

# Changes to Prison Rules and YOI Rules in respect of Foreign National Prisoners on whom a Deportation Order has been signed in respect of their eligibility for open conditions and for release on temporary licence (ROTL)

## Consultation response by HM Chief Inspector of Prisons

1. We welcome the opportunity to comment on the draft amendments to Prison/YOI Rules affecting the eligibility for open conditions and for ROTL, of Foreign National Prisoners on whom a Deportation Order is in force.
2. Her Majesty's Inspectorate of Prisons (HMI Prisons) is an independent inspectorate whose duties are primarily set out in section 5A of the Prison Act 1952. HMI Prisons has a statutory duty to report on conditions for and treatment of those in prisons, young offender institutions (YOIs) and immigration detention facilities. HMI Prisons also inspects court custody, police custody and customs custody (jointly with HM Inspectorate of Constabulary), and secure training centres (with Ofsted).
3. HMI Prisons coordinates, and is a member of, the UK's National Preventive Mechanism (NPM), the body established in compliance with the UK government's obligations arising from its status as a party to the UN Optional Protocol to the Convention Against Torture (OPCAT). The NPM's primary focus is the prevention of torture and ill treatment in all places of detention. Article 19 (c) of the Protocol sets out the NPM's powers to submit proposals concerning existing or draft legislation.
4. The following response is based on evidence from our inspections. All inspections are carried out against our *Expectations* - independent criteria based on relevant international human rights standards and norms. Expectations are brigaded under four healthy prison tests: safety, respect, purposeful activity and resettlement.<sup>1</sup> All our expectations are supported by a series of 'indicators' which we would expect to see in place if the expectation is met although these do not preclude an establishment demonstrating to us that the expectation is met in other ways.
5. With regards the treatment of foreign national prisoners, HMIP expects that prisoners of all nationalities be treated equitably and according to their individual needs.
6. With regards the strategic management of resettlement, HMIP's expectation is that coordinated and targeted resettlement services meet the needs of the prison population. One of our suggested indicators for achieving this expectation is the use of release on temporary licence (ROTL) to good effect in individual sentence plans as a key part of a resettlement strategy. Furthermore, accurate and timely assessments of the risk of harm to others, reviewed at appropriate intervals, should inform decisions regarding ROTL, and any imposed restrictions should be proportionate to managing their risk and protecting the public.
7. In addition, HMIP expects that categorization decisions be proportionate, applied objectively, fairly and transparently, and recognize the individual needs of all prisoners. Prisoners should be placed in the lowest appropriate security category.

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<sup>1</sup> Expectations. Criteria for assessing the treatment of prisoners and conditions in prison, version 4, 2012. <http://www.justice.gov.uk/downloads/about/hmipris/adult-expectations-2012.pdf/>

8. The principles set out in paragraphs (6) and (7) should apply regardless of nationality, immigration status or final destination.
9. We consider that the proposal to introduce a blanket ban to foreign national prisoners' eligibility for ROTL and their prohibition from open conditions once a deportation order has been signed into Prison Rules and YOI Rules undermines the principles laid out above.
10. Decisions around eligibility for ROTL and categorization should be made on the basis of risk assessments and the merits of individual cases, rather than sweeping rules that do not best serve the needs of individual prisoners. This point has been made by the Council of Europe's Committee of Ministers:

*Ordinarily, foreign prisoners should be eligible for prison leave and other authorized exits from prison according to the same principles as nationals. The assessment of risk that a foreign prisoner may leave the country and escape punishment should always be made on the merits of the individual case.<sup>2</sup>*

