



**THE UK BORDER AGENCY RESPONSE TO
THE INDEPENDENT CHIEF INSPECTOR'S REPORT
ON THE MANAGEMENT OF FOREIGN NATIONAL
PRISONERS**

The UK Border Agency thanks the Independent Chief Inspector (ICI) for advance sight of his report.

The UK Border Agency response to the recommendations:

1. Recommendation 1: That the UK Border Agency reduces the number of decisions to deport that are overturned on appeal

1.1 Accepted in part

1.2 The Agency accepts in principle that we need to reduce the number of decisions that are subsequently lost at appeal. However, the question of how far the UK Border Agency should align its decisions with those of the courts goes to the wider question of the overall balance to be struck in removal or deportation between an individual's Article 8 right to respect for private and family life and the public interest in public protection and maintaining immigration controls.

1.3 This Government believes that Article 8 should only rarely outweigh the need to protect the public from serious criminals. The family migration consultation published in July opened up the debate around the overall balance to be struck in such cases. The consultation set out the Government's view that, where the deportation threshold is met, the presumption must be that deportation is justified in the public interest and that only in exceptional circumstances will deportation breach Article 8. Following the consultation the Government now intends to change the immigration rules to ensure a better balance between an individual's right to a family life, expressed in Article 8 of the ECHR, and the wider public interest, as expressed in the rest of Article 8, in controlling immigration.

1.4 With these considerations ongoing, it would not be appropriate for the Agency to accept a recommendation which could mean that large numbers of foreign national offenders, many of whom have not had lawful status in the UK, should be allowed to remain here unchallenged. We do however accept that we need to improve the quality of our decision making in criminal cases and we are taking steps to do this. For example we have instituted a quarterly review within the Criminal Casework Directorate (CCD) to assess reasons for allowed appeals and to review cases where deficiencies by UK Border Agency may have contributed to the appeal being allowed. Through this process we will ensure that areas of common weakness are covered by the CCD Quality Assurance Framework and in case owner guidance and we are also identifying areas of good practice that should be shared more widely.

2. Recommendation 2: That the UK Border Agency ensures that foreign national prisoners are provided with the reasons why they are being deported at the time the decision is made.

2.1 Accepted

2.2 We agree that the reasons for deportation must be served at the same time as the decision to deport and we will continue to work to improve our performance in this key area.

2.3 An enhanced quality assurance framework has been embedded in CCD since 2010, supported by a quality assurance team. The team has recommended that any instances of delays between the service of a notice of a decision to deport and the reasons for deportation letter be monitored and investigated. The contents of the Inspector's report will be reviewed to identify any issues in relation to quality which need to be addressed and will be addressed through an action plan in an effort to reduce unnecessary appeals and the attendant cost to the tax payer.

3. Recommendation 3: That the UK Border Agency develops clear timescales for obtaining travel documentation in individual cases to ensure deportation action can be taken more quickly where appropriate.

3.1 Accepted in part

3.2 Whilst the time taken to secure travel documentation does vary from country to country, the timescale for obtaining a document is mainly dependent on the compliance of the FNP. Non-compliance covers a range of behaviour but it centres on frustrating removal by refusing to cooperate with attempts to obtain travel documents, for example by adopting a false identity, nationality swapping, refusing to engage with the UK Border Agency, or refusing to engage with embassies. We estimate that this is a significant issue in around 60% of long term detained foreign national prisoners. Documentation can be arranged quite quickly in most circumstances when the FNP is compliant, takes longer with the semi-compliant FNP and takes a very long time with the non-compliant.

3.3 It would therefore be very difficult for us to develop nationality based timescales for commencing deportation action, as the time taken to conclude the case will be contingent on the individual facts of each case. We have however introduced a number of strategies to increase compliance. For example our work with the National Offender Management Service (NOMS) to embed immigration staff in prisons ensures that we make contact with all FNPs in prisons where we have UK Border Agency staff within 5 days of their arrival, allowing us to start collecting evidence of identity and nationality from the outset. This has paid dividends in terms of increasing the numbers of early removals so we are continuing to work with NOMS to increase the provision of FNP only prisons.

