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Deporting EU national offenders from the UK after Brexit: moving from a system that recognises individuals, to one that sees only offenders

Abstract

Deportation is a core state practice for the management and control of time-served foreign national offenders. Post-Brexit law changes mean that EU national offenders in the UK will become subject to the same deportation rules which apply to non-EU national offenders. This article argues that this will result in a fundamental shift in the kind of human EU national offenders will be conceived of by UK law. It argues that the law that applied to EU national offenders before Brexit, derived from the EU's Citizens' Rights Directive, was underpinned by a focus on the offender as an individual person. In contrast, UK deportation law that applies to third-country nationals, and to EU nationals after Brexit, sees only the label of 'offender'. This argument is made by examining two important elements of the contrasting deportation laws: the permitted justifications for deportation and the importance of rehabilitation. On permitted justifications for deportation, the Citizens' Rights Directive's requires individualised rationales for deportation and prohibits justifications based solely on the fact of past offending. This future-orientation also encouraged UK courts to focus on the foreign national offender as an individual who is capable of rehabilitation and reform, whereas the UK's post-Brexit rules justify deportation on the basis of the status of offender: a status that is determined by prior conviction, is hard to lose, and makes limited space for considering the potential for rehabilitation.

Keywords: Foreign National Offenders; Deportation; Citizens' Rights Directive; Brexit

1. Introduction

This article compares the law that UK authorities apply to EU nationals and third-country nationals who have committed criminal offences in the UK, and who the UK is seeking to

deport. It argues that the law that applied to EU national offenders before Brexit, derived from the EU's Citizens' Rights Directive, was underpinned by a focus on the offender as an individual person. In contrast, UK deportation law that applies to third-country nationals, and to EU nationals after Brexit, sees only the label of 'offender'.

Part 2 of this article describes the pre-Brexit (2.1) and post-Brexit (2.2) rules for deporting EU national offenders. Part 2.3 challenges the extent to which the pre-Brexit deportation rules for EU nationals were straight-jacketed by EU law.

The central original argument of this article is that the post-Brexit UK deportation law treats the foreign national offender (FNO)[1] as a different kind of human than did the EU derived law. This article argues that the law that applied to EU national offenders before Brexit was focussed on the individual whereas the post-Brexit rules focus on the status of offender. In part 3.1 the article argues that the focus of the pre-Brexit deportation rules required individualised rationales for deportation and prohibits justifications based solely on the fact of past offending. In contrast, the post-Brexit rules justify deportation because of the status of 'offender' alone: a status that is determined by prior conviction, is hard to lose, and makes limited space for considering rehabilitation. Part 3.2 identifies that this future-orientation also encouraged UK courts to focus on the foreign national offender as an individual who is capable of rehabilitation and reform.

This article is significant for its direct comparison between the different deportation regimes applicable in UK law to EU national offenders before and after Brexit. Academic literature to date has focussed on either the deportation provisions of the Citizens' Rights Directive alone, or on UK deportation law. Comparing the two regimes is of particular

[1] The author is acutely aware of the irony of (at least implicitly) championing law which conceptualises foreign national offenders as an individual human being, whilst consistently using the label of 'foreign national offender' (or worse, the abbreviated FNO) to describe this group of individuals. It remains difficult to square the circle of readability and humanisation.

importance in the present moment because Brexit heralds the transition of EU nationals living in the UK from governance under one regime to the other.

This article is also significant because it is concerned with what kind of human each legal regime conceives of the FNO as being. Many of the cases considered here have been analysed in the context of what they tell us about developing conceptions of EU Citizenship.[2] This article uses a different analytical lens: instead of identifying legal distinctions between citizen and alien, this article examines what kind of human being is conceptualised in the different deportation regimes. It also differs from analyses which highlights the distinction between a rights-based approach to the migration of EU nationals within the EU, and a permissions-based approach to the immigration of non-EU nationals which prevails in the UK and the domestic laws of other EU states.[3] This article adopts a different kind of analytical frame by asking what kind of *human*, rather than what kind of *rights holder*, foreign national offenders are conceived as being.

This article does not suggest that it is adopting a better kind of analytical lens, only that it is a different one of sufficient importance to obtain a full view of the UK's deportation law regime. The post-Brexit UK deportation law treats EU national offenders more harshly and this article argues that this is, at least in substantial part, because UK law conceives of the FNO as a different kind of human than did the pre-Brexit EU derived law.

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[2] See for example, Dimitry Kochenov and Benedikt Pirker, 'Deporting the Citizens within the European Union: A Counter-Intuitive Trend in Case C-348/09, P.I. V Oberburgermeisterin der Stadt Remscheid' (2013) 19 Colum J Eur L 369; Theodora Kostakopoulou and Nuno Ferreira, 'Testing Liberal Norms: The Public Policy and Public Security Derogations and the Cracks in European Union Citizenship' (University of Warwick School of Law, Legal Studies Research Paper No. 2013-18) <http://sro.sussex.ac.uk/id/eprint/63227/1/Testing%20Liberal%20Norms%20-%20working%20paper.pdf> accessed 29 July 2021; Valsamis Mitsilegas, 'European Criminal Law and the Dangerous Criminal' (2018) 25 Maastricht Journal of European and Comparative Law 733.

[3] See for example, James Dennison and Andrew Geddes, 'Brexit and the perils of 'Europeanised' migration' (2018) 25 European Public Policy 1137.

2. The Pre-Brexit and Post-Brexit rules for deporting EU national offenders

Pre-Brexit day (31 December 2020) two distinct set of deportation laws applied to foreign national offenders (FNOs) sentenced in the UK. The first – Part 4 of The Immigration (European Economic Area) Regulations 2016 ('the Regulations') – applied to EU nationals resident in the UK and was derived from EU law.[4] The second set – which this article will refer to as 'the Immigration Act 2014 rules' – applied to third country nationals.[5] British citizens cannot be deported from the UK for criminal offending.[6]

2.1 Part 4 of The Immigration (European Economic Area) Regulations 2016

Prior to 31 December 2020, the law governing the deportation of all EU national offenders from the UK was governed on the domestic level by the Immigration (European Economic Area) Regulations 2016 ('the Regulations').[7] The Regulations are clearly derived from EU law

[4] The Immigration (European Economic Area) Regulations 2016, implementing Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[5] Some commentary on the changes to deportation law refers to the Immigration Act 2014 rules as 'UK law' and to the Regulations as 'EU law'. This article avoids these labels for three reasons. First, after 31 December 2020 'EU law' will cease to apply to an increasing number of EU nationals in the UK. Second, although the Regulations implement EU Directive 2004/38/EC, the Regulations themselves are UK secondary legislation: i.e. are constitutionally UK law, not EU law. Thirdly, in the context where the EU law-derived Regulations are often presented as being more generous and the 'UK law' more harsh, setting up the dichotomy of UK versus EU deportation law would continue to frame the issue in the nationalist terms of debate which promoted Brexit as a means of "taking back control" of UK borders and immigration from "lax" EU control. Perpetuating this framing is neither generally helpful, nor does it fit with the argument made in part 2.3, below, that the content of UK deportation law was not as highly constrained by EU law as is often believed.

