Suspended Deportation Orders: A Proposed Law Reform to the Deportation of Foreign National Offenders From the UK

Jonathan Collinson

Lecturer in Law, University of Huddersfield, j.m.collinson@hud.ac.uk

Acknowledgements: My thanks to Professor Roger Brownsword and the anonymous referees for their comments, and to Professor Audrey Macklin and Dr Diego Acosta for their suggestions as to avenues for international comparisons.

Abstract

The Immigration Act 2014, the UK statutory law governing deportation, requires deportation as the normal consequence of criminal offending by a foreign national. Deportation is a binary institution; a foreign national offender (FNO) is made subject to a deportation order and deported from the UK, or they are not. This is problematic because it creates two kinds of "hard cases" on either side of the statutory categories for exemption from deportation on the basis of an FNO's Article 8 ECHR family life. The first type of "hard case" in the Immigration Act 2014 is the creation of hard and fast lines for qualification for the exceptions to deportation. This results in cases where one individual qualifies for an exception but another individual, who is otherwise in substantially in the same position, does not because the qualifying criteria are based on arbitrary lines, drawn on the basis of age or length of residence. The second type of "hard cases" arise because the vague, subjective way in which other of the exception criteria are worded, and for which there is no objective standard by which they may be judged. This article proposes the introduction of a "suspended deportation order" so as to create a third possible disposal for deportation appeals as a means by which to tackle the problems arising from the binary outcomes to deportation appeals. This article examines suspended prison sentences as a model for the rationale and practical application of a "suspended deportation order", noting both similarities and differences to this fixture of sentencing law.

Keywords: deportation; sentencing; foreign national offenders; crimmigration law; law reform; criminal justice

1. Introduction

UK law positions deportation as the normal consequence of criminal offending by a foreign national. The Nationality, Immigration and Asylum Act 2002 states that 'The deportation of foreign criminals is in the public interest'[1] and that where a foreign national offender has been sentenced to a period of imprisonment of over twelve months duration, 'the public interest requires deportation unless'[2] one of the statutory exceptions are met. One of the problems with the UK's deportation system is that deportation is a binary institution; a foreign national offender (FNO) is either made subject to a deportation order and deported from the UK, or they are not.

I argue that one of the reasons this is problematic is because the decision-maker (the Home Office in the first instance, the First-tier Tribunal (Immigration and Asylum) on appeal), has no options other than to permit deportation or else free the FNO from the prospect of deportation in "hard cases". The Immigration Act 2014 outlines exceptions to deportation based on the Article 8 European Convention on Human Rights (ECHR) right to private and family life where the FNO is integrated into the UK and there are barriers to their reintegration into the receiving country,[3] or where the effect of the FNO's deportation is 'unduly harsh' (or worse) on the FNO's 'qualifying' child or partner.[4] However, the binary nature of deportation creates two types of "hard cases". Firstly, where the qualification for the statutory exceptions to deportation are based on hard and fast, yet arbitrary lines. These arise with respect to qualification criteria based on age or length of residence. Secondly, "hard cases" are created by the subjective qualifying criteria, for example that the deportation is 'unduly harsh' on an FNO's child or partner, or the FNO's reintegration into their country of nationality presents 'very significant obstacles'. In some cases, an FNO may ostensibly meet the requirements of the exception to deportation but continues to pose a significant risk to the public, alternatively, the FNO may pose no further risk to the public but their circumstances are marginally short of falling within one of the exception categories.

One way of addressing these two problems is to create a third option for the disposal of deportation cases. I therefore propose in this article a new "suspended deportation order". Such

[1] Nationality, Immigration and Asylum Act 2002, s117C(1) (inserted by the Immigration Act 2014, s19).

[2] Nationality, Immigration and Asylum Act 2002, s117C(3) [emphasis added].

[3] Nationality, Immigration and Asylum Act 2002, s117C(4).

