 and supported the family back in Romania as the sole breadwinner.

4. In her witness statement prepared for the appeal she states that she will do her best to obtain documentary evidence of this, in her husband's absence. On the 18 April 2015 Mr Gheorghiu's solicitors submitted a bundle of self assessment tax returns for the Tax Years from 4 April 2010 to 2014 and the provisional figures for 2015. The judge accepted the evidence that he was working and supporting his family, although we observe that since that was based on Mrs Gheorghiu's evidence this could only have been a reference to the period from January 2007 onwards.

5. Mrs Gheorghiu and the three children of the family came to the United Kingdom to live with their husband/father between 2013 and September 2014. The family live in rented accommodation in the UK. Mrs Gheorghiu is in employment as is the eldest daughter; the younger two children are at college and school.

6. In November 2007, Mr Gheorghiu was convicted of driving a motor vehicle with excess alcohol, was fined and disqualified from driving for 20 months. There have been no subsequent convictions.

7. It seems that in June 2014 the Secretary of State became aware that Mr Gheorghiu had a criminal record in Romania. In 1990 he was convicted of the offence of rape and sentenced to 6 years imprisonment. Between 2001 and March 2002 he was convicted on three occasions of forestry offences, cutting timber without a licence, and received custodial sentences on the last two occasions.

8. On 28 January 2015, the Secretary of State made the decision to deport Mr Gheorghiu, essentially because of the serious nature of his overseas convictions, notably the conviction for rape. It was assessed that he posed a present threat to public policy and his deportation was proportionate under regulation 21. It was also decided to certify his case under regulation 24AA of the Immigration (EEA) Regulations 2006 (the Regulations). He was detained and subsequently removed in March 2015.

9. An application that was made to the Secretary of State under regulation 29AA of the Regulations to attend the appeal was unsuccessful. The appeal accordingly proceeded in his absence with Mrs Gheorghiu giving evidence. The case for the Secretary of State was that the rape conviction meant that the respondent's presence in the UK represented a genuine, present and sufficiently serious threat affecting

one of the fundamental interests of society. The case for Mr Gheorghiu was that his presence in the UK did not represent such a threat; his criminal conduct was long ago; he had since married and supported his family; he had led a law abiding life in the UK since 2002 with the exception of the drink drive conviction and that was not sufficiently serious in itself to engage public policy grounds for removal or suggest recidivism.

10. The judge noted that he had no information from Romania about the nature of the offence, or rehabilitation in prison. He concluded that as the offence of rape was committed 25 years ago and there was no evidence of subsequent violent or sexual offending, he represented at worst a very low risk of re-offending. He was not satisfied that the drink drive conviction was a persuasive indicator of a propensity to reoffend in a sexual or violent manner.

11. He considered the requirements of regulation 21 and made a proportionality evaluation on the evidence before him. He concluded at [49] as follows:

> "The fact that the appellant has committed previous offences is not a matter which can solely justify deportation; there is no evidence which leads me to find that he is a genuine, present and sufficiently serious threat to one of the fundamental interests of society; his present conduct in the last seven years, has been that of a law abiding and working member of United Kingdom society, exercising treaty rights as a worker. *I do not find that deportation is justified on imperative grounds of public security, because there is no evidence which shows that he represents a genuine, present and sufficiently serious threat to public security. The threshold of imperative grounds is a high level of justification for deportation, and I find that the decision made by the respondent in this case has not reached that level*".
>
> (emphasis supplied)

12. The Secretary of State appeals with leave of the FtT judge on the grounds that the judge fell into error in the reference made to imperative grounds in the passage highlighted above.

13. We agree that the judge fell into error in this respect. He may have been misled by reading the words of regulation 21 (4) (a) ('has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision') as meaning that <u>any</u> such residence counted regardless of its quality. The skeleton argument filed below for Mr Gheorghiu invited him to take such a course. That invitation was misconceived. Curiously his legal team had submitted a bundle of legal materials including the decision of this Tribunal in <u>Vassallo (Qualifying residence; pre-UK accession)</u> [2014] UKUT 313 (IAC) which would have demonstrated the falsity of the proposition.

14. This authority recites the case law of the Court of Justice to the effect that residence in a host state prior to the coming into force of the Citizens Directive that the EEA Regulations were designed to implement, can count as residence towards the ten year period, provided that it is legal residence for a purpose contemplated by EU law: see Case C-424/10 <u>Ziolkowski</u> [2011] ECR. It also draws attention to the words

of former Schedule 4 paragraph 6 (3) of the Regulations (inserted to deal with transitional provisions that have now expired) reflecting this case law. It states that residence before the coming into force of these regulations counts where the claimant:

> '(a) had leave to enter or remain in the United Kingdom
> (b) would have been carrying out (the relevant EU) activity or residing in the United Kingdom in accordance with these Regulations had the relevant state been an EEA State at that time and had these Regulations at that time been in force.'

15. A period of ten years before the decision was taken in the present case starts in January 2005. It was common ground that Mr Gheorghiu entered the UK in breach of domestic immigration law in 2002, and did not have leave to enter or remain. Romania was not then a member of the EU and he could have had no Treaty rights to remain at that time. There was no evidence before the judge that he had entered into lawful employment before January 2007. He could not have been lawfully resident for the purpose of EU law and the EEA regulations between January 2005 and January 2007.

16. The position is different for the period from January 2007 onwards. There was evidence accepted by the judge that Mr Gheorghiu had worked continuously from the first date that he was entitled to do so. For most of the period in the five years before the decision in January 2015, there was documentary evidence of self-employed status for tax purposes, but in any event there was the evidence of the wife that she was supported by her husband's earnings that the judge accepted. We pointed out to Ms Fijiwala that the implication of this was that the respondent had acquired a permanent right of residence under regulation 15 (1)(a) of the Regulations, as he had resided lawfully in the United Kingdom for a purpose (employment) that was in accordance with the Regulations. Having considered the evidence she agreed.

17. The consequence was that although the judge fell into error in referring to imperative grounds of public policy, he should have referred to 'serious grounds of public policy or public security' in accordance with regulation 21 (3).

Conclusions

18. Although there was an error by the judge in referring to imperative grounds, it made no difference to the outcome of the appeal. The first part of paragraph 49 of the decision quoted above, was sufficient to allow the appeal even at the basic level of protection from expulsion for EU citizens. In fact Mr Gheorghiu could only have been removed on the basis that a higher threshold of serious grounds was met. In the light of the judge's primary conclusions of fact there were no such grounds.

19. We accordingly dismiss the Secretary of State's appeal.

20. We are conscious that Mr Gheorghiu was removed from the United Kingdom and his wife and family in March 2015, pursuant to the Secretary of State's certification.

We note that this decision may have been influenced by the fact that he failed to respond to the pre- decision inquiry into his personal circumstances. We further note that his legal team failed to apply to a judge of the First-tier Tribunal to suspend the certification pursuant to regulation 24AA (4) of the Regulations.

21. We are aware that the certification power is a novel one, and no case law on its application in appeals under the EEA Regulations exists. Since the hearing our attention has been drawn to the recent decision of the Court of Appeal in R (ota Kiarie and others) [2015] EWCA Civ 1020 handed down on 13 October 2015 and concerned with the application of a similar power in Article 8 deportation appeals. That decision upheld certification decisions made on the facts of the particular cases; and noted that in Article 8 cases, appeals from abroad can be an effective remedy, but much depends on the assessment of the requirements of justice in the particular case reached by specialist immigration judges (see per Richards LJ at [64] to [67]).

22. We have no doubt that if an application to suspend certification enabling pre-appeal removal were made in an EEA case, the judge would take due account of the following factors:-

(i) that the status of an EEA national exercising Treaty rights of employment and residence in the host state at the time of the expulsion decision are significantly different from those of aliens generally; interference with the right of residence is not permitted in the absence of a sufficiently serious and present threat to the requirements of public policy, that cannot include in an EU case general deterrence or the interest of maintaining purely domestic immigration control;

(ii) that the removal pending appeal from the communal household of the principal wage earner of the family who (as here) is both a spouse and a parent of a minor child involved in the child's daily life is itself an interference with both the right to respect for family life under Article 8 and the EU Charter of Fundamental rights and the EU right of residence afforded by the Citizens Directive;

(iii) that in cases of serious criminality, if there is no evidence of continuing risk to the public, the case for expulsion may not be a strong one; where there is some evidence of risk that is being addressed and rehabilitation of the offender is promoted by the family and employment circumstances in the host state, then, at least in the case of people entitled to permanent residence in that state, substantial weight may be afforded to the duty to promote rehabilitation (see Essa (EEA rehabilitation/integration) [2013] UKUT 316 (IAC) as corrected by the Court of Appeal in SSHD v Dumliauskas and others [2015] EWCA Civ 145 at [46] and [54]; see also MC (Portugal) [2015] UKUT 00520 (IAC). Interference with the factors that promote such rehabilitation may not be readily justified.

(iv) that in cases where the central issue is whether the offender has sufficiently been rehabilitated to diminish the risk to the public from his behaviour, the experience of immigration judges has been that hearing and seeing the offender give live evidence and the enhanced ability to assess the sincerity of that evidence is an important part of the fact-finding process (see for example the observations of this Tribunal as to the benefits of having heard the offender in Masih (Pakistan) [2012] UKUT 46 (IAC) at [18]; see also Lord Bingham in Huang [2007] 2 AC 167 at [15][1]).

23. In any event, we consider it is of importance that Mr Gheorghiu is reunited with his family as quickly as possible and the necessary arrangements are made to give effect to this decision within 28 days of its promulgation. His enforced absence from the UK since March 2015 was not voluntary; for reasons found by the judge as corrected by this Tribunal it was not justified, and should not be treated as breaking the continuity of any residence relevant for the acquisition in due course of the right of permanent residence by his wife and children. As noted above, it is accepted that Mr Gheorghiu himself is entitled to a permanent residence on his return and the residence card issued to him will reflect that.

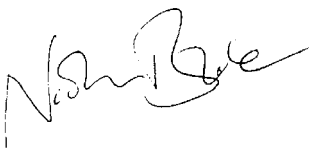
24. The FtT judge directed anonymity. We can see no basis to depart from the principle of open justice in this case. The direction is revoked.

Notice of Decision

The Secretary of State's appeal is dismissed.
The decision of the FtT judge allowing the respondent's appeal from the decision to deport stands.
The Secretary of state is directed to arrange for the return of the respondent to the United Kingdom within 28 days of the promulgation of this decision

No anonymity direction is made.

No fee is paid or payable and therefore there can be no fee award.

Signed 

Date 20 November 2015

[1] 'The first task of the appellate immigration authority is to establish the relevant facts. These may well have changed since the original decision was made. In any event, particularly where the applicant has not been interviewed, the authority will be much better placed to investigate the facts, test the evidence, assess the sincerity of the applicant's evidence and the genuineness of his or her concerns and evaluate the nature and strength of the family bond in the particular case. It is important that the facts are explored, and summarised in the decision, with care, since they will always be important and often decisive'.

IN THE UPPER TRIBUNAL

R (on the application of Masalskas) v Secretary of State for the Home Department (Regulations 24AA and 29AA EEA Regs) IJR [2015] UKUT 00677 (IAC)

Field House
London

Heard on: 14 October 2015
Handed down: 26 November 2015

BEFORE

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE PETER LANE

Between

THE QUEEN
(ON THE APPLICATION OF VIDMANTIS MASALSKAS)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - - - -

1. A decision to certify a person's (P's) removal under regulation 24AA of the European Economic Area Regulations 2006 operates as a temporary measure that can be applied only for so long as there is a statutory appeal which could be brought in time or which is pending.

2. Regulation 24AA is a discretionary measure whose implementation is currently subject to Home Office guidance entitled "Regulation 24AA Certification Guidance for European Economic Area deportation cases".

3. EEA decisions to remove or deport taken against EEA nationals do not have automatic suspensive effect. No removal can take place, however, until an applicant has had a decision on any application made for an interim order to suspend removal.

4. As with the very similar power in section 94B to the Nationality, Immigration and Asylum Act 2002, when deciding whether to certify the removal of a person under regulation

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24AA the avoidance of "serious or irreversible harm" is not the sole or overriding test. It is also necessary for the decision-maker to assess whether removal of P would be unlawful under section 6 Human Rights Act 1998 (HRA): see Kiarie, R (on the application of) and Another v Secretary of State for the Home Department [2015] EWCA Civ 1020.

5. Whilst the assessment pursuant to section 6 HRA requires a proportionality assessment, it is one that is limited to the proportionality of removal for the period during which any appeal can be brought in time or is pending.

6. P's right under regulation 29AA to be temporarily admitted to the UK in order to make submissions in person at the appeal:

(a) is qualified by regulation 29AA(3) ("except when P's appearance may cause serious troubles to public policy or public security"); and

(b) does not extend to the pre-hearing stages of the appeal.

Mr Z Malik, Counsel, instructed by Salamons Solicitors appeared on behalf of the applicant.

Ms J Smyth, Counsel, instructed by the G.L.D. appeared on behalf of the respondent.