[6] Although see deprivation and nullification of British citizenship as a means of deporting, or making deportable, British citizens: Colin Yeo, 'The rise of modern banishment: deprivation and nullification of British citizenship' in Devyani Prabhat, *Citizenship in Times of Turmoil? Theory, Practice and Policy* (Elgar, 2019).

[7] For a detailed account of the underlying EU Directive and Home Office guidance at the time of its introduction, see Alison Harvey, 'Expulsion and Exclusion' (2007) 21 Journal of Immigration, Asylum and Nationality Law 208.

because they directly 'transpose'[8] the EU's Citizens' Rights Directive[9] into UK law: however, the Regulations are, constitutionally speaking, UK secondary legislation.

However, Brexit is not a clean break with EU derived immigration law. After 31 December 2020, the Regulations will still apply to EU national offenders who were both resident in the UK and committed criminal offences before 31 December 2020. EU nationals whose criminal offending takes place after 31 December 2020 (regardless of when they began residing in the UK), and EU nationals whose residence in the UK begins after 31 December 2020, will be subject to the Immigration Act 2014 rules.[10] Inevitably this will be an increasingly small group as the criminal justice system processes those who committed offences before that date.

Regulation 23(6)(b) provides that an EU national 'may be removed if […] the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27.' Although the Regulations label this 'removal', Regulation 32(3) provides that 'the person is to be treated as if the person were a person to whom [legal powers of deportation] are to apply'. This article therefore uses 'deportation' as the appropriate label as both the legal effect and the legal reasoning ('The most common basis for expulsion on grounds of public policy is criminal conduct')[11] are the same as for the deportation of non-EU FNOs.

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[8] Gina Clayton, *Immigration and Asylum Law* (7th edn, Oxford University Press 2016), 135.

[9] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[10] Home Office, 'Public Policy, Public Security or Public Health Grounds' (Version 4.0, 31 December 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948136/eea-public-policy-decisions-v4.0ext.pdf> accessed 9 February 2021, 18.

[11] Clayton (n8) 136.

The level of seriousness of the public interest in deportation of an EU national that must be demonstrated by the Secretary of State for the Home Department (SSHD)[12] to justify deportation increases depending on the length of continuous residence of the FNO. EU nationals ordinarily resident in the UK may be deported on grounds of public policy, public security or public health. Those with a permanent right of residence (usually after 5 years residence)[13] can be deported 'on serious grounds of public policy and public security'.[14] An EU national continuously resident for ten years or more, or a child under 18 years of age, can only be deported on 'imperative grounds of public security'. Imperative grounds of public security can include particularly serious criminal offending.[15]

Regulation 27(5)(a) requires that the decision to deport 'must comply with the principle of proportionality', therefore even imperative grounds of public security can be outweighed by considerations of the FNO's integration and family life.[16] The proportionality of the deportation decision must be in accordance with Regulation 27(6) which requires that:

> the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

[12] The burden of proof lies with the SSHD in EU deportation appeals: *Arranz (EEA Regulations – deportation – test)* [2017] UKUT 294 (IAC).

[13] The Immigration (European Economic Area) Regulations 2016, Regulation 15.

[14] The Immigration (European Economic Area) Regulations 2016, Regulation 27(3).

[15] *P.I. v Oberbürgermeisterin der Stadt Remscheid* (Judgment of the Court (Grand Chamber), 22 May 2012) *Case C-348/09.*

[16] *Orfanopoulos and Oliveri v Land Baden-Württemberg* (Judgment of the Court (Fifth Chamber), 29 April 2004) C-482/01 and C-493/01 [2004] ECR I-5257.

It is said that 'These are equivalent to the widest possible interpretation of family and private life'.[17] However, that none of the levels of protection against deportation are absolute has been identified by Berry as being one of the 'potential gaps in the protection offered by EU law'.[18]

2.2 Deportation under the Immigration Act 2014 rules

EU nationals who commit criminal offences after 31 December 2020 (regardless of when they began residing in the UK), and EU nationals who committed criminal offences in the UK and who begin residing in the UK after 31 December 2020 (regardless of when their offending in the UK occurs), will be subject to deportation under the Immigration Act 2014 rules.[19]

Immigration enforcement in the UK distinguishes between 'removal' and 'deportation'.[20] Removal applies 'if the person requires leave to enter or remain in the United Kingdom but does not have it.'[21] Removal is not contingent upon criminality[22] and is sometimes referred to as 'administrative removal'.[23] On the other hand, the deportation of a foreign national offender (FNO) occurs after conviction for a criminal offence and a prison sentence has ended. A deportation order invalidates any extant leave to enter or remain,[24]

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[17] Clayton (n8) 137. Although Article 7 of the EU Charter of Fundamental Rights protecting private and family life ceases to apply, the wording of the Regulation remains unaltered.

[18] Elspeth Berry, 'The Deportation of "Virtual National" Offenders: The Impact of ECHR and EU Law' (2009) 23 Journal of Immigration, Asylum and Nationality Law 11, 14.

[19] Home Office (n10) 18.

[20] Clayton (n8) 583-584.

[21] Immigration and Asylum Act 1999, s10(1).

[22] Although entry without leave or overstaying a period of leave is itself a criminal offence which may be prosecuted: Immigration Act 1971, s24.

[23] Clayton (n8) 584.

[24] Immigration Act 1971, 5(1).

whereas a removal order applies only where there is no leave in the first place.

The Immigration Act 2014 rules on deportation are not derived from a single statutory source. The Immigration Act 2014 is but the last of a series of statutory interventions into deportation law which have built up on top of each other like sedimentary deposits. Section 3(5)(a) of the Immigration Act 1971 provides the Secretary of State for the Home Department (SSHD) the bedrock power to determine that the deportation of a person, other than a British Citizen, is 'conducive to the public good'. The UK Borders Act 2007 introduced a statutory presumption that the deportation of FNOs sentenced to twelve months or more of imprisonment is conducive to the public good for the purposes of the 1971 Act: statutorily binding the SSHD to making a deportation order when the custody threshold is met.[25]

Section 33 of the UK Borders Act 2007 permits exceptions to deportation, including that deportation would breach the rights of the individual under the European Convention on Human Rights (ECHR).[26] The decision of courts and tribunals as to whether a deportation order breaches the rights of the individual to respect for private or family life under Article 8 ECHR is further constrained by the Nationality, Immigration and Asylum Act 2002 (NIAA), as amended by the Immigration Act 2014.[27]

Whereas the NIAA is addressed to the courts when hearing appeals against deportation, the Immigration Rules constrain the SSHD's in making decisions in initial applications.[28] The Immigration Rules concerning deportation (Rules 398-399A) are of functionally the same

[25] UK Border Act 2007, s32(2).

[26] UK Border Act 2007, s33(2)(a).