[4] Nationality, Immigration and Asylum Act 2002, s117C(5) & (6).

orders would work similarly to suspended prison sentences, as the Sentencing Council puts it; a 'chance to stay out of trouble and to comply with up to 12 requirements set by the court'.[5] This article uses suspended prison sentences as a jumping off point for both the practical and rhetorical aspects of suspended deportation orders.

The introduction of suspended deportation orders will not be sufficient to satisfy those (including myself) who argue that the deportation of FNOs is an additional criminal punishment, and is therefore an illegitimate and discriminatory practice because it applies exclusively to foreign nationals.[6] It will also be objectionable to critics of crimmigration law;[7] the extension to immigration law of criminal law norms, discourse and tools, for the purposes of the social control of migrant populations.[8] However, suspended deportation orders have the potential to address the problems that a purely binary system of deportation presents and as such would be a positive step forward, as small as that step may be in the context of wider reform of deportation law in the UK.

Any reform presents potential unintended consequences. In this article I address two. First, that the introduction of suspended deportation orders may result in a form of sanction inflation whereby those FNOs who currently benefit from a statutory exception to deportation but do not represent a "hard case" are made subject to a suspended deportation order, and FNOs who have genuine "hard cases" remain subject to the automatic deportation regime. The second possible unintended consequence is that the conditions attached to suspended deportation orders are inappropriate and thereby undermine the rationale and practice of suspended deportation orders.

This article proceeds as follows. In section 2, I describe the current deportation regime in the UK, outlining the binary nature of outcomes in deportation decision-making, and the statutory exceptions to deportation. In section 3, I expand on the problems of "hard cases" created by a system of deportation which recognises only binary outcomes. In section 4, I examine suspended prison sentences in the UK, and how their use and rationale are transferable

[5] Sentencing Council, 'Suspended Sentences' <https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/suspended-sentences/> accessed 14 February 2018.

[6] See, for example, Victor S Navasky, 'Deportation as Punishment' (1959) 27 University of Kansas City LR 213.

[7] Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56 American University LR 367.

[8] David Alan Sklansky, 'Crime, Immigration, and Ad Hoc Instrumentalism' (2012) 15 New Criminal LR 157, 202; Teresa A Miller, 'Blurring The Boundaries Between Immigration and Crime Control After September 11th' (2005) 25 Boston College Third World LJ 81, 107.

to the deportation context. In section 5, I present an outline of how a suspended deportation regime may operate and how it may resolve the kind of "hard cases" for which it is designed. I also explore some parallel international practices. The final part addresses the two possible unintended consequences of the proposed reform, and I explain how a suspended deportation order scheme may be drafted so as to address these concerns.

2. The UK's Deportation Regime

The labelling of immigration enforcement in the UK draws a distinction between 'removal' and 'deportation'.[9] Removal applies 'if the person requires leave to enter or remain in the United Kingdom but does not have it.'[10] Removal therefore applies to individuals who entered the UK without permission (known as leave to enter), or those who once had permission but have been refused, or failed to apply for, a further period (known as leave to remain). Removal is aimed at illegal entrants and visa overstayers. Removal is not contingent upon criminality[11] and is sometimes referred to as 'administrative removal'.[12]

On the other hand, deportation of a foreign national offender (FNO) occurs after conviction for a criminal offence and a prison sentence has ended. The deportation of non-EEA national FNOs from the UK is carried out under section 3(5)(a) of the Immigration Act 1971 which provides the Secretary of State for the Home Department (SSHD) the power to determine that the deportation of a person, other than a British Citizen, is 'conducive to the public good'. The power to consider deportation as being conducive to the public good was, under the 1971 Act, a discretionary one,[13] however, the UK Borders Act 2007 introduced a statutory presumption that the deportation of foreign nationals sentenced to twelve months or more of imprisonment is conducive to the public good for the purposes of the 1971 Act.[14]

The effect of a deportation order is that it invalidates any extant leave to enter or

[9] Gina Clayton, *Immigration and Asylum Law* (7th edn, Oxford University Press 2016), 583-584.

[10] Immigration Act 2014, s1.

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

[12] Gina Clayton, *Immigration and Asylum Law* (7th edn, Oxford University Press 2016), 584.

