



# **A thematic inspection of how the UK Border Agency manages foreign national prisoners**

February – May 2011

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# Foreword from John Vine CBE QPM



Foreign national prisoners are a diverse group of people coming from many different countries, having committed a range of offences and each having their own individual ties to the UK. The management of foreign national prisoners by the then Immigration and Nationality Directorate became a major public and political concern in 2006, following the revelation that over 1,000 had been released without consideration for deportation.

This inspection assessed how well the UK Border Agency is applying the powers relating to deportation of foreign national prisoners.

The Agency has deported over 20,000 people since 2007, with annual figures averaging over 5,000 since the law was changed to provide for 'automatic deportation' in cases where foreign national prisoners are sentenced to 12 months or more. Of the overall number deported, more foreign national prisoners are being deported under specific Early Removal or Facilitated Returns schemes.

I found that the Agency is now monitoring the deportation of foreign national prisoners more closely and has assessed the numbers and costs of foreign national prisoners both in detention and living in the community. The UK Border Agency's Board now also monitors associated risks.

However, the Agency can still improve the way it handles foreign national prisoners.

Firstly, a significant number of appeals continue to be allowed against decisions to deport, in most cases because deportation would breach the UK's obligation to the individual under the Human Rights Act. As the law clearly provides for foreign national prisoners to be exempt from the automatic detention provisions in these circumstances, and notwithstanding the complexity of some cases, I believe the Agency must do more to align its decision-making with the judgement of the courts.

Secondly, although more foreign national prisoners were deported before the end of their sentence, I found the overwhelming majority of those who had yet to be deported were detained at the end of their sentence under immigration powers. Where decisions to detain are based, in part, on the risk to the public, I expect the Agency to set out the evidence of whether a person is likely to re-offend and to ensure that detention is not the default position in all cases. The Agency should also ensure that casework is carried out in a more timely manner and that there is a change in the level of authority required to authorise release as well as to detain.

Finally, I found a sharp rise in the number of foreign national prisoners whom the Agency has not deported or cannot deport immediately at the end of their sentence and are therefore detained or released into the community. These cases cannot be ignored and represent a growing cost to the taxpayer. More must be done to actively manage these cases and, in particular, to obtain the travel documentation necessary for deportation.

I have set out eight recommendations for improvement, which I expect to be implemented immediately.

A handwritten signature in black ink that reads "John Vine". The signature is written in a cursive, flowing style.

John Vine CBE QPM  
Independent Chief Inspector of the UK Border Agency

# 1. Executive Summary

1. The UK Border Agency is responsible for deciding, in accordance with the law, whether foreign national prisoners should be deported from the UK. Where deportation is being considered, it also decides whether a person should be detained at the end of their prison sentence or released into the community with a requirement to report to the Agency if deportation has not occurred prior to the end of the prison sentence. This inspection assessed the effectiveness and efficiency of the Agency in managing foreign national prisoners.
2. Between 2007 and 2010, a total of 20,360 foreign national prisoners were deported from the UK. In 2010, 5,235 foreign national prisoners were deported. More than 2,500 (49 per cent) of these left the UK under a Facilitated Returns Scheme, which provided a cost-effective method of deportation. Greater emphasis had been placed on this scheme by the Agency with 19 per cent more foreign national prisoners deported than in 2009. A proportion of these people had been deported prior to the end of their custodial sentence under an Early Removal Scheme with consequent reduction in the cost of detention.
3. There was evidence of some good practice in decision-making with case owners proactively obtaining information from other public service agencies to ensure that decisions reflected all available evidence. However, the Agency had also made decisions to deport before foreign national prisoners had sufficient chance to make representations and, in five cases of our file sample, decisions to deport had been taken without the reasons being provided to the foreign national prisoner.
4. We found a significant disparity between the Agency's and the courts' interpretation of whether a foreign national prisoner should be entitled to remain in the UK on human rights grounds. Between March and December 2010, the Agency's decisions to deport had been overturned in 425 cases by the First-Tier Tribunal – the overwhelming majority on human rights grounds. This contrasted with figures showing 151 foreign national prisoners being granted permission to remain on initial consideration by the Agency. In the 12 months to February 2011, 32 per cent of appeals lodged by foreign national prisoners against deportation had been successful.
5. There were a growing number of people whom the Agency had decided to deport, but had not done so, primarily because of difficulties in enforcing returns to particular countries, including the availability of travel documents. In 52 cases of our file sample (39%) the foreign national prisoner had yet to be deported. In May 2011 there were 3,775 foreign national prisoners in the community who had not been removed at the end of their custodial sentence. There was consistent awareness by staff and managers of the difficulties in obtaining travel documents, but no evidence that the issues and timescales were factored systematically into the handling of each case.
6. The Agency continues to rely on accurate referral of foreign national prisoners from prisons and the courts. Work had taken place to reduce the risks of incorrect referrals although the Agency was still seeking to locate 12 people who had been released directly from court or who had not been referred correctly.
7. By January 2011, over 1,600 foreign national prisoners were detained under immigration powers at the end of their custodial sentence, pending deportation. The average length of detention had increased from 143 days in February 2010 to 190 days in January 2011, and 27 per cent of all foreign national prisoners who were detained after their custodial sentence had been detained for longer than 12 months.

8. The Agency's policy presumes the release of foreign national prisoners at the end of their sentence subject to an assessment of the risk they pose to the public and the risk of absconding. However, foreign national prisoners had remained in detention in 94 out of 97 cases sampled (97 per cent), where they had completed their sentence and where deportation was being pursued. Release needed to be authorised at senior Board level, in contrast to a decision to detain, which could be taken by lower management.
9. There was genuine fear and reluctance to release, given the potential implications of a foreign national prisoner committing a further offence, but no evidence that a detailed assessment of the risk of reoffending had taken place in each case. There was also a disparity between the number of people released from detention by the Agency and the number released on bail by the courts. Between February 2010 and January 2011, the Agency released 109 foreign national prisoners from detention compared with 1,102 released on bail by the courts.
10. The Agency had increased the amount of contact with foreign national prisoners who were serving their custodial sentence. However, there were no minimum standards for the level of contact that case owners should have, and consequently there were variations in practice. The Agency had not carried out an assessment to determine whether greater contact would be beneficial in terms of timeliness or accuracy of decision-making.
11. The standard of file management varied, with some containing documents arranged in a logical order, while others lacked information explaining actions that had been taken. In 11 of the cases sampled (8 per cent), information relating to people other than the foreign national prisoner was held on file with no explanation as to why this had happened. In addition, there was a risk that data obtained for foreign nationals who had been acquitted of an offence would be retained unlawfully in the absence of a clear retention or destruction policy.
12. The Agency received 144 complaints from foreign national prisoners between February 2010 and January 2011; the overwhelming majority relating to the standard of service provided by the Agency, and 31 of these had been substantiated. There was an inconsistent understanding amongst staff of what constituted a complaint, with the risk that some complaints were not being identified. Senior managers received feedback on the nature of complaints, although we found no evidence of specific operational changes that had occurred as a result.
13. The Agency routinely monitored the number of foreign national prisoners deported, the number detained following completion of their sentence and the length of detention. It had assessed the likely numbers and costs of foreign national prisoners remaining in detention or living in the community, and monitored risks at senior Board level.
14. Staff changes arising from measures to reduce costs were being introduced with a likely short-term drop in the number of deportations as new staff received training.

## 2. Summary of Recommendations

### **We recommend that the UK Border Agency:**

1. Reduces the number of decisions to deport that are overturned on appeal.
2. Ensures that foreign national prisoners are provided with the reasons why they are being deported at the time the decision is made.
3. Develops clear timescales for obtaining travel documentation in individual cases to ensure that deportation action can be taken more quickly where appropriate.
4. 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.
5. Ensures that each individual decision to detain or release a foreign national prisoner at the end of their sentence takes full account of the risk of reoffending, in line with published policy and any assessments produced by the National Offender Management Service.
6. Changes the level of authorisation required to release foreign national prisoners at the end of their sentence in line with its policy that presumes release.
7. Analyses whether the frequency and nature of contact between case owners and foreign national prisoners can improve the quality and timeliness of decisions.
8. Ensures that 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.

## 3. The Inspection

- 3.1 The role of the Independent Chief Inspector of the UK Border Agency was established by the UK Borders Act 2007 to examine the efficiency and effectiveness of the UK Border Agency. In 2009, the Independent Chief Inspector's remit was extended to include customs functions and the work of UK Border Agency contractors.
- 3.2 The Chief Inspector is independent of the UK Border Agency and reports directly to the Home Secretary.