3.4 Where foreign governments co-operate with us we are very successful in deporting foreign national prisoners. We will therefore continue to work with other governments to improve the provision of travel documentation. We will also work with the police, NOMS and the courts to fix identity and nationality earlier in the criminal justice system, and to access overseas criminal records. This will help us significantly in tackling non-compliance later on in the process and make documentation easier.

4. Recommendation 4: That the UK Border Agency actively manages all cases where foreign national prisoners have yet to be deported and considers regularly whether deportation can be enforced or whether a person is entitled to remain in the UK.

4.1 Accepted

4.2 In recent years the UK Border Agency has greatly increased the focus on deporting foreign criminals. Since 2006 we have removed over 25,000 FNPs from the UK, including 5,342 in 2010. We are also increasingly successful at removing FNPs before the end of their prison sentence; 43% of removals in 2010 were with the early removal period.

- 4.3 The by-product of our success each year has been a number of cases which we want to remove that typically the courts agree should be removed, but are presently facing barriers. The principle reasons are:
- i. the situation in country;
 - ii. a requirement from the foreign country that the FNP 'agrees' to return;
 - iii. insufficient evidence of nationality or identity to meet the foreign countries re-documentation standards.

In CCD cases concerning foreign national prisoners, where 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. The appropriateness and legality of detaining someone in each of these cases is considered every 28 days. Where it is no longer appropriate or lawful to detain, or where the courts grant bail (which accounts for 90% of releases from immigration detention), FNPs are released into the community. This has resulted in a growth in the numbers of non-detained former FNPs; the stock has grown by over 700 since Mar 2010 to a population of 3,807 in June 2011.

- 4.5 Through our recent investment in performance management we now have more robust systems which enable us to better monitor cases at all stages of the deportation process and promptly identify and address blockages and issues as they arise. It would be inappropriate to cease our attempts to remove cases where practical barriers are preventing removal in cases where the courts have agreed that deportation is appropriate. We are however working to conclude more cases early and to reduce nugatory work where there is a valid Article 3 or 8 claim balanced against the seriousness of the crime. The number of cases concluded at the initial consideration stage increased from approximately 260 in 2008 to 350 in 2010.
- 4.6 We agree that we need to continue to develop our strategies for managing this challenging population. The Home Office Ministerial Strategy Unit is therefore conducting a review of non-detained cases to assess the risks inherent in this population and to develop solutions for managing it more effectively.

5. Recommendation 5: That the UK Border Agency ensures each individual decision to detain or release a foreign national prisoner at the end of their sentence takes full account of the risk of re-offending in line with published policy and any assessments produced by the National Offender Management Service.

5.1 Accepted

- 5.2 There is no presumption to detain in criminal cases. Our powers only allow us to detain for as long as there is a realistic prospect of removal within a reasonable timescale. The policy does however take into account the imperative to protect the public from foreign nationals who have offended in the UK and are liable to deportation. For this reason, proximity of removal, risk of reoffending (based on NOMS assessments) and risk of absconding are all taken into account at the point at which the detention decision is made and every 28 days thereafter.
- 5.3 Risk of harm to the public is an important consideration when deciding whether or not to detain, but it is not the only consideration. The courts have found that it may be lawful to prolong detention in cases where the risk of re-offending is low but there is a significant risk of absconding and/or where the individual's own lack of cooperation is a determinative factor preventing removal. To release someone who cannot be deported

solely or mainly as a direct result of their own refusal to comply with the documentation process would (in many cases) be to concede the removal.

- 5.4 We therefore accept that risk assessments should always be taken into account (in line with the published policy) where they are available. Where such assessments are not available (for example they are only provided in respect of adults with sentences of 12 months or over) managers will have to make a decision based on the evidence before them. There will be circumstances in which it will be legitimate to detain even where there is no identified risk of re-offending.
- 5.5 We also accept that we need to ensure that detention is used appropriately and lawfully and we have already put in place a package of measures to improve the quality of detention decisions and documentation. For example the detention review template and guidance have been revised to better support caseworkers in making evidence-based detention decisions and demonstrating progress since the last 28 day review. We will also review the template and guidance for making the initial detention decision to ensure that all detention decisions are based on a sound consideration of the evidence.