[13] Laura Dubinsky, Hamish Arnott & Alasdair Mackenzie, *Foreign National Prisoners: Law and Practice* (Legal Action Group, 2012), 5.

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

remain,[15] whereas a removal order applies only where there is no leave in the first place. This article is therefore about the deportation of FNOs, as understood in UK law, and the proposal developed for a suspended deportation order would apply to this group. For context, in 2017, the Home Office enforced the return of 12,321 individuals, of whom 5,835 (i.e. 47%) were foreign national offenders being deported.[16]

Section 33 of the UK Borders Act 2007 creates a number of listed exceptions to deportation; that deportation would breach either the UK's obligations under the Refugee Convention,[17] or the Convention on Action against Trafficking in Human Beings,[18] or breach the rights of the individual under the European Convention on Human Rights (ECHR).[19] 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 statute. The Immigration Act 2014 re-emphasises the UK Borders Act 2007 in its command that 'The deportation of foreign criminals is in the public interest.'[20] The 2014 Act 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.'[21] 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.

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

[16] Home Office, 'How Many People Are Detained or Returned?' (21 March 2018) <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2017/how-many-people-are-detained-or-returned> accessed 13 April 2018.

[17] UK Border Act 2007, s33(2)(b).

[18] UK Border Act 2007, s33(6A).

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

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

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

> 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.[22]

Where the FNO has been sentenced to a period of imprisonment of four years or more, statute states that 'the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.'[23] Immigration Rules of identical effect constrain the SSHD's decision making.[24]

The effect of a deportation order is that the FNO is deported from the UK and that the deportation order remains in place until actively revoked by the SSHD. Immigration Rule 391 provides that a minimum period of ten years elapse before revocation is even considered.[25] This practice is different from that of some other Council of Europe states which provide for time-limited exclusion orders.[26]

The UK's deportation regime is therefore a binary institution; a foreign national offender is deported or they are not, and the decision to deport is independent of the decision as to the length of time exclusion might last. Where the exceptions to deportation apply –where the FNO is a refugee, a victim of trafficking, or deportation would be a breach of their ECHR rights – the FNO will not be deported. Where the foreign national offender does not meet one of the exceptions, deportation will follow.

Binary outcomes are unusual where the consequences are as serious for the individual as deportation decisions. In contrast, in sentencing for a criminal offence, multiple outcomes are potentially available to the judge.[27] Ancillary orders may be imposed in addition to a

---

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

[23] Nationality, Immigration and Asylum Act 2002, s117C(6).

[24] Immigration Rules 398-399A.

[25] Gina Clayton, *Immigration and Asylum Law* (7th edition, Oxford University Press 2016), 580; Home Office, 'Guidance: ECB04: deportees' (24 April 2015) <https://www.gov.uk/government/publications/who-needs-an-entry-clearance-ecb04/ecb04-who-needs-an-entry-clearance> accessed 11 July 2017.

[26] The ECtHR has also expressed disquiet over the relative length of some exclusion orders, incorporating the length of the exclusion into its assessment of proportionality. See for example, *Sarközi and Mahran v Austria* App no 27945/10 (ECtHR, 2 April 2015), [74]; *Gablishvilli v Russia* App no 39328/12 (ECtHR, 26 June 2014), [59].

[27] Such as absolute discharge, conditional discharge, fines, community sentences, custodial sentences, or suspended sentence. Sentencing Council, 'Types of Sentencing' <https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/> accessed 9 January 2019.

sentence to address specific aspects of the offending.[28] Furthermore, the quantum of any sentence – such as the length of imprisonment, or the size of the fine – may be altered by the judge as part of the sentencing exercise to reflect 'seriousness, harm to the victim, the offender's level of blame**,** their criminal record, their personal circumstances and whether they have pleaded guilty.'[29]