[27] For an account of the development and changing understanding of the Immigration Act 2014 rules, see Jonathan Collinson, 'The Troublesome Offspring of Section 19 of the Immigration Act 2014' (2017) 31 Journal of Immigration, Asylum and Nationality Law 244; Jonathan Collinson, 'Disciplining the Troublesome Offspring of Section 19 of the Immigration Act 2014: The Supreme Court Decision in KO (Nigeria)' (2019) 33 Journal of Immigration, Asylum and Nationality Law 8.

[28] Immigration Rules, available at <https://www.gov.uk/guidance/immigration-rules>

effect as the NIAA and are treated as such by UK courts and immigration tribunals.[29] For clarity, and because nothing in the argument turns on this distinction, this article refers solely to the NIAA.

Exemptions from deportation on the basis of family and private life were created by the Immigration Act 2014, which amended the NIAA. It re-emphasises the UK Borders Act 2007 in its command that 'The deportation of foreign criminals is in the public interest.'[30] The NIAA states that in the case of a FNO who has been sentenced to less than four years imprisonment, 'the public interest requires [the FNO's] deportation unless Exception 1 or Exception 2 applies.'[31] These exceptions are closely defined by statute (where 'C' is the FNO):

> 117C(4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> 117C(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.[32]

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[29] *KMO (section 117 – unduly harsh) Nigeria* [2015] UKUT 00543 (IAC), [12]: 'There is no tension in the fact that there is an area of overlap between s117C(4)&(5) [Nationality, Immigration and Asylum Act 2002] and para 399 of the rules. When s117 was brought into effect by the Commencement Order, the vocabulary of para 399 was different […] The rule was amended to reflect the vocabulary of the statute and so the assessment now carried out under the rules is compliant with the requirements of the statutory provisions.'

[30] Nationality, Immigration and Asylum Act 2002, s117C(1).

[31] Nationality, Immigration and Asylum Act 2002, s117C(3).

[32] Nationality, Immigration and Asylum Act 2002, s117C(4)-(5).

The NIAA's statutory exceptions to deportation are claimed by the government to discharge its obligations under Article 8 ECHR; the right to family and private life.[33] Article 8 ECHR comes into play 'In cases where the two Exceptions do not apply',[34] but the setting of the scales in the Article 8 ECHR proportionality assessment is defined by the NIAA:

> a full proportionality assessment is required, weighing the interference with the article 8 rights of the potential deportee and his family against the public interest in his deportation. In conducting that assessment the decision-maker is required by section 117C (6) (and paragraph 398 of the Rules) to proceed on the basis that "the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2".[35]

An appeal to Article 8 ECHR does not allow the FNO to pursue legal or factual arguments which remedy the issues with UK deportation law identified in this article. This article is concerned with how the FNO is conceptualised as different kinds of human beings in the Regulations and in the Immigration Act 2014 rules. As part 3 of this article demonstrates, that conception in the Immigration Act 2014 rules of the FNO as 'offender' rather than individual applies equally to appeals based on the explicit statutory exceptions, as well as the residual "Article 8 ECHR" exercise conducted under s117C(6) NIAA.

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[33] 'Immigration Bill, European Convention on Human Rights, Memorandum by the Home Office', <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249270/Immigration_Bill_-_ECHR_memo.pdf> accessed 6 May 2021, [1].

[34] *HA (Iraq) v Secretary of State for the Home Department (Rev 1)* [2020] EWCA Civ 1176, [29].

[35] ibid

2.3 High Concern, High Constraint?

In a 2015 article, Ford, Jennings, and Somerville[36] argued that between 2004-2012 there was high public concern about immigration but that policy makers were concurrently 'hampered by new constraints […to] restrict the inflows concerning the public the most'.[37] They identified both domestic human rights law stemming from the Human Rights Act 1998, and EU law as the primary sources of high policy constraint:

> The EU looms larger than ever, as the largest source of labour migrants, which cannot be constrained under existing treaty arrangements. The EU also continues to shape policy and constrain action through jurisprudence, institutions and regulation.[38]

Their article does not consider deportation, however, the idea that the deportation of EU national offenders might be subject to the same dynamics has some power. Foreign national offenders (of all nationalities) have been a 'folk devil'[39] in immigration policy making since the foreign national prisoners scandal of 2006.[40] In 2007, media attention focussed on:

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[36] Robert Ford, Will Jennings and Will Somerville, 'Public Opinion, Responsiveness and Constraint: Britain's Three Immigration Policy Regimes' (2015) 41 Journal of Ethnic and Migration Studies 1391.

[37] ibid 1406.

[38] ibid 1407.

[39] Melanie Griffiths, 'Foreign, Criminal: A Doubly Damned Modern British Folk-Devil' (2017) 21 Citizenship Studies 527, 527.

[40] Hindpal Singh Bhui, 'Alien Experience: Foreign National Prisoners After the Deportation Crisis' (2007) 54 Probation Journal 368; Luke de Noronha, 'Unpacking the Figure of the "Foreign Criminal": Race, Gender and the Victim-Villain Binary' <http://ssrn.com/abstract=2600568> accessed 13 September 2016.

> The judgment in *Chindamo*, that an Italian national convicted of a high profile murder as a teenager should not be deported after serving his sentence, was greeted with considerable public hostility, reflecting wider concerns with teenage violence and immigrant criminality … [and] hostility in some quarters to the obligations attaching to UK membership of the EU.[41]

The Vote Leave campaign in the 2016 Brexit referendum used the perceived gap between high concern but high constraint of action on the deportation of EU national offenders. It published a list of fifty individuals whom it claimed could not be deported under 'EU Rules' and argued that 'Outside the EU, we can take back control of our borders, deport more dangerous criminals, and strengthen public protection.'[42]

The Immigration Act 2014 rules for deportation were introduced explicitly to ensure a greater number of deportations of FNOs.[43] And whereas the Immigration Rules and statutory scheme requiring the deportation of non-EU national offenders was strengthened, the EU law-derived Regulations were not amended.

Post-Brexit, this disparity between high concern and high constraint is reinforced by the difference in language used to describe and compare the two regimes. The Regulations governing the deportation of EU national offenders are frequently presented as being more generous: they 'mandates a much higher level of protection against deportation for EU

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[41] Berry (n18) 18 (footnotes omitted). The *Chindamo* judgment (*R (Chindamo) v Secretary of State for the Home Department* [2006] EWHC 3340 (Admin)) is also cited by Anderson et al as an example of how deportation is a lightening rod for the political debate as to the boundaries of membership in the national community (Bridget Anderson, Matthew Gibney and Emanuela Paoletti, 'Citizenship, Deportation and the Boundaries of Belonging' (2011) 15 Citizenship Studies 547, 554).

[42] Rowena Mason, 'Vote Leave lists 50 criminals it says EU has stopped UK deporting' (*The Guardian*, 7 June 2016) <https://www.theguardian.com/politics/2016/jun/07/vote-leave-lists-50-criminals-it-says-eu-has-stopped-uk-deporting> accessed 4 February 2021.

