

ILPA information sheet

Information sheets provide general information only, accurate as at the date of the information sheet. Law, policy and practice may change over time.

ILPA members listed in the directory at www.ilpa.org.uk provide legal advice on individual cases. ILPA does not do so.

The ILPA information service is funded by the Joseph Rowntree Charitable Trust.

An archive of information sheets is available at www.ilpa.org.uk/infoservice.html

Steve Symonds ILPA Legal Officer 020-7490 1553 steve.symonds@ilpa.org.uk

Immigration Law Practitioners' Association www.ilpa.org.uk 020-7251 8383 (t) 020-7251 8384 (f)

Deportation 3 – European Cases

17th September 2012

The July 2012 “Deportation” information sheet [<http://tinyurl.com/8ot9kay>] provides information about deportation, and further information about ‘automatic deportation’ is contained in the “Deportation 2” information sheet. This information sheet provides information about the deportation of European Economic Area nationals and their family members.

Related information, concerning European Economic Area nationals and their family members is provided by the August 2008 “Families of EEA Nationals” [<http://tinyurl.com/8wm5ze2>] and June 2010 “European Free Movement” [<http://tinyurl.com/9pw77j2>] information sheets.

How UK deportation laws relate to European Union law

The powers available to the UK Border Agency (and Home Secretary) to deport someone from the UK are contained in the Immigration Act 1971 and the UK Borders Act 2007. These two Acts each set out a distinct deportation regime, and in any particular case it will be necessary to consider both Acts to check whether or not either regime applies.

European Union law establishes additional rights in respect of European Economic Area nationals and their family members against deportation. This information sheet provides further information as to those rights. However, in any particular case concerning an European Economic Area national or his or her family member, it will first be necessary to consider whether either of the deportation regimes in the two Acts applies. If neither applies, there is no power to deport the person.

Specific rights concerning European Economic Area nationals and their family members

Where there is power to deport a person under either the Immigration Act 1971 or UK Borders Act 2007, the European Citizens Directive (2004/38/EC) makes further requirements before that power may be exercised in the cases of European Economic Area nationals or their family members. Those requirements include (Articles 27 to 33). In what follows, the terms in the Directive are used – ‘exclude’ means to prevent entry (to the UK) and ‘expel’ means to deport:

- The only grounds on which it is permissible to expel a person (or exclude him or her from the UK) are those of public policy, public security or public health. However, these grounds may not be relied upon to achieve an economic purpose (e.g. restricting access to a job market).
- Expulsion or exclusion on public health grounds is only permitted in limited circumstances relating to infectious or communicable disease (e.g. where the World Health Organisation has defined a disease to carry an epidemic risk). It is not permissible to expel a person on public health grounds on the basis of a disease occurring more than three months after the person’s arrival in the UK.

- A decision to expel, or exclude, a person on public policy or public security grounds must be both proportionate and based exclusively on the personal conduct of the relevant individual. The personal conduct of the individual must present a real, current and sufficiently serious threat affecting the fundamental interests of society.
- Past criminal convictions cannot of themselves be grounds for the expulsion or exclusion of a person on public policy or public security grounds; and any expulsion or exclusion decision may not be justified by grounds isolated from the specific circumstances of the individual case – e.g. it is not permissible to expel a person for the purpose of deterring others.
- Before making a decision to expel or exclude a person on public policy or public security grounds, the following factors must be considered – the person’s length of residence, age, state of health, family and economic circumstances, social and cultural integration and links to his or her country of origin.
- If the person has acquired the right of permanent residence (which is generally acquired after living in the UK for five years), he or she may not be expelled unless there are serious grounds of public policy or public security for the person to be expelled. (See below on serious and imperative grounds & periods in prison.)
- If the person has been living in the UK for 10 years or more, he or she may not be expelled unless there are imperative grounds of public security for the person to be expelled. (See below on serious and imperative grounds & periods in prison.)
- A child (i.e. a person under the age of 18) may not be expelled unless there are imperative grounds of public security, unless expulsion is necessary in his or her best interests.
- Where a decision is made to expel or exclude a person, he or she must be notified of that decision, be given full reasons for it (except in certain national security cases) and be informed as to how he or she may challenge that decision. There are also provisions to protect a person from being expelled before any appeal or judicial review of an expulsion decision is decided; and to permit a person from presenting in person his or her appeal or judicial review claim against a decision to exclude him or her.
- Where a person is excluded from the UK on public policy or public security grounds, there must be an opportunity for him or her to put forward reasons after a reasonable time, and in any event after three years, as why his or her exclusion should be lifted.

Serious and imperative grounds & periods in prison

As indicated above, where a person has lived in the UK for five years or more, the circumstances in which he or she may be expelled are more limited – limited to serious grounds of public policy or public security only. When he or she has lived in the UK for ten years or more, the circumstances become even more limited – limited to imperative grounds of public security. Public security is not limited to national security, and may include the risk of a sufficiently serious criminal act or acts. The word ‘imperative’ means the risk to public safety or to a section of the public must be more than serious. While ‘serious’ sets a high threshold, ‘imperative’ sets a very high threshold.

The issue of how periods in prison relate to ‘living in the UK’ for five years or 10 years is complex. In *Jarusevicius (Lithuania)* [2012] UKUT 120 (IAC), the Upper Tribunal confirmed that a period of imprisonment did not count towards the five years to acquire a right to permanent residence, but suggested that earlier decisions that a period in prison broke the period of living in the UK (such that a person could not add time before the period of imprisonment to time after that period for calculating the five years) may be wrong. In August 2012, the Upper Tribunal referred questions to the Court of Justice of the European Union relating to this issue – see *Onuekwere (Nigeria)* [2012] UKUT 269 (IAC). In the same month, the Upper Tribunal referred questions to the Court of Justice relating to similar issues about how the 10 years is calculated – see *MG (Portugal)* [2012] UKUT 268 (IAC). In the circumstances, unless and until the Court of Justice answers these questions, the UK Border Agency should not, in considering deportation, treat a period in prison as breaking a person’s period of living in the UK, whether for calculating the five or the 10 years.