In another example, in family law, neither residence nor contact between a child and parents have binary, all-or-nothing outcomes. Residence may be shared between parents,[30] and contact can take various forms and duration, such as 'overnight staying contact, or take place during the day. It can be supervised by relatives, or by staff of a contact centre, and it can also be indirect contact through phone calls, emails, Skype, or letters and cards.'[31] Even adoption is not a binary institution as it might be granted on a temporary, rather than permanent basis, and adoption orders may permit continued contact with the birth family and parents.[32]

3. The Problem with a Binary Deportation System: creating "hard cases"

I argue that the principal problem with a binary system of deportation under the Immigration Act 2014 is that the system of exceptions to deportation creates two kinds of "hard cases". The first type of "hard case" in the Immigration Act 2014 is the creation of hard and fast lines for qualification for the exceptions to deportation. This results in examples where one individual qualifies for an exception but another individual, who is otherwise in substantially the same position, does not because the qualifying criteria are based on the drawing of arbitrary lines. The second type of "hard cases" arise because of the vague, subjective way in which other of the exception criteria are worded, and for which there is no objective standard by which they may be judged.

The question as to whether to deport or not to deport an FNO requires there to be a way

---

[28] Sentencing Council, 'Ancillary Orders' <https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/ancillary-orders/> accessed 9 January 2019.

[29] Sentencing Council, 'How Sentences Are Worked Out' <https://www.sentencingcouncil.org.uk/about-sentencing/how-sentences-are-worked-out/> accessed 9 January 2019.

[30] Annika Newnham, 'Private Child Law' in Ruth Lamont (ed) *Family Law* (OUP, 2018), 265; Mary Welstead, *Family Law* (4th ed, OUP, 2013) 383.

[31] Annika Newnham, 'Private Child Law' in Ruth Lamont (ed) *Family Law* (OUP, 2018), 270.

[32] Mary Welstead, *Family Law* (4th ed, OUP, 2013), 383; Julie Doughty, 'Adoption' in Ruth Lamont (ed) *Family Law* (OUP, 2018), 493.

of deciding which outcome is appropriate in any one case. Two broad approaches to decision-making are generally available. The first is to create hard and fast rules whereby qualification for a benefit, or release from a burden, is dependent upon meeting an objective threshold. For example, British citizenship by naturalisation is obtained, in part, on the basis of continuous residency in the UK for five years with absences amounting to no more than 450 days in the same period.[33] However, strictly enforced rules create can unjust outcomes,[34] particularly where two individuals appear to be in essentially the same position, but when one individual's circumstances do not meet the threshold, for example, the naturalisation applicant absent from the UK for 451 days. The second possible approach to decision-making is a discretionary form, possibly within a broad overarching framework. For example, Article 3 of the UN Convention on the Rights of the Child states that the best interests of the child ought to be a primary consideration in actions concerning a child. However, the best interests of the child is critiqued as being fundamentally 'indeterminate',[35] not least because there is a lack of consensus with respect to the values that underpin the interests of the child.[36] Clearly, both forms of decision-making have limitations.

The Immigration Act 2014 deportation regime is perhaps unusual in that it creates both types of "hard cases". Clearly if one were seeking to critique the Immigration Act 2014 deportation regime because of the form of decision-making that it relies upon – a rules-based system, or a discretionary process – the Act appears unjust to those who prefer one form of decision-making process over the other, simply because it utilises the other, disfavoured method. However, the purpose of this article is to identify that it is deficient because it creates both kinds of "hard cases", and is therefore objectionable from both theoretical perspectives, and to suggest a law reform – suspended deportation orders – which can address some of the injustice inherent to both kinds of "hard cases" created by the current law.

Decision-making is arguably the *raison d'être* of the judicial system, and judges make decisions on "hard cases" every day. However, as suggested above, deportation decisions are unusual in the binary nature of the outcome. In other contexts such as sentencing or family law,

[33] British Nationality Act 1981, Schedule 1, s1(2)(a).

[34] Katherine E Otto, 'The Foreign National Prisoner's Dilemma in the United Kingdom: The Human Rights Implications of Restricting Article 8 Claims' (2015) 24 Transnational Law & Contemporary Problems 431, 445.