[43] politics.co.uk, 'Theresa May Speech in Full' (*politics.co.uk*, 4 October 2011) <http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full> accessed 9 April 2018.

citizens'.[44] In contrast, the Immigration Act 2014 rules are presented as 'tougher'[45] or 'harsher'.[46]

However, it would be inaccurate to suggest that the Regulations present a weak framework for deporting FNOs, or that they entirely constrained domestic policy makers. Firstly, the Regulations were effective as a legal basis for deporting EU national offenders. 3,501 EU national offenders were deported from the UK in 2019 and EU national offenders comprised a large majority (68%) of all FNOs deported in 2019.[47] Secondly, the Regulations permitted policy makers some discretion in responding to high public concern towards EU national offenders. The Migration Observatory note that 'In the decade from 2010 to 2019, the share of returned FNOs that were EU citizens has risen, from 17% in 2010 to 68% in 2019. This is [in part] the result of a steady increase in the number of EU FNOs returned'.[48] This increase in the number of deportations of EU nationals reflect policy makers' ability to work within the constraints of the Regulations to prioritise enforcement,[49] and to amend policy rather

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[44] Nevena Nancheva, 'Despicable Migrants? UK's Treatment of Foreign Criminals Will Only Harden after Brexit' (*LSE*, 19 August 2019) <https://blogs.lse.ac.uk/brexit/2019/08/19/particularly-despicable-migrants-uks-treatment-of-foreign-criminals-will-only-harden-after-brexit/> accessed 4 February 2021.

[45] Rob Merrick, 'EU citizens will be deported for minor offences under Priti Patel's post-Brexit immigration crackdown, lawyer warns' (*The Independent*, 14 July 2020) <https://www.independent.co.uk/news/uk/politics/eu-citizens-brexit-deported-offences-crime-priti-patel-a9618476.html> accessed 4 February 2021.

[46] Iain Halliday, 'EU Deportation Protections after Brexit' (*Free Movement*, 24 September 2020) <https://www.freemovement.org.uk/eu-deportation-protections-continue-after-brexit/> accessed 4 February 2021.

[47] The Migration Observatory, 'Deportation and Voluntary Departure from the UK' (*The Migration Observatory at the University of Oxford*, 7 July 2020) <https://migrationobservatory.ox.ac.uk/resources/briefings/deportation-and-voluntary-departure-from-the-uk/> accessed 14 February 2021.

[48] ibid

[49] Albeit that schemes to increase enforcement of the deportation of EU national offenders were not always lawful: see *R (Gureckis) v Secretary of State for the Home Department* [2017] EWHC 3298 (Admin), and comment at Diane Taylor, 'Home Office policy to deport EU rough sleepers ruled unlawful' (*The Guardian*, 14 December 2017) <https://www.theguardian.com/uk-news/2017/dec/14/home-office-policy-deport-eu-rough-sleepers-ruled-unlawful> accessed 4 February 2021; *R (Hafeez) v Secretary of State for the Home Department & Anor* [2020] EWHC 437 (Admin), and comment at Iain Halliday, 'EU citizens are protected by EU law, High Court reminds government' (*Free Movement*, 9 March 2020) <https://www.freemovement.org.uk/deport-first-appeal-later-eu-citizens/> accessed 14 February 2021.

than the underlying law such as 'a gradual decrease from April 2009 in the threshold of seriousness of crimes that led to an EU citizen being considered for deportation'.[50] This ability reflects the fact that the EU law underpinning the Regulations permits a range of different policies between Member States:

> the CJEU [Court of Justice of the European Union] has recognized that the needs of public policy and public security can vary from Member State to Member State and from one period to another. Thus there is a degree of flexibility in the meaning of the two terms.[51]

These statistics and scope for action do not fully support the contention that the Regulations were unduly lax or generous towards EU national FNOs, or that the government was constrained from acting on high public concern, whether real or imagined. Whilst the comparative harshness of the Immigration Act 2014 rules mean that which set of rules will apply to an individual EU national offender 'will most likely determine whether or not you are able to stay in the UK',[52] this should by no means be interpreted to suggest that the application of the Regulations to an individual case will automatically result in a deportation order being reversed: 3,501 EU nationals in 2019 will tell you that it will not.

3. Comparisons

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[50] The Migration Observatory (n47).

[51] Elspeth Guild, Steve Peers and Jonathan Tomkins, *The EU Citizenship Directive: A Commentary* (Second Edition, Oxford University Press 2019), 261.

[52] Halliday (n46).

This article argues that the law that applied to EU national offenders before Brexit (the Regulations) was focussed on the individual whereas the post-Brexit rules (the Immigration Act 2014 rules) focus on the status of offender. It constructs this argument by comparing the two sets of rules on the basis of the reasons that they permit the state to deploy to justify the deportation (part 3.1), and the importance of rehabilitation (part 3.2).

3.1 Reasons for deportation: general deterrence and desert

The Regulations and the Immigration Act 2014 rules differ considerably in what is considered a permitted justification for deportation. The Regulations are centred on the individual, whereas the Immigration Act 2014 rules are concerned primarily with the FNO's status as an offender.

The case law on the Immigration Act 2014 rules consistently gives three primary justifications for deportation:

> the public interest in the deportation of criminals is not based only on the need to protect the public from further offending by the foreign criminal in question but also on wider policy considerations of deterrence and public concern.[53]

The wider policy consideration of deterrence is concerned with a general deterrence against offending. Whereas specific deterrence is aimed at the individual offender, general deterrence seeks to discourage the population at large from committing criminal offences.[54] General deterrence appears as an explicit justification for deportation in the Court of Appeal

[53] *HA (Iraq)* (n34) [141].

[54] Johannes Andenaes, 'The General Preventive Effects of Punishment' (1966) 114 University of Pennsylvania LR 949, 949.

cases of *DW (Jamaica),*[55] *AM*[56] and *OH (Serbia).*[57] They confirm deportation's utilitarian application as a factor which the court expects a would-be offender to weigh in a putative cost-benefit assessment of criminal conduct, because deportation ought 'to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation'.[58] However, by focussing on the general rather than the specific facet of deterrence in deportation cases it becomes irrelevant as to whether their time-served prison sentence was adequate in deterring the individual FNO from future offending: the general deterrence function of deportation is served just as clearly by deporting those who present no future risk of reoffending.

Other communicative functions of deportation are also about foreign nationals as offenders, rather than as individuals. It is perhaps a mark of the hardening of discourse around FNOs that in the earlier case of *OH (Serbia)* the court refers to 'revulsion at serious crimes',[59] whereas in the later *SS (Nigeria)* it is no longer condemnation of the act but of the offenders themselves as 'serious wrongdoers.'[60] Lord Wilson later walked back his ratio in *OH (Serbia)*, stating that:

> I regret my reference there [*OH (Serbia)*] to society's revulsion at serious crimes […] Society's undoubted revulsion at certain crimes is, on reflection, too emotive

[55] *DW (Jamaica) v Secretary of State for the Home Office* [2018] EWCA Civ 797, [23].

[56] *AM v Secretary of State for the Home Department* [2012] EWCA Civ 1634, [24].

