



Foreign national offenders

Removal of Foreign Criminals: MW 484

- There are **18,400** foreign national offenders (FNOs) in the UK, including 9,000 in prisons (who made up 11% of a total prison population in 2019 of 82,200).¹
- Non-EU FNOs make up around 5,100 (or 57%) of the total FNO population in prisons; the other portion (3,900, or 43%) consists of EU nationals (2019).²
- In the year to June 2020, there were also 9,400 FNOs living amongst the general public. This has more than doubled from just under 4,000 in 2012.³
- Under Section 32 of the UK Borders Act of 2007, non-EU “foreign criminals” sentenced to 12 months or more in prison are subject to automatic deportation.⁴
- Those recognised as refugees may also be stripped of their right to stay if convicted of a ‘*serious crime*’, i.e. leading to a sentence of imprisonment of at least two years.⁵
- There were **4,700** FNOs removed in the year to March 2020. The number of such returns fell from 6,200 in 2016. Returns averaged 5,300 (2010-19 - Home Office).⁶
- Returns of EU FNOs have risen over time, while the number of non-EU-national returns has fallen. Only 32% of those returned in 2018/19 were from outside the EU.
- The average FNO is removed 139 days after release from prison.⁷
- Obstacles to removal include: ‘last minute’ asylum claims, Judicial Review applications, further representations, documentation issues and absconding.⁸
- Brexit change UK rules regarding the deportation of EU criminals. After 31 December 2020, foreign national offenders (including EU offenders) can be removed (under the same rules as non-EU offenders) if they receive a custodial sentence of at least 12 months (under the UK Borders Act 2007).⁹
- The estimated annual cost of administration of FNOs is **£850 million**, according to the National Audit Office (NAO).¹⁰

There are just over 9,000 foreign national offenders (FNOs) in UK prisons - representing 160 nations of the world - making up about 11% of the total prison population of 82,200 (2019).

About a third were convicted of violent or sexual offences, about a fifth for drug charges, and others for burglary, fraud, robbery and other serious crimes.

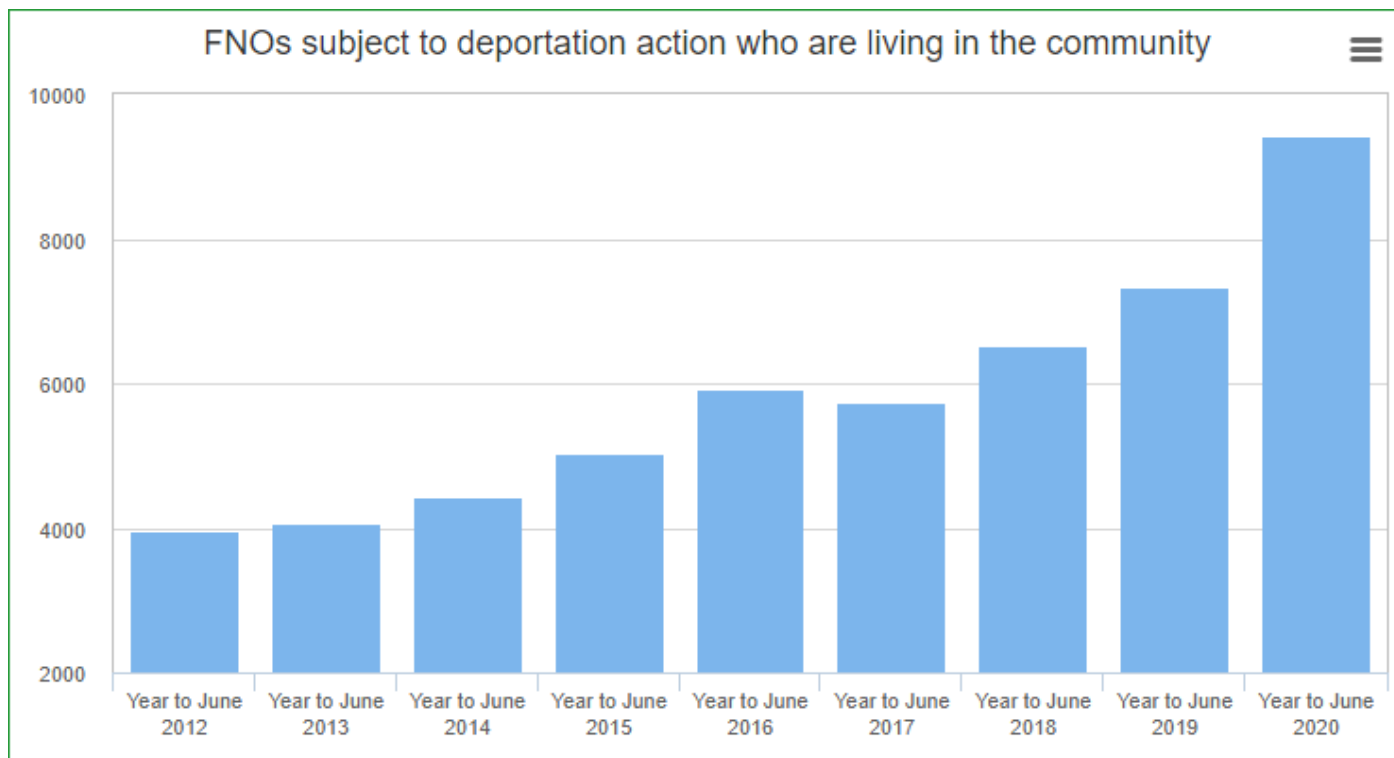
There are two foreign national offender-only prisons, one of which is located at Huntercombe - Henley-on-Thames, Oxfordshire. The operational capacity of this prison is about 480.

