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13.Deportation under Section 3(5)(b)

Deportation action may be initiated under section 3(5) (b) against the non-settled spouse of a person liable to deportation action and against any dependent children who are not settled here and do not have the right of abode. Deciding to make a deportation order makes it clear what our intentions are for the family as a whole. In the unlikely event that the spouse, or a child over 16, is liable to deportation in his own right, take action on that basis. But where one member of the family is being deported and the spouse or children are liable to removal under section 10 powers, deportation action should normally be taken in order to avoid possible challenges under Article 8 of the ECHR.
The following categories of children are liable to deportation action:

- Children born abroad, or in the UK on or after 1 January 1983, where neither parent is a British citizen or settled here. (Children born in the UK after 1 January 1983 are entitled to apply for British citizenship once they have completed 10 years' residence or 5 if the parents are BOTCs. This does not, however, preclude deportation action being initiated against them prior to their entitlement to British citizenship).

- Children where the father is a British citizen or settled here, but who was never married to the child's mother who is herself a foreign national liable to deportation action. (However, the amount of contact that the father has with the child should be established).

13.1 Deportation of family members

When considering whether 3(5)(b) action is appropriate, full account must be taken of paragraphs 365 to 368 of the Immigration Rules, as outlined below, as well as to the
Compassionate factors in paragraph 364. **See also:** Factors to be at taken into account when deciding whether deportation is appropriate. These considerations must be reflected in the

comments on the APP104a or ICD1072. (Refer to Section 5(3) of the 1971 Act for procedure and further provisions as to deportation).

The Secretary of State will not normally decide to deport the spouse of a deportee where:

- he has qualified for settlement in his own right; or
- He has been living apart from the deportee.

The Secretary of State will not normally decide to deport the child of a deportee where:

- he and his mother or father are living apart from the deportee;
- he has spent some years in the UK and is nearing the age of 18;
- he has left home and established himself on an independent basis; or
- He married before deportation came into prospect.

As well as the factors listed in paragraph 364, the Secretary of State will take into account the following:

- the ability of the spouse to maintain himself and any children in the UK, or to be maintained by relatives or friends without charge to public funds, not merely for a short period but for the foreseeable future, and
- in the case of a child of school age, the effect of removal on his education; and
- The practicability of any plans for a child's care and maintenance in this country if one or both of his parents were deported; and any representations made by or on behalf of the spouse or child.

13.2 Deportation activity that falls outside the remit of the Criminal Casework Directorate

There are other types of deportation that fall *outside* of the remit of the Criminal Casework Directorate. Deportation action can also be taken:

- on grounds of national security that do not fall within criminal casework criteria (e.g. EU Nationals);
- because the person has engaged in unacceptable behaviour; or
- because of involvement or complicity in war crimes, crimes against humanity or genocide (non-conducive).
- Or, exceptionally, in other occurrences, such as the deportation of individuals who have committed serious offences in their own country.

Section 3.8 of the Immigration Act 1971 puts the onus of proof on the subject to establish that they are exempt from deportation. However, in order to successfully implement deportation action efforts may be made to identify the individual's identity and nationality prior to this.

13.3 Enforcement Casework - DOs for those served with APP 104 and applications under the Regularisation of Overstayers.

Most deportations are dealt with by CCD and should be referred to them where their criteria is met, using the process outlined above. Further information on Criminal deports can be obtained from the sections referring to criminal casework found on the Enforcement Guidance page on Horizon.

There are 2 exceptions;

a) APP104 (served prior to 1-10-2000)
b) Applications for Regularisation of overstayers

The APP104 was a notice of decision to make a deportation order (also known as a notice of intention). On 2 October 2000, administrative removal (section 10 of the 1999 Act) replaced deportation in all circumstances where HM Inspectors devolved authority to serve an APP104 (now ICD 1070 series forms). Therefore, enforcement offices will now only serve a notice of decision to make a deportation order when requested to do so by the relevant casework section. The APP104 is no longer used but there are still pending cases that have been served with an APP104.

There may still be circumstances where decisions relating to the detention or restriction, or supervised departure of a person served with an APP104 under devolved HM authority can still be taken by designated Inspectors. In addition to the designated Inspectors, such decisions may also be taken by Immigration Service Directors, Deputy Directors and Assistant Directors responsible for enforcement issues.

An APP104 stops the clock for the purpose of marriage, DP5/96 and the long residence under the rule. If this was served deportation procedures must be followed if removal was still being pursued and you cannot switch to an Administrative removal.

Stock paragraphs for APP104 letters can be found on DocGen.