- - - - - - - - - - - - -

JUDGMENT

- - - - - - - - - - - - -

JUDGE STOREY:

1. This application for judicial review concerns regulations 24AA and 29AA of the Immigration (European Economic Area) Regulations 2006 (hereinafter "the 2006 Regulations"). These regulations are a relatively recent addition to the ever-expanding panoply of the 2006 Regulations, having been inserted with effect from 28 July 2014 (SI 2014/1976). As far as we are aware, ours is one of the first cases which seeks to deal in any depth with their proper scope and meaning. It has assisted our task that the day before our the hearing the Court of Appeal gave judgment in the case of Kiarie, R (On the Application Of) and Another v The Secretary of State for the Home Department [2015] EWCA Civ 1020 (13 October 2015) (hereafter "Kiarie and Byndloss") which concerned a very similar provision to regulation 24AA set out in the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") (as amended), namely

section 94B[1]. In order to set the scene, it is useful first of all to set out the relevant legislative and policy framework of which regulations 24AA and 29AA form a part.

The legislative and policy framework

The 2004 Citizens Directive

2. Chapter V1 of the Directive 2004/38/EC ("the Citizens Directive") is concerned with '*Restrictions on the right of entry and the right of residence on grounds of public policy, public security and public health*'. Articles 27 and 28 deal with the substantive conditions that must be satisfied before a Member State may restrict the freedom of movement and residence of EU citizens and their family members falling within the scope of the Directive. In summary, they permit a Member State to expel EU citizens and their family members on grounds of public policy, public security or public health, subject to certain restrictions. So far as material, Articles 27 and 28 provide:

> Article 27
>
> *General principles*
>
> 1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
>
> 2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.
>
> 3. …
>
> 4. …
>
> Article 28
>
> *Protection against expulsion*

[1] This section applies to appeals from within the United Kingdom where a human rights claim has been made by a person who is liable for deportation. Subsection (2) provides: "The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of an appeal in relation to P's claim, wold not be unlawful under section 6 of the Human Rights Act 1998…". Subsection (3) states that "The grounds upon which the Secretary of State may certify a claim under subsection (2) include (in particular) that P would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed."

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) …

Article 31

3. Article 31, which is also part of Chapter V1 to the Directive, is entitled 'procedural safeguards'. It provides:

Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

- where the expulsion decision is based on a previous judicial decision; or

- where the persons concerned have had previous access to judicial review; or

- where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may

cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

The 2006 EEA Regulations

Regulations 24AA and 29A) state as follows:

> **24AA**
>
> *Human rights considerations and interim orders to suspend removal*
>
> (1) This regulation applies where the Secretary of State intends to give directions for the removal of a person ("P") to whom regulation 24(3) applies, in circumstances where—
>
> (a) P has not appealed against the EEA decision to which regulation 24(3) applies, but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); or
>
> (b) P has so appealed but the appeal has not been finally determined.
>
> (2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).
>
> (3) The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.
>
> (4) If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken, except—
>
> (a) where the expulsion decision is based on a previous judicial decision;
>
> (b) where P has had previous access to judicial review; or
>
> (c) where the removal decision is based on imperative grounds of public security.
>
> (5) In this regulation, "finally determined" has the same meaning as in Part 6.

29AA

Temporary admission in order to submit case in person

(1) This regulation applies where –

(a) a person ("P") was removed from the United Kingdom pursuant to regulation 19(3)(b);

(b) P has appealed against the decision referred to in sub-paragraph (a);

(c) a date for P's appeal has been set by the First tier Tribunal or Upper Tribunal; and

(d) P wants to make submissions before the First tier Tribunal or Upper Tribunal in person.

(2) P may apply to the Secretary of State for permission to be temporarily admitted (within the meaning of paragraphs 21 to 24 of Schedule 2 to the 1971 Act, as applied by this regulation) to the United Kingdom in order to make submissions in person.

(3) The Secretary of State must grant P permission, except when P's appearance may cause serious troubles to public policy or public security.

(4) When determining when P is entitled to be given permission, and the duration of P's temporary admission should permission be granted, the Secretary of State must have regard to the dates upon which P will be required to make submissions in person.

(5) Where—

(a) P is temporarily admitted to the United Kingdom pursuant to this regulation;

(b) a hearing of P's appeal has taken place; and

(c) the appeal is not finally determined,

P may be removed from the United Kingdom pending the remaining stages of the redress procedure (but P may apply to return to the United Kingdom to make submissions in person during the remaining stages of the redress procedure in accordance with this regulation).

(6) Where the Secretary of State grants P permission to be temporarily admitted to the United Kingdom under this regulation, upon such admission P is to be treated as if P were a person refused leave to enter under the 1971 Act for the purposes of paragraphs 8, 10, 10A, 11, 16 to 18 and 21 to 24 of Schedule 2 to the 1971 Act.

(7) Where Schedule 2 to the 1971 Act so applies, it has effect as if—

(a) the reference in paragraph 8(1) to leave to enter were a reference to admission to the United Kingdom under these Regulations; and

(b) the reference in paragraph 16(1) to detention pending a decision regarding leave to enter or remain in the United Kingdom were to detention pending submission of P's case in person in accordance with this regulation.

(8) P will be deemed not to have been admitted to the United Kingdom during any time during which P is temporarily admitted pursuant to this regulation.

4. Also relevant is regulation 26(1), which provides that "Subject to the following paragraphs of this regulation, a person may appeal under these Regulations against an EEA decision", and regulation 29 which prescribes the effect of appeals to the First-tier Tribunal or Upper Tribunal. Regulation 29(3) provides that:

> "If a person in the United Kingdom appeals against an EEA decision to remove him from the United Kingdom (*other than a decision under regulation 19(1(3)(b*)), any directions given under section 10 of the 1999 Act or Schedule 3 to the 1971 Act for his removal from the United Kingdom are to have no effect, except in so far as they have already been carried out, while the appeal is pending."

The words in italics were inserted with effect from 28 July 2014.

5. It is as well to mention also regulation 19(3) which specifies that subject to two exceptions:

> "an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if-
>
> (a) that person does not have or ceases to have a right to reside under these Regulations;
>
> (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21"; or
>
> (c) the Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with regulation 21B(2).

Home Office Guidance

6. To accompany the insertion of regulations 24AA and 29AA the Home Office also issued a document entitled "Regulation 24AA Certification Guidance for

European Economic Area deportation cases", which we have annexed in its Version 2.0, 20 October 2014 form. It explains that when the regulations came into force it was with an initial cohort limited to persons aged 18 or over who do not have a genuine and subsisting parental relationship with a dependent child or children. That first phase ended on 17 October 2014. Section 2 deals with cases not suitable for regulation 24AA certification. Section 3 addresses when to certify a human rights claim under regulation 24AA and at 3.3. (real risk of serous irreversible harm) and 3.4. (timing of certification) the caseworker is instructed to see for guidance the section 94B certification guidance for non-EEA nationals. Section 4 deals with interim orders. Section 5 concerns re-entry to present appeal in person.

The application

7. The applicant is a citizen of Lithuania and seeks judicial review of the decision made by the respondent to certify his removal from the United Kingdom under regulation 24AA of the 2006 Regulations. That decision was originally made on 10 December 2014, at the same time as he was served a reasons for deportation letter and a deportation order. On 17 March 2015 the respondent issued him with a supplementary decision to certify his removal under regulation 24AA, together with a new notice of decision to make a deportation order. His judicial review claim form lodged on the same day identifies the decision being challenged as a decision of 12 March to set removal directions for 18 March 2015, but it is common ground that it is the underlying decision to certify that is in issue in these proceedings (we return to this matter in a moment). On the same day the applicant applied for judicial review he also applied for an interim injunction to prevent removal. This was granted on the specific basis that the position regarding the applicant's appeal 'should be clarified before any further steps are taken to remove the applicant". It was ordered that the respondent was not to remove the applicant until determination of this application or further order.

The statutory appeal

8. The applicant had earlier (in January 2015) lodged a statutory appeal against the EEA decision to make a deportation order against him. At the date he brought his judicial review proceedings (17 March 2015) his statutory appeal was still pending. When permission was granted on 20 August 2015 to bring this judicial review, it was assumed that the applicant had not yet had a hearing before the First-tier Tribunal of his statutory appeal. In point of fact we now know that by then his appeal had been heard by the First-tier Tribunal and dismissed on 27 May 2015. However, he has applied for permission to appeal to the Upper Tribunal, which means that, albeit it is at a different stage, his statutory appeal is still one which is pending.

9. The reason why the applicant has found himself subject to adverse Home Office measures is that on 13 November 2013 he was arrested and on 22 January 2014 he was convicted of possession of a controlled drug class A – with intent to supply. For this offence he was sentenced to 28 months'

imprisonment (with forfeiture and destruction of drugs and paraphernalia) and ordered to pay a victim surcharge. He was also sentenced to four months' consecutive imprisonment (with forfeiture and destruction of 440 counterfeit £10 bank notes) for an offence of having counterfeit banknotes.

The decision under challenge

10. It is common case that the challenge brought in this judicial review is to the decision to certify under regulation 24AA taken on 10 December 2014. The further decision to certify taken on 17 March 2015 was specifically described as being supplementary and we entirely agree that this was all it was. The gravamen of the applicant's challenge in December 2014 was that the decision to certify was unlawful because it prevented him from being present at his statutory appeal and to that end the interim relief he sought was an interim order prohibiting his removal.

11. As already noted, the applicant has had since then a hearing before the First-tier Tribunal, at which he was able to attend and present his case and he has also had a decision on his appeal: on 27 May 2015 the First-tier Tribunal dismissed his appeal against the deportation order against him under regulation 19(3).

12. Two things flow from this. First, even if the applicant is successful in his judicial review application, he cannot expect relief aimed at securing his attendance at his statutory appeal before the First-tier Tribunal as he has already achieved this. Second, if he is unsuccessful in this judicial review and the respondent acts to remove him by way of directions, he will still be entitled to apply under regulation 29AA to return to be present in person at any relevant hearing for as long as his appeal is still pending.

13. Nevertheless, particularly because his appeal remains pending, we do not consider that his application has been rendered academic. Success in this application would have inevitable consequences for any further decision to certify in respect of what regulation 29(5) refers to as "the remaining stages of the redress procedure in accordance with this regulation". Given the wide-ranging nature of the submissions before us in this case, our decision may additionally assist in clarifying the proper ambit of regulations 24AA and 29AA in other cases.

The grant of permission

14. In the grant of permission to bring judicial review proceedings made on 20 August 2015 reference was made to the case of Macastena v Secretary of State for the Home Department [2015] EWHC 1141 (Admin), a renewed permission hearing and the question was posed whether observations by Collins J in that case disclosed grounds for considering that regulation 24AA was consistent with Article 31.

The grounds

15. In presenting the grounds Mr Malik before us cast his submissions in the following terms. First he submitted that the regulation 24AA decision made against the applicant was unlawful in public law terms by dint of having four defects:

    (a) failure to appreciate that there was a discretion;

    (b) failure to take into account material considerations;

    (c) failure to balance competing considerations against each other; and

    (d) failure to make a decision that was reasonable.

    Second, he submitted that the respondent had erred in law in using "real risk of serious irreversible harm" as the sole or overarching test for certifying under regulation 24AA. He submitted that the test set out in regulation 24AA also had to establish that the decision to certify was compliant with s.6 Human Rights Act 1998 ("HRA 1998") and thus entailed a test of proportionality. Third he argued that the decision of Collins J in the Macastena case reinforced his underlying arguments.

16. Ms Smyth first asked us to rule as a preliminary point that in order to advance these grounds, which Mr Malik had only drafted the day before, he would need to apply formally for leave to amend his grounds as they differed significantly from those set out in the original pleadings. We disagree. Given that the day before the hearing, the Court of Appeal had given judgment in Kiarie and Byndloss, it was inevitable – and indeed only good sense – that Mr Malik should reorient his submissions, but they still bore a sufficient correspondence to those originally pleaded. We would accept that the original grounds make no mention of the discretion ground and that certain passages betoken a misunderstanding of what was being certified, but one can still see an express contention that the decision to certify wrongly failed to consider s.6 of the HRA1998 and we discern that paragraph 48 did at least seek to identify factors that were relevant to the legality of the decision both in terms of discretion and proportionality.

17. Even had we decided that Mr Malik needed to apply to amend his grounds formally, he helpfully stated that if needed, he wished to apply to do so and on that basis we would have acceded to his request. In the event Ms Smyth was content to respond to Mr Malik's submissions without needing to ask for more time. As Ms Smyth herself emphasised, the fact that both parties had invested considerable time in addressing the three key issues identified by Mr Malik, coupled with the plain need for their submissions before us to deal with the implications of Kiarie & Byndloss, are strong pointers in favour of our taking a holistic view.

18. Ms Smyth asked us to note that no challenge has been made to the legality of regulation 24AA; and that in the light of the Court of Appeal analysis in Kiarie & Byndloss of the very similar provision at section 94B of the 2002 Act, no such challenge could succeed. As regards ground 1, she urged us to find that just as

the Court of Appeal had found the discretion point in Kiarie & Byndloss to fall away, so should we in this case. Even if discretion had not been exercised perfectly in the applicant's case, any shortcoming was not material. There was an additional reason in this case why any defect was immaterial, in that the applicant had simply not identified evidence of material or competing considerations. Further, to the extent that Collins J in Macastena appeared to query the public policy rationale for this power, that overlooked that it had been given legislative endorsement by the EU legislature in Article 31 of (the Citizens Directive (which clearly contemplates that removal can take place whilst an appeal is pending) and UK Parliamentary endorsement by the insertion into the 2006 EEA Regulations of regulation 24AA. The provisions enacted by both legislatures reflected a balancing of public policy and individual considerations. She urged us to find the Macastena decision as affording no help to the applicant.