### **Terms of reference**

- 3.3 The inspection's terms of reference were 'to inspect whether the UK Border Agency is using its powers to deport foreign nationals efficiently and effectively'. In conducting the inspection, we assessed the Agency against the criteria set out in Appendix 1.

### **Methodology**

- 3.4 The on-site phase of the inspection took place between 23 March and 11 May 2011.
- 3.5 A range of methods were used during the inspection, including:
- Reviewing the UK Border Agency's policy and procedures relating to foreign national prisoners;
  - Interviewing caseworkers, managers and UK Border Agency staff in prisons and immigration removal centres;
  - Sampling the case files of 132 foreign national prisoners, whose earliest date for release from custody was July 2010. We chose July 2010 as it allowed us to assess whether caseworking had started early enough and whether foreign national prisoners had been deported after completing their custodial sentence.
- 3.6 The inspection team provided feedback on high-level emerging findings to the UK Border Agency on 4 July 2011.
- 3.7 The inspection identified eight recommendations for improvement. A summary of recommendations is provided on page five of this report.



## 4. Background

- 4.1 Concerns around foreign national prisoners rose to prominence in 2006 when statistics issued by the Home Office revealed that 1,023<sup>1</sup> foreign national prisoners had been released from custody without being considered for deportation. Of these, around 686 foreign nationals had served sentences for what were categorised as ‘other’ offences<sup>2</sup>; 144 people for ‘more serious’ offences<sup>3</sup> and 36 people for the ‘most serious’<sup>4</sup> offences.
- 4.2 The release of these figures led to the replacement of the then Home Secretary and raised a question over how to manage foreign national prisoners nearing the end of their sentences. The issue was bolstered by a thematic report by Her Majesty’s Chief Inspector of Prisons<sup>5</sup> soon after the Home Office figures were released. The report criticised the then Immigration and Nationality Directorate<sup>6</sup> for failing to work coherently and efficiently with foreign national prisoners to ensure that they received appropriate attention, support and a plan of action after their sentences finished.

### **The foreign national prisoner population and detention**

- 4.3 The term foreign national prisoner (FNP) is commonly used to describe any non-British citizen under the authority of the criminal justice system. This means that people who have been remanded, convicted or sentenced for a criminal offence, are regularly referred to as foreign national prisoners. The term is also frequently used to refer to:
- Foreign nationals who are detained under immigration powers after they had served their sentences, either in prison or an immigration removal centre; and
  - Foreign nationals who have been released into the community by the court service on bail or by the UK Border Agency while their deportation status is considered.
- 4.4 We recognise that foreign national prisoners who have completed their custodial sentences are effectively ex-prisoners in the same way that British nationals are. However, for the purposes of this report and for ease of reading, we refer to all foreign nationals in custody, detention and those released into the community as foreign national prisoners.
- 4.5 Between 1996 and 2006, the number of foreign national prisoners in prisons in England and Wales doubled, but it has remained relatively constant over the last five years. The most recent figures show that there are currently 10,779 foreign nationals in the prisons estate, representing approximately 13 per cent of the overall prison population. 10,091 (94 per cent) of the population are male and 688 (six per cent) are female<sup>7</sup>.

1 This figure covered the period between February 1999 and March 2006.

2 ‘Other’ offences include arson, burglary, deception, fraud, theft, drugs offences, driving offences, robbery, false imprisonment, customs offences and assisting illegal entry into the UK. It should be noted that the official figures showed 158 FNPs as ‘not concluded’.

3 ‘More serious’ crimes refers to other sex offences, kidnapping, grievous and actual bodily harm, indecent assault and other violent crimes.

4 ‘Most serious’ offenders were categorised as people convicted of murder, manslaughter, rape and child sex offences.

5 Foreign National Prisoners: a thematic review, HMIP July 2006.

6 At the time of HMIP’s thematic review, immigration functions were the responsibility of the Immigration and Nationality Directorate, a directorate within the Home Office.

7 Offender Management Statistics Quarterly Bulletin, England and Wales; as of 30 June 2011.

- 4.6 Foreign national prisoners are located in a number of prisons across the UK. In some prisons there are large numbers of non-British nationals while in others a much smaller number of people are accommodated. However, since 2008, there has been some reorganisation resulting in a concentration of adult male foreign national prisoners in certain prisons such as HM Prison Canterbury and HM Prison Bullwood Hall. This more concentrated population has not included women and young people, who continue to be accommodated across a number of other prisons.
- 4.7 Foreign national prisoners come from many different countries. For example, in our file sample there were 45 different nationalities represented. The type of offence committed by foreign national prisoners varies. A breakdown of the index offences committed by the 132 foreign national prisoners whose files we sampled can be seen in Figure 1.

**Figure 1: Breakdown of index offences**

| Index offence               | Number     | Percentage (%) |
|-----------------------------|------------|----------------|
| Fraud and forgery           | 36         | 27             |
| Drugs                       | 30         | 23             |
| Violence against the person | 29         | 22             |
| Robbery                     | 13         | 10             |
| Theft and handling          | 7          | 5              |
| Sexual                      | 6          | 5              |
| Burglary                    | 2          | 2              |
| Motoring                    | 1          | 1              |
| Other                       | 8          | 6              |
| <b>TOTAL</b>                | <b>132</b> | <b>100</b>     |

- 4.8 Of the 132 files sampled, the shortest custodial sentence received was four months and the longest was life imprisonment<sup>8</sup>.

### **The process for considering whether foreign national prisoners should be deported**

- 4.9 Where a foreign national has received a custodial sentence, prisons are required by the National Offender Management Service (NOMS) to refer details of the person to the UK Border Agency in the following circumstances:
- Where deportation has been recommended by the court;
  - If the person is an EEA national sentenced to 24 months or more, or 12 months where the offence involves drugs, sex or violence<sup>9</sup>;
  - If the person is a foreign national sentenced to 12 months or more;
  - If the person is a foreign national sentenced to less than 12 months but where the current sentence and any previous sentences within the last five years total 12 months or more.

<sup>8</sup> Two foreign national prisoners had been sentenced to indeterminate sentences, therefore the length of their sentence was not known.

<sup>9</sup> This does not apply to nationals of the Republic of Ireland.

- 4.10 A referral should also be made where the criteria above are met but the nationality of the person is unclear (if, for example, they do not have any documentation to provide evidence). Cases should be referred to a dedicated part of the UK Border Agency, which is responsible for considering whether foreign national prisoners should be deported. This is known as the Criminal Casework Directorate (CCD). At the time of the inspection, CCD had 868 members of staff based in Croydon, Liverpool and Leeds with a small number based in prisons.
- 4.11 The Agency then needs to consider the relevant law. Provisions in the UK Borders Act 2007 came into force on 1 August 2008 that introduced an ‘Automatic Deportation’ provision for foreign national prisoners. Under the Act<sup>10</sup>, the Secretary of State is required to make a Deportation Order against a foreign national prisoner who has received a sentence of imprisonment of 12 months or more (in a single sentence for a single conviction), unless they fall within one of six exceptions<sup>11</sup>. The exceptions are:
- Where deportation would breach the person’s rights under the European Convention of Human Rights (ECHR) or the UK’s obligations under the Refugee Convention;
  - Where the person was under the age of 18 on the date he or she was convicted;
  - Where the person is a citizen of a country belonging to the European Economic Area (EEA), is exercising treaty rights, or is a close relative of an EEA national exercising treaty rights and deportation would breach those rights;
  - Where the person is subject to extradition proceedings instigated by another government;
  - Where the person is held under specified provisions of the Mental Health Act 1983 or its associated legislation; and
  - Where deportation would contravene the United Kingdom’s obligations under the Council of Europe Convention on Action Against Trafficking in Human Beings.
- 4.12 If a foreign national prisoner does not meet the Automatic Deportation criteria they may still face deportation where:
- The court has recommended that a person should be deported, regardless of the length of their sentence<sup>12</sup>;
  - It would be ‘conducive to the public good’. This might occur where a person had received two or three sentences over a particular period, which in total amounted to 12 months<sup>13</sup>;
  - There are grounds to deport a person for reasons of public policy, public security or public health. These provisions apply to nationals of the EEA and their families where they are exercising Treaty rights<sup>14</sup>.
- 4.13 Where a person has been sentenced to less than 12 months and their deportation is not considered to be conducive to the public good, they may nevertheless be removed if they do not have permission to remain in the UK. This is referred to as administrative removal, rather than deportation.