Nations with the largest numbers of their citizens in UK prisons are: 1) Poland 2) Albania 3) Romania 4) Ireland 5) Jamaica 6) Lithuania 7) Pakistan 8) Somalia 9) India and 10) Portugal.¹¹

How many ‘foreign criminals’ live amongst the public?

In the year to June 2020, there were also 9,400 FNOs living amongst the public, of whom 4,700 had been residing in the community for two years or more and 2,500 had been for more than 60 months (five years) (Source: Home Office)¹². The number of FNOs living in the community has more than doubled from under 4,000 in the year to March 2012. Most of those released into the community are granted bail by judges. See Figure 1:

Figure 1: FNOs subject to deportation action who are living in the community



In May 2006, the-then Home Secretary, John Reid, informed the Home Affairs Committee that, since February 1999, 1,019 FNOs who ‘*ought to have been considered for deportation*’ had been released from prison without the possibility of deportation being examined.

At the end of March 2014, **1 in 6 FNOs** living in the community (760) had absconded, a rise of 6 % since 2010. Over half of these (395) had been missing since before 2010, of which 58 were high harm offenders.¹³ Data obtained by the Press Association following a Freedom of Information request showed that nearly 500 foreign national offenders 'absconded' while they were subject to deportation action from 2014 to the end of March 2016.¹⁴

The risk of reoffending

The public must be protected from reoffending by criminals. The easiest and safest way to do this is deportation where the person is a foreign national. There are numerous examples of crimes being committed by those who should have been removed but managed to spin out their stay. There should be an effective system, rigorously enforced, to prevent reoffending.

Under which powers can foreign national offenders be deported?

Under current legislation, non-EU nationals sentenced to 12 months or more in prison can be considered for deportation under the Borders Act 2007¹⁵. FNOs can also be deported where this is conducive to the public good under the Immigration Act 1971¹⁶. A criminal court can also recommend the deportation from the UK of any non-British citizen over the age of 17 who is convicted of an offence punishable by imprisonment¹⁷. In most cases, criminals from the EU can also be deported after two years, or one year if the conviction is for a sex attack. Since August 2008, non-EU foreign nationals involved in gun crime or a serious drug offence can also be considered for removal from the UK regardless of the length of sentence¹⁸.

It is not necessary in all cases to serve a deportation order in order to enforce removal. FNOs who **do not** have a right to be in the UK, for example those who have entered the UK illegally, may be removed without a deportation order.

