

EEA Deportation: Recent Cases

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Legislation

- Council Directive 2004/38/EC of the 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 (**‘the Directive’**)
- Immigration (European Economic Area) Regulations 2016 (**‘the Regulations’**)

Guidance

- European Economic Area (EEA) administrative removal (Version 4.0) (Dec 17)
- EEA decisions on grounds of public policy and public security (Version 3.0) (Dec 17)

Regulation 23(6)

Subject to paragraphs (7) and (8), 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 27](#); or

(c) the Secretary of State has decided that the person's removal is justified on grounds of **misuse of rights** under [regulation 26\(3\)](#).

Regulation 23(7)

(7) A person must not be removed under paragraph (6)—

(a) **as the automatic consequence of having recourse to the social assistance system of the United Kingdom;** or

(b) if that person **has leave to remain in the United Kingdom under the 1971 Act** unless that person's removal is justified on the grounds of public policy, public security or public health in accordance with [regulation 27](#).

Regulation 26(3)(a) – administrative removal

- The person does not have or ceases to have a right to reside under the Regulations
- Examples in guidance:
 - an EEA national is no longer a qualified person because they failed to
 - exercise Treaty rights as required
 - a non-EEA national family member has ceased to be the family member of an
 - EEA national
 - the Home Office has previously recognised a non-EEA national as having an EEA right (for example a family permit), but evidence later suggests rights were gained on the basis of a marriage of convenience
 - the person is attempting to make use of EU rights they never had

Administrative removal must be proportionate

Relevant factors (Administrative Removal Guidance, p.24):

- type of decision being taken
- level of the misuse of a right to reside
- personal circumstances of the individual including any vulnerabilities
- the implications of limiting the individual's free movement

Misuse of rights – regulations 23(6)(c) and 26

26.— Misuse of a right to reside

(1) The misuse of a right to reside occurs where a person—

(a) **observes the requirements of these Regulations in circumstances which do not achieve the purpose of these Regulations ...;**
and

(b) **intends to obtain an advantage from these Regulations by engaging in conduct which artificially creates the conditions required to satisfy the criteria set out in these Regulations.**

Regulation 26 cont.

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

...

(6) This regulation **may not be invoked systematically**.

Rough sleeping

R. (on the application of Gureckis) v Secretary of State for the Home Department [2018] 4 W.L.R. 9

The court (Lang J) quashed the SSHD's previous guidance on the administrative removal of EEA nationals (version 3.0) insofar as it treated any rough sleeping by EEA nationals as an abuse of the EU right to freedom of movement and residence, rendering them liable to removal under regulation 26.

Lang J held that the targeting of EEA nationals sleeping rough for enforcement action on that basis amounted to unlawful discrimination against them on the ground of their nationality and involved unlawful systematic verification of their EU right to reside.

Regulation 27

(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under [regulation 15](#) except on **serious grounds of public policy and 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 a right of permanent residence under [regulation 15](#) and who 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 in the best interests of the person concerned ...

B v Land Baden-Wurttemberg (C-316/16)

Decision of the CJEU Grand Chamber - [2018] 3 W.L.R. 1035 (17 April 2018)

Joined with *FV (Italy) v Secretary of State for the Home Department (C-424/16)*, a preliminary reference from the UK Supreme Court: [2017] 1 C.M.L.R. 3 (27 July 2016)

Held:

- **The right to permanent residence is a pre-requisite of enjoying the highest status of protection against deportation;**
- A period of imprisonment does not necessarily break the continuity of a 10-year period of residence for the purposes of regulation 27(4)(a) – instead, it is necessary to conduct an overall assessment to determine whether the individual’s integrative links have been broken;
- The date of assessment is the date of the expulsion decision.

Regulation 3

(3) Continuity of residence is broken when—

(a) a person serves a sentence of imprisonment;

...

(4) Paragraph (3)(a) applies, in principle, to an EEA national who has resided in the United Kingdom for at least ten years, but it does not apply where the Secretary of State considers that—

(a) prior to serving a sentence of imprisonment, the EEA national had forged **integrating links** with the United Kingdom;

(b) the effect of the sentence of imprisonment was **not such as to break those integrating links**; and

(c) taking into account an **overall assessment** of the EEA national's situation, it would not be appropriate to apply paragraph (3)(a) to the assessment of that EEA national's continuity of residence.