<sup>10</sup> Section 32(5).

<sup>11</sup> At Section 33. In addition a person is also exempt if they are subject to Sections 7 or 8 of the Immigration Act 1971. Section 7 provided an exception to deportation for certain people who were resident in the UK when the 1971 Act came into force; Section 8 provided exceptions for seamen, aircrews and other ‘special cases’.

<sup>12</sup> Section 3(6), Immigration Act 1971.

<sup>13</sup> Section 3(5)(a), Immigration Act 1971.

<sup>14</sup> Regulation 19(3)(b) Immigration (European Economic Area) Regulations 2006.

## Timing and nature of deportation

- 4.14 The law provides for foreign national prisoners to be deported before they complete their sentence in the UK. This is known as the Early Removal Scheme and means that people may be deported up to 270 days before they would otherwise be released. The purpose of this provision is to ensure that foreign nationals liable for deportation leave the UK as soon as possible, thereby reducing the costs of keeping them in custody. Under this mandatory scheme, prison governors approve the removal of eligible foreign national prisoners<sup>15</sup>, unless there are exceptional or compelling reasons why they should not be deported.
- 4.15 Foreign national prisoners can make an application at any time to be removed under a Facilitated Returns Scheme. If successful, they can be deported once they fall within the Early Removal Scheme period. This scheme provides foreign national prisoners with a package consisting of a cash payment (which can only be accessed once they have left the UK) and a reintegration allowance to help the foreign national prisoner adapt to life in their own country. The package decreases if the foreign national prisoner does not choose to leave during their custodial sentence. The purpose of the scheme is again to encourage foreign national prisoners to leave the UK as soon as possible and reduce the costs associated with continued custody.
- 4.16 The amount that foreign national prisoners are entitled to under the scheme can be seen in Figure 2.

**Figure 2: Incentives available under Facilitated Returns Scheme**

|   | Application received before 01.09.2010   | Application received after 01.09.2010 and 30.09.2010 and is removed before 31.03.2011   | After 01 October 2010                                       |
|---|--|---|---|
| <b>Application made before custodial sentence completed</b> | Prepaid card for £500 on departure and £5,000 (less the £500 cash payment made on removal) | Prepaid card for £500 on departure, £5,000 (less the £500 cash payment made on removal) | Maximum of £1500. This includes £500 on a prepaid cash card |
| <b>Application made after custodial sentence completed</b>  | £3,000 (less the £500 prepaid card payment made on removal)                                | £3,000 (less the £500 prepaid card payment made on removal)                             | Maximum of £750. This includes £500 on a prepaid cash card  |

## Rights of appeal

- 4.17 Foreign national prisoners are entitled to appeal against their deportation to the independent Courts and Tribunal Service. If their deportation is under the automatic deportation provisions, they may only appeal once they have left the UK, unless they claim that deportation would breach their human rights, be contrary to the Refugee Convention or, if they are an EEA national, that deportation would breach their rights under Community treaties. Those people deported prior to the Act's commencement or under other deportation provisions can appeal while they are in the UK and cannot be deported until their appeal has been determined.

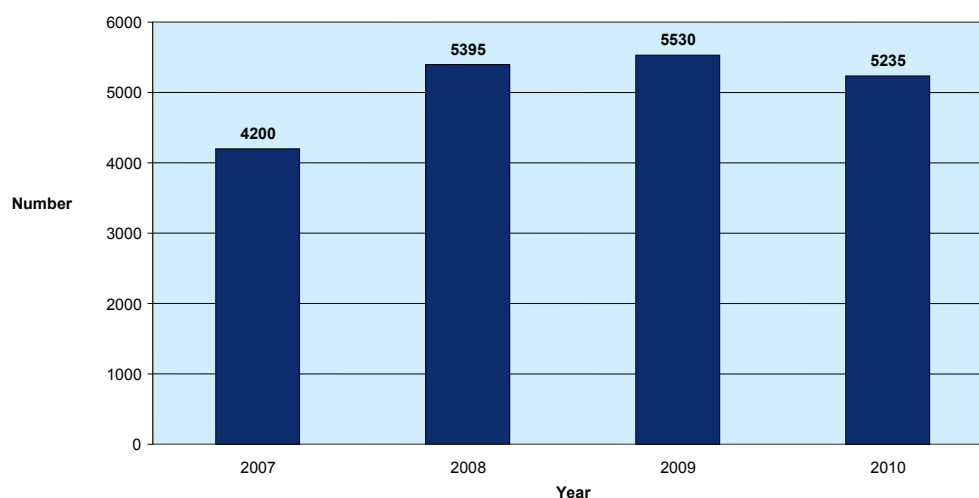
<sup>15</sup> FNPs are ineligible if they are serving an indeterminate sentence; are on remand or detained under immigration powers; are subject to further custodial requirements; have outstanding criminal charges or an outstanding confiscation order.

## 5. Inspection Findings: Decisions on the entry, stay and removal of people should be taken in accordance with the law and the principles of good administration

### Number of foreign national prisoners removed

Between 2007 and 2010, 20,360<sup>16</sup> foreign national prisoners had been removed from the UK. Figures for each year are set out in Figure 3.

**Figure 3: Foreign National Prisoners removed / deported by year**



### How foreign national prisoners were removed

- 5.1 In 2010, more than 2,500 foreign national prisoners had been deported under a Facilitated Returns Scheme (FRS) – 49 per cent of the total.<sup>17</sup> This represented an increase from the figures for 2009 when 30 per cent were deported under the scheme.
- 5.2 The costs of the scheme are set out in Figure 4.

**Figure 4: Facilitated Return Scheme costs**

| Period of time               | Approximate cost (£)   |
|------------------------------|--|
| October 2006 – March 2009    | 4.3 million <sup>18</sup>  |
| 2009 – 2010 (Financial year) | 7.1 million (including 2.3 million EU funding) <sup>19</sup>             |
| 2010 – 2011 (Financial year) | 9.7 million (including 2.7 million EU funding) – projected <sup>20</sup> |

<sup>16</sup> Data provided by UKBA to the Home Affairs Committee: UKBA advised that these figures were subject to data cleansing.

<sup>17</sup> Foreign National Prisoners: Operating Review, May 2011.

<sup>18</sup> Home Office response to a Freedom of Information request, 2 July 2010: <http://www.homeoffice.gov.uk/about-us/freedom-of-information/released-information1/foi-archive-immigration/15085-ERS-and-FRS/?view=Standard&pubID=830739>

<sup>19</sup> Response by Damian Green, MP, Minister of State (Immigration), 14 December 2010 to questions by Keith Vaz, MP.

<sup>20</sup> Ibid

- 5.3 A proportion of these people had been deported prior to the end of their custodial sentence under the Early Removal Scheme, which according to estimates from the Agency meant around 500 prison places in any given month were no longer taken by foreign nationals<sup>21</sup>. The estimated savings were £1.5 million per month to the National Offender Management Service.
- 5.4 We believe that the focus on both the Early Removal Scheme and the Facilitated Returns Scheme is a sensible approach for the Agency to take. Deportation – whatever the method and timing – incurs costs to the taxpayer. The evidence points clearly to these schemes being more cost-effective than enforcing deportation at the end of a person’s sentence. For example, for applications made after 1 October 2010, the maximum package available to a person deported under the FRS would be £500 in cash and £1,000 payment in kind for reintegration assistance (e.g. purchase of a vehicle or payment of rent for shop premises).
- 5.5 In comparison, the cost of detaining a person for two months at the end of their sentence would be £6,600. It also affords the individual greater dignity and, with the FRS and the provision of reintegration assistance, the opportunity to adapt more quickly to life in their country of origin. Given the scheme’s clear benefits, it is important that the Agency continues to promote it consistently and effectively.

### **Decision-making**

- 5.6 When making a decision on whether a foreign national prisoner should be deported, the Agency should consider all the evidence available to it. Although the onus is on foreign national prisoners to inform the Agency of any reasons why they should not be deported, the Agency should take all reasonable steps to obtain and consider information that will allow it to make the correct decision. Depending on the facts of the case, this may require case owners to obtain information from other public services – such as the police or local authorities – or to proactively seek further information from foreign national prisoners themselves. Such an approach minimises the risk of incorrect decisions and the consequent cost of appeals.
- 5.7 Our file sampling showed variation in the level of information used by case owners to make their decision. In some cases, case owners proactively sought information from prisons and the probation service. This enabled a complete picture of the foreign national prisoner’s circumstances to be available before the decision was made. An example of this approach is set out in Case Study 1.