19. In relation to Mr Malik's ground 2, Ms Smyth said the Secretary of State accepted that "serious irreversible harm" in regulation 24AA was not the sole or overarching test and that in order to certify lawfully the respondent had also to be satisfied there was no breach of section 6 of the HRA 1998. She accepted that the latter test required the respondent to assess whether a decision to certify was proportionate, but urged us to find that the proportionality assessment was limited to the period of the pending appeal, which could be presumed to be short-term.

ANALYSIS

We shall deal first with general matters raised by this application.

The relevance and import of Article 31

Judicial redress

20. It is not in dispute that UK law faithfully transposes Article 31(1) and 31(3). The requirements of Article 31(3) are for a form of judicial redress that extends to an examination not just of the "legality of the decision", but also of "the facts and circumstances on which the proposed measure is based". These requirements are met in the UK by provisions in the 2006 EEA Regulations, in particular by regulation 26 which affords a statutory right of appeal against EEA decisions and by provisions in Schedule 1 which apply certain sections of the 2002 Act that ensure the appeal deals with the merits, not just with the legality of the EEA decision. The statutory appeal under these Regulations also provides at regulation 21 for an assessment of whether decisions taken on public policy, public health or public security grounds are disproportionate in relation to the safeguards guaranteed by Articles 27 and 28 of the Directive.

21. It is also not in dispute that Article 31(2) is faithfully transposed by regulation 24AA(4). Both Counsel agreed that these judicial review proceedings provided for an application for "an interim order to suspend enforcement of [the expulsion decision] …until such time as the decision on the interim order has

been taken." The applicant sought such an order and was granted it so that the position regarding his appeal could be clarified. This injunction has remained in place pending the handing down of this judgment.

Suspensive effect

22. Likewise it was common ground that regulation 29AA seeks to give effect to the provisions of Article 31(4). Whilst Mr Malik disputed that it fully achieved this, we consider Ms Smyth is entirely right in her submission that Article 31 is predicated on recognition that expulsion decisions against Union citizens do not attract automatic suspensive effect. As we have just explained, the article does require that no removal can take place until an applicant has had a decision on an application for an interim order to suspend enforcement of that decision (Article 31(2)). It also stipulates that Member States may not prevent the individual from submitting his/her defence in person (except in two specified circumstances). But it does **not** prevent removal prior to the hearing of his statutory appeal – subject only to a right to a decision on an application for an interim order to suspend enforcement of that decision (Article 31(2) and (4)).

23. Consistent with the terms of Article 31, the new wording of regulation 29(3) provides that a statutory appeal against an EEA decision to remove an EEA national from the United Kingdom has suspensive effect except where that decision is made under regulation 19(3)(b) (which is the provision under which the decision to deport was made against the applicant in this case).

The regulation 24AA test

24. As now clarified by Kiarie & Byndloss in respect of identical wording in section 94B of the 2002 Act, the statutory test set out in regulation 24AA is two-pronged and cannot be reduced to a mere question of whether an affected person faces a "real risk of serious irreversible harm if removed…". The latter is not the overarching test. Mirroring s.94B of the 2002 Act, regulation 24AA contains a first requirement (at regulation 24AA(2)) that the Secretary of State may only give directions for P's removal if she certifies that removal pending the outcome of P's appeal would not be unlawful under section 6 of the HRA 1998. The "real risk of serious irreversible harm…" test arises only as a "ground" on which the Secretary of State "**may"** certify a removal under paragraph (2) (emphasis added).

25. In Kiarie & Byndloss at [35] Richards LJ stated:

> "By subsection (3) a ground for certification is that the person would not, before the appeals process is exhausted, face 'a real risk of serious irreversible harm' if removed to the country or territory to which he or she is proposed to be removed. That ground does not, however, displace the statutory condition in subsection (2), nor does it constitute a surrogate for that condition. Even if the Secretary of State is satisfied that removal pending determination of an appeal would not give rise to a real risk of serious irreversible harm, that is not a sufficient basis for certification. She cannot certify in any case unless she

considers, in accordance with subsection (2), that removal pending determination of any appeal would not be unlawful under section 6 of the Human Rights Act. That the risk of serious irreversible harm is not the overarching test was rightly accepted by Lord Keen on behalf of the Secretary of State at the hearing of the appeal."

Regulation 24AA as a discretionary power

26. It is clear that regulation 24AA does not mandate the Secretary of State to certify a removal in every case in which she considers the two-pronged statutory test is made out. The language of the provision clearly imports discretion: as already noted, it provides only that "The Secretary of State may certify a removal …"

27. Mr Malik sought to submit that it was a discretionary power that could only be lawfully exercised if the decision-maker undertook a balancing of competing considerations and reached a decision as to its proportionality. We shall address that submission when dealing with the applicant's particular case.

Regulation 24AA as a temporary measure tied to the appeals process

28. Regulation 24AA is not a free-standing power to certify removal. It is parasitic on there being an "appeals process" (24AA(2)). Thereby its scope is limited jurisdictionally and temporally. It is limited jurisdictionally by being tied to the actuality or possibility of an appeal: regulation 24AA (2) provides that directions for removal may only be given if the Secretary of State certifies that "despite the appeal process not having been begun or not having been finally determined, removal of P pending the outcome of the appeal ..." The temporal limits to its scope are that there must be the possibility of an **in-time appeal:** "P has not appealed against the EEA decision but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time, with permission)"(24AA(1)(a)) or **an appeal which is still pending** (24AA(1)(b)).

The proportionality issue

29. Mr Malik submitted that any decision to certify removal under regulation 24AA could **not** lawfully be made unless the Secretary of State was satisfied it would be proportionate in human rights terms. He submitted that a proportionality test could not be diminished just because the context was removal/deportation in the context of a pending appeal. With both of these propositions we agree. If there was any doubt about their efficacy it has been settled by the Court of Appeal analysis of s.94B in Kiarie and Byndloss. Ms Smyth was quick to accept as much.

30. Nevertheless, as Mr Malik was equally quick to accept, the proportionality assessment cannot be the same wide-ranging one that the decision-maker must conduct when deciding the substantive matter of whether there are grounds of public policy, security or health for the deportation or removal under

regulation 21/Articles 27 and 28 in the context of a statutory appeal. It can only be one that confines itself to the context of an appeals process which is not yet exhausted. By regulation 29(3) read together with regulation 29AA, the respondent is obliged to afford a person who is the subject of an EEA decision to deport or remove a right to attend his hearing in person. The decision is to certify removal until such time as such a person (P) has a hearing of his statutory appeal which is still pending. Ordinarily this entails that what will be at issue in any attempt to obtain an interim order suspending enforcement is the impact on P and/or his family members of short-term separation limited to the period up to final determination of an appeal. Furthermore, the decision arises within a legal framework which guarantees that even if removed a person can apply to come back to the UK to attend his or her statutory appeal hearing.

31. We derive from the above that the assessment to be made under regulation 24AA requires the decision-maker to focus not just on whether removal would cause serious and irreversible harm, but whether, for the period while the appeal process remains unexhausted, P's removal would have an unduly harsh impact on him and/or his family members. One possible example, to borrow from the Home Office document "Section 94Bthe Nationality, Immigration and Asylum Act 2002", Version 5, 30 October 2015, at 3.18, concerns the situation where "the person has a genuine and subsisting relationship with a partner or parental relationship with a child who is seriously ill and requires full-time care, and there is credible evidence that no one else could provide that care". But, going by the Court of Appeal's analysis in Kiarie & Byndloss and the guidance given in the aforementioned document on the similar provision, section 94B, such cases are likely to be relatively rare.

The right of "defence" in person and regulation 29AA

32. Article 31(4) prohibits a Member State excluding the individual concerned from their territory pending the redress procedure from preventing the individual "from submitting his/her defence in person" (subject to two limited exceptions). (We do not need to explore why the word "defence" is used, although we posit that it may be linked to the fact that in some Member States expulsion decisions are made by criminal courts.) Reflecting that prohibition, regulation 29AA provides for "temporary admission to submit a case in person". It provides that if a person who has been removed wants to make submissions before the First-tier Tribunal or Upper Tribunal in person, "P may apply to the Secretary of State to be temporarily admitted". Indeed, there is even provision for a person who has (i) been removed, (ii) has then been admitted back into the United Kingdom for a First-tier Tribunal hearing; (iii) who has then pursued onward appeal, (iv) is then removed again, to then (v) apply under regulation 29AA(5) "to return to make submissions in person during the remaining stages of the redress procedure" (regulation 29AA(5)).

Meaning of Exclusion

33. Mr Malik voices two objections to any reading of either provision that confines the right to return under regulation 29AA to attendance at the hearing of the statutory appeal. First he argues that the use of the verb "exclude" limits the scope of Article 31(4) to cases in which a person has not yet been admitted to/entered the United Kingdom. (If he were right in this submission, that would of course raise an issue as to whether regulation 29AA is a lawful transposition of Article 31). We can dispose of this objection summarily, it being entirely clear from the wording of Article 31(4) that exclusion is used to denote the expulsion of persons. That is also the primary sense of the word as used in Article 32 (Duration of exclusion orders). Indeed, in Article 31(4) exclusion is juxtaposed with cases when there is an appeal or judicial review concerning a "denial of entry to the territory". Whether recourse is had to a literal, contextual or purposive meaning, exclusion exists within Article 31 as a procedural safeguard for those who have been removed or expelled "pending the redress procedure".

Right to be heard

34. Mr Malik's second objection is that to delimit the prohibition to prevention of return to attend a hearing would improperly circumscribe the "right to be heard" which must be understood to encompass not just the hearing itself but pre-hearing stages, including preparation of a case and oral conferencing with legal advisors. We are no more persuaded by this objection than we are by the first. If Mr Malik were right, then since pre-hearing preparation can both theoretically and sometimes in reality begin on the very day the deportation/removal decision is made, there would never be any lawful basis for exclusion "pending the redress procedure". We do not exclude that the Secretary of State may decide to temporarily admit an individual to make submissions in person for some period of days before an actual hearing; for her to do so would be an entirely lawful step under regulation 29AA. However, there is plainly no right of an individual to be present in the United Kingdom in advance of an actual hearing. Insofar as Mr Malik seeks in raising this objection to invoke the "right to be heard" under Article 47 of the Charter of Fundamental Rights, we would repeat a point made by this panel in Ahmed, R (on the application of) v Secretary of State for the Home Department (EEA/s 10 appeal rights: effect) (IJR) [2015] UKUT 436 (IAC) at [50]-[51] in commenting on Ms Smyth's submission in that case (she having also been Counsel for the G.L.D on that occasion) that Article 47 was context-specific :

> "50. We agree with that last submission. As was noted by the Court of Justice of the European Union in Case C-249/13 Khaled Boudjlida at [43]:
>
> > "… it is… in accordance with the Court's settled case law that … fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (the judgments in *Alassini and Others*, C-

> 317/08 to C-320/08, EU:C2010:146, paragraph 63; *G and R,* EU:C:2013:533, paragraph 33; and *Texdata Software,* C-418/11, EU:C:2013:588, paragraph 84)".

> 51. In order to see where the balance is to be struck in cases of this kind, one looks to the provisions of the Directive. There, as we have noted, the relevant appeal rights are non-suspensive. However, in cases covered by Article 31 (which, we emphasise, does not include the applicant's type of EEA appeal), the persons concerned have a qualified right of re-entering in order to submit a "defence in person". The scheme of the Directive is, we find, entirely compatible with Article 47 of the Charter. Article 47 does not necessitate the wholesale conferring of suspensive rights of appeal against any EEA decision."

35. It is fair to say that there is an important difference between regulation 24AA and section 94B. Whereas the latter envisages that the appeal itself will be heard whilst the appellant is out of country, the different scheme under the Directive and Regulations recognises a "right to be heard" for the purposes of being present at the hearing of the appeal.

36. That difference might be said to suggest that it would be proper to restrict the proper ambit of regulation 24AA to cases where there was a particularly strong reason to certify notwithstanding that an affected person would in any event have a right to return to be present at their hearing. It seems to us that there are two responses fatal to that suggestion. The first is one we have highlighted already. The EU legislature has expressly permitted states, subject to judicial supervision, to have the power to remove persons pending their appeal. Article 31(1) makes that clear, as does the Commission's Explanatory Memorandum, Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM/2001/0257 Final – COD 2001/0111*. In commenting on Article 29 of this document states:

> "Giving appeals automatic suspensory effect would not be a suitable solution, since it would lay the arrangements open to abuse. The judgment of national courts can be relied on to ensure that the interests of both the individual concerned and the Member States are adequately protected."

37. We accept Ms Smyth's submission that in this respect the EU institutions were concerned to give legislative effect to the judgment of the Court of Justice in Case C 98/79 Pecastaing v Belgium, in which the applicant challenged an order that she leave Belgian territory whilst she had a pending action against the Belgian authorities for refusing her a residence permit. At [9] the Court set out the text of Article 8 of Directive 64/221 which states:

> "9. According to Article 8: The person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration."