Factors relevant to overall assessment (*B & Vomero*)

- the strength of the integrative links forged with the host state before the detention
- the nature of the offence which had resulted in the detention
- the circumstances in which that offence had been committed
- the conduct of the person throughout the period of detention

Is deportation justified?

- Relevant date for assessment of justification: the date of the decision on an appeal (i.e. taking into account any changes following the date of the expulsion decision) – see *B & Vomero* at [94] and *MG (prison – Citizens Directive)* [2014] UKUT 392 (IAC) at [27]
- The burden of proof rests upon the Secretary of State and the standard of proof is the balance of probabilities: *Arranz (EEA Regulations – deportation – test)* [2017] UKUT 00294 (IAC).

Regulation 27(5)-(6)

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the **fundamental interests of society**, and where a relevant decision is taken on grounds of public policy or public security it must also 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 must represent **a genuine, present and sufficiently serious threat** affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

Regulation 27(5)-(6) (cont)

(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;

(f) the decision may be taken on **preventative grounds**, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person (“P”) 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.**

Regulation 27(8)

A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

Schedule 1

Para. 3:

“Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the **longer the sentence, or the more numerous the convictions**, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.”

Schedule 1

Para. 4:

“**Little weight** is to be attached to the **integration of an EEA national** or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed **at or around the same time** as—

- (a) **the commission of a criminal offence;**
- (b) an act otherwise affecting the fundamental interests of society;
- (c) the EEA national or family member of an EEA national was in custody.”

Schedule 1

Para. 5:

“The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has **successfully reformed or rehabilitated**) is less likely to be proportionate.”

Is deportation justified?

Deportation “must be both appropriate and necessary for the attainment of the public policy objective sought - the containment of the threat – and also must not impose an excessive burden on the individual, the deportee”: *B v Secretary of State for the Home Department* [2000] Imm AR

The Tribunal must be satisfied that the Appellant is a “**present**” threat to the interests of society, and that her past record is not in itself sufficient: see *Bulale v Secretary of State for the Home Department* [2009] Q.B. 536 at [16].

As to the requirement to demonstrate “serious grounds”:

“[t]he thrust of the thinking that led to the Directive seems fairly clearly to have been that it should be, at the least, difficult to expel an EU citizen on the basis of crimes of **dishonesty**, but that **violence** is a different matter”.

“Public security”

- the “imperative grounds” threshold only relates to “public security” and not “public policy” (unlike the serious grounds threshold).
- In *I v Oberbürgermeisterin der Stadt Remscheid* (Case C-348/09) [2012] Q.B. 799, the CJEU (Grand Chamber) confirmed that “public security” covers **“both a member state's internal and its external security”**: [18].
- “imperative grounds” is **“considerably stricter”** than “serious grounds” and must be **“interpreted strictly”**: [19] and [23].
- “... 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 grounds””: [20].

“Imperative grounds”

- In *FV (Italy) v SSHD* [2013] 1 W.L.R. 3339, the Court of Appeal applied this test in *I* and found “**no real prospect** of the tribunal finding “imperative grounds of public security” to justify deportation” in circumstances where the appellant had committed **a serious offence of violence against the person justifying a sentence of eight years' imprisonment and had also committed other offences**”: [98].

Further punishment and deterrence

- It is impermissible to sanction an EEA national's deportation **as further punishment for their offence** (*Kamki v SSHD* [2017] EWCA Civ 1715, see Sales LJ at §39).
- The need to **deter** other potential wrongdoers and to reflect **public revulsion** at the offence in question is not relevant under the EEA Regulations (*Straszewski v SSHD* [2016] 1 WLR 1173, per Moore-Bick LJ at §14).