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21 Foreign National Prisoners: Operating Review, May 2011.

## Case Study 1 – Basing a decision to deport on all available evidence

### The foreign national prisoner Mr S:

- received a sentence of four years' imprisonment for drug offences.

### The UK Border Agency:

- wrote to Mr S informing him that he was liable to be deported and asking for any reasons why he should not be deported to be provided within 28 days;
- contacted both the prison and probation services to obtain Mr S's pre-sentence report and assessment of risk to the public;
- contacted the police to obtain additional information about Mr S's former partner in the UK in light of his claim that deportation would breach Article 8 (right to a private and family life) of the European Convention of Human Rights; and
- assessed this evidence as a whole before deciding that deportation was appropriate.

### Chief Inspector's comments:

- The Agency correctly allowed Mr S 28 days to provide reasons why he should not be deported.
- In light of the claim that deportation would breach Article 8 of the ECHR, the Agency identified the need to make further enquiries and contacted the police to provide additional relevant information.
- Ensured that an assessment of risk provided by the prison and probation services informed the decision to deport.

- 5.8 However, in other cases deportation decisions had been made before the foreign national prisoner had been given sufficient opportunity to set out any reasons why they should not be deported. An example of this is set out in Case Study 2.

## Case Study 2 – Making a decision before the evidence was available in full

### The foreign national prisoner Mr E:

- received a sentence of nine months' imprisonment for using a copy of a stolen passport to enquire about bank charges. The court also recommended that he be deported following his custodial sentence.

### The UK Border Agency:

- wrote to Mr E on 7 May 2009 informing him that he was liable for deportation and asking for any reasons why he should not be deported to be provided within 28 days;
- decided to make a Deportation Order on 27 May 2009 – before the 28 days had elapsed – stating that 'No representations have been received from you';
- revoked the Deportation Order against Mr E on 25 March 2011 because MR E had not been given the appropriate time to provide any reasons why he should not be deported.

### Chief Inspector's Comments:

- It was unacceptable that a decision to deport was made before Mr E had been given the full 28 days to set out any reasons why he should not be deported.
- Mr E was detained unnecessarily, as a result of this error, for 180 days at a cost of £19,800.

- 5.9 The Agency is required to inform a foreign national prisoner of the reasons why it intends to deport them. Clearly this is necessary so that the foreign national prisoner can consider whether the Agency's reasons have taken account of any representations they have made and, consequently, whether they should appeal. In the majority of cases that we sampled, the Agency had clearly set out the reasons at the time it informed the foreign national prisoner it intended to deport them. However, this had not happened in five cases, an example of which is set out in Case Study 3.

## Case Study 3 – Making a decision to deport without providing the reasons why

### The foreign national prisoner Mr M

- received a sentence of 12 months' imprisonment for affray.

### UK Border Agency:

- wrote to Mr M on 8 July 2010, informing him that it had made a decision to deport him but did not provide any reasons for this;
- informed Mr M that if he wished to appeal he would need to do so within five days (as he was detained).
- A Senior Caseworker (SCW) did not authorise the reasons why he should be deported until 22 July 2010, two weeks after Mr M had been told he was being deported.
- Mr M appealed against deportation on 15 July.

### Chief Inspector's comments:

- It was unacceptable that Mr M did not receive the reasons why he was being deported until 26 July 2010. This was 18 days after he had been told he was being deported.
- He was therefore obliged to appeal to safeguard his position without being aware of the reasons for the decision.



5.10 The Agency must prevent this in future. It is imperative that people are given the reasons why a decision has been made. Failure to do so is not only unfair on individuals; it may also result in unnecessary appeals being made at additional cost to the taxpayer. We also believe that this practice could be contrary to legislative provisions that require the Agency to give reasons for immigration decisions (regulation 5 of the Immigration [Notices] Regulations 2003).

### Foreign national prisoners who are not deported

#### Those entitled to remain

- 5.11 It is important to note that the law provides for people to remain in the UK if, for example, deportation would breach their human rights or the UK's obligations under the Victims of Trafficking Convention.
- 5.12 Between March and December 2010, the Agency gave permission to 151 foreign national prisoners to remain in the UK, as deportation would have breached their human rights. In the majority of cases this reflected Article 8 of the ECHR – the right to private and family life – where issues such as the length of time a foreign national prisoner had lived in the UK or whether they had children here would be relevant. Between February 2010 and January 2011, 425 foreign national prisoners won their appeal against the Agency's decision to deport them; this was 32 per cent of the appeals lodged against decisions to deport. Again, these were won primarily on the grounds of Article 8. All those who won an appeal were given, or were in the process of being given, permission to remain in the UK.
- 5.13 Our file sample contained similar findings. Thirty-three cases – 25 per cent of the sample – resulted in the foreign national prisoner being given permission to remain in the UK, either on initial consideration by the Agency or following an appeal. Where appeals were allowed, the majority were on the basis that deportation would place the UK in breach of its obligations under the Human Rights Act. Of the 16 cases in the sample where appeals were allowed, 63 per cent of cases were allowed for these reasons as set out in Figure 5.

**Figure 5: Basis of allowed appeals**

| Basis of allowed appeal  | Number    | Percentage (%) |
|--|-----------|----------------|
| Deportation would breach human rights                            | 10        | 63             |
| Deportation not justified in light of all evidence <sup>22</sup> | 4         | 25             |
| Deportation would breach rights under Refugee Convention         | 1         | 6              |
| More than one ground   | 1         | 6              |
| <b>TOTAL</b>   | <b>16</b> | <b>100</b>     |

5.14 The Agency was carrying out work to assess the reasons for allowed appeals and had instituted a quarterly review to identify cases where deficiencies had contributed to the appeal being allowed. It is important that this continues and results in action, given the importance of reducing the number of allowed appeals, both for individuals who are entitled to remain, and because the cost is considerable – over £480,000 for the 425 appeals that were allowed between February 2010 and January 2011.<sup>23</sup>

<sup>22</sup> Where the court found that the presumption in favour of deportation was outweighed, where deportation was not contrary to the Refugee Convention or Human Rights Act.

<sup>23</sup> Based on the cost of an oral hearing for asylum cases of £1,137. The Agency was unable to provide an alternative cost for deportation appeals.

5.15 We are in no doubt that the interpretation of Article 8 is complex and case law continues to evolve. However, the fact that nearly three times as many cases were granted on appeal, compared with the number granted by the Agency initially, is of considerable concern. In interviews, staff and managers consistently set out their view that the UK courts and tribunals had increasingly interpreted Article 8 more leniently than the ECHR. As a result, staff and managers thought that the domestic courts were more likely to find that deportation would be unlawful than the ECHR would. We are not in a position to critique the interpretation placed on Article 8 by the courts, and note that the government recently launched a consultation on the balance to be struck between an individual's right to respect for private and family life and the public interest in public protection and maintaining immigration controls. However, the Agency must work to reduce the number of decisions that are overturned on appeal and take full account of the courts' decisions in deciding whether deportation action is appropriate or whether it would breach a person's rights under Article 8. If not, there will continue to be a cycle of appeals, at considerable cost to the taxpayer even though the outcome will eventually be that the foreign national prisoner is entitled to remain in the UK.

### **Other cases where foreign national prisoners are not deported**

- 5.16 Of the files we sampled, 47 had resulted in the foreign national prisoner being deported – 36 per cent. As indicated in paragraph 5.12 above, a further 33 had been given permission to remain – 25 per cent. The remaining 52 – 39 per cent – had not yet been deported, but were not entitled to be given permission to remain in the UK, even after an appeal. In all these cases the Agency was pursuing deportation action but was unable to physically deport the individual. The principal reason was due to the difficulty in obtaining travel documentation for the foreign national prisoner.
- 5.17 This is a significant issue that needs to be understood, addressed and managed appropriately. In May 2011, 3,775 former foreign national prisoners had been released from custody, as there was no prospect of them being deported within a reasonable period of time, and were living in the community. Of these, 3,259 had served sentences for what were categorised as 'other' offences; 429 for 'more' serious' offences and 87 for the 'most serious' offences. In addition, over 1,600 foreign national prisoners remained in detention under immigration powers, having completed their sentence.
- 5.18 There were two main categories of person – those who could not be deported because of the general situation in their country of origin, and those where the Agency was pursuing appropriate travel documentation to allow deportation to take place. This is because a person cannot be deported from the UK unless they have a valid travel document. Where the foreign national prisoner has their own national passport, there will normally be no difficulties with deportation. Where the person does not have their own passport, the Agency needs to obtain a further document from a foreign national prisoner's Embassy or High Commission before it can proceed with deportation. These documents are called Emergency Travel Documents (ETDs) and the process for obtaining one, including the time taken, will vary depending on the relevant country and the checks they wish to make to verify a person's nationality.
- 5.19 A person's cooperation with the process of obtaining an ETD can determine whether or not an ETD is issued. Where foreign national prisoners are unable or unwilling to co-operate with the re-documentation process, this poses a significant challenge to the Agency's ability to remove them. The Agency had taken steps aimed at encouraging people to cooperate with the removal process. It had worked with the National Offender Management Service (NOMS) to embed Agency staff into some prisons housing adult male prisoners. Part of the role for these staff was to increase the amount of contact between foreign national prisoners and the Agency, with the aim of obtaining information about, and evidence of, the foreign national prisoner's identity and nationality. This increased contact had contributed to more foreign national prisoners choosing to return under both the Early Removal and Facilitated Returns Schemes.