The Government introduced new requirements through the Policing and Crime Act 2017 so that anyone appearing in court now has to state their nationality. This was designed to speed up early identification of foreign national offenders and therefore assist with speedier removal. However, watered-down rules revealed in August 2020 mean that anyone arrested by police or brought to court no longer has to say which country they are from because it was thought that this rule breached a privacy law that came into force in the UK in 2018 – based on the EU's General Data Protection Regulation.

Under which mechanisms are people removed?

There are three main ways by which FNOs have been removed from the UK - 1) the early removal scheme 2) prisoner transfer agreements 3) removal after release from prison.

1. The first - and main route - is called the early removal scheme. This is the principal mechanism for removing foreign national offenders *directly from prison*¹⁹. Under the scheme, offenders are returned to their home countries and barred from returning to the UK, potentially for life. In 2017/18, over 2000 foreign national offenders were removed under this scheme²⁰.
2. The UK also has more than 100 transfer agreements countries and territories around the world. The

number of people removed under this scheme is very low. Under these the UK can theoretically transfer prisoners during their time behind bars so that they serve the rest of the sentence in their home country. Although six of these are compulsory, meaning the consent of the prisoner in question is not required, most such agreements (e.g. with Pakistan - one of top ten countries with nationals in UK prisons) are voluntary, meaning that the prisoner is not obliged to return to the country should they wish not to do so. Another limitation is that the receiving country can still choose whether to accept or refuse to take back the prisoner. Three transfer schemes in operation are detailed below:

- a. The EU prisoner transfer framework decision, which EU member states signed up to between December 2011 and December 2015 (2008/909/JHA). This tends to be the most successful means of transferring prisoners because (unlike for non-EU countries) there are limited grounds on which a receiving member state can refuse to accept a prisoner transfer request. Under the scheme, 357 EU national offenders were removed between 2011 and 2019 (Written Parliamentary Answer)²¹. The UK also took back a total of 100 British national criminals since the scheme was introduced.
 - b. Theoretical compulsory transfers under the Additional Protocol to the Council of Europe Convention on the Transfer of Sentenced Persons. 13 other countries are signed up to this: Georgia, Iceland, Liechtenstein, Macedonia, Moldova, Montenegro, Norway, Russia, Serbia, San Marino, Switzerland, Turkey and Ukraine. *The UK has sent no foreign offenders at all back to their home countries under this protocol.*
 - c. Compulsory bilateral agreements with six countries around the world - Albania, Ghana, Libya, Nigeria, Rwanda and Somaliland. However, the number of people removed under these schemes is very low - a Written Parliamentary Answer from 2019 revealed that only 25 people had been removed under these agreements²². There are a number of limitations including the following - transfer can take place only if all appeal routes have been exhausted, a deportation order is in place, and there are no legal concerns about the prison system to which the prisoner will be moved.
3. Thirdly, there is enforced removal or voluntary return after release under the a) Tariff Expired Removal Scheme and the b) Facilitated Returns Scheme, under which FNOs are offered financial assistance when they arrive in their home country on the condition that they cooperate with the deportation process and waive their right to appeal (an average of 1,800 people per year were removed under this latter scheme between 2010 and 2014 but usage has fallen considerably in recent years).²³

Ex-foreign national prisoners may be detained in the immigration estate on completion of their criminal sentence if they have been recommended for deportation by the sentencing court, are subject to the automatic deportation provisions of the 2007 UK Borders Act or have been served with a notice of a decision to make a deportation order. This can occur because they are appealing against their deportation, are not complying with the deportation process, or the Department has not made a decision on their case. Just under 1,500 people were transferred from prisons into detention in 2019.

However, prior to January 2018, a significant proportion were granted Temporary Release, in accordance with the Immigration Act 1971 (as amended)²⁴. From 15 January 2018 onwards, a new single power for the government to grant immigration bail (created under Schedule 10 of the Immigration Act 2016) also came into effect²⁵. Meanwhile, the use of detention to protect the public has declined considerably in recent months and years, with the numbers in detention falling by around 2,000 or more since 2017.