Differences between EEA and non-EEA

The Court of Appeal held in *Straszewski* (§11-14) that:

- the context of the deportation of a foreign criminal under section 32 UK Borders Act 2007 and removal of an EEA national pursuant to the EEA Regulations are **very different**.
- Section 32 is directed towards those who have no right to be in the United Kingdom other than in accordance with leave to remain granted by the SSHD. Their position is **inherently less secure** than that of EEA nationals who are entitled to reside in the UK to exercise their Treaty rights.
- Where the removal of an EEA national would *prima facie* interfere with that exercise it is for the relevant Member State to justify its action. The person to be deported **does not have the burden** of showing that the decision was not in accordance with EU law.

- The Court of Appeal said in *Decker v SSHD* [2017] EWCA Civ 1752 (in a case where the appellant had been convicted of **immigration offences involving dishonesty**), “there was clearly **considerable room for argument** as to whether the threat he represented was ‘genuine’, ‘present’ and ‘sufficiently serious’”, per Hamblen LJ at §60. Further, it was highly relevant in *Decker* that the Appellant has been assessed as posing a low risk of reoffending (§60).

Rehabilitation

The Upper Tribunal in the case of *Essa (EEA: rehabilitation/integration)* [2013] UKUT 00316 (IAC) established that (§3 of the Headnote):

“3. For those who at the time of determination are or remain a present threat to public policy but where the factors relevant to integration suggest that there are **reasonable prospects of rehabilitation**, those prospects can be a **substantial relevant factor** in the proportionality balance as to whether deportation is justified. If the claimant cannot constitute a present threat when rehabilitated, and is **well-advanced in rehabilitation in a host state where there is a substantial degree of integration**, it may well very well be disproportionate to proceed to deportation.”

Proportionality

As to the meaning of the concept of proportionality, see *R (Lumsdon and others) v Legal Services Board* [2015] UKSC 41, [2015] 3 WLR (§33):

“Proportionality as a general principle of EU law involves a 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**”.

Refugee status exclusion

K v Staatssecretaris van Veiligheid en Justitie (C-331/16) & HF v Belgium (C-366/16)

[2018] 3 C.M.L.R. 26 (2 May 2018)

- “the fact that the person concerned had been the subject, in the past, of a decision excluding him from refugee status **did not automatically permit** the finding that the mere presence of that person in the territory of the host Member State constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. A **case-by-case assessment** was necessary before a measure based on grounds of public policy or public security was adopted.”

Refugee status exclusion

Relevant factors:

- **the findings of fact in the decision to exclude that individual from refugee status** and the factors on which that decision was based, particularly:
 - the **nature and gravity of the crimes** or acts that he was alleged to have committed,
 - the **degree of his individual involvement** in them,
 - whether there were any grounds for excluding criminal liability, and
 - whether or not he had been convicted.
- the **time that had elapsed** since the date when the crimes or acts were allegedly committed
- the individual's **subsequent conduct**, particularly in relation to whether that conduct revealed the **persistence in him** of a disposition hostile to the fundamental values of the EU

Suspensive effect

- Appeals against **administrative removal** (regulation 23(6)(a) or (c)) will have **suspensive effect**, but not appeals against removal on public policy/public security grounds: see regulation 40(3).
- Where a decision has been taken to remove on public policy/public security grounds, the SSHD can certify that, despite the appeals process not having been begun or not having been finally determined, removal pending the outcome of an appeal would **not be unlawful under section 6** of the Human Rights Act 1998: regulation 33(2).
- The grounds upon which the Secretary of State may certify a removal include (in particular) that the person 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 the person is proposed to be removed.

Regulation 33(4): interim orders

(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 removal 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.

Temporary admission: regulation 41

- For those deported on public policy grounds pending their appeal, there is an option to apply to the SSHD for **temporary admission to the UK to attend an appeal hearing**.
- Regulation 41(3):

The Secretary of State must grant P permission, except when P's appearance may cause **serious troubles** to public policy or public security.

Challenges to certification

- Judicial review
- Article 8 ECHR gives rights for an appeal to be fair and effective.
- The onus is on the Secretary of State to demonstrate that certification is fair and proportionate.
- However: *R (Wandzel) v SSHD* [2018] 1 W.L.R. 4219 – court distinguished EEA national position from the non-EEA national position in *Kiarie v SSHD* [2017] 1 WLR 2380, principally due to the temporary admission right, but also because it is easier to conduct an appeal from another EEA state, rather than outside EEA.