- 5.20 We appreciate that the re-documentation process is far from straightforward. Even where foreign national prisoners cooperate and provide detail, political and diplomatic issues can affect the availability of documentation, as can relations with Embassies and High Commissions. Staff and managers were aware of the difficulties in obtaining travel documentation from particular countries. However, we saw little evidence that cases were prioritised on the basis of the length of time and potential difficulty in obtaining travel documentation.
- 5.21 The scope of this inspection did not include an assessment of the Agency's processes for obtaining, or using, ETDs in detail. However, given the findings in both this inspection and our inspection of asylum<sup>24</sup>, we intend to carry out a more detailed examination of this in the future.
- 5.22 We recognise there are no easy solutions in cases where a person cannot be deported because of the particular situation in the country of origin and where they have not chosen to leave voluntarily. Senior managers informed us that several options were being considered, which ultimately may require policy changes. However, we found no evidence that solutions were imminent. Given the number of people yet to be deported and the forecast that this will rise, it is essential that these cases are managed actively with regular assessments of whether it is feasible to enforce deportation; the appropriate levels of reporting to the Agency; and promotion of the Facilitated Returns Scheme. Careful consideration also needs to be given to the point at which an individual may qualify to remain in the UK on human rights grounds in light of any growing connections with the UK and the length of time here.

### **The referral of foreign national prisoners**

- 5.23 This inspection focused specifically on the Agency's handling of cases once they had been referred to it and we did not examine in detail the overall process for referral of cases to the Agency. However, in light of the potential risks, we highlight briefly some of the issues below.
- 5.24 The Agency's process for deporting foreign national prisoners relies on effective communication with other bodies working in the Criminal Justice System, such as prisons and the courts, who identify foreign national prisoners. We found that following the release of foreign national prisoners without consideration in 2006, the Agency had worked more closely with other bodies to develop and refine processes for the identification and referral of foreign national prisoners. However, there remain two particular risks that require careful monitoring: releases directly from court and releases because of nationality.

### **Releases directly from court**

- 5.25 Foreign national prisoners who meet the deportation criteria can be released into the community directly from the court without returning to prison. This might occur, for example, if a person had received a short sentence and effectively served this while on remand. Between 2009 and 2011, a total of 48 people were released in this way, only 39 of whom had been located by the Agency with attempts still being made to locate the remaining nine.
- 5.26 This risk had been identified by the Agency and was described as 'our biggest challenge in the referral process'. The Agency had taken steps to mitigate this risk and had reached agreement with Her Majesty's Court Service that it would notify the Agency of all foreign nationals released in this way.

<sup>24</sup> 'Asylum: Getting the balance right? A thematic inspection: July – November 2009; [http://icinspector.independent.gov.uk/wp-content/uploads/2010/03/Asylum\\_Getting-the-Balance-Right\\_A-Thematic-Inspection.pdf](http://icinspector.independent.gov.uk/wp-content/uploads/2010/03/Asylum_Getting-the-Balance-Right_A-Thematic-Inspection.pdf)

## Releases because of nationality

- 5.27 The identification of foreign national prisoners falls to prison staff in the first instance, and the verification that a person is a foreign national can be difficult. Prisons are required to inform the Agency when a foreign national prisoner, or somebody whose nationality is unclear, arrives in prison and meets the criteria for deportation. Full instructions on mandatory referral to the Agency are clearly set out in a Prison Service Order<sup>25</sup>. However, prison staff are often reliant on whether the foreign national prisoner is certain about their own nationality or what they are able or prepared to disclose to prison staff on arrival. Therefore there is a risk that the right people are not always brought to the attention of the Agency. The Agency informed us that nine such cases were identified in 2009-10 and six cases in 2010-11. Three of these had yet to be located by the Agency. We noted that the Agency was working with the Association of Chief Police Officers (ACPO) to implement a process where nationality and identity will be determined when a person is charged.

### We recommend that the UK Border Agency:

- Reduces the number of decisions to deport that are overturned on appeal.
- Ensures that foreign national prisoners are provided with the reasons why they are being deported at the time the decision is made.
- Develops clear timescales for obtaining travel documentation in individual cases to ensure that deportation action can be taken more quickly where appropriate.
- 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.

<sup>25</sup> Prison Service Orders are national instructions issued to Her Majesty's Prison Service by the National Offender Management Service on all aspects of prison life. They are currently being replaced by Prison Service Instructions (PSI), which will set out both mandatory and discretionary practice in future. A new PSI is due to be issued to prison governors later this year. The current guidelines governing FNPs and immigration issues is set out in PSO 4630 and are available at [http://pso.hmprisonservice.gov.uk/PSO\\_4630\\_immigration\\_and\\_foreign\\_nationals.doc](http://pso.hmprisonservice.gov.uk/PSO_4630_immigration_and_foreign_nationals.doc)

## 6. Inspection Findings:

### Decisions to detain must be lawful

### Functions should be carried out having regard to the need to safeguard and promote the welfare of children

#### **The power to detain foreign national prisoners**

- 6.1 The UK Border Agency has the power to detain foreign national prisoners in Immigration Removal Centres or prisons once their custodial sentence has finished, for the purpose of removing them from the UK. The power may be used where the Agency has yet to complete consideration of whether the foreign national prisoner should be deported or because, having made the decision to deport, it believes it is necessary to detain pending the deportation. Detention on this basis, in accordance with case-law<sup>26</sup>, may be for some time.
- 6.2 The Agency's detention policy is set out in its Enforcement Instructions and Guidance. Cases concerning foreign national prisoners are subject to the general policy, which has a presumption in favour of temporary admission or release. The policy then goes on to say:

*'Thus, the starting point in these cases remains that the person should be released on temporary admission or release unless the circumstances of the case require the use of detention. However, the nature of these cases means that special attention must be paid to their individual circumstances. In any case in which the criteria for considering deportation action (the "deportation criteria") are met, the risk of reoffending and the particular risk of absconding should be weighed against the presumption in favour of temporary admission or temporary release. Due to the clear imperative to protect the public from harm from a person whose criminal record is sufficiently serious as to satisfy the deportation criteria, and/or because of the likely consequence of such a criminal record for the assessment of the risk that such a person will abscond, in many cases this is likely to result in the conclusion that the person should be detained, provided detention is, and continues to be, lawful. However, any such conclusion can be reached only if the presumption of temporary admission or release is displaced after an assessment of the need to detain in the light of the risk of reoffending and/or the risk of absconding.'*

- 6.3 Given that the power to detain exists in order for the Agency to facilitate a person's removal, detention will only be lawful while there is a 'realistic prospect' of the Agency removing them, within a 'reasonable timescale', which will depend on the facts of the case.

#### **Number of foreign national prisoners detained**

- 6.4 In February 2007, approximately 1,300<sup>27</sup> foreign national prisoners were detained under immigration powers, while the Agency pursued deportation action against them. By January 2011 this had increased to 1,667, which cost the Agency £55m per annum. Of these, 907 foreign national prisoners (54 per cent) were detained in IRCs, with the remaining 760 (46 per cent) detained in prisons.

<sup>26</sup> R -v- Governor Durham Prison, Ex parte, Hardial Singh, 1984 1 WLR 704 706D,

<sup>27</sup> Letter from UKBA's then Chief Executive to the Home Affairs Committee, 19 February 2007.

- 6.5 The Agency's own preliminary forecasts indicated that the total number of foreign national prisoners detained under immigration powers would continue to increase.