38. At [12]-[13] it concluded:

> "12. On the other hand Article 8 contains no specific obligation concerning any suspensory effect of applications available to persons covered by the directive. If that provision requires that the person concerned should be able to appeal against the measure affecting him it must be inferred, as the Court stated in its judgment in the *Royer* case (paragraph 60 of the decision), that the decision ordering expulsion may not be executed – save in cases of urgency – before the party concerned is able to complete the formalities necessary to avail himself of the remedy. However, it cannot be inferred from that provision that the person concerned is entitled to remain on the territory of the State concerned throughout the proceedings initiated by him. Such an interpretation, which would enable the person concerned unilaterally, by lodging an application, to suspend the measure affecting him, is incompatible with the objective of the directive which is to reconcile the requirements of public policy, public security and public health with the guarantees which must be provided for the persons affected by such measures.
>
> 13. Accordingly, the reply to be given to the questions submitted must be that Article 8 covers all the remedies available in a Member State in respect of acts of the administration within the framework of the judicial system and the division of jurisdiction between judicial bodies in the State in question. Article 8 imposes on the Member States the obligation to provide for the persons covered by the directive protection by the courts which is not less than that which they make available to their own nationals as regards appeals against acts of the administration including, if appropriate, the suspension of the acts appealed against. On the other hand there may not be inferred from Article 8 an obligation for the Member States to permit an alien to remain in their territory for the duration of the proceedings, so long as he is able nevertheless to obtain a fair hearing and to present his defence in full."

39. The second response, which was also adumbrated earlier, is that the 2006 EEA Regulations at regulations 24AA and 29AA reflect a similar resolve of the United Kingdom legislature to make removal lawful pending the redress procedure, without any caveat save for the guarantee of a right to return to make submissions before the First tier Tribunal or Upper Tribunal in person except when P's appearance may cause serious troubles to public policy or public security".

Significance of the *Macastena* case

40. It is in the above context that we must consider Mr Malik's submission that the applicant should also succeed because the decision to certify his removal was contrary to the observations of Collins J in Macastena.

41. In Macastena Collins J was considering whether to grant permission in the case of a claimant from Kosovo who had been the subject of a decision to certify removal under regulation 24AA pending his appeal to the First-tier Tribunal against a decision to remove him in light of his convictions and two year sentence. Having noted that regulation 24AA had two aspects (what we have

called "prongs"), Collins J addressed a submission made by Mr Manjit Gill QC that the regulation failed to take account of the need for proportionality within Article 27 of the Citizens Directive. Collins J drew a distinction between the statutory appeal where Article 27 would be central and the challenge to a decision to certify under regulation 24AA by way of an application for an interim order to suspend enforcement of removal:

> "16. However, it is not at the interim stage for a further consideration to be given to the factual basis. Only if it would be unlawful for interim removal, as I shall call it, to take place would it be appropriate to seek to come to court to prevent it. Such cases, I would have thought, would be comparatively rare. But one can see situations where, for example, a very damaging effect upon a child of the family might be such as to require such removal not to take place.
>
> 17. I am bound to say that, unless a very lengthy period was likely between appeal being lodged and hearing or the individual is in custody, it is difficult to see the point of exercising this power. It is particularly pointless if the individual is in work and providing for his or her family whilst in this country, because that will be removed and the likelihood is recourse to public funds by the family left there.
>
> 18. However, for some reason best known to the Secretary of State, that power has been required. In my judgment, it cannot be said that it is at all arguable that the regulation as it stands is itself unlawful. Equally, it would only be if the interim decision were unlawful and could be shown to be unlawful that it should not be permitted to be made.
>
> 19. I would have thought it is necessary for the Secretary of State to use this power with the greatest of care because one wants to avoid any satellite litigation which might otherwise result. Surely, it should only be in a case where it can be seen to be desirable and really desirable that such power should be exercised. It may depend on the view taken of the strength of the case which the Secretary of State has for removal in due course, because it may be obvious that there is little point in removing someone if it transpires that the appeal in due course is allowed."

42. We would underline the following points. First, this decision being on whether to grant permission, was not intended to give authoritative guidance; the observations made in it are obiter. Second, Collins J makes quite clear at [18] that regulation 24AA is an entirely lawful provision. Third, Collins J emphasises at [16] that cases in which there would be unlawfulness in the operation of regulation 24AA would be "comparatively rare". Third, insofar as Collins J addresses the public policy dimension of the operation of regulation 24AA, we cannot ignore the fact, highlighted earlier, that this regulation (like the corresponding provision of the Citizens Directive which it transposes), represents a decision of the EU legislature not to provide for automatic suspensive effect in EEA removal cases. Fourth, it seems to us that at most Collins J was here venturing suggestions for the Secretary of State to consider when adopting policy guidance as to the application of regulation 24AA. They are suppositions which may or may not find their way into future versions of

the respondent's policy guidance to caseworkers. His decision is no foundation for identifying public law error in the applicant's case.

THE APPLICANT'S CASE

43. In light of our analysis of the general issues the only remaining live issue in the applicant's case is the discretion issue.

The discretion issue

44. Mr Malik has submitted that the certification of the applicant's case under regulation 24AA was unlawful because it failed to demonstrate either that the respondent had grasped that a decision under this provision was a matter of discretion or that it was a matter which required a weighing-up of competing considerations and a decision as to proportionality.

45. We think it beyond doubt that the respondent understood that her decision on certification involved the exercise of a discretion. At paragraph 84 of her December 2014 decision letter she correctly referred to the fact that under regulation 24AA the Secretary of State "may" certify removal and that the grounds on which she "may" certify included absence of serious irreversible harm. At paragraph 85 she commenced by noting that "[c]onsideration has been given to whether your case "should" be certified..."

46. We also consider that this decision letter together with the supplementary decision letter of 17 March 2015 shows that regard was given to section 6 HRA1998 matters separate from the issue of serious, irreversible harm. However, in much the same way as the decision letters in the Kiarie and Byndloss cases were found wanting, the wording of the decision letters with which we are concerned is defective, in that it wrongly framed the Secretary of State's consideration solely in terms of whether there was a real risk of serious, irreversible harm. It was stated that "such a risk" did not exist even having regard to family and private life factors, but it did not separately consider whether the applicant's family, private life circumstances might constitute a breach of Article 8.

47. Nevertheless, for very much the same reasons as Richards LJ gave in Kiarie and Byndloss in respect of the decision letters in those two cases, we find the defects in decision letters in the applicant's case to be immaterial. There are essentially two reasons for this. First, the applicant had simply failed to produce evidence to show that the decision would breach his human rights. He had not provided any evidence of any subsisting relationship with any persons who were dependent on him: he had not shown that he had very significant private life in the UK. The respondent could only respond to the evidence placed before her and what was produced in this regard was nugatory. Second, even on the basis of his own claim, he failed to particularise how his human rights were considered to be adversely affected by a temporary absence. Further, the decision under challenge did not purport to remove him unconditionally. It simply had the effect of overriding what would otherwise be potential suspensive effect of a pending appeal. If he were successful in his

statutory appeal he would no longer be subject to exclusion or threat of such whilst still here.

48. Mr Malik sought to advance his submissions based on the discretion point by reference to the decision of Stadlen J in JR (in the application of) v Secretary of State for the Home Department [2009] EWHC 705 (Admin) and that by the Upper Tribunal in Ukus (discretion; when reviewable) [2012] UKUT 00307 (IAC).

49. We are not persuaded that either of these decisions assists his case.

50. As regards JR, the certification power in issue in that case was that under s.96(1) of the 2002 Act which applies when a person has relied on a matter that could have been raised in an appeal against the old decision and in the opinion of the Secretary of State there was no satisfactory reason for the matter not having been so raised in an appeal against the old decision. On Stadlen J's analysis, before the Secretary of State can lawfully decide to certify, she has to go through a four-stage process. The first two relate to notification and reliance. The third is that the Secretary of State must form the opinion that there is no satisfactory reason for the matter not having been raised in a previous appeal or previous s.120 statement. The fourth is stated at [106] as being: "she must address her mind to whether, having regard to all relevant factors she should exercise her discretion to certify and conclude that it is appropriate to exercise the discretion in her favour". Stadlen J also considered this exercise had to be informed by anxious scrutiny (e.g. [124]).

51. This brief synopsis suffices to point up obvious differences between the ambit and context of the process to certify under s.96 on the one hand and that relating to process to certify under regulation 24AA on the other. The former has the effect of negating a right of appeal of any kind completely; whereas the latter only means it is non-suspensive since it does not even prevent the appeal against the EEA decision to remove/deport being in-country for the purposes of an actual hearing.

52. As regards Ukus, this case concerned discretion required to be exercised by statute in the context of a statutory appeal. It concerned a ground of challenge to an immigration decision under section 84(1)(f) of the 2002 Act, that "the person taking the decision should have exercised differently a discretion conferred by immigration rules". That is not the case here. Further, insofar as the Tribunal adverted to the context of judicial review, it made clear that it did not seek to enunciate any criteria of its own. The Tribunal confined itself simply to saying that one of the ways of assessing whether a decision was "in accordance with the law" under s.84 was "by reference to the criteria by which a decision can be approached..."

53. Even if we regarded Mr Malik as being right to say that the principles enunciated in these two cases had direct or even analogous application to regulation 24AA, it is clear from Kiarie and Byndloss that unless their breach could be shown to have a material bearing on the outcome of the case, it would not give rise to a public law error.

54. For completeness we record that we reject also the applicant's grounds as originally pleaded.

55. For the above reasons, we conclude that this application for judicial review must fail.

56. The interim injunction granted to the applicant at an earlier stage of this case (see [21] above) hereby ceases to have effect.

57. If agreement cannot be reached as to costs the parties are directed to make any submissions regarding costs in writing within 14 days of this judgment being handed down.

Signed

Dr H H Storey, Judge of the Upper Tribunal

Annex A

Regulation 24AA certification guidance for European Economic Area deportation cases

Version 2.0

20 October 2014

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Section 1: Introduction

Purpose

1.1 This guidance explains how case owners consider certifying a human rights claim, made by an EEA national in the context of deportation, under regulation 24AA of the Immigration (European Economic Area) Regulations 2006. This guidance applies to any EEA national or non-EEA national with enforceable EU law rights who falls to be deported under regulation 19(3)(b) of the EEA Regulations.

Legislation

1.2 Regulation 24AA of the EEA Regulations came into force on 28 July 2014. It reads:

Human rights considerations and interim orders to suspend removal

24AA. (1) This regulation applies where the Secretary of State intends to give directions for the removal of a person ("P") to whom regulation 24(3) applies, in circumstances where—

(a) P has not appealed against the EEA decision to which regulation 24(3) applies, but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); or

(b) P has so appealed but the appeal has not been finally determined.

(2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(3) The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.

(4) If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken, except—

(a) where the expulsion decision is based on a previous judicial decision;

(b) where P has had previous access to judicial review; or

(a) where the removal decision is based on imperative grounds of public security.

(5) In this regulation, "finally determined" has the same meaning as in Part 6.".

Background

1.3 The Immigration (European Economic Area) (Amendment) (No.2) Regulations 2014 amended the Immigration (European Economic Area) Regulations 2006 so that an appeal against a deportation decision under regulation 19(3)(b) of the EEA Regulations no longer suspends removal proceedings, except where:

- the Secretary of State has not certified that the person would not face a real risk of serious irreversible harm if removed to the country of return before the appeal is finally determined.

- the person has made an application to the courts for an interim order to suspend removal proceedings (e.g. judicial review) and that application has not yet been determined, or a court has made an interim order to suspend removal.

1.4 The application of a regulation 24AA certificate does not prevent a person from lodging an appeal from within the UK, rather, by amending regulation 29 of the EEA Regulations, it removes the suspensive effect of that appeal. So, whilst a person may lodge their appeal in-country, the lodging of such an appeal does not suspend their removal from the UK. The new Regulations also do not impact on the period allowed for voluntary departure, and a person liable to deportation pursuant to the EEA Regulations still has 30 days in which to leave the UK voluntarily before their removal is enforced, save in duly urgent cases.

1.5 Therefore, regulation 24AA applies to:

- a person who appeals in time against an EEA deportation decision, where that appeal has not been finally determined;

- a person who has not appealed against an EEA deportation decision but would be entitled to do so from within the UK (this does not include out of time appeals).

1.6 The amended EEA Regulations also allow a person who was deported under regulation 19(3)(b) before their appeal is finally determined, to apply from out of country for permission to re-enter the UK solely in order to make submissions in person at their appeal hearing.

Initial Cohort

1.6 Regulations 24AA and 29AA came into force on 28 July 2014. They were initially rolled out to a limited cohort of cases where:

- the person was aged 18 or over at the time of the deportation decision; and
- the person did not have a genuine and subsisting parental relationship with a dependent child or children.

1.7 That first phase came to an end on 17 October 2014.

Section 55 duty

1.8 The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK means that a child's best interests are a primary consideration in deportation cases.