11. In its inspection reports, HMIP has identified the failure to use ROTL to support resettlement, subject to appropriate risk assessments, as a missed opportunity to support prisoners' progression (Canterbury). Prisoners "of interest to UKBA" have also been barred from home detention curfew (Canterbury), and the management of offending behavior and risk for foreign nationals has been seen as secondary to immigration matters (Bullwood Hall). In such instances, we have recommended that all assessments of prisoner risk of absconding should be individualised, based on clear and consistent criteria, and that all foreign national prisoners receive effective offender management and reintegration support in line with the national offender management model.
12. We have identified two main areas where our indicator of good practice – that the lowest appropriate security category should apply to prisoners – is not met. Firstly, we have noted that prisoners recategorised to category D are not accepted at open prisons because they are "of interest to UKBA" (Canterbury). In response, we have called for prompt transfers to appropriate establishments as a means to address this problem. Secondly, we have noted the perception of UKBA and the prison that any prisoner who could be removed from the UK is at risk of absconding – manifested in one case by a prisoner being asked to prove legal status in the UK before his application for recategorisation was considered. It is our consideration that such an approach undermines the notion of individualised assessment of risk and we have underscored that Category D status should be granted on the basis of an individualised risk assessment only (Bullwood Hall).
13. We are also concerned by the suggestion in the proposal that foreign national prisoners have "no resettlement needs" on three main grounds.
  - Firstly, deportation orders can be, and are, successfully challenged and foreign national prisoners subsequently released in the UK.<sup>3</sup> The imposition of a blanket ban on ROTL/open conditions to these prisoners would mean that none of those subsequently released rather than deported would have had a chance to prepare for resettlement such as would be afforded by ROTL/open conditions.

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<sup>2</sup> Council of Europe Committee of Ministers. Recommendation No. R(84) 12 (Concerning Foreign National Prisoners). Adopted by the Committee of Ministers on 21 June 1984 at the 374<sup>th</sup> meeting of the Ministers' Deputies.

<sup>3</sup> Our inspections of HMP Canterbury (2012) and HMP Bullwood Hall (2012) highlight the substantial numbers of foreign national prisoners that are eventually released in the UK. In our view, the lack of strategic focus on resettlement outcomes at HMP Canterbury "took no account of the fact that there was no certain way to tell which prisoners were eventually going to be removed or released until very shortly before discharge. About a fifth of prisoners were released into the UK". During our inspection of HMP Bullwood Hall, we found that UKBA data indicated that in the previous six months, 54 prisoners had returned to their country of origin through the facilitated returns scheme (FRS), 59 through the early removal scheme (ERS), 19 had secured immigration bail, 56 were transferred to an immigration removal centre (IRC), 78 were released into the community (13 on temporary admission) and 11 were removed.

- Secondly, some foreign national prisoners will not be removable. In some instances a deportation order may be in force but because of a lack of documentation or disputes over a person's nationality, they will remain in the UK. The Home Office will normally detain these ex-prisoners under immigration powers, but ultimately they may be released into the community through FTT-IAC bail. There may be risks to the public if these ex-prisoners' offending needs are unmet.
- Thirdly, the suggestion also undermines the principle of international responsibility, by which the UK would surely expect foreign countries to consider and respond to the rehabilitation needs of our nationals in their prisons. We have urged that:

*Whether prisoners were returning to their own country or being released into the community in the UK, they should receive support to reduce the risk of reoffending and to help them resettle successfully. This is in their own interest and in the interests of the communities to which they are returning. (HMIP Inspection Report, Bullwood Hall)*

14. Our inspections have also identified good practice in addressing the resettlement needs of foreign national prisoners. At HMP Huntercombe, although the foreign national population was relatively new, the prison had shaped its resettlement strategy to meet the needs of foreign national prisoners: a comprehensive action plan in place and an analysis of their needs had been carried out. Progression to category D was developing and there was good use of release on temporary licence. We believe that this approach to categorisation and ROTL eligibility for foreign national prisoners, among whom some were eventually deported, and some released in the UK, demonstrates that positive strategies based on individual assessments of needs and risks are feasible, as well as desirable.
15. In short, we consider that the proposal would constitute a regressive step, even if it reflects what has already become practice in some prisons. Where foreign national prisoners are already complying with open conditions or ROTL (these may include prisoners who have opted to join a voluntary return scheme and would not want to jeopardize their return to their country), the implications of this PSI would be to withdraw benefits that they have been granted. This could be considered an arbitrary limitation on their rights.
16. I hope that you find this information useful and should you require anything further, please do not hesitate to contact me.

**NICK HARDWICK**  
**HM Chief Inspector of Prisons**

**16 December 2013**