### **Length of detention**

- 6.6 The average length of time in detention for foreign national prisoners who were detained under immigration powers at the end of their custodial sentence had increased significantly between February 2010 and January 2011<sup>28</sup>. In February 2010, foreign national prisoners were detained for an average of 143 days; by January 2011 this had increased to 190 days, an increase of 33 per cent. We found that this was due to a higher percentage of foreign national prisoners having been detained under immigration powers for over 12 months. In May 2011, 27 per cent of all foreign national prisoners who were detained after their custodial sentence had been detained for longer than 12 months. The Agency predicted that the percentage of foreign national prisoners detained for longer than 12 months would continue to increase. Senior managers indicated that the increase was due primarily to the number of foreign national prisoners who were not complying with attempts to obtain travel documentation and that this was influenced by more foreign national prisoners being deported under the Early Removal Scheme and were therefore not being detained at the end of their sentence.

### **Factors affecting length of detention**

#### **Timeliness of consideration**

- 6.7 Given the deprivation of liberty for the foreign national and the cost to the taxpayer, it is essential that time spent in detention after completion of a sentence is kept to an absolute minimum. One of the main factors affecting this is the point at which the Agency begins consideration of deportation.
- 6.8 The Agency's policy is that deportation decisions should not be made more than 18 months before a foreign national prisoner's release date. This reflects case law (*Chindamo v SSHD 00/TH/02345*), which says that the appropriate time for a deportation decision to be taken is towards the end of a prison sentence, shortly before deportation is carried out. Staff and managers were aware of this and a database was used to monitor when action should be taken on cases.
- 6.9 However, during our file sample we found clear examples where the Agency had not made a decision as early as it could have on whether a person should be deported. As a result, the foreign national prisoners were potentially detained for longer than necessary. An example of such a case can be seen in Case Study 4.

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<sup>28</sup> Figures refer only to those detained in Immigration Removal Centres. The Agency was unable to provide comparable figures for those detained in prisons.

#### Case Study 4 – Example of delay in caseworking

##### **The foreign national prisoner Mr A:**

- claimed asylum in January 2007;
- received a sentence of 12 months' imprisonment for a sexual assault in January 2010; and
- completed his custodial sentence in July 2010.

##### **The UK Border Agency:**

- had not made a decision on Mr A's asylum claim between 2007 and completion of Mr A's sentence;
- detained Mr A under immigration powers in July, immediately after he had completed his custodial sentence;
- carried out an asylum screening interview with Mr A on 17 January 2011; and
- made a decision to make a Deportation Order, in which his asylum claim was rejected, which was served on Mr A on 26 May 2011.

##### **Chief Inspector's comments:**

- There was no explanation of why the asylum claim had not been considered between 2007 and 2010.
- There was no assessment of the cost implications or the impact on Mr A of continued detention due to the:
  - failure to consider his asylum claim between his sentence in January 2010 and the end of his custodial sentence in July 2010;
  - delay of approximately six months between his detention under immigration powers and his asylum interview; and
  - further delay of four months between his asylum interview and the decision to refuse his claim.

- 6.10 It is essential that the Agency considers the complexity of each foreign national prisoner's case in assessing when casework should begin. Clearly, there are greater complexities if a person has raised a fear of return to their own country. Similarly, if a person has spent a number of years in the UK or has family in the UK, there will need to be greater consideration of the factors relevant to deportation.
- 6.11 This is particularly relevant where the foreign national prisoner has children in the UK, as occurred in 38 of the 132 files we considered. The case owners we interviewed were fully aware of the Agency's obligations to safeguard and promote the welfare of children. There was consistent evidence from interviews that, at the very least, the Agency's Office of the Children's Champion were consulted in any case where it was proposed to deport a foreign national prisoner who had a child in the UK. Case owners were also required to consult with local authority children's services and the Children and Family Court Advisory and Support Service to obtain information on the child's circumstances.
- 6.12 Although this awareness existed, and despite the added complexity of these and other types of cases, we did not find evidence that the Agency had processes in place to identify and highlight them so they received intensive caseworking as early as possible. In particular, we did not find there was any imperative to avoid, as far as possible, the detention of a foreign national prisoner after the end of their sentence.

## The presumption of release

- 6.13 Our file sample indicated that foreign national prisoners were highly likely to be detained under immigration powers at the end of their custodial sentence. Of 97 cases where the person had completed their custodial sentence and the Agency was seeking their deportation<sup>29</sup>, 94 had been detained under immigration powers (97 per cent). In one case, the foreign national prisoner had been released and in a further two cases there was no indication on the file of whether or not the person had been detained.
- 6.14 We noted the Agency's policy which sets out that 'substantial weight' must be given to the risk of further offending and of harm to the public when considering whether detention is appropriate and that 'particularly substantial weight' must be given when someone has been convicted of particular offences, including violence against the person and sexual offences.
- 6.15 Clearly, there will be a number of cases where the prospect of removal is imminent and the risk of further offending or absconding is such that detention is appropriate. However, of the cases sampled by us where the foreign national prisoner had been detained under immigration powers, the highest percentage concerned convictions for fraud and forgery and these offences are not listed in the Agency's policy as offences where 'particular weight' or 'particularly substantial weight' should be given to the risk of further offending or harm to the public. Despite this, such cases were also overwhelmingly likely to result in detention. The individual circumstances of such cases may again justify detention, but the sheer weight of cases resulting in detention is of concern and, in our view, there remains a culture that detention is 'the norm'. Indeed, one member of staff said, 'A decision to deport equals a decision to detain.' The Agency needs to ensure that it takes full account of any reports that are provided by the National Offender Management Service detailing the risk of a person reoffending, and that it sets out in detail the evidence of risk of reoffending in each decision to detain.
- 6.16 In interviews with staff and managers, we encountered genuine fear and reluctance to release foreign national prisoners from detention in case they committed a further crime. This, together with the potential media and political scrutiny, is fuelling a culture where the default position is to identify factors that justify detention rather than considering each case in accordance with the published policy.
- 6.17 There is a clear disparity between the approach taken by the Agency in deciding to detain the overwhelming majority of foreign national prisoners at the end of their sentence and decisions to release taken by the Tribunal following applications for bail. The respective figures for the period from February 2010 – January 2011 are set out below and demonstrate that the number released by the Agency was less than ten per cent of the number released by the Tribunal.

**Figure 6: Number of foreign national prisoners released from detention (Feb 2010 – Jan 2011)**

| Released from detention   | Number of foreign national prisoners |
|---|--------------------------------------|
| By the UK Border Agency (and subject to a requirement to report to the Agency on a regular basis) | 109                                  |
| By the Tribunal   | 1,102                                |
| <b>TOTAL</b>  | <b>1,211</b>                         |

<sup>29</sup> This does not include cases where the foreign national prisoner had been deported prior to the end of their custodial sentence.



- 6.18 This approach to detention was reinforced by the level of authorisation required in the Agency to either detain or release a foreign national prisoner. In accordance with the Agency's own guidance, our file sample showed that the initial decision to detain foreign national prisoners at the end of their sentence was, in most cases, taken at lower management level (the Higher Executive Officer grade). This contrasted starkly with the procedure for release of a foreign national prisoner that had to be authorised by a senior manager of Board level (and, up until shortly before the inspection had to be authorised personally by the Chief Executive of the Agency). This was a level even higher than required to authorise detention for 12 months or more (senior manager of Director level).
- 6.19 The different levels of authority required to release or detain sit very uneasily with a policy which presumes that foreign national prisoners will be released at the end of their custodial sentence. We recognise the need to ensure that decisions to release are consistent, one of the reasons referred to in interviews with managers. However, consistency of decision-making is equally, if not more important in decisions to detain foreign national prisoners, and this cannot justify a procedure that stands in such stark contrast to the published policy.

**We recommend that the UK Border Agency:**

- Ensures that each individual decision to detain or release a foreign national prisoner at the end of their sentence takes full account of the risk of reoffending in line with published policy and any assessments produced by the National Offender Management Service.
- 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.

## 7. Inspection Findings:

# All people should be treated with dignity and respect and without discrimination except where the law permits difference of treatment

7.1 We noted that the UK Border Agency had taken steps to work more closely with foreign national prisoners before they reached the end of their custodial sentence. Some prisons had dedicated immigration teams, whose activity included:

- agency staff attending the prison regularly;
- interviewing all foreign national prisoners shortly after they were ‘inducted’ into the prison; and
- agency staff holding regular ‘immigration surgeries’.