[57] *OH (Serbia) v Secretary of State for the Home Department* [2008] EWCA Civ 694, [2009] INLR 109, [15].

[58] ibid

[59] ibid

[60] *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550, [2014] WLR 998, [53].

a concept to figure in this analysis. But I maintain that I was entitled to refer to the importance of public confidence in our determination of these issues.[61]

However, the revised focus on responding to 'public concern'[62] remains fixed on the fact of the past offence. The law continues to presume that the public demand the deportation of FNOs and that public confidence in the system of enforcement (and the Ministers of State responsible for the system) would be undermined by not deporting them.[63] This was clearly the message of the then Home Secretary's Conservative party conference speech when announcing her intention to create what became the Immigration Act 2014: 'I will write it into our immigration rules that when foreign nationals are convicted of a criminal offence or breach our immigration laws: when they should be removed, they will be removed.'[64] The courts thereby express deportation as having the effect that it 'preserves public confidence in a system of control whose loss would itself tend towards crime and disorder'[65] or else acts 'in building public confidence in the treatment of foreign citizens who have committed serious crimes.'[66] All these messages apply regardless of the individual FNO's rehabilitation as they all relate to the offence that has been committed, rather than on the likelihood of future offending.

Section 117C(2) NIAA is a mandatory consideration for the courts: 'The more serious

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[61] *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC, [2016] 1 WLR 4799, [70].

[62] *HA (Iraq)* (n34) [141].

[63] In fact, the UK public have a much more nuanced view on which foreign national offenders ought to be deported. For example, 'A majority of Brits (58%) say foreign-born offenders who have committed a serious or violent crime should not be deported if they came to the UK as a young child, while just over a quarter say they should.' (Eir Nolsoe, 'Under which circumstances should foreign-born offenders be deported' (*YouGov,* 2 March 2020) <https://yougov.co.uk/topics/politics/articles-reports/2020/03/02/under-which-circumstances-should-foreign-born-offe> accessed 27 July 2021).

[64] politics.co.uk, 'Theresa May Speech in Full' (*politics.co.uk*, 4 October 2011) <http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full> accessed 9 April 2018.

[65] *AM* (n56) [24].

[66] *OH (Serbia)* (n57) [15].

the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.' This is firmly a desert rationale for the consequences of offending. On its face, it takes little account of the individual at the heart of the deportation decision and instead focusses on the fact of their offending: a past act over which they now possess no control. A person who committed a serious criminal offence may, for reasons of remorse or rehabilitation, never repeat their offending. In contrast, a second person who committed a less serious offence may be more likely to reoffend because of, *inter alia*, gang membership or substance abuse. However, s117C(2) weighs more heavily the public interest in the deportation of the FNO whose offence was more serious but is less likely to repeated, than in the case of the FNO whose offence was less serious but who is more likely reoffend in the future.

In stark contrast to the Immigration Act 2014 rules, the Regulations require an individualised assessment of the rationale for deportation which go beyond the FNO's status as an offender. Indeed, the simple fact that an FNO is an offender is not sufficient justification for deportation under the Regulations. Regulation 27(5)(e) provides that: 'a person's previous criminal convictions do not in themselves justify the decision'.

Whereas the Immigration Act 2014 rules are automatically triggered because of the statutory presumption that deporting a FNO who has been sentenced to 12 months or more is in the public interest,[67] the Regulations do not permit such an assumption:

> The approach required in an EEA case [under the Regulations] is fundamentally inconsistent with the application of a statutory duty to deport on the basis of a generalised assumption that deportation is conducive to the public good.[68]

[67] UK Border Act 2007, s32(2).

[68] *R (Connell) v Secretary of State for the Home Department* [2018] EWCA Civ 1329, [2018] WLR(D) 364, [34].

Instead, 'a decision to remove an EEA national has to be based exclusively on the personal conduct of the person concerned and requires an individualised assessment of his case.'[69] Under the Regulations, it is the risk of future conduct against the public good by the individual that justifies deportation.

This is supported by CJEU case law which does not permit even the most serious offences to, by themselves, justify deportation. *K v Staatssecretaris van Veiligheid en Justitie and HF v Belgische Staat*[70] concerned individuals who had been excluded from Refugee Convention protection because of their involvement previously in war crimes or crimes against humanity. Yet even the past offending of such a serious nature:

> does not enable the competent authorities of that Member State to consider automatically that the mere presence of that person in its territory constitutes, whether or not there is any risk of re-offending, a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, capable of justifying the adoption of measures taken on grounds of public policy or public security.[71]

Whilst the state may consider the severity of the offending and extent of the individual's involvement in the past offending in determining the question of proportionality of deportation, the state must also take into account whether 'the subsequent conduct of that

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[69] ibid

[70] *K v Staatssecretaris van Veiligheid en Justitie and HF v Belgische Staat* (Judgment of the Court (Grand Chamber), 2 May 2018) C-331/16 and C-366/16.

[71] ibid [65].

individual […] reveals the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU [including peace, human dignity, and democracy]'.[72]

The future-orientated nature of the Regulations is central to treating the FNO as an individual, rather than as an offender. Regulation 27(5)(b) provides that 'the decision must be based exclusively on the personal conduct of the person concerned' and 27(5)(d) that 'matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision'. Therefore factors outside of the control of the individual FNO, such as general deterrence, cannot be used to justify deportation under the Regulations:

> deterrence, in the sense of measures designed to deter others from committing similar offences, has of itself no part to play in a decision to remove the individual offender. Similarly, it is difficult to see how a desire to reflect public revulsion at the particular offence can properly have any part to play[73]

As a consequence, the seriousness of a past offence is not determinative of the question of the public interest in deportation: only likely future conduct of the individual is. However, the Home Office guidance has been revised since the inception of the Regulations to allow the seriousness of the offence to have greater impact on decision-making. Now the guidance provides that 'the length of sentence will provide a strong indication of the severity of the offence and will therefore provide an indication of the nature and severity of the threat posed'[74]

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[72] ibid [66].

[73] *Secretary of State for the Home Department v Straszewski* [2015] EWCA Civ 1245, [2016] Imm AR 482, [14].

[74] Home Office (n10) 23.

whereas the guidance used to hold that the length of sentence and sentencing comments were merely 'helpful indicators'.[75]

Yet the guidance remains future-orientated and focussed on the individual, consistent with the Regulations. The 'personal conduct of the person must represent a genuine, present and sufficiently serious threat'[76] and the guidance suggests that decision-makers take into account factors such as police intelligence, the nature of any licence conditions imposed, and the security category of the prison in which they have been held,[77] as relevant to making an individualised assessment of the future risk posed by the individual.

The future-orientated aspect of the Regulations is important for the argument that the Regulations conceive of the FNO as an individual for two reasons. Firstly, as highlighted above, justifications for deportation based solely on the fact of past offending focus on 'offender' as an immutable characteristic and which justify deportation on the basis of factors outside their current control, such as the general deterrent effect of deportation.[78] Secondly, the on general deterrence, communication, and desert permit little room for the FNO to argue that they no longer present a risk to the public because of their rehabilitation. This aspect is discussed in detail in the following part.