[35] Robert H Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemporary Problems 226, 229.

[36] ibid 250.

multiple options are available to judges that can be used to better reflect the individual circumstances of the case before them. The existence of multiple outcomes assists the decision-maker to come to a more nuanced decision that more appropriately and proportionately reflects the individual facts of the case before it, rather than be tethered to only two possible outcomes which cannot adequately reflect the diversity of facts underpinning individual cases.

The Immigration Act 2014 creates the first kind of "hard case" by having hard and fast rules for the qualification for the exceptions to deportation, based on age or length of residence. These qualifying criteria may be missed by days but with no discernible consequence beyond the failure to meet an arbitrary legal threshold. Of this first kind, the Immigration Act 2014 creates "hard cases" on either side of the lines that it draws. Recall that the exceptions to deportation in the Immigration Act each have qualifying conditions. Under 'Exception 1' (s117C(4)), the FNO must have been 'lawfully resident in the United Kingdom for most of [their] life'; i.e. 50% plus one day. 'Exception 2' (s117C(5)) applies to relationships with 'qualifying' partners or 'qualifying children'. Section 117D(1) of the Immigration Act 2014 states that:

> "qualifying child" means a person who is under the age of 18 and who—
> (a) is a British citizen, or
> (b) has lived in the United Kingdom for a continuous period of seven years or more;
>
> "qualifying partner" means a partner who—
> (a) is a British citizen, or
> (b) who is settled in the United Kingdom

Drawing hard lines for the qualification for the exceptions to deportation under the Immigration Act 2014 means that some individuals will fall marginally short of the qualification period. It cannot be reasonably said that a child who has been resident in the UK for 2550 days is likely to experience the deportation of a parent less acutely than a child resident in the UK for 2555 days (i.e. seven years). The qualification based on seven years residence applies to children born in the UK so a six year old can never be a qualifying child, even if that child was born in the UK and has lived their whole life there. Likewise, a 20 year old foreign national offender who arrived aged 10 years and one week, is no less likely to be culturally and socially integrated into the UK than a 20 year old foreign national offender who arrived on the

day of their tenth birthday. Yet the fact of the week separating their arrival alone defines their qualification for the statutory exception to deportation.

There are examples of individuals for whom missing hard and fast qualifying criteria has had serious implications. One particularly stark example can be found in *MA (Pakistan)*.[37] The appellant had been sentenced to precisely four years imprisonment.[38] The Immigration Tribunal judge found that the appellant's deportation would be 'unduly harsh' on his wife and children, but because he was sentenced to four years imprisonment he had to demonstrate that there were 'very compelling circumstances'. The appellant could not demonstrate that the effect of his deportation was 'over and above' unduly harsh, and so his deportation was ordered.[39] Because a sentence of four years duration is the hard and fast line between qualifying criteria for relief from deportation 'his appeal would have been allowed if his sentence was a single day less than it had been'.[40]

In *Weekes*,[41] the FNO was a 58-year-old Barbadian man who had been resident in the UK for 26 years. He was six years short of being resident in the UK for more than half his life, and therefore fell short of the qualifying period for the exception for deportation. Although this is not a narrow miss of the qualifying period, in the context of this case his residence in the UK for 26 years enabled him to establish that he was 'socially and culturally integrated' in the UK as required by the exceptions to deportation. In this case, the setting of an arbitrary qualifying period had the absurd result that, 'were it not for an insufficient period of lawful residents here, Mr Weekes would have made out Exception 1. That would then have been a bar to deportation.'[42]

Recognition of the incongruous and absurd results that may arise from hard lines for qualification in the Immigration Act 2014 is not about special pleading. Instead it arises from the nature of Article 8 of the European Convention on Human Rights (ECHR), the right to

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

[38] ibid [4]

[39] ibid [26]

[40] 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.

[41] Secretary of State for the Home Department v Weekes [2019] UKAITUR HU060742017 (available from BAILII <http://www.bailii.org/uk/cases/UKAITUR/2019/HU060742017.html> accessed 2 July 2019).