6. Recommendation 6: That the UK Border Agency changes the level of authorisation required to release foreign national prisoners at the end of their sentence in line with its policy which presumes release

6.1 Accepted in part

- 6.2 The level of authority for release of a foreign national offender is deliberately set at high level to ensure that release decisions take a proper account of the need to protect the public and to enforce border controls. We will, however, review how the levels of decision to detain and release are authorised. Ministerial agreement will be required to change the levels of authorisation.

7. Recommendation 7: That the UK Border Agency analyses whether the frequency and nature of contact between case owners and foreign national prisoners can improve the quality and timeliness of decisions

7.1 Rejected

- 7.2 The Agency has encouraged and developed a strong sense of personal responsibility and accountability in dealing with foreign nationals who present a challenge to removal from the UK. This has been achieved through the implementation of the hubs and spokes prison model and the 2009 UK Border Agency/NOMS service level agreement that has provided a clear framework for contact with FNPs. There has been more effective communication between embedded staff and the FNP with a view to gaining compliance and removal at the earliest opportunity.
- 7.3 The principle of the hub and spoke strategy is to promote a focused interaction with foreign nationals from the earliest identified point in sentence. UK Border Agency staff embedded in prisons are able to develop face to face relationships with FNPs at hub and spoke locations through presence at regular surgeries and in response to ad hoc requests and concerns. The consistency of using the same staff aids building a rapport and so encourages compliance. The embedded staff act as the interface between the

FNP and case owner and can often quickly articulate FNP concerns with the case owner or workflow manager, obtain additional information required by the case owner and assist with documentation issues. Our assessment of the hub and spoke strategy is that has been very effective at driving up the early removal of FNPs. Removals under the Early Removal Scheme have increased from 19% of CCD removals in 2008 to 43% last year. In 2010 76% of removals from hub prisons were during the ERS period.

- 7.4 Managing and co-ordinating visits at various locations across the country for several hundred case owners would be time consuming and resource intensive for both the UK Border Agency and NOMS. The current model frees case owners' time to progress cases, and avoids the need for personal safety training or extensive travelling. Case owners are encouraged as part of their personal development to attend prisons and meet individual prisoners where this is appropriate but this can also frequently be achieved through effective communication at regular surgeries.
- 7.5 We do however recognise the benefits of improving the access that foreign national prisoners have to their case owner. As part of its commitment to improving customer service CCD is currently establishing duty telephone lines in each case work area. The relevant duty officer numbers and office hours will be included on all documents and correspondence despatched to CCD foreign national prisoners and their representatives. Team managers will also ensure that prisoners are notified of the relevant duty officer number when their case is first allocated to a case owning team, or when a case is transferred to a team with a different duty number.
- 7.6 Clear standards are already in place for contacts between embedded UK Border Agency staff and FNPs, including those not in hub or spoke locations. For example we make contact with all FNPs in prisons where we have UK Border Agency staff within 5 days of their arrival; we attend all non priority FNP prisons to conduct surgeries on a quarterly basis and we provide translated material where available for all FNPs at induction to non priority FNP locations. We will also look at extending minimum standards for case owners (which currently focus on the quality of decision making and documentation) to cover contacts with FNPs.

8. Recommendation 8: That the UK Border Agency ensures files contain data relevant only to the subject of that file; and ensures the timely destruction of data where a person has been acquitted of an offence

8.1 Accepted

- 8.2 It is in the Agency's interest to assess the content of files and ensure that case files are maintained to a standard for ease of future reference in line with Public Records. Policies are in place to ensure that all staff comply with the data protection act including the active review and weeding of extraneous material on case files. All staff are aware of how to manage information through e-learning and refresher e-learning training. It is the case owning team's responsibility to ensure that files are reviewed and weeded of extraneous material, particularly at the post deport stage when the file is put into storage. Managers will remind case owners about the importance of complying with the data protection act and will remind case owners about the maintenance of Home Office files.