1.9 Case owners must carefully consider all of the information and evidence provided concerning the best interests of a child in the UK, in relation to the application of the regulations 24AA and 29AA of the EEA Regulations. Case owners must carefully assess the quality of any evidence provided. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions about a child's best interests.

1.10 For further guidance in relation to the section 55 duty, see:

- Section 55 children's duty guidance;
- Introduction to children and family cases; and
- Criminality guidance for Article 8 ECHR cases.

Section 2: Cases not suitable for regulation 24AA certification

2.1 Where the following certificates can be applied in relation to all grounds which may be brought in an appeal, there will be no need to apply a regulation 24AA certificate:

- regulation 26(5) of the EEA Regulations, which states, “The Secretary of State or an immigration officer may certify a ground for the purposes of paragraph (4) if it has been considered in a previous appeal brought under these Regulations or under section 82(1) of the 2002 Act”;
- paragraph 4(5) of Schedule 2 (regulation 30) to the EEA Regulations, which requires the Secretary of State to certify a protection claim from an EEA national unless the claim is not clearly unfounded.

2.2 Decisions to deport pursuant to the EEA Regulations where the person is serving a determinate-length sentence where release is at the discretion of the Parole Board will not normally be suitable for regulation 24AA certification. This includes those who were:

- sentenced in accordance with the Discretionary Conditional Release Scheme (DCR) under the Criminal Justice Act 1991;
- given an Extended Sentence for Public Protection (EPP); and
- given an Extended Determinate Sentence (EDS).

2.3 Decisions to deport pursuant to the EEA Regulations where the person is a minor will not normally be suitable for regulation 24AA certification.

2.4 Decisions to deport pursuant to the EEA Regulations where the person has been resident in the UK and exercising Treaty rights for a continuous period of at least five years and the person has not been sentenced to a period of imprisonment of at least four years will not normally be suitable for regulation 24AA certification.

2.5 Cases to which the scenarios at 2.3 and 2.4 apply will not usually be suitable for section 94B certification for practical operational reasons, not because there will necessarily be a real risk of serious irreversible harm. Consideration must be given to all cases on an individual basis about whether or not it is appropriate to certify.

Section 3: When to certify a human rights claim under regulation 24AA

3.1 Regulation 24AA certification must be considered in all deportation decisions made pursuant to the EEA Regulations unless it is a case to which section 2 of this guidance applies. The “test” phase where regulation 24AA was rolled out to a limited cohort of cases ended on 17 October 2014 and no longer applies.

3.2 The Government’s policy is that the deportation process should be as efficient and effective as possible. Case owners should therefore seek to apply regulation 24AA certification in all applicable cases where doing so would not result in serious irreversible harm.

Real risk of serious irreversible harm

3.3 For guidance on serious irreversible harm, please see the section 94B certification guidance for Non-EEA deportation cases which is here.

Timing of certification

3.4 For guidance on when a regulation 24AA certificate can be applied, please see paragraphs 3.10 to 3.13 of the section 94B certification guidance for Non-EEA deportation cases which is here.

Section 4: Interim orders

4.1 Regulation 24AA establishes that removal may not be enforced if:

- the person has made an application for an interim order to suspend removal proceedings (for example, through judicial review); and
- that application has not yet been determined, or has been determined in favour of the applicant.

4.2 Regulation 24AA lists certain exemptions where an application for an interim order will not suspend removal proceedings (as established by Article 31(2) of the Free Movement Directive (2004/38/EC)). An application for an interim order will not suspend removal proceedings if:

- the notice of a decision to make a deportation order is based on a previous judicial decision; or
- the person has had previous access to judicial review; or
- the removal decision is based on imperative grounds of public security.

4.3 If the person is deported from the UK pursuant to regulation 19(3)(b) at any stage after the person has lodged an appeal then the case owner must notify the Tribunal.

4.4 Where a court or tribunal makes an interim order suspending removal, removal will not be possible even if one of the criteria outlined in paragraph 4.2 are met. In these circumstances, contact Litigation Operations (Criminality, Detention & International) to arrange making an application to the court which granted the interim relief to apply to have the effect of the interim order lifted.

Section 5: Re-entry to present appeal in person

5.1 Regulation 29AA reflects the requirements of Article 31(4) of the Free Movement Directive (2004/38/EC). Article 31(4) states that, “Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory”.

5.2 Accordingly, regulation 29AA establishes a process whereby a person who has lodged an appeal against a deportation decision and who has been deported from the UK may apply from outside the UK for permission to be temporarily admitted to the UK solely for the purpose of making submissions in person at their appeal hearing.

5.3 Caseworkers must ensure that the person is notified of the means by which they can make such an application using the following standard paragraphs in the decision to make a deportation order:

“Pursuant to regulation 29AA of the Immigration (European Economic Area) Regulations 2006 (as amended) you may apply from outside the UK for permission to re-enter the UK in order to make submissions in person at your appeal hearing, if you meet the following conditions:

- you appealed within time against the notice of a decision to make a deportation order;
- you were deported from the UK pursuant to regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 before your appeal was finally determined;
- a date for your appeal has been set; and
- you want to make submissions before the First Tier Tribunal or Upper Tribunal in person.

You should not apply for permission to re-enter unless you have been given a date for your appeal hearing by the Immigration and Asylum Tribunal, and you should provide us with evidence of the date of your appeal hearing.

It is your responsibility to notify the relevant Tribunal of your location and contact details and to update the Tribunal in the event of any changes to your location and contact details.

If you meet these criteria then you may apply for permission to re-enter the UK. You can make this application by contacting Immigration Enforcement at [insert email address].

Permission will not be granted if the Secretary of State considers that your presence would cause serious troubles to public policy or public security.

You must apply for permission in advance of attempting to re-enter the UK or you will be refused admission at the UK Border.

If permission is granted, it will be a temporary admission pursuant to Schedule 2 of the Immigration Act 1971. If you were deported under the Early Removal Scheme then you will be recalled to prison if you are admitted to the UK before the expiry of your sentence. In any other case you are liable to be held in immigration detention for the duration of your stay.

You must leave the UK immediately after your appeal hearing or you will be enforcedly removed.

In the case of any subsequent hearing at which you wish to submit your case in person, you must apply again for permission to re-enter.

Any return to the United Kingdom is entirely at your own cost."

5.4 Under regulation 29AA the Secretary of State must grant such permission, except where the person's re-admission for the purpose of appearing and making submissions at their appeal hearing may cause serious troubles to public policy or public security.

Section 6: Successful appeals

6.1 For guidance on successful appeals where the deportation decision was certified under regulation 24AA, please see the section 94B certification guidance for Non-EEA deportation cases which is here.

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Section 7: Change Record

Version	Author(s)	Date	Change References
1.0	LS (CPT)	28/07/2012	First draft.
2.0	LC (CPT)	20/10/2014	Added section 1: introduction;; added section 2: when not to certify; added section 5: re-entry to present appeal in person; added section 6: successful appeals; added section 7: change record.

Neutral Citation Number: [2016] EWHC 54 (Admin)

Case No: CO/3695/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
(Handed down at Preston Law Courts
Openshaw Place, Ringway,
Preston, PR1 2LL)

Date: 22/01/2016

Before :

THE HONOURABLE MR JUSTICE KERR

- -

Between :

GRZEGORZ MACHNIKOWSKI	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Martin Westgate QC and Catherine Meredith (instructed by **Leigh Day**) for the **Claimant**
Holly Stout (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 15 December 2015

- -

Judgment

Mr Justice Kerr:

1. I heard this judicial review application on 15 December 2015. It was made by permission of Blake J, who gave leave limited to the issues (a) whether the detention of the claimant had lasted too long and so become unlawful and (b) whether the defendant unlawfully failed to provide him with accommodation under section 4(1)(c) of the Immigration and Asylum Act 1999 ("the 1999 Act"). The claimant is a Polish national now aged 31, born in June 1984. He arrived in this country aged 22, in May 2007.

2. When Blake J gave permission in those terms, there was considerable urgency as the claimant was then still in custody. By the time the hearing before me took place he had (on 2 December 2015) been released and required to provide an address, which he has done. However, his present circumstances are difficult as his accommodation is short term and inconvenient to him and to the provider who has kindly provided a roof over his head.

3. Under European and domestic law relating to free movement and freedom to work, the claimant required five years' continuous residence in this country to acquire a

permanent right of residence. He had various jobs but did not acquire such a right because custodial sentences do not count towards the period and indeed (it is common ground) the five year period starts afresh on each release from custody for a criminal offence.

4. Unfortunately, the claimant committed and was sentenced for 13 offences including common assault, having a bladed article in a public place, breaching a community order, theft, disorderly behaviour, making off without payment, using a vehicle uninsured, failing to surrender to custody, breach of a conditional discharge and affray.

5. The latter offence was the most serious. The sentencing judge said the claimant lost control and armed himself with a piece of wood in order to alarm and terrify those with whom he came into contact. For that offence he was sentenced to 12 months' imprisonment at Ipswich Crown Court on 20 September 2012, having earlier pleaded guilty at the first opportunity. He had served 155 days on remand in custody and was therefore soon eligible for release.

6. But he then had the misfortune to move seamlessly into immigration detention rather than being set at liberty. That was because the defendant decided in October 2012 to make a deportation order and to place the claimant in immigration detention pending deportation. His representations against that proposed course were unsuccessful and the deportation order was signed on 11 December 2012, when a bail application was rejected. He then languished in detention until last month when, as I have said, he was released.

7. The usual detention reviews have punctuated his time in immigration detention, taking place at approximately lunar monthly intervals. A recurrent feature of those reviews has been a perceived substantial risk of absconding and of re-offending, in view of his bad criminal record including an offence of failure to answer bail and breaches of court orders, as well as a concern that his offending has included violence. He was assessed in October 2012 as posing a medium risk of serious harm to the public.

8. At the end of December 2012, removal directions were set since, although the claimant had appealed against his deportation order, the appeal was out of time. However, on 3 January 2013 the First-tier Tribunal ("FTT") granted him permission to appeal out of time. This meant the claimant was no longer regarded as "appeal rights exhausted"; as a result, the deportation order was regarded as invalid and was revoked on 8 January 2013.

9. Delay then ensued before the appeal was heard, first because the claimant changed solicitors and then because the new solicitors needed time to prepare. The appeal was not heard until 31 May 2013 and the decision, adverse to the claimant, was given on 12 June 2013.

10. He then successfully obtained permission to appeal to the Upper Tribunal, which was granted by Judge Parkes, a judge of the FTT, on 5 July 2013. The judge regarded as arguable the proposition that, because the claimant had lived in this country for more than five years, he was entitled to avoid deportation unless there were serious grounds of public policy or public security justifying deportation.

11. Unfortunately, it took over a year for the claimant's appeal to the Upper Tribunal to take place and judgment was then reserved for some five months. It is unnecessary to say much about this period of the claimant's detention because he has already, in a previous judicial review application, been refused leave to argue that his detention during it was unlawful. However, some points do deserve mention.

12. The first is that in the summer of 2013, the claimant refused to eat and drink at regular mealtimes, though he was observed eating and drinking at other times. The second is that in August 2013 it emerged that two inconsistent policy documents of the defendant relevant to the claimant's contested deportation, remained on the Home Office's website. This was an error.

13. An outdated policy document, which should have been removed but had not been, would if applied to the claimant have given him an expectation of not being deported, because his prison sentence for affray was for under two years. The more recent policy document, which was current and had been applied to the claimant, pointed to deportation of EEA nationals sentenced to 12 months or more for offences of violence among other offences.

14. Then in the latter part of 2013, the claimant was involved in two alleged misconduct issues and, in consequence of the second, transferred to a different location. Meanwhile, the Upper Tribunal had adjourned his appeal to await the decision of the Court of Justice of the European Union in *Onuekwere v. SSHD* (Case C-378/12), in which judgment was subsequently given on 16 January 2014.

15. That decision was expected to determine whether periods in prison count towards acquisition of permanent residence rights for EEA nationals. The decision had been expected in November 2013. When it was given in January 2014, it became clear that the claimant's time in prison for criminal offences prevented the five year period from running and restarted the "clock" on release. The decision does not in terms apply also to immigration detention.

16. By the time the claimant's appeal to the Upper Tribunal finally took place on 21 July 2014 the claimant's then solicitors had (in May 2014) obtained a psychiatric report about him, which supported the view that there was a medium risk of re-offending if he were released, although the risk of serious harm to others was said to be low.

17. After the appeal had taken place but before judgment, the claimant applied on 8 October 2014 for permission to bring judicial review proceedings challenging the lawfulness of his detention on *Hardial Singh* grounds. That application for permission was refused by His Honour Judge Behrens, sitting as a judge of the High Court on 5 December 2014. The judge, refusing leave, commented:

> … there is a significant risk of re-offending and of absconding. The appeal process in relation to the lawfulness of the deportation order has not been exhausted. I agree that in those circumstances the reasonable period for detention set out in Hardial Singh and later authorities has not arguably been exceeded and will at least cover the point when the UT delivers it judgment. I express no view about future detention.

18. I interrupt the narrative to record that the parties addressed me on the impact of that order refusing leave. Ms Stout submitted that, while the formal doctrine of *res judicata* does not apply to judicial review proceedings, in practice a further challenge to the legality of detention up to the date of the Upper Tribunal's decision is barred because to bring one would be an abuse of process.