3.2 Rehabilitation

The focus of the Immigration Act 2014 rules on general deterrence, communication, and desert are additionally problematic because they permit little room for the FNO to argue that they no longer present a risk to the public because of their rehabilitation. The courts have little means

[75] Harvey (n7) 217.

[76] The Immigration (European Economic Area) Regulations 2016, Regulation 27(5)(c).

[77] Home Office (n10) 23-24.

[78] For an explicit Kantian exploration of some of these issues, see: Berry Tholen, 'The Europeanisation of Migration Policy – The Normative Issues' (2005) 6 European Journal of Migration and Law 323.

by which to recognise the possibility of rehabilitation by individual FNOs. This runs counter to the UK's current penal policy which otherwise retains some 'commitment to rehabilitation'.[79] Recognising that individuals have the capacity to express remorse, change, and become rehabilitated is an important aspect of conceptualising FNOs as individuals rather than just as offenders.

Yet consistent with the idea that the Immigration Act 2014 rules conceives the FNO solely as one who possesses the indelible label of offender, rather than as an individual, the possibility of the individual FNO demonstrating rehabilitation has limited (and markedly grudging) impact on the Immigration Act 2014 deportation rules. '[A]voiding the risk of reoffending'[80] is the only rationale for deportation recognised in UK case law which is concerned with the individual, rather than in their status as offender. Taking into account the risk of reoffending (and thereby the possibility that an FNO may not reoffend) was described in *OH (Serbia)* as 'not the most important facet.'[81] Lord Kerr in *Hesham Ali* seemingly gives more weight to the possibility of rehabilitation:

> The strength of the public interest in favour of deportation must depend on such matters as the nature and seriousness of the crime, the risk of re-offending, and the success of rehabilitation, etc.[82]

[79] Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (Fourth Edition, Oxford, Oxford University Press, 2012), 367 & 370.

[80] *DW (Jamaica)* (n55) [23].

[81] *OH (Serbia)* (n57) [15].

[82] *Hesham Ali* (n61) [164].

However, even here, Lord Kerr does 'not have trouble with the suggestion that there may generally be a strong public interest in the deportation of foreign criminals'[83] because of their pre-existing status as offender and regardless of their rehabilitation. In *HA (Iraq)*, those factors which rely on the FNO's status as an offender were again expressed as the predominant rationales for deportation:

> The weight which it [rehabilitation] will bear will vary from case to case, but it will rarely be of great weight bearing in mind that […] the public interest in the deportation of criminals is not based only on the need to protect the public from further offending by the foreign criminal in question but also on wider policy considerations of deterrence and public concern.[84]

Underhill LJ only grudgingly allows the prospect of rehabilitation to have *any* weight in the assessment of the public interest in deportation:

> I do not think that it properly reflects the reason why rehabilitation is in principle relevant in this context, which is that it goes to reduce (one element in) the weight of the public interest in deportation which forms one side of the proportionality balance. It is not generally to do with being given credit for being a law-abiding citizen: as the UT [Upper Tribunal] says, that is expected of everybody, but the fact that that is so is not a good reason for denying to an appellant such weight as his rehabilitation would otherwise carry.[85]

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[83] *Hesham Ali* (n61) [164].

[84] *HA (Iraq)* (n34) [141].

[85] *HA (Iraq)* (n34) [142].

Finally, the Immigration Act 2014 rules mark the FNO's status as an offender as a long-lasting legal status which cannot easily be lost, even though the FNO may demonstrate effective rehabilitation. Instead, the FNO is continually treated as an offender because of their past offence. In *Chege*,[86] the appellant was considered to continually possess, first and foremost, a status of deportability derived from his past criminal offending, regardless of the future risk he apparently posed to the public:

> an "offender" acquires that status by virtue of committing a crime, and having once offended he does not lose that status even if he never commits another crime. […] an individual can be regarded as a "persistent offender" for the purpose of the Rules and the 2002 Act even though he may not have offended for some time.[87]

In stark contrast to the Immigration Act 2014 rules, rehabilitation plays a far more important role in the assessment of future risk under the Regulations. The executive guidance requires the decision-maker to 'consider the nature and duration of any efforts to rehabilitate. This is relevant in particular to whether or not that person poses a "present" threat.'[88] Engaging in rehabilitation programmes may also have a positive impact on those other factors that the guidance suggests that decision-makers consider: intelligence, licence conditions, and prison category.

Furthermore, the guidance also reflects that the seriousness of past offending is not a

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[86] *Chege ('is a persistent offender') Kenya* [2016] UKUT 187 (IAC), [2016] Imm AR 833.

[87] ibid [50] & [53]; although 'persistent offender' is not 'a permanent status that can never be lost once it is acquired' [53].

[88] Home Office (n10) 24.

reliable guide to future conduct if the past offending was as a consequence of factors which no longer apply: 'you should consider how long ago any offending took place and if a change in lifestyle or circumstances may now have removed the likelihood of reoffending.'[89] This contrasts with how the Immigration Act 2014 rules weighs more heavily the public interest in the deportation of the FNO whose offence was more serious[90] but is less likely to repeated due to rehabilitation, than in the case of the FNO whose offence was less serious but who is more likely reoffend in the future due to factors such as continued gang membership or untreated substance abuse.

The importance of rehabilitation is underlined by *R (Essa)*[91] in which it was found (relying on readings of the Citizens' Rights Directive by both UK courts, the Advocate General, and the CJEU) that an important dimension of the decision to deport the FNO is whether deportation would prejudice their prospects of rehabilitation. Doing so upholds 'the interests of the individual concerned as much as the interests of the Union in general.'[92] In the original quote, the emphasis is reversed so as to underline the importance of rehabilitation to the Union in general, whereas for the purposes of considering what kind of human the FNO is in the Regulations it is most important here to note that rehabilitation is recognised as being important for the individual for their own sake.

This approach under the Regulations is consistent with the case law of the CJEU on the interpretation of the underlying Citizens' Rights Directive. Both *PI v Oberbürgermeisterin der*

[89] Home Office (n10) 24.

[90] Nationality, Immigration and Asylum Act 2002, s117C(2): 'The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.'

[91] *R (Essa) v Upper Tribunal (Immigration & Asylum Chamber) & Anor* [2012] EWCA Civ 1718.

[92] Advocate General Opinion in *Land Baden-Würtemberg v Tsakouridis* [2011] 2 CMLR 11, quoted in *R (Essa) v Upper Tribunal (Immigration & Asylum Chamber) & Anor* [2012] EWCA Civ 1718, [8].