[42] ibid [10].

family and private life, which the Immigration Act 2014 purports to be compliant with.[43] The European Court of Human Rights (ECtHR) does not apply hard and fast rules to its Article 8 ECHR jurisprudence, instead it searches for 'a fair balance between the relevant interests'[44] and seeks to ensure that the interference is 'proportionate to the legitimate aim pursued'.[45] In neither *MA (Pakistan)* or *Weekes* can it be said that the hard line qualifying periods contribute determining the proportionality of the decision to deport.

The second type of "hard cases" created by the Immigration Act 2014 are those where the terms of qualification are subjective and vague. Decision-makers will be faced with borderline cases in which they have to decide whether the effect on children or partners of an FNOs deportation is 'unduly harsh' or merely harsh,[46] or whether the obstacles to the FNO's reintegration in their country of nationality presents 'very significant obstacles' or merely significant obstacles.[47] These standards, enshrined in primary legislation, are impervious to comprehensive or objective definition. This is evident from the case law. The 'unduly harsh' effects of deportation are defined by case law by reference to synonyms rather than substantive content:

> *"unduly harsh"* does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antitheses of pleasant or comfortable. Furthermore, the addition of the adverb *"unduly"* raises an already elevated standard still higher.[48]

To hang the statutory exceptions to deportation on a test of 'highly bleak' is no more objectively illuminating than the original formulation of 'unduly harsh'. In *MK (Sierra Leone)*, from which the above definition of 'unduly harsh' is taken, the Upper Tribunal found that:

---

[43] Home Office, 'Immigration Bill: European Convention on Human Rights Memorandum by the Home Office' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/249270/Immigration_Bill_-_ECHR_memo.pdf> accessed 9 May 2018.

[44] For example, see: *Keles v Germany* App no 32231/02 (ECtHR, 27 October 2005), [55].

[45] For example, see: *Palanci v Switzerland* App no 2607/08 (ECtHR, 25 March 2014), [49].

[46] Nationality, Immigration and Asylum Act 2002, s117C(5).

[47] Nationality, Immigration and Asylum Act 2002, s117C(4)(c).

[48] *MK (section 55 – Tribunal options) Sierra Leone* [2015] UKUT 223 (IAC), [46] [emphasis original].

> we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less than cruel.[49]

In this case, was it the 'plague stricken' state of the country (Sierra Leone was at the time experiencing an Ebola outbreak)[50] that tipped it into being *unduly* harsh? Would 'exile to this struggling and impoverished' country be merely harsh once the Ebola outbreak had been contained? Even the most recent Supreme Court decision on deportation, *KO (Nigeria)*,[51] does not give authoritative guidance as to how to distinguish between 'unreasonable', 'unduly harsh', or 'very compelling circumstances',[52] although, it did leave a breadcrumb trail of clues as to where at least that panel of the Supreme Court might draw those lines.[53]

This is not a problem exclusive to the current formulation of UK deportation law. The same problem would occur if UK deportation law were to revert to a simple balancing exercise under Article 8 ECHR proportionality. It would simply alter the site of the problem to determining whether deportation would be "proportionate" or "disproportionate", rather than whether it is "unduly harsh" or just "harsh". The problem is not lack of definition *per se*, rather it is the impossibility of encyclopaedic definition: there will always be cases which sit in a grey area of uncertainty whatever formulation is used. The problem with the binary nature of deportation is that it does not permit the nuanced outcomes which proportionality demands. Even with further case-by-case guidance as to what the subjective aspects of the exceptions to deportation mean, because UK deportation law has only two possible outcomes – to deport, or not to deport – the decision-maker is limited in their ability to reflect in their decisions the

[49] ibid.

[50] ibid [45].

[51] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53.

[52] Nationality, Immigration and Asylum Act 2002, s117B(6), s117C(4), and s117C(5), respectively.

[53] Jonathan Collinson, 'Disciplining the Troublesome Offspring of Section 19 of the Immigration Act 2014: The Supreme Court in *KO (Nigeria)*' (2019) 33 JIANL 8.

significant consequences of deportation on the individual and their families, whilst also reflecting the public interest in preventing reoffending.