19. Ms Stout referred me to the Court of Appeal's endorsement of that proposition by Professor Wade in the then current edition of his *Administrative Law* (5th edition, 1982) at page 246, by the Divisional Court in *R v. Secretary of State for the Environment ex parte London Borough of Hackney* [1983] 1 WLR 524 at 539 (May LJ giving the judgment of the court). In the same case, the Court of Appeal upheld that view: see [1984] 1 WLR 592 per Dunn LJ at 602A-B.

20. Mr Westgate QC, for the claimant, did not strongly argue that I should find the detention unlawful as from a date prior to the Upper Tribunal's decision on his appeal. But he reminded me that this does not make the period of detention down to that date irrelevant; on the contrary it is part of the history relevant to whether the detention became unlawful subsequently. He therefore took me in some detail to the events up to December 2014 as well as thereafter.

21. On this point, I agree with both parties' observations. Ms Stout is right that it would be an abuse of process to revisit the conclusion of Judge Behrens that the detention up to December 2014 was lawful. But Mr Westgate is right that this does not mean events prior to December 2014 are irrelevant. They contribute to the overall history and, in particular, to the duration of the detention overall which I have to consider. The question is whether the detention has become unlawful since 12 December 2014, in the light of events both before and after that date.

22. In 2015, the defendant's agents tried to keep track of the twists and turns of the legal process, but were not always up to speed with the latest developments. After the Upper Tribunal's decision was issued on 12 December 2014, the defendant (to whom I refer in *Carltona* terms, to embrace her agents) thought the claimant had reached the end of the road and had become "appeal rights exhausted". The claimant's appeal had wholly failed and further appeals are rare because of the stiff test a prospective appellant must meet. The way appeared clear for his removal to Poland.

23. However, he had, on 22 December 2014, applied for permission to appeal. The defendant did not know about this at the time. When in January 2015 the claimant applied for accommodation under section 4 of the 1999 Act, the defendant refused on the ground that she lacked power to grant his wish, since to refuse it would not breach his rights under either the European Convention or the EU Treaties. On 9 February 2015 the defendant signed a fresh deportation order which was served on the claimant the next day.

24. She then got wind of the application for permission to appeal, as early as 11 February 2015 according to a case record sheet entry of that date. An attempt was made to make enquiries to follow this up. However, it came to nothing; the following month on 16 March 2015, the Upper Tribunal (according to a further case note entry) wrongly told the defendant that the application for permission to appeal was no longer live and "the case was closed". The defendant concluded that there is "no barrier" and

that further removal directions could be set. A few days later they were set for 30 April 2015.

25. Undaunted, the claimant refused to sign them when they were served on him on 30 March 2015 and reapplied for accommodation under section 4 of the 1999 Act the same day. The next day, case record sheet entries indicate that a firm of solicitors had sent a fax notifying the defendant that the "appeal is still pending"; yet, a different firm appeared to be the claimant's representative at the time. The defendant therefore responded declining to acknowledge the existence of a possible appeal and kept the removal directions in place.

26. On 10 April 2015 the defendant was formally notified of the pending permission application, which was before the Upper Tribunal. The claimant's solicitors requested cancellation of the removal directions. On 14 April 2015 the Upper Tribunal (Judge Storey) granted permission to appeal on the point that the Home Office website had at material times had two inconsistent policies, erroneously and simultaneously. The issue for the Court of Appeal would be whether that gave the claimant some form of right or expectation that the old policy and not the new one, would be applied in his case.

27. The same day, the defendant in a detention review decided to make enquiries to ascertain the timescale for the appeal in order to consider the claimant's possible release and any accommodation that might be available to him if released. The defendant then cancelled the removal directions set for a fortnight later. In the last week of April the claimant again applied for accommodation under section 4 of the 1999 Act. This was his third such application.

28. While that request was awaiting an answer, a detention review record of 8 May 2015 noted that a date for the appeal was awaited. The reviewer continued:

> The issues around self harm appear to have been resolved, but the case owner must monitor this closely.
>
> He is considered to pose a high risk of re-offending and medium risk of harm to the public, his absconder risk is also high given his lack of compliance with restrictions previously.

29. The decision was to keep him in detention for a further 28 days "while the appeal is heard". On 15 May, according to a case record sheet, the claimant was "involved with another detainee, inciting others not to be locked behind their doors… ." On 28 May his solicitors pressed for a response to his application for accommodation to which he could be released.

30. A further review took place on 4 and 5 June 2015. The reviewer noted that no date for the appeal was set and recommended that the position regarding bail accommodation should be checked and an attempt made to "see whether the appeal can be expedited and a hearing date set". The claimant's continuing risk of harm was noted but, it was said, that had to be balanced against the lengthening detention period.

31. The reviewer recommended that if no date had been set for the appeal by the time of the next review, and accommodation were available, he should be released with an electronic tag and strict reporting restrictions. Meanwhile, he should be kept in detention.

32. That recommendation was rejected by the authorising officer who on 5 June 2015 saw:

> … little prospect of success in this latest appeal. He has an alternative remedy which is to comply with removal and seek to have the deportation order revoked from abroad. I am clear that he is driving the length of detention by pursuing, seemingly, without merit appeals.

33. So the claimant's continued detention was authorised for 28 further days. The defendant would "do everything we can to expedite that appeal so we can move to removal". But the "risk of harm and absconding outweigh the presumption to liberty [sic]".

34. By 3 July 2015, the next detention review date, a date for the hearing of the appeal was no closer. On 23 June the claimant had renewed his application for permission to appeal to the Court of Appeal on all grounds, not just the ground permitted by the Upper Tribunal. The authorising officer set out the convoluted procedural history at some length and repeated the concerns about the claimant's poor criminal history, risk to the public if released and risk of absconding.

35. He or she also noted that he claimed to have a partner and sister in the United Kingdom, but these were not willing to stand as surety and did not attend a bail hearing that had taken place. Violent incidents in detention had also been a problem. The tone had hardened. The recommendation was accepted.

36. However, the next review on 31 July 2015 struck a different note. The reviewing officer still considered that the presumption of liberty was outweighed by the factors already mentioned (criminal history, risk to the public, risk of reconviction, past lack of cooperation and altercations while in detention) and recommended a further 28 days' detention.

37. But the authorising officer took the claimant's part and concluded that his "removal was not achievable within a realistic timeframe and we should consider release". A further 28 days' detention was approved only "on the basis that a release referral is submitted".

38. On 5 August 2015 the claimant made the present application. The next day his solicitors wrote a letter before claim challenging the defendant's failure to provide accommodation or respond to his request for it. On 18 August the defendant applied to the Court of Appeal to have the appeal expedited. The next day Lewis J heard an application for interim relief in this case, but it was withdrawn on Lewis J granting permission to amend the claim.

39. The amendment added an allegation of unlawful withholding of accommodation in the exercise of the defendant's power under section 4 of the 1999 Act. Thus, the claimant was asserting that he was entitled to be released and that the defendant must facilitate his release by providing accommodation. The defendant, on the other hand, denied that she had power to provide accommodation but, as from 19 August 2015, was prepared to release the claimant subject to a condition of residence, tagging and reporting.

40. The bar to release was no longer the appeal but the issue of accommodation. The defendant was not yet prepared to release the claimant without accommodation. On 3 September 2015, she formally refused the request for accommodation under section 4 of the 1999 Act.

41. On 25 September 2015, with this case moving towards the permission stage, a further 14 days' detention was authorised. On 29 September the defendant granted the claimant bail but subject to a condition of residence at an address to be supplied by him. The grant of bail therefore did not lead to release from detention. The next day his solicitors wrote saying he could stay with a friend but only for a week or so following which he would become destitute.

42. The solicitors renewed yet again the request for accommodation. On 9 October 2015, according to a case record sheet, the claimant was "trying to get the address and he will let us know as soon as he can arrange something". Thus, the claimant was starting to turn his thoughts to finding accommodation in this country, rather than pinning all his hopes on the defendant providing it, as he had done hitherto.

43. At the end of October, further progress was made in the litigious matters. On 22 October Blake J granted limited permission in the judicial review claim now before me. In the Court of Appeal, five days later, Tomlinson LJ ordered the appeal to be expedited and heard before Christmas 2015.

44. On 4 November 2015 the defendant indicated willingness to consider bail accommodation under section 4 of the 1999 Act. The defendant wrote to the claimant asking for evidence from him about access to money in Poland and why he could not use that money to obtain accommodation, even if that meant visiting Poland. In the same letter reference was made to money earned while in detention and the question was asked what efforts he had made to provide himself with accommodation.

45. On 11 November 2015 the parties were informed that the appeal would be heard in the Court of Appeal on 9 or 10 December. Then on 20 November, the claimant's solicitors wrote responding to the letter asking for evidence of attempts to find accommodation. Several witness statements were attached. The attempts to find accommodation had been undertaken after 4 November rather than before.

46. The claimant, in his witness statement, despaired of finding accommodation with only £2,000 and with a requirement for electronic tagging. He denied having access to money in Poland and expressed his strong lack of enthusiasm for returning there.

47. The position was then considered on 1 December 2015 by Mr James Holton of the defendant. He was unaware that the Court of Appeal was to hear the claimant's appeal

eight or nine days later. He sought and obtained authorisation for the claimant's immediate release without an accommodation address or a tagging requirement.

48. Mr Holton did not, for his part, believe that tagging was necessary, though the relevant policy document did not rule it out in the claimant's case. He reasoned that if the claimant were released with a requirement to provide an address within 48 hours, and reporting restrictions, he would, it could be hoped, obtain accommodation using the £2,000 he had earned in detention.

49. The claimant was released, on those conditions, the next day. He provided a temporary address in Dover the next day. A requirement to live there was then added to his release restrictions.

50. The Court of Appeal heard his appeal on 10 December 2015 and orally gave judgment that day dismissing his appeal. The court held that the claimant had no legitimate expectation that the earlier policy (which, it will be recalled, had erroneously remained on the Home Office website) would be applied to him.

51. Those, then, are the facts in outline. The following matters are not in dispute between the parties:

(1) that the onus is on the defendant to justify the decision to detain the claimant, and not vice versa;

(2) that the legality or otherwise of the detention turns on application of the *Hardial Singh* principles;

(3) that the first principle – that the defendant must intend to deport the claimant and can only use the power to detain for that purpose – is not in issue; the battleground is the application of the second, third and fourth principles;

(4) that the court is the judge of whether reasonable grounds for detention existed at any particular time and "examines the decision on the basis of the evidence known to the Secretary of State when she made the decision" (*Fardous v. Secretary of State for the Home Department* [2015] EWCA Civ 931 per Lord Thomas CJ at paragraph 42);

(5) that while the risk of absconding is of "paramount importance" (*ibid.* paragraphs 44 and 45), and is distinct from the risk of re-offending, there must come a time where the risk of absconding cannot justify continued detention (*ibid.* paragraph 46);

(6) that section 4 of the 1999 Act empowers the defendant to provide or arrange the provision of facilities for accommodating persons such as the claimant who are released on bail from immigration detention, but the power is removed in the case of EEA nationals unless and "to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of … a person's Convention rights, or … a person's rights under the EU Treaties" (see Schedule 3 to the Nationality Immigration and Asylum Act 2002, paragrapghs 1(1)(l), 5 and 3);

(7) That in accordance with the decision of the Court of Justice in *Onuekwere*, the claimant cannot count periods spent in prison for criminal offences towards the continuous five year period of residence required to aquire a right of permanent residence in this country; that he cannot aggregate discontinuous periods while at liberty punctuated by periods spent in prison; and that there is no clear authority on whether immigration detention (lawful or otherwise) is to be treated in the same way as imprisonment for a criminal offence.

52. Those are the main points of common ground. The parties also agree that there is no "trump card" for the purpose of determining whether the claimant's detention became unlawful at some point and that each case turns on its own specific facts.

53. I come now to the issues that divide the parties, their respective contentions and my reasoning and conclusions.

54. At first, I was concerned about a possible conundrum: that to determine whether the detention became unlawful, the court might have to determine whether the defendant had power under section 4 of the 1999 Act to provide accommodation; while to determine the latter point, it could be necessary to determine whether the detention had become unlawful.

55. I have therefore reflected on which issues should be addressed first and have formed the view that the correct starting point is to ascertain what the claimant's rights under EU law and under the European Convention were on the footing that the detention was, at least initially, lawful.

56. I therefore propose to consider the issues in the following way: (1) what were the claimant's EU law and Convention rights on that assumption; (2) whether provision of accommodation under section 4 was necessary to avoid a breach of them; and (3) whether the detention of the claimant became unlawful, and if so from when.

57. On the first of those issues, I was referred to Directive 2004/38/EC ("the directive") and the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"), made under section 2(2) of the European Communities Act 1972 and section 109 of the Nationality, Immigration and Asylum Act 2002.

58. The parties agreed that the right to move freely and reside in the territory of an EU member state conferred by the directive may be ended by removal from the United Kingdom if the defendant "has decided that the person's removal is justified on grounds of public policy, public security or public health…" (regulation 19(3) of the EEA Regulations). Such a decision must be taken in accordance with regulation 21 of the EEA Regulations.