Stadt Remscheid[93] and *Land Baden-Württemberg v Tsakouridis*[94] might be read primarily as an expansion of the types of offending which might be used to justify the deportation of an EU national on imperative grounds of public security, thus bringing more EU national offenders within the scope of the deportation powers provided for by the Directive.[95] However, each judgment also restates the importance of the requirements that 'the individual concerned must represent a genuine, present threat'[96] and that 'previous criminal convictions cannot in themselves constitute grounds for taking public policy or public security measures'.[97] Moreover, although more offences might now be covered by deportation provisions in the Directive it is not the past offending, per se, which renders the EU national deportable but 'a propensity to act in the same way in the future.'[98]

It has been argued that *PI* and *Tsakouridis* represent a significant move in EU law towards a more expansive interpretation of deportation provisions in the Citizens' Rights Directive. The narrowest possible interpretation of 'imperative grounds of public security' would limit deportation to crimes against the state and terrorism, consistent with the context of its drafting in the wake of 9/11.[99] However, it overstates the effect of the Citizens' Rights Directive to assert that 'after 10 years of residence a Union citizen ought to be treated like a

[93] *P.I.* Case C-348/09 (n15).

[94] *Land Baden-Württemberg v Tsakouridis* Judgment of the Court (Grand Chamber), 23 November 20210) Case C-145/09.

[95] Václav Stehlik, 'Metamorphosis of Public Security Exception in the EU Internal Market and EU Citizens' Rights' in Agnieszka Bień-Kacała, Lóránt Csink, Tomasz Milej, and Maciej Serowaniec (eds) *Liberal constitutionalism – between individual and collective interests* (Faculty of Law and Administration, Nicolaus Copernicus University in Toruń, 2017), 237.

[96] *P.I.* Case C-348/09 (n15) [34].

[97] *Tsakouridis* Case C-145/09 (n94) [48].

[98] *P.I.* Case C-348/09 (n15) [34].

[99] Stehlik (n95) 236.

national.'[100] After all, a national can never be deported, even for the grossest offences against public security (they must, at least, be stripped of their nationality of the state first).

For the purposes of the comparison made with the situation under the Immigration Act 2014 rules, it is important to note that there is no specific definition of 'public security' in EU law texts[101] and even critics of the judgments in these cases concede that under a general reading of 'imperative grounds of public security':

> drug trafficking could probably qualify, as could organized crime concerning the sexual exploitation of children, if we perceive it as organized action against the State.[102]

Furthermore, the interpretation in *PI* and *Tsakouridis* by the CJEU emphasised the importance of the intensifier (*imperative* grounds) to delineate which forms of normal offences might be covered by cases of public security:

> attention should be given to the 'exceptional circumstances' surrounding the offending conduct and the 'high degree of seriousness' it reflects – elements that are captured by the adjective 'imperative'. This could be termed the 'counter-restrictionist' view.[103]

Regardless though of whether or not these judgment reflect a significant expansion of

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[100] Kochenov and Pirker (n2) 384.

[101] Stehlik (n95) 128.

[102] Kochenov and Pirker (n2) 387.

[103] Kostakopoulou and Ferreira (n2) 10-11 (footnotes omitted).

the range of offences that might lead to deportation under the UK's Immigration (European Economic Area) Regulations, these CJEU's judgments retain the central features of the underlying Directive which defines the subject as an individual, rather than as an offender: future-orientation, individualised assessment, and a concern for rehabilitative potential. Indeed, the very language used in the CJEU cases – 'the individual concerned'[104] – stands in stark contrast to much UK case law and statute which addresses the 'foreign criminal'.

Furthermore, the importance of the possibility of the rehabilitation of the individual is underlined by the procedural requirement (also found in Regulation 32(5)) that:

> requires the Member State to check that the individual concerned is currently and genuinely a threat to public policy or public security and to assess whether there has been any material change in the circumstances since the expulsion order was issued.[105]

Almost the opposite is the case under the Immigration Act 2014 rules. In *MA (Pakistan)*,[106] the Home Office successfully deported MA, despite his having won a previous appeal against deportation and despite his not reoffending since, because MA's status as an offender continued even after changes in deportation law which made him more likely to be deported.[107] Whereas the Regulations require the SSHD to check for evidence of rehabilitation which might render a deportation order inappropriate, to the benefit of the individual, the

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[104] *P.I.* Case C-348/09 (n15) [34].

[105] ibid [31].

[106] *MA (Pakistan) v Secretary of State for the Home Department* [2019] EWCA Civ 1252.

[107] Nick Nason, 'Win a Deportation Appeal? You Can Still Be Deported, Court of Appeal Holds' (*Free Movement*, 24 July 2019) <https://www.freemovement.org.uk/win-a-deportation-appeal-you-can-still-be-deported-court-of-appeal-holds/> accessed 22 August 2019.

Immigration Act 2014 rules permit the SSHD deport an individual when immigration law changes to the individual's detriment.

Rehabilitation is not just relevant under the Regulations to whether or not there is sufficient reasons for deporting an FNO, but also to the proportionality assessment as to whether the reasons for deportation outweigh the interference with residency rights. The executive guidance states that, 'Access to rehabilitation programmes or support may also in certain circumstances be relevant to whether or not the public policy or public security decision is proportionate'.[108]

The consistent focus of how the Regulations permit the UK state to justify the deportation of an FNO is both future-oriented and individualised. The Regulations are clearly concerned with the individual as they are at the time of the decision and their possible future conduct rather than with the past offence. In contrast, the Immigration Act 2014 rules are concerned solely with the past act of offending. The foreign national offender is a 'foreign criminal':[109] a label that is not readily lost (as in *Chege*, above). Their deportation is, by law, 'in the public interest'[110] for reasons of general deterrence, communication and desert which apply irrespective of the individual's rehabilitative potential. Under the Immigration Act 2014 rules the FNO is first and foremost and offender, not an individual.

Recognising FNOs as individuals with the capacity for rehabilitation and reform by refocusing UK deportation law on preventing future risk of public harm, rather than focussing primarily on FNOs as 'offenders', would help reverse some of the more dehumanising aspects of deportation law in the UK.[111] It would also be important because deportation occurs *after*

[108] Home Office (n10) 24.

[109] Nationality, Immigration and Asylum Act 2002, s117D(2).

[110] Nationality, Immigration and Asylum Act 2002, s117C(1).

[111] The dehumanisation of deportation is captured vividly in Luke de Noronha, 'Deportation, Racism and Multi-Status Britain: Immigration Control and the Production of Race in the Present' (2019) 42 Ethnic and Racial

the prison sentence is served. Therefore rationales for deportation that are based solely on previous conduct (desert and communication), rather on individual future behaviour (specific deterrence and incapacitation), give deportation the appearance of an additional punishment. If deportation is an additional punishment, then it is one that only FNOs can serve, and it is therefore a discriminatory punishment.[112] The UK's Immigration Act 2014 rules do not permit FNO's an opportunity to prove, through a period of non-offending, that they no longer present a risk of harm to the public. If deportation law permits of a possibility of rehabilitation, and thus reintegration of the foreign national as a law-abiding member of UK society, it goes some way to negate the argument that deportation is illegitimate as a discriminatory additional punishment for past wrongs.