In addition, some will be waiting for Emergency Travel Documents (ETD) to be issued by their Embassies in the UK²⁶. The Home Office can obtain an ETD from a foreign embassy in cases where non-UK nationals have previously destroyed their own passports or have arrived here illegally without them²⁷. However, as the Independent Chief Inspector of Borders and Immigration has said: “*Non-compliance with the documentation process is known to have a significant impact in detained FNO cases.*”²⁸ Most (77%) of the sample of cases examined were related to non-compliance by individual FNOs rather than the countries involved. The ICIBI said the government had no clear strategy in place to tackle delays and non-compliance in the ETD process (March 2014)²⁹.

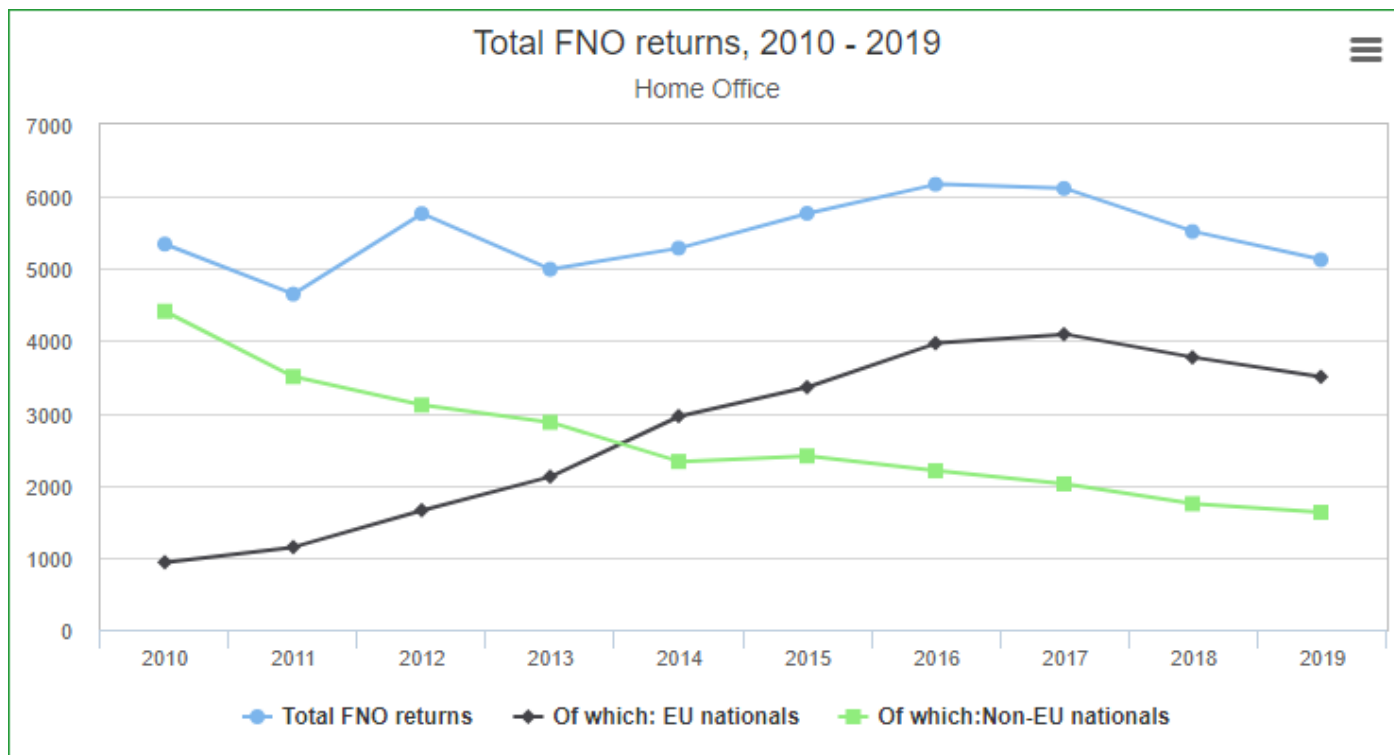
Measures in the government’s 2016 Immigration Act mean that all non-detained foreign nationals subject to deportation proceedings or a deportation order are electronically monitored. However, it is not clear whether this has had any effect in making the removal process any easier or quicker.