59. Regulation 21(5) enacts safeguards for the person liable to removal: the decision must comply with the principle of proportionality, must be based exclusively upon the personal conduct of the person concerned which must represent a genuine and sufficiently serious threat and must not be founded on "matters isolated from the particulars of the case" or "considerations of general prevention"; nor on criminal convictions alone.

60. Regulation 21(6) obliges the defendant to take account of:

> considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

61. Nor is there any dispute that a person subject to removal under regulation 21 may be detained pending removal (see regulation 24, applying provisions of the Immigration Act 1971 to such a person). Alternatively, he may be released subject to restrictions as to residence, not taking up employment, and reporting to police or immigration officials.

62. The claimant submitted that the requirement of proportionality in a case such as this is separate and distinct from the protection afforded by the *Hardial Singh* principles, since detention deprives a person of rights he would otherwise enjoy under EU law to reside and work in the country, as well as the right to clock up time towards the five year period required for permanent residence; and that proportionality requires the consideration of measures (i.e. reporting restrictions and the like) less draconian than outright detention as a means of protecting the public.

63. The defendant submitted that the claimant's rights under the directive and EEA Regulations are no greater than his right to secure compliance with the *Hardial Singh* principles, since the latter are (as is well established) compatible with article 5 of the European Convention and are themselves an embodiment of the principle of proportionality (see e.g. *R (Nouazli) v. Secretary of State for the Home Department* [2014] 1 WLR 3313, per Moore-Bick LJ at paragraph 16).

64. Ms Stout maintained that, while in the present case the defendant could not remove the claimant to Poland until his appeal had been determined (see regulation 29(3) and (6) of the EEA Regulations; the interim power under regulation 24AA to do so not having entered into force in time for this case), the claimant nonetheless had no right to reside in this country worth the name under the directive, pending determination of his appeal, because the directive itself permitted removal from a member state's territory while an appeal is pending (see article 31(4)).

65. Similarly Ms Stout submitted that the claimant may also, if released, be subjected to restrictions such as a prohibition on employment under provisions in Schedule 3 to the Immigration Act 1971, in a manner that is compatible with the directive (see article 27(2)), which itself confers no right to reside or work pending an appeal against deportation.

66. In response to the argument that the EU law principle of proportionality required consideration of measures less intrusive than detention, the defendant countered that detention is by its nature the measure best suited to deter re-offending and absconding and that the *Hardial Singh* principles provide a framework for balancing the efficacy of that deterrent against the desirability of release if achievable by less restrictive measures such as reporting restrictions, and the like.

67. I think the defendant's submissions are, in general, to be preferred. Ms Stout has demonstrated that they are not incompatible with the legislative scheme, domestic and international, nor with decided cases. They also appear to me more closely attuned to

the reality of the situation. The context here is that the defendant is seeking to deport the claimant to Poland because he is a criminal and is dangerous. The claimant wishes to stay in this country and, until recently, his right to do so was awaiting determination in the Court of Appeal.

68. The power of detention was being used to secure the claimant's removal from this country, as the first *Hardial Singh* principle requires and as the claimant does not dispute. It would be odd if the claimant's putative right to remain in this country (premised on his appeal succeeding, though as it turned out it has failed) should carry greater weight during the interregnum while the appeal is pending, than the putative countervailing public interest in his deportation, premised on his appeal failing, as it has done.

69. It seems to me, after reflection, that the claimant's arguments founded on prejudice to his EU law right to reside in this country, and on proportionality, ultimately do no more than restate his basic argument that his detention has gone on too long and that he should have been released sooner than he was. Any rights to reside, move freely and work in this country must depend on whether he may properly be deported from this country. The Court of Appeal has recently decided that he can be.

70. Before that decision was made, the question whether his detention had become unlawful must be determined applying the ordinary domestic *Hardial Singh* principles to which the requirement of proportionality adds nothing of substance here.

71. The next question is whether provision of accommodation under section 4 of the 1999 Act to the claimant by the defendant was necessary to avoid a breach of the claimant's rights under EU law or the Convention.

72. The claimant, through Mr Westgate, submitted that there would be a breach of his right under article 27 of the directive if such accommodation were not provided, because failure to provide it would keep him in detention, preventing him from exercising his putative right to live and work in this country by means of a decision that violated the principle of proportionality.

73. Secondly, Mr Westgate contended that measures less intrusive than detention could sufficiently protect the public and accordingly there was a breach of the ancillary duty under article 5 of the Convention articulated by the Supreme Court in *R (Kaiyam) v. Secretary of State for Justice* [2015] AC 1344.

74. The defendant, through Ms Stout, submitted that the Supreme Court's decision in *Kaiyam* is irrelevant because the ancillary duty contained within article 5 of the Convention arises in a case where a person is in preventive detention for the purpose of rehabilitation; the content of the duty being to take reasonable steps to provide the means of rehabilitation. That has nothing to do with a case such as this, of detention for the purposes of deportation.

75. Ms Stout went on to submit that there is no freestanding Convention right (either under article 3 or 8) to accommodation in this country for the purpose of pursuing legal claims to have a right to remain here: see *R (Kimani) v. London Borough of Lambeth* [2004] 1 WLR 272, per Lord Phillips MR at paragraph 49.

76. The simple factual answer to the claimant's contention, she submitted, is that the claimant could have obtained his release much sooner than he did by returning to Poland and, once ensconced there, pursuing his fight against deportation and seeking to return here. Mr Westgate countered that *Kimani* was not a case of immigration detention and is not in point.

77. For my part, I do not rule out the possibility that there could be cases where unlawful prolongation of immigration detention could, even in the case of an EEA national with a right to return to his or her country of origin, only be avoided by provision of accommodation, under section 4 of the 1999 Act or otherwise. The difficulty for the claimant is that I am quite satisfied this is not such a case.

78. The claimant does not say that the Secretary of State misdirected herself on the issue of whether she had power under section 4 of the 1999 Act to provide accommodation. There is no public law challenge to the legality of the detention founded on an alleged misdirection of law. The claimant asserts a *duty* to provide accommodation and a declaration that the defendant acted unlawfully by failing to provide it. The simple factual answer is that, on the evidence before the court, the claimant could have accommodated himself.

79. He did not assert that he would be destitute and homeless if he should return to Poland. He said he did not want to go there. I therefore dismiss, on the facts here, the notion of a duty to provide an address under section 4 of the 1999 Act. Even if, contrary to the defendant's case, there existed a power to provide one, it would have to be shown that a reasonable Secretary of State could not but exercise the power. That is far from the case here.

80. The third and final issue I have to determine is whether the claimant's detention lasted too long and became unlawful at some point, and if so when. For reasons already given, it would have to be as from a date not earlier than 12 December 2014 when the Upper Tribunal issued its decision on the claimant's appeal.

81. There was a disagreement about the significance of the claimant's unwillingness to return to Poland and pursue his claims and rights in this country while living there pending their determination. Surprising though it may seem, the claimant plainly preferred the four walls of a British immigration detention centre to the open skies of Poland.

82. He says that work is difficult to find in Poland but not that he would become homeless and destitute if he went back to live there. His solicitors' position was that he was entitled to be accommodated here at the expense of the defendant rather than pursue his claims from a base in Poland or (subject to domestic law of the territory) elsewhere outside the United Kingdom.

83. The difference between the parties mainly centred on interpreting what Lord Dyson JSC said in *R (Lumba) v. Secretary of State for the Home Department* [2012] 1 AC 245 at paragraphs 122 to 128, and in particular at paragraphs 127-8. The issue is whether refusal of voluntary return is relevant only to the risk of absconding or, more broadly, to the reasonableness of the duration of detention.

84. I do not propose to review in detail the authorities considered by Lord Dyson JSC in *Lumba*. In none of them was the case of an EEA national refusing to leave one member state to go to another, before appeals had been exhausted, under consideration.

85. In paragraph 127, Lord Dyson said that it is reasonable to remain in the United Kingdom while legal proceedings here continue unless they are an abuse. He said that was so if "return would be possible, but the detained person is not willing to go". He did not expressly limit his remarks to cases in which return would be perilous or pursuit of claims difficult or impossible. Nevertheless, his concluding words in paragraph 127 were these:

> In accepting voluntary return, the individual forfeits all legal rights to remain in the United Kingdom. He should not be penalised for seeking to vindicate his ECHR or Refugee Convention rights and be faced with the choice of abandoning those rights or facing a longer detention than he would face if he had not been offered voluntary return.

86. That reasoning suggests that he might have taken a different view in a case such as this where voluntary return would not entail loss of the right to pursue outstanding legal claims in this country. EEA states usually make a better litigation base than non-EEA states, for litigating in this country. Indeed the scheme of the directive and the EEA Regulations requires the ability to pursue claims here from another EEA state. It is now commonplace for parties to attend and give evidence by video link from one state to another.

87. It seems to me that Lord Dyson's observations, though unqualified on their face, were not intended to govern the position here, where the right of appeal is relatively easily exercisable from abroad. In such a case, the remarks of Toulson LJ (as he then was) in *R (A v. Secretary of State for the Home Department* [2007] EWCA Civ 804, at paragraph 54, still resonate and are not denuded of authority:

> …there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the latter case the loss of liberty involved in the individual's continued detention is a product of his own making.

88. I conclude that the claimant's unwillingness to return to Poland is relevant to the reasonableness of the period of detention and not just to the risk of absconding. It is a factor, here, of some weight given the proximity of Poland and its benign environment. However, it is not a trump card in the defendant's favour.

89. That leaves the question of the legality of the claimant's detention applying other aspects of orthodox *Hardial Singh* principles. I turn finally to consider that question.

90. The claimant points out, rightly, that this detention lasted for a long time. Mr Westgate submits that it was clear in early 2015 there was no reasonable prospect of

the claimant's imminent removal, and that the defendant did not take reasonable steps to expedite the matter. It did not help that the defendant's information about the forthcoming appeal was tardy and inaccurate.

91. The defendant submits that the period of detention was not over-lengthy, if one avoids the error of hindsight. In particular, the claimant's failure to notify the defendant properly of his application for permission to appeal to the Court of Appeal caused removal directions to be set, quite reasonably, for 20 April 2015. This, says Ms Stout, belies the notion of drift and inertia.

92. If the claimant did not like custody, said Ms Stout, his remedy was simply to pursue his rights from Poland. If he did not favour that course he had the wherewithal (including £2,000 and friends in this country) to obtain accommodation in this country, to which he could have been released earlier. Instead, he chose to accept custody while demanding lodgings at the defendant's expense.

93. As to the risk of absconding, this was considered relatively high and, the defendant submitted, fairly so in view of the evidence of past non-cooperation (including with the process of documentation for the acceptance of the Polish authorities), unwillingness to go to Poland, prior offences involving non-cooperation with the judicial system; altercations and poor conduct in custody and the lack of strong social and strong personal ties in this country, albeit he has friends here.

94. The claimant says the risk of absconding is overplayed and that this is shown by the recent decision to release him into the wilds of Kent with neither tag nor accommodation. However, the latter point is met by Mr Holton's evidence that, in his mind, the passing of time had ratcheted up the urgency of release to the point where it must occur even without those safeguards.

95. Mr Holton is plainly right, as the claimant himself has argued, that the longer detention continues, the more urgent early release becomes. The claimant must, in my view, accept the logic that increased urgency necessarily brings with it increased willingness to accept risk.

96. The same argument applies to the risk of re-offending. The defendant submits that the claimant's time in detention gave little comfort that the risk of further violent offences, assessed on sentence in 2012, had materially diminished. The claimant, rightly, points out that he has also at times been found to have "good custodial behaviour", has undertaken courses while in custody and done work requiring a high degree of trust in him.

97. In my judgment, the defendant cannot be faulted for harbouring continued concern about the risk of re-offending; nor for showing increased toleration of that risk by releasing the claimant. The latter cannot fairly hold against the defendant the decision to fulfil the claimant's wish for release.

98. I agree with the claimant that it was less than fair of the reviewing officer on 5 June 2015 to describe the claimant's then forthcoming appeal as "without merit". It is unusual for the Upper Tribunal to permit a second appeal to the Court of Appeal, and the merits of that appeal then had yet to be determined.

99. Nonetheless, despite that error, I am unpersuaded that the period of detention in 2015 was characterised by the sense of inertia, incompetence and drift asserted by the claimant. There were the usual periodic reviews. The reviewing officers and authorising officers examined and assessed the factors that were properly relevant and did not lose sight of the need for progress towards release, nor of the increasing urgency of release once the April 2015 removal directions had, of necessity, been cancelled.

100. It would have been better if the defendant's information about the forthcoming appeal had been more timely and more accurate, but it was in part the claimant's responsibility to contribute to providing that information, which he and his separate immigration representatives did not always do; instead, concentrating his fire on obtaining a mandatory accommodation address, which actually contributed to delay in his release.

101. In the end, it was the defendant and not the claimant who broke the impasse, when the urgency became such that release was judged essential even at the risk of absconding and further offending which were, rightly, still perceived as present. By doing so, in my judgment the defendant complied with, rather than breached, the second and third *Hardial Singh* principles.

102. Nor is the claimant assisted by the existence of an internal debate, and disagreements, among the defendant's officials. Far from evidencing unlawfulness, that process shows a healthy concern to air and discuss the issues and flush out the right and lawful conclusion in the course of resolving any internal disagreements about the timing of release, the conditions thereof and the balance of risk against the presumption of liberty.