3.3 Enemy Penology: Citizen or Criminal?

This article is written from a position within domestic UK law, looking out towards EU law.[113] A number of articles have argued that the EU case law addressed in this article – *Tsakouridis,* and *PI* – and those following these decisions, reflect a change in the position of the CJEU to one which now 'accommodates a moralised, backwards looking and offence-based understanding of the threat to public policy and public security'[114] or which introduces 'a higher level of abstraction and presumption'.[115] These analyses are undoubtedly correct in terms of assessing the direction of travel in EU law and changing perceptions within the EU

Studies 2413; and Luke de Noronha, *Deporting Black Britons: Portraits of Deportation to Jamaica* (Manchester University Press, 2020).

[112] Daniel Kanstroom, 'Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases' (2000) 113 Harvard Law Review 1890.

[113] Pre-Brexit, this manifests as looking at the EU legal order as a supra-national order overlayed on top of UK law. Post-Brexit, an almost wistful position of an outsider looking in at the legal order that has been lost.

[114] Stephen Coutts, 'The Expressive Dimension of the Union Citizenship Expulsion Regime: Joined Cases C-331/16 and C-366/126, *K and HF*' (2018) 3 European Papers 833, 838.

[115] Mitsilegas (n2) 750.

organs as to the meaning of EU citizenship. It is a direction of travel which is 'making EU citizenship significantly weaker'.[116]

However, from the position within UK deportation law, there remains (or rather, post-Brexit, remained) a high level of stratification of rights held by UK citizens, EU citizens, and non-EU nationals.[117] Cases in UK domestic courts under the Regulations were as late as *R(Connell)* in 2018 still unequivocally emphasising the fundamental incompatibilities of the Immigration Act 2014 approach towards non-EU national offenders and the approach of the Regulations towards EU national offenders.[118] It may well be that the level of stratification between EU and non-EU national offenders would have narrowed in the future in UK deportation law, depending on how much further the CJEU amends its approach to interpretation of the Citizens' Directive. However, Brexit makes this hypothetical and speculative. Instead Brexit collapses entirely the stratification between EU and non-EU nationals, in ways which this article has sought to demonstrate fundamentally alter the perception of the human being in deportation cases involving EU nationals.

When changing the lens of analysis to include all the stratified layers of rights accruing to UK citizens, EU citizens, and non-EU nationals, the difference in the Immigration Act 2014 rules for non-EU national offenders and the Regulations for EU national offenders remain striking. No matter how bad things may be getting for EU national offenders under revised case law of the CJEU, it is still not as awful as the treatment of foreign national offenders under the Immigration Act 2014 rules. Post-Brexit, UK deportation law will cease to draw any distinction between foreign national offenders with EU nationalities and non-EU nationalities.

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[116] Leandro Mancano, 'Punishment and Rights in European Union Citizenship: Persons or Criminals' (2018) 24 European Law Journal 206, 208.

[117] Eleonore Kofman, 'Contemporary European Migrations, Civic Stratification and Citizenship' (2002) 21 Political Geography 1035; Lydia Morris, *Asylum, Welfare and the Cosmopolitan Ideal: A Sociology of Rights* (Routledge 2010).

[118] *R (Connell)* (n68).

From a UK law perspective, EU citizenship always lacked an essential characteristic which in UK law is reserved solely for British citizenship:[119] the unconditional right of abode. EU citizenship always contained a level of conditionality which permitted expulsion on grounds of public policy and/or security, even if such grounds have expanded under recent CJEU case law. In UK law fundamental rights must be granted without discrimination on the basis of nationality, except that 'a non-[UK] national may be lawfully detained pending deportation, and that is a position in which a [UK] national could never find himself.'[120] The EU national was never exempt from this foundational statement of UK nationality and immigration law.

From the perspective of EU law it might truthfully be said that the CJEU's recent interpretations of the requirement to examine the likelihood of re-offending means that the 'individual propensity test becomes a criterion to distinguish between citizens and enemies; in other words, a way to decide whether or not to continue a dialogue with the individual'.[121] From the perspective of EU law those who are likely to reoffend in the future may be expelled from the member state, and so expelled from the protections of EU citizenship or free movement rights.[122] In so expelling, EU law declares the individual not to be a citizens but an enemy[123] or outlaw (in the sense of being outwith the law). Expulsion ceases the ability of EU law to 'continue a dialogue with the individual' as they cease to be subjects of EU law.

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[119] Plus an increasingly small number of Commonwealth nationals as a legacy of colonialism. See Colin Yeo, Briefing: what is the 'right of abode' in UK immigration and nationality law?' (*Free Movement,* 18 September 2019) <https://www.freemovement.org.uk/what-is-the-right-of-abode-in-uk-immigration-law/#Who_currently_has_the_right_of_abode> accessed 29 October 2021.

[120] *A & Ors v Secretary of State for the Home Department* [2004] UKHL 56, [56].

[121] Mancano (n116) 218.

[122] As, with limited exceptions such as *Zambrano* children, the Citizens Directive and free movement laws only applied once an EU national was outside the member state of their nationality. Even in *Surinder Singh* cases, the EU national has to have moved to another member state in order to return to the member state of their nationality where they may then rely on EU law.

[123] Mancano (n116) 218.

In contrast though, from the perspective of UK deportation law, the EU law derived Regulations *demanded* a dialogue with the individual before their expulsion. The Regulations permit the expulsion of the EU national offender but only (as established above) if they were individually adjudged to be a future offending risk. Such an assessment required dialogue because the individual was able to present evidence which established their rehabilitation and reform and such evidence must make up part of the assessment of their case. In contrast, the designation under the Immigration Act 2014 rules as an 'offender' refused any dialogue with the individual: it is a status that is determined solely by prior conviction and is hard to lose through rebuttal as any attempt to engage the deportation decision-maker in dialogue about their rehabilitation and reform might be rejected as being of little weight in comparison to their persistent status as 'offender'.

4. Conclusion

This article presents a comparison between the pre-Brexit and post-Brexit rules for the deportation of EU national offenders. The fact that after 31 December 2020 EU national offenders will be subject to the same deportation rules that have applied to third-country nationals for some time, means that we have a great deal of certainty about how exactly the deportation of EU national offenders will be judged. The differences in the rules mean that for EU national offenders, whether they became resident or committed their offences before Brexit-day on 31 December 2020 'will most likely determine whether or not you are able to stay in the UK'.[124]

However, the law governing the deportation of EU national offenders was not weak pre-Brexit. 3,501 EU national offenders were deported from the UK in 2019 and EU national

[124] Halliday (n46).

offenders comprised a large majority (68%) of all FNOs deported in 2019.[125] This article has argued that the difference between the pre- and post-Brexit deportation laws that apply to EU national offenders is not simply a difference in severity or harshness. Instead, the two sets of rules are premised on two different views of what kind of human being the foreign national offender is. One sees the foreign national offender as first and foremost an individual, the other that they are an offender.

This article traces how the difference in how the state is legally permitted to justify deportation and the weight and importance of rehabilitative potential as two key sites whereby this difference between visions of the foreign national offender as individual or offender make a significant difference to the substance of the law.

[125] The Migration Observatory (n47).