The majority of staff and managers who we interviewed believed that the intensive contact helped to improve the level of communication between the Agency, Her Majesty’s Prison Service and foreign national prisoners.

7.2 However, immigration teams were not based in all prisons. Due to logistics and the small number of women and young offenders in the prison estate, the Agency had allocated teams to specific Category C<sup>30</sup> adult male prisons only. Other categories of male prisoners and women / young offenders were housed across a large number of prisons without this level of intensive contact. The Agency had processes in place to maintain contact with foreign national prisoners housed in these prisons by, for example, conducting immigration surgeries in there. Despite this, there is a risk that the level of information given to foreign national prisoners, and the ability of the Agency to collect information relevant to the decision, may vary depending on the location of prisoner.

7.3 We were interested to find that despite the concept of each case being managed by a case owner, the level and frequency of contact between case owners and foreign national prisoners varied; both in terms of the quantity and quality. Although contact could be made via telephone, there was no minimum standard for case owners to speak to foreign nationals directly about their cases. In addition, there was no minimum expectation for case owners to visit prisons. Consequently, a foreign national prisoner may never meet or speak to their case owner to discuss information that was required, resolve any outstanding queries or to keep informed about their case. Some case owners expressed concerns about engaging more directly with foreign national prisoners.

7.4 While we recognise that contact between the Agency and foreign national prisoners can be initiated and maintained by immigration teams housed in or visiting prisons, we believe that if a decision in a particular case would benefit from more direct contact then it should be pursued. If there is evidence of any security issues then this can be addressed in each individual case.

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<sup>30</sup> There are four prisoner security categories. These are used to assign adult prisoners to the most relevant prison conditions according to the severity of their crimes and the risk to the public that they are considered to pose should they escape. Category C prisoners are classified as those who cannot be trusted in open conditions but are unlikely to try to escape.

- 7.5 All foreign national prisoners who are serving 12 months' imprisonment or more are subject to a sentence plan. This is case-owned by an offender manager in the National Offender Management Service (NOMS). The plans are designed to identify their needs and to then connect them to relevant programmes and services that address and aim to resolve issues specific to their circumstances. Prisoners may have a number of issues (for example, drug addiction, mental health problems, behavioural or educational needs) that require intervention from prison-based services and services outside the prison environment.
- 7.6 Deportation is a significant part of a foreign national prisoner's pathway through the criminal justice system. A similar plan to develop a profile of an individual, recognise their immigration issues earlier and to keep them engaged with the process and up to date with case progression may benefit both the Agency and individuals.
- 7.7 Staff and managers informed us that the intensive contact management from immigration teams, particularly those based in prisons, had led to an increase in the number of foreign national prisoners removed within their Early Removal Scheme period and under the Facilitated Returns Scheme.
- 7.8 Senior managers said that while the benefit of closer contact management had been recognised, there were 'insufficient resources' to enable the Agency to place an expectation on case owners to visit prisons when required, carry out interviews personally and build further relations with individuals while deportation is decided. However, no analysis had been carried out that would have allowed the Agency to assess general outcomes, including the:
- quality of decision-making;
  - timeliness of deportation; or
  - foreign national prisoners' level of understanding of the process.
- 7.9 This could have allowed the Agency to determine whether the existing approach was the most efficient and effective way of managing cases. Furthermore, such analyses could highlight whether there were any differences in contact management and the outcomes for foreign national prisoners that were served by outreach immigration teams.
- 7.10 It is also important for case owners to understand how the general administration of cases can impact on foreign national prisoners. Our file sample revealed cases where important documents about the case were served on the prisoner later than they should have been, and in some cases repeatedly, for no apparent reason. This could result in foreign national prisoners being unclear about what is happening to them and when, and – as we indicated earlier – result in foreign national prisoners being detained under immigration powers for longer than necessary. It could also result in appeals against deportation being lodged in circumstances where a foreign national prisoner did not know the full reasons for the Agency's decision.
- 7.11 We also found cases in which foreign national prisoners or their representatives had repeatedly written to the Agency to enquire about progress on a case, yet had not received a response. An example of such a case can be seen in Case Study 5.

## Case Study 5 – Lack of response to correspondence

### A foreign national prisoner's representative:

- Wrote to the Agency on:
  - 29 October 2008;
  - 9 December 2008;
  - 13 February 2009;
  - 28 April 2009;
  - 6 May 2009;
  - 20 May 2009.
- Wrote a letter of complaint on 22 June 2009.

### The UK Border Agency:

- did not respond to the six pieces of correspondence that preceded the complaint letter;
- responded to the letter of complaint on 4 August 2009, in which the case owner stated, 'Please accept my apologies for the lack of response to your letters.'

### Chief Inspector's comments:

- It is completely unsatisfactory that UKBA failed to respond to the initial six pieces of correspondence.
- Disappointingly, it would appear that the 'complaint' may have prompted the Agency's response.

### We recommend 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.

## 8. Inspection Findings: Personal data should be treated and stored securely in accordance with the relevant legislation and regulations

- 8.1 The Agency's files relating to foreign national prisoners contain personal data and, in some cases, sensitive personal data such as the health of an individual or details of claims for asylum. In order to comply with its obligations under the Data Protection Act, the Agency needs to process such information fairly and lawfully. In particular it needs to take appropriate technical and organisational measures to prevent unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

### Information attached to wrong files

- 8.2 We found 11 cases (8 per cent) where the file contained information that related to a person or persons entirely unrelated to the foreign national prisoner with no explanation as to why this information was on the file. An example is set out in Case Study 6.

#### Case Study 6 – Example of data relating to another person held on file

**The foreign national prisoner, Ms G, a Portuguese national, received a sentence of 21 months' imprisonment for violence against a person.**

#### The UK Border Agency:

- attached documents for a Miss K, a Polish national, to Ms G's file, including Miss K's address, payslips, national insurance number, salary details, banking details – including her sort code and account number – and a tenancy agreement;
- also attached documents for a Mr K, a Sri Lankan national, to Ms G's file. These included Mr K's Home Office reference number, date of birth and details of his previous offences.

#### Chief Inspector's comments:

- There was no indication of why Miss K's details were held on file and whether she had any connection to Ms G.
- Mr K's details were clearly unrelated to Ms G's case and should not have been held on Ms G's file.

### Retention of data

- 8.3 We noted that the Agency had evaluated a project that captured data about foreign nationals held in prison on remand. The Agency told us that in cases where a person had gone on to be found 'not guilty', and it had decided that further immigration action was not appropriate, papers relating to the charge were destroyed.

8.4 However, we found that although the entry referring to the person's charge on the Agency's Casework Information Database (CID) was closed, it was not deleted. As such, there is a risk that personal data could be held for longer than is required in contravention of the data protection principles.

### **File management**

8.5 The standard of file maintenance varied. Some of the files sampled had clear minutes and were arranged in a logical order, while others lacked minutes setting out what action had been taken. This meant it was difficult to establish quickly what action had been taken or why. Staff informed us that practices varied with some teams:

- recording information only on the Agency's Casework Information Database (CID);
- recording information only on the file; or
- recording information on both CID and the file.

8.6 This is not efficient and means it is difficult to establish a clear audit trail in all cases. We made a similar finding in our inspection of asylum<sup>31</sup>, published in February 2010.

8.7 Files also contained significant amounts of duplicated documents, which made it more difficult and time-consuming to navigate through the file. A recent exercise to 'cleanse' files by removing duplicate and unnecessary documents had been carried out by one office and had significantly reduced the size of files. This made it easier to identify what had happened in each case and potentially cheaper to store. We did not examine this exercise in any detail, but there is potential for the Agency to do much more of this to reduce costs and establish a clearer audit trail for individual cases.

### **We recommend that the UK Border Agency:**

- Ensures that 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.