103. One senses the increasing urgency of release in the documents evidencing that internal debate within the defendant, not just after the present claim was issued but in the period leading up to issue. In short, the defendant correctly judged when the time had come for release and did not, in my judgment, act unlawfully in failing to release the claimant earlier.

104. It follows that the claimant was not, in my judgment, unlawfully detained. Nor was the failure to provide him with accommodation under section 4 of the 1999 Act unlawful. The claim must therefore be dismissed.

105. The parties are invited to agree a form of draft order, in the usual way, and submit it to my clerk for my approval.

106. I conclude by expressing my thanks to both counsel for their erudite and cogent submissions, both written and oral.

Neutral Citation Number: [2016] EWCA Civ 373

Case No: C4/2014/1422

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr. Timothy Dutton Q.C.
[2014] EWHC 1169 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 April 2016

Before :

LORD JUSTICE MOORE-BICK
Vice-President of the Court of Appeal, Civil Division
LORD JUSTICE McFARLANE
and
LORD JUSTICE BRIGGS

- -

Between :

THE QUEEN (on the application of GOMES)	**Appellant**
- and -	
SECRETARY of STATE for the HOME DEPARTMENT	**Respondent**

- -
- -

Mr. Raza Husain Q.C. and **Ms. Leonie Hirst** (instructed by **Wilson Solicitors LLP**) for the **appellant**
Mr. Robin Tam Q.C. and **Mr. Tom Poole** (instructed by the **Government Legal Department**) for the **respondent**

Hearing date : 8th March 2016

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Approved Judgment

Lord Justice Moore-Bick :

1. The appellant, Mrs. Gomes, is a Portuguese national who entered this country with her husband in April 1998. The couple have three children. In July 2009 at the Crown Court at Kingston-upon-Thames she was convicted of an offence of cruelty towards one of the children, for which she was sentenced to 21 months' imprisonment.

2. The custodial portion of the appellant's sentence ended on 11th July 2010, after which she would normally have been released on licence until the sentence as a whole expired on 26th May 2011. On 8th July 2010, however, the Secretary of State served the appellant with a notice of intention to make a deportation order against her and exercised her powers under paragraph 2(2) of Schedule 3 to the Immigration Act 1971 authorising her detention pending the making of a deportation order against her. As a result, when the custodial portion of her sentence expired the appellant was kept in prison.

3. The appellant exercised her right to appeal to the First-tier Tribunal, which, by a decision promulgated on 10th January 2011, allowed her appeal. The Secretary of State had a right within ten days to appeal to the Upper Tribunal against that decision, but she failed to do so, with the result that on 20th January 2011 the appellant was entitled to be released. However, on 25th January 2011 the Secretary of State filed a notice of appeal with the Upper Tribunal, which on 7th February 2011 granted her permission to appeal out of time. It is unnecessary for the purposes of this appeal to describe the subsequent course of events other than to say that the appellant remained in custody until 7th March 2012 when the Upper Tribunal granted her bail.

4. By the present proceedings, which were commenced on 21st December 2011 while she was still in custody, the appellant sought to challenge the lawfulness of her detention. Her claim for judicial review was heard by Mr. Timothy Dutton Q.C. sitting as a Deputy Judge of the Queen's Bench Division. Before the judge the appellant argued that she had been unlawfully detained for the whole of the period between 11th July 2010 and 7th March 2012 following her successful appeal against the original notice of intention to make a deportation order against her. The Secretary of State argued that she had been lawfully detained throughout the entire period, including the period between 20th January 2011, when time for appealing against the decision of the First-tier Tribunal in her favour had expired, and 7th February 2011, when the Secretary of State obtained permission to appeal out of time.

5. The judge held that the statutory power to detain the appellant had lapsed when the time for appealing against the decision of the First-tier Tribunal had expired, but that her appeal reverted to being pending when the Secretary of State obtained permission to appeal out of time and that the authorisation for her continued detention which followed the Detention Review on 17th February 2011 was sufficient to justify her detention thereafter without the need for any further formal step. However, he also held that as from 2nd September 2011 the appellant could and should have been released to a suitable accommodation address and that her detention thereafter had been unlawful. He therefore granted a declaration that she had been unlawfully detained from 20th January 2011 to 17th February 2011 and from 2nd September 2011 to 7th March 2012 and gave directions for the assessment of damages. He also awarded the appellant 50% of her costs of the proceedings.

6. This is the appellant's appeal against the judge's order. She appeals on the grounds that he ought to have held that, since no formal authorisation had been given for her detention following the success of her appeal to the First-tier Tribunal, she had been unlawfully detained throughout the whole of the period from 20th January 2011 to 2nd September 2011 and that he should have granted a declaration to that effect. Moreover, since she had succeeded on a substantial part of her claim, he ought to have awarded her the whole of her costs. There is a cross-appeal by the Secretary of State on the grounds that no further authority for the appellant's detention was required once she had obtained permission to appeal to the Upper Tribunal, but that if it was, it was provided by the decisions taken as part of Detention Reviews conducted on 25th January or 17th February 2011.

7. Paragraph 2(2) of Schedule 3 to the Immigration Act 1971, under which the appellant was detained, provides as follows:

> "Where notice has been given to a person in accordance with regulations under Section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of the court, he may be detained under the authority of the Secretary of State pending the making of the deportation order."

8. On 8th July 2010 the Secretary of State authorised the appellant's detention using form IS91 in the following terms:

> "To: Ms Maria Monica Valente De Achada Gomes Portugal 05 May 1979
>
> Whereas the Secretary of State has decided to make a deportation order under section 5(1) of the Immigration Act 1971 against
>
> Ms Maria Monica Valente De Achada Gomes
>
> a citizen of Portugal who is, at present, detained in pursuance of the sentence or order of a court and is due to be released otherwise than on bail on 11 July 2010
>
> The Secretary of State hereby, in pursuance of paragraph 2(2) of Schedule 3 to that Act authorises any constable, at any time after notice of the decision has been given to the said
>
> Ms Maria Monica Valente De Achada Gomes
>
> in accordance with the Immigration Appeals (Notices) Regulations 1984 to cause her to be detained from the date of her release until the deportation order is made or an appeal against the decision under Part II of the Act is finally determined in her favour."

9. In the course of argument we canvassed with counsel a number of questions relating to the effect of the decision of the First-tier Tribunal on that authority for the detention of the appellant, which seemed to us to depend for its lawfulness on the existence of a valid notice of a decision to make a deportation order against her. We are particularly grateful to Leading Counsel for the Secretary of State, Mr. Robin Tam Q.C., for his assistance in relation to those questions and are satisfied, as he

submitted, that in order to dispose of the appeal it is necessary for us to determine only two matters: (i) the true construction of the authority for detention and (ii) the effect of the Detention Review which took place on 25th January and 17th February 2011.

(i) The authority for detention

10. There are two parts to the document authorising the appellant's detention. The first contains a notice informing the appellant of the Secretary of State's decision to make a deportation order against her; the second contains the authority for her detention, by which any constable may cause her to be detained "until the deportation order is made or an appeal against the decision under Part II of the Act is finally determined in her favour." Mr. Tam accepted that the appellant's appeal had been finally determined in her favour when the time for appealing against the decision of the First-tier Tribunal expired on 20th January 2011, but he submitted that the position changed on 7th February 2011 when her appeal once again became pending as a result of the grant of permission to appeal. At that point, he argued, the authority was revived, so that, if the appellant had by then been released (as she should have been), she could have been arrested and detained once more pursuant to it.

11. Mr. Husain Q.C. submitted that the document authorising the appellant's detention should not be construed in that way. It was essential, he submitted, that when dealing with a matter as important as the liberty of the person the exercise of executive power be rigorously scrutinised and any warrant for detention expressed in clear terms. In particular, he submitted that the statutory provisions do not contemplate the existence of a warrant, the validity of which varies according to circumstances, including the fluctuating state of legal proceedings. He argued that the warrant ceased to have any effect when the time for appealing against the decision of the First-tier Tribunal expired and could not thereafter be revived.

12. I start from the proposition that any infringement of the right to personal liberty must be clearly justified, both in terms of the existence of the power to detain and in terms of its exercise. It follows that the language of any warrant authorising detention is to be construed in favour of liberty and any ambiguity resolved in favour of the person against whom it is directed. In this case the warrant was expressed to authorise the appellant's detention only until an appeal had been finally determined in her favour. That condition was satisfied when the time for lodging a notice of appeal to the Upper Tribunal expired. At that point the warrant lapsed and could not justify her continued detention. The question then is whether it purported to authorise a subsequent period of detention.

13. I have a good deal of sympathy with Mr. Husain's submission that the statute does not permit an ambulatory warrant of the kind for which Mr. Tam contended, but I do not think it necessary to determine that question in the present case. Mr. Tam drew our attention to the case of *R (Erdogan) v Secretary of State for the Home Department* [2004] EWCA Civ 1087, [2004] INLR 503, in which this court considered for the purposes of qualification for asylum support the distinction to be found in section 104 of the Nationality, Immigration and Asylum Act 2002 between an appeal under section 82(1) of that Act which is "pending" and one that has been "finally determined". The court held that an appeal was no longer "pending" (and so had been "finally determined") when the time for lodging a notice of appeal had expired, but it

accepted that, if permission to appeal out of time were granted, the appeal would once again become pending.

14. The expression "until . . . an appeal . . . is finally determined in her favour" is capable of being construed as extending to a time after the Secretary of State had obtained permission to appeal, but that would be to render the effect of the warrant uncertain. It does not expressly purport to authorise a subsequent period of detention or detention from time to time and I do not think it should be construed in that way. For reasons I have already given, I think it should be construed restrictively in favour of the appellant. Moreover, although in this case the delay in seeking permission to appeal was relatively short, there is no limit beyond which it can be said with confidence that the Upper Tribunal would decline to exercise its discretion to extend time in favour of the Secretary of State. Moreover, it is possible that the appellant might have succeeded before the Upper Tribunal, but failed on an appeal by the Secretary of State to this court. Since, as is common ground, the appellant was entitled to be released on 20th January 2011, it would be very unsatisfactory to construe the original warrant as authorising her arrest and detention many weeks, if not months, later. In my view, therefore, this warrant should be construed as authorising only one continuous period of detention, which in this case expired on 20th January 2011.

(ii) The Detention Review

15. The second question is whether the Detention Reviews which took place on 20th January and 17th February 2011 constituted authority for the appellant's detention thereafter. Mr. Tam was at pains to emphasise that the statutory power to detain continued to exist and that the Secretary of State could exercise it again once she had obtained permission to appeal. That may be so, but the question is whether she did in fact do so. Mr. Tam submitted that she did, because, following a consideration of the circumstances surrounding the appellant's case, the Secretary of State took an informed decision to authorise her continued detention. Mr. Husain submitted, on the other hand, that there is an important distinction between a formal warrant authorising a person's detention and a decision to continue detention following a Detention Review, the sole purpose of which is to consider whether the existing position should be maintained. He submitted that in this context great importance is to be attached to compliance with the proper formalities. In the absence of a second warrant for the appellant's detention signed by or on behalf of the Secretary of State, there was no exercise of the power available to her under the Act and so no lawful detention.

16. Regular reviews in accordance with the Secretary of State's published policy are a procedural obligation essential to ensure the lawfulness of continued detention: see *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1 W.L.R. 1299. They are necessary because they are the means of ensuring that the power of executive detention is not used in an arbitrary fashion, but the policy is not the source of the Secretary of State's authority to detain; that lies in the statute. In paragraphs 50 and 51 of his judgment in *Kambadzi* Lord Hope drew a distinction between the initial decision to detain, which will be lawful if made under the authority of the Secretary of State pending the making of a deportation order, and the decision to continue that detention following a review. Baroness Hale in paragraphs 69-72 emphasised that the requirement to conduct regular reviews is procedural in nature. Similarly, in paragraphs 83-84 Lord Kerr drew a distinction between an initial valid exercise of the power of detention and periodic reviews of its continued justification.

All this tends to support the conclusion that, although regular reviews are essential to the lawfulness of continued detention, they cannot constitute a valid exercise of the statutory power.

17. Mr. Tam submitted that to hold that the decision to continue to detain the appellant following the Detention Reviews on 25th January and 17th February 2011 respectively did not constitute authority for her detention would be to allow form to triumph over substance. I do not agree. Although, in general, substance is to be preferred to form, there are circumstances in which it is necessary to observe the correct form because only by doing so will the substantive requirements be satisfied. This is one of them. A Detention Review is an internal procedure conducted by the Home Office on behalf of the Secretary of State. A report of its outcome is given to the detainee, but not, apparently to anyone else. As far as the governor of the detention facility is concerned, authority for the detention of the person concerned is derived from the initial authorisation. In the present case once the original authorisation had lapsed, the governor of HMP Bronzefield, where the appellant was detained, was holding no valid authority for her continued detention.

18. For these reasons I am satisfied that there was no lawful authority for the appellant's detention after 20th January 2011 and that the appeal should therefore be allowed and the cross-appeal dismissed.

Lord Justice McFarlane :

19. I agree.

Lord Justice Briggs :

20. I also agree.