How many foreign criminals are removed each year?

Just under 1,600 were removed straight from prison to their home countries during a recent four-year period. The average offender is removed **139 days** after their release from prison, according to the National Audit Office³⁰.

In total, there were 4,700 FNOs removed from the UK in the year to March 2020 which has fallen from 6,200 in 2016 (Home Office statistics)³¹. The number of FNOs returned each year since 2010 is 5,300 (see figure 2 below) and less than half of those removed were non-EU nationals despite non-EU nationals forming the majority of FNOs in the UK:

Figure 2: Total FNO returns, 2010 - 2019, Home Office.



Why are more FNOs not removed?

In October 2012, the Home Office and the Metropolitan Police Service launched Operation Nexus to improve the identification and removal of immigration offenders, including FNOs. Early indications were that it was working well but the effectiveness appears to have declined in recent years. The Police said the operation was aimed at tackling 'high harm' offending³².

In 2015, the Commons Public Accounts Committee stated that the number of British citizens returned to UK prisons through prison transfer agreements to serve the remainder of their sentences in the UK was broadly double the number of foreign national offenders removed from the UK.

A deportation order cannot be made if deportation would be contrary to the UK's obligations under the UN Refugee Convention or the European Convention on Human Rights³³. And caselaw³⁴ means that terrorist suspects at risk of torture in their countries of origin could neither be deported nor held in immigration detention. The courts have interpreted the statutes setting out the meaning of the 'public interest' in removing people to include exceptions that that lead to deportation not going ahead if the FNO is socially and culturally integrated into the UK or has developed deep family links³⁵ here.

According to the Independent Chief Inspector of Borders, there are a number of obstacles to removal of FNOs:

- Asylum claims, Judicial Review applications and other legal claims (accounting for about 22% of obstructions to removal in 2013/14).
- Disruptive behaviour by the FNO at port or elsewhere (13% of cases)
- Non-compliance in the process of securing an Emergency Travel Document (11% of cases)³⁶.

The ICIBI has also found serious deficiencies in the monitoring of foreign national criminals while they live among the public. He found that foreign offenders can fail to attend meetings with staff on as many as 19 occasions before the alarm is raised.

Meanwhile, the National Audit Office identified a lack of joint working and administration errors which have often led to missed opportunities for removal.

In October 2018, a Somali convicted gang rapist, Yaqub Ahmed, 29, had to be removed from a plane about to take off when passengers heckled the private security guards accompanying him.

In August 2020, it was revealed that a Nigerian fraudster was flown back to the UK after his removal was ruled unlawful.

And in October 2020, a failed Sri Lankan asylum seeker who had killed another man by stabbing him 21 times was allowed to stay in Britain on human rights grounds. He successfully brought a legal challenge under Article 3 of the European Convention on Human Rights (ECHR), which stipulates that no one may be returned to a country where they could be '*subjected to torture or to inhuman or degrading treatment or punishment*'.

Many countries are also unwilling to take such offenders despite accepting them as nationals.

Section 94B of the Nationality, Immigration and Asylum Act 2002, inserted by the Immigration Act 2014, conferred upon the Home Secretary a power to certify human rights claims brought by those facing deportation proceedings with the effect that appeals could be carried out only **after** deportation. However, an additional barrier to deportation was the Supreme Court's ruling in July 2017 that these rules were unlawful. In *R (Kiarie and Byndloss) v Secretary of State for the Home Department*, the Supreme Court held that the Home Secretary had not established that 'deport first, appeal later' struck a fair balance between the rights of the appellants and the interests of the wider community.

Another contributory factor is the suspension of the government's previous Detained Fast-Track policy as a result of a High Court ruling in 2015.

It is of great concern that foreign offenders who have committed serious crimes are able to remain in the UK and move freely and do as they wish while arrangements for their deportation are, in theory, being made, and that many planned removals are aborted as a result of questionable application of human rights law.

The government has a duty to protect the public's safety. It could begin by doing more to prevent the initial entry of criminals into the UK. It could also consider the reforms to legislation that may be necessary to allow for proper enforcement and the removal of foreign nationals who commit serious crimes.