<sup>31</sup> Asylum: Getting the balance right? A Thematic Inspection. [http://icinspector.independent.gov.uk/wp-content/uploads/2010/03/Asylum\\_Getting-the-Balance-Right\\_A-Thematic-Inspection.pdf](http://icinspector.independent.gov.uk/wp-content/uploads/2010/03/Asylum_Getting-the-Balance-Right_A-Thematic-Inspection.pdf)

## 9. Inspection Findings: Complaints procedures should be in accordance with the recognised principles of complaints handling

### Number of complaints made by foreign national prisoners

- 9.1 Between February 2010 and January 2011, the Agency received 144 complaints from foreign national prisoners, 13 relating to misconduct and 131 relating to service. None of the misconduct complaints were substantiated but 31 of the service complaints had been. A breakdown of the substantiated service complaints as categorised by the Agency can be seen below:

**Figure 7: Substantiated service complaints, Feb 2010 – Jan 2011**

| Reason for Complaint   | Number Substantiated |
|------------------------|----------------------|
| Delay                  | 10                   |
| Poor communication     | 10                   |
| Administrative process | 4                    |
| Wrong information      | 3                    |
| Lost documents         | 2                    |
| Complaint handling     | 2                    |
| <b>Total</b>           | <b>31</b>            |

### Identification of complaints

- 9.2 The Agency has clear guidance setting out its definition of a complaint as: ‘any expression of dissatisfaction about the services provided by or for the UK Border Agency and / or about the professional conduct of UK Border Agency staff, including contractors. However, and as we also identified in our thematic inspection of complaints handling, there was an inconsistent understanding by staff of what constituted a complaint. As a result, we believe that there is the potential that cases falling within the Agency’s own definition of ‘complaint’ may not be identified, considered or responded to in accordance with the Agency’s processes for handling complaints.

### Use of information obtained from complaints

- 9.3 The Agency did monitor complaints received from foreign national prisoners, and managers confirmed in interviews that feedback on the type of complaints and whether they had been substantiated were provided at senior management team meetings.
- 9.4 A number of examples were provided to demonstrate changes in operational practice arising from complaints. These included resolution of a backlog that had developed where foreign national prisoners had applied for revocation of a deportation order, and additional training where a complaint highlighted a lack of knowledge amongst caseworkers regarding Multi-Agency Public Protection Arrangements.

## 10. Inspection Findings:

The implementation of policies should be continuously monitored and evaluated to assess the impact on service users and associated costs

Risks to the efficiency and effectiveness of the Agency should be identified, monitored and mitigated

- 10.1 The Agency routinely monitored the number of foreign national prisoners deported, the number detained following completion of their sentence and the length of time they were detained. It also took forward detailed work to forecast the likely numbers, both held in detention and living in the community, by June 2014, along with the associated costs. Risks were monitored at senior Board level.
- 10.2 As with other public services, the Agency is required to implement savings as part of the government's commitment to reduce public expenditure. The overall number of case owners in the Agency will reduce from 1,350 to 540<sup>32</sup> to help meet this commitment. While the overall number of people managing foreign national prisoner casework will remain the same, there may be a short-term impact as caseworkers from other parts of the Agency are redeployed to the Criminal Casework Directorate and trained in deportation work. This may lead to slower processing of cases in the short-term with a consequential short-term drop in the number of people deported and, potentially, an increase in the length of time that people are detained.
- 10.3 To mitigate these risks, senior managers informed us that the Agency had developed plans to use surplus staff from other caseworking areas, thereby temporarily increasing the number of case owners working in the Criminal Casework Directorate. Plans were also in place to train new staff and to monitor the risks arising from this restructure. Although they were confident that this would ensure that the number of foreign national prisoners removed by the end of the financial year would not have been affected, senior managers did acknowledge that it could take longer to remove foreign national prisoners than it would have previously.



# Appendix 1:

## Inspection Criteria

The criteria for this inspection were:

- Decisions on the entry, stay and removal of people should be taken in accordance with the law and the principles of good administration.
- Complaints procedures should be in accordance with the recognised principles of complaints handling.
- All people should be treated with dignity and respect and without discrimination in accordance with the law.
- Decisions to detain people must be lawful.
- Functions should be carried out having regard to the need to safeguard and promote the welfare of children.
- Personal data should be treated and stored securely in accordance with the relevant legislation and regulations.
- The implementation of policies should be continuously monitored and evaluated to assess the impact on service users and associated costs.
- Risks to the efficiency and effectiveness of the UK Border Agency should be identified, monitored and mitigated.

# Appendix 2:

## Glossary

| Term  | Description   |
|---|---|
| <b>A</b>  |   |
| Absconder                                       | A term used by the Agency to describe a person who the Agency has lost contact with, who has breached reporting restrictions or bail conditions and/or who they are unable to make contact with via their last known address.                     |
| Administrative Removal                          | The process by which foreign nationals with no entitlement to remain in the UK are removed.   |
| Agency  | Refers to the UK Border Agency.   |
| Article 3 (European Convention of Human Rights) | A person may claim that their removal or deportation would breach Article 3, where it would place them at risk of torture or to inhuman or degrading treatment or punishment.   |
| Article 8 (European Convention of Human Rights) | A person may claim that their removal or deportation would breach Article 8 where it would interfere with their family and private life.  |
| Automatic deportation                           | The UK Borders Act 2007 introduced a legal obligation on the Secretary of State to make a Deportation Order against some foreign national prisoners.  |
| <b>B</b>  |   |
| Border and Immigration Agency (BIA)             | The name of the agency responsible for immigration functions prior to creation of the UK Border Agency.   |
| <b>C</b>  |   |
| Case owner                                      | The UK Border Agency term for an official responsible for processing cases of foreign national prisoners. A case owner's role includes considering whether a person should be deported or granted leave to remain in the UK.                      |
| Complaint                                       | Defined by the UK Border Agency as 'any expression of dissatisfaction about the services provided by or for the UK Border Agency and/or about the professional conduct of UK Border Agency staff, including contractors'.                         |
| Criminal Casework Directorate (CCD)             | UK Border Agency directorate responsible for managing cases involving foreign national prisoners. CCD considers whether a person should be deported from the UK, having committed a criminal offence.   |
| <b>D</b>  |   |
| Data Protection Act 1998                        | The Data Protection Act requires anyone who handles personal information to comply with a number of important principles. It also gives individuals rights over their personal information.   |
| Deportation                                     | The process used to remove some foreign national prisoners who have committed criminal offences in the UK. People who are deported can only apply to return to the UK after they have successfully applied to have the Deportation Order revoked. |

|   |   |
|---|---|
| Deportation Order                                   | An official document, signed by the Chief Executive of the UK Border Agency. It requires the person to leave the UK. It also prohibits them from re-entering the UK while it remains in force.  |
| Director  | A senior UK Border Agency manager, typically responsible for a directorate, region or operational business area.  |
| <b>E</b>  |   |
| Early Removal Scheme                                | A scheme that allows foreign national prisoners to be deported before they have completed their custodial sentence in the UK.   |
| Emergency Travel Document                           | A document to allow people who do not have a passport, to travel to their country. ETDs are issued by a person's Embassy or High Commission.  |
| Enforcement Instructions and Guidance (EIG)         | Guidance and information for officers dealing with enforcement of immigration matters within the United Kingdom.  |
| European Convention of Human Rights                 | A Convention to protect human rights and fundamental freedoms.  |
| European Economic Area (EEA)                        | <p>The European Economic Area (EEA) was established on 1 January 1994 following an agreement between the member states of the European Free Trade Association (EFTA) and the European Community, later the European Union (EU).</p> <p>All European Economic Area (EEA) nationals enjoy free movement rights in the EEA. This means that they are not subject to the Immigration Rules and may come to the United Kingdom and reside here in accordance with the 2006 Regulations. They do not require permission from the UK Border Agency to enter or remain, nor do they require a document confirming their free movement status.</p> |
| <b>F</b>  |   |
| Facilitated Returns Scheme (FRS)                    | A scheme run by the UK Border Agency intended to encourage foreign national prisoners to return to their country of origin.   |
| <b>H</b>  |   |
| Human Rights Act                                    | Legislation, which took effect on 2 October 2000, which meant that the UK's domestic courts could consider the European Convention of Human Rights.   |
| <b>I</b>  |   |
| Independent Chief Inspector of the UK Border Agency | The role of the Independent Chief Inspector of the UK Border Agency was established by the UK Borders Act 2007 to examine the efficiency and effectiveness of the UK Border Agency. The Chief Inspector is independent of the UK Border Agency and reports directly to the Home Secretary.  |
| <b>S</b>  |   |
| Screening Interview                                 | The process of establishing initial information from an asylum seeker in support of his or her claim. The interview is conducted by UK Border Agency staff at asylum screening units in Croydon and Liverpool. Applicants are then issued with an application registration card as identification while their claim is being considered.  |

# Appendix 3:

## Acknowledgements

We are grateful to the UK Border Agency for its cooperation throughout the inspection, and for the assistance provided in helping to arrange and schedule inspection activity in Croydon, Leeds and Liverpool.

We are particularly grateful to all staff who participated in interviews and focus groups.

|                            |   |
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