Nor is it a problem of relying unduly on the principle of balancing and ignoring of the prior test of necessity: a failing which the European Court of Human Rights in particular is accused of.[54] The binary nature of deportation means that there simply is no less restrictive means available to promote the legitimate aim of preventing crime and disorder under Article 8(2) ECHR. In a binary deportation system when the deportation of the FNO has been found to serve a legitimate aim (for if it did not, it would be unlawful), deportation *must* be necessary if the only alternative is a course of action which does not further the legitimate aim. In contrast, a third possible disposal which supports the legitimate aim by its link to conditions aimed at rehabilitation or prevention of future offending does offer a less restrictive means of securing the legitimate aim.

The reasoning in favour of suspended deportation orders as a means by which to address the problem of "hard cases" in deportation decisions is therefore politically neutral. It applies equally to those individual cases to which the public may be sympathetic to but which do not meet the qualifying criteria, as well as to the event that the FNO's deportation is found to meet the qualifying thresholds yet the FNO presents a risk of reoffending which may be considered unacceptable.

The rationale for introducing a 'suspended deportation order' is rooted in these distinct problems of "hard cases" which arise from the current situation in which deportation is a binary choice for decision-makers: to deport or not to deport. Unlike prison sentences, the quantum of deportation cannot be varied. Nor are there other available public policy tools to address the "hard cases". Before I develop an outline as to how suspended deportation orders may work in section 5, this article briefly identifies the suspended prison sentences upon which the proposed policy reform is modelled and examines the rationales which resulted in its being adopted as part of sentencing law and policy in the UK.

4. Suspended Prison Sentences

The Criminal Justice Act 2003 allows that when a person is convicted of an offence attracting a prison sentence of less than two years duration, the sentencing court may order that the

[54] Bart van der Sloot, 'The Practical and Theoretical Problems with "Balancing": Delfi, Coty and the Redundancy of the Human Rights Framework' (2016) 23 Maastricht J of European and Comparative L 439, 441; Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study* (Europa Law Publishing 2013), 188.

custodial sentence not take immediate effect. This has the effect of 'suspending' the custodial sentence. The suspension of the sentence may be accompanied by the same kind of orders that can make up a non-custodial community order; unpaid work, the requirement to engage with certain activities or programmes, and orders imposing curfews, exclusion from certain geographic locales, or the prohibition on certain activities, amongst others.[55] Failure to comply with an accompanying order, or the committing of another criminal offence, may result in the suspended sentence being activated and the offender may then serve all or part of the prison sentence that had been suspended.[56]

5. Introducing Suspended Deportation Orders

If we draw on the rationale of suspended prison sentences for the introduction of a suspended deportation order, it makes some sense to also draw on the practical aspects of the suspended prison sentence too. Whereas the effect of a deportation order at present is to invalidate any existing leave to remain, suspending the deportation order would grant FNOs leave to remain until the period of extension expires, which could then be renewed without conditions if the suspended period is served without breach. Where the FNO had no extant leave, or leave to remain would expire during the period of the suspension, the Home Office would issue further leave to remain until the period of extension expires. This would not be a great innovation in practice as at present the Home Office must grant leave to remain whenever a deportation or removal is deemed to be contrary to the UK's ECHR obligations. Where deportation is found to be contrary to the human rights of the individual FNO, any extant leave is invalidated and replaced with a shorter period of leave.[57] To not grant leave to remain undercuts the finding that deportation would be a human rights breach under the ECHR, by making the exercise of the human right impossible.

The decision to suspend a deportation order must remain proportionate to the Article 8 ECHR right to family life of the FNO and their family. A suspended deportation order is still an interference with the right to family life because the threat of deportation remains a very real one. The Sentencing Council guidelines on suspended prison sentences may provide the

[55] Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (Fourth Edition, Oxford, Oxford University Press, 2012), 357. Summarising the Criminal Justice Act 2003, s189-194