In 2014, David Cameron's government introduced an Immigration Act which, among other things, was aimed at reducing the number of appeals to deportation orders. This legislation also introduced curbs on the way in which FNOs could use Article Eight of the ECHR (the right to family life). This provision had long been abused in a way which aided the obstruction of removal from the UK. It is right that Ministers should look at ways in which to curtail abuse of Article 3 of the ECHR also. The government is right to be looking at sensible reforms so that they cannot be abused in a way which endangers the public's safety or is a complete affront to justice.

In 2012, Lord Thomas, later Lord Chief Justice, expressed a hope that the problem of misconduct amongst immigration and asylum solicitors would come to an end. In 2018, Mr Justice Green said in the High Court, "It has not. It remains in 2018 an issue of deep concern.....the motive of some practitioners in initiating court or tribunal proceedings [is] simply to delay the immigration process." The latest LCJ to point to such abuse is Lord Burnett when even in finding against the Home Office, he referred to, "*endemic problems of false and fanciful late claims, some of which involved a minority of lawyers*". Clearly, Priti Patel, the Home Secretary was not alone, nor the first to refer to such abuse.

5 November 2020

Notes

1. This includes a currently unknown number who are on remand, non-criminals, recalls and fine defaulters, but including those as time served in either prison or immigration removal centres. Such people are not eligible for immigration action. For instance, foreign nationals on remand have not yet been convicted of an offence so cannot be removed.
2. Ministerial answer, Hansard, February 2019, URL: <https://www.theyworkforyou.com/whall/?id=2019-02-19a.520.1#g522.2>
3. Home Office, Immigration enforcement data, August 2020, URL:
4. This means that the Home Secretary must make a deportation order unless exceptions (set out in s33 of the 2007 Act) apply (e.g. where deportation would contravene human rights provisions). See statutory provision, URL: <https://www.legislation.gov.uk/ukpga/2007/30/section/33>
5. See Section 72 of the Nationality, Immigration and Asylum Act 2002, URL: <https://www.legislation.gov.uk/ukpga/2002/41/section/72>
6. HO statistics, URL: <https://www.gov.uk/government/publications/immigration-statistics-year-ending-march-2020/how-many-people-are-detained-or-returned>
7. 2014 estimate by NAO.
8. This is because the scope to deport EEA nationals has been restricted by European law. Directive 2004/38/EC – often referred to as the “Citizens Rights Directive” or the “Free Movement Directive
9. This results from changes to the EEA deportation provisions to be made via the Immigration, Nationality and Asylum (EU Exit) Regulations 2019/745 (the “EU exit regulations”), enacted under powers in the EU Withdrawal Act 2018.
10. 2013/14 figure. National Audit Office, Report on FNOs, 2014, Figure 16, p. 44, URL: <https://www.nao.org.uk/wp-content/uploads/2014/10/Managing-and-removing-foreign-national-offenders.pdf>
11. Ministerial answer, Hansard, February 2019, URL: <https://www.theyworkforyou.com/whall/?id=2019-02-19a.520.1#g522.2>
12. Immigration Enforcement transparency data, August 2020, URL: <https://www.gov.uk/government/publications/immigration-enforcement-data-august-2020>
13. National Audit Office, <https://www.nao.org.uk/wp-content/uploads/2014/10/Managing-and-removing-foreign-national-offenders.pdf>
14. See Press Association report, 2018, URL: <http://home.bt.com/news/latest-news/hundreds-of-foreign-national-offenders-have-absconded-figures-show-11364255768648>
15. The criteria relating to criminality for non-UK nationals are set out in the immigration rules. They include a number of specific requirements which may lead to a non-EU national being refused a visa, denied entry at the UK Border or being subject to deportation. These include: length of custodial sentence; committing an offence which caused serious harm; minor offences committed in the last 12 months; being a persistent offender who shows particular disregard for the law; character, conduct or associations which are not beneficial for the public good; or deception (where this involves failing to declare convictions); Changes are pending to s32 as regulation 17 of the Immigration, Nationality and Asylum (EU Exit) Regulations 2019/745 will amend the definition of a ‘foreign criminal’ to exclude Irish citizens. This will grant Irish citizens an exemption from the automatic deportation provisions. The amendments are not in force at time of writing
16. Under section 3(5) of the Immigration Act 1971, a person who is not a British citizen is liable to deportation from the UK if the Home Secretary deems their deportation to be conducive to the public good.
17. Immigration Act 1971, section 3(6)
18. This is known as the ‘Bournemouth Commitment’ and was translated into Home Office guidance in August 2008.
19. Section 260 of the Criminal Justice Act 2003 introduced an ERS for determinate sentenced FNOs in England and Wales, which includes non-European and European Economic Area (EEA) nationals. The provisions came into force on 14 June 2004. This means eligible FNOs can be released up to 270 days before the halfway point of their sentence for the purpose of deportation or removal from the UK. Home Office, Early Removal Scheme, URL: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/534168/early_removal_scheme_v7.pdf
20. Ministerial answer, Hansard, February 2019, URL: <https://www.theyworkforyou.com/whall/?id=2019-02-19a.520.1#g522.2>
21. Written Parliamentary Answer, 2019, URL: <https://questions-statements.parliament.uk/written-questions/detail/2018-11-13/190835>
22. Written Parliamentary Answer, 2019, URL: <https://questions-statements.parliament.uk/written-questions/detail/2019-02-12/220146>
23. National Audit Office, 2014, URL: <https://www.nao.org.uk/wp-content/uploads/2014/10/Managing-and-removing-foreign-national-offenders.pdf>
24. Paragraph 21(1), Schedule 2 states: “A person liable to detention or detained under paragraph 16...may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention.” The Immigration Act 1971 also permitted release from detention on bail (Paragraph 29, Schedule 2) and release from detention pending deportation (Schedule 3).
25. House of Lords, Hansard, 23 May 2018.
26. Ibid.
27. Under section 35 of the Asylum and Immigration Act 2004.
28. Report by ICIBI, 2014, URL: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546968/An-Inspection-of-the-Emergency-Travel-Document-Process-March_2014.pdf
29. Report by ICIBI, 2014, URL: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546968/An-Inspection-of-the-Emergency-Travel-Document-Process-March_2014.pdf
30. NAO report, 2014, p. 4, URL: <https://www.nao.org.uk/wp-content/uploads/2014/10/Managing-and-removing-foreign-national-offenders.pdf>
31. HO statistics, URL: <https://www.gov.uk/government/publications/immigration-statistics-year-ending-march-2020/how-many-people-are-detained-or-returned>
32. High harm is defined as follows: Cases where conduct incurs significant adverse impact, whether physical, emotional or financial, upon individuals or the wider community. HO guidance on Operation Nexus, 2017, URL: <https://www.gov.uk/government/publications/operation-nexus-high-harm>
33. E.g. When considering deportation the Government must comply with article 3 of the UN Convention against Torture (UNCAT) and

article 3 of the European Convention on Human Rights (ECHR). To get around this obstacle the UK has pursued a policy of deportation with assurances (DWA) in the cases of foreign nationals suspected of terrorism. See 2017 report by the Independent Reviewer of Terrorism Legislation on DWAs, URL: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/630809/59541_Cm_9462_Accessible.pdf#page=14

34. *Chahal v UK*, application 22414/93 ECtHR 1996, 23 EHRR 41. To get around this after 2001 attacks, the UK government negotiated agreements with six countries between 2005 and 2011 with provide to enable deportations to take place in a manner that is consistent with the UK's human rights obligations. However, as of July 2018 only 12 people (including Jordanian Abu Qatada) had been removed under these arrangements. House of Commons Library report on FNO deportation, URL: <https://researchbriefings.files.parliament.uk/documents/CBP-8062/CBP-8062.pdf>
35. *R (Kiarie & Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42at [55].
36. National Audit Office, 2014, URL: <https://www.nao.org.uk/wp-content/uploads/2014/10/Managing-and-removing-foreign-national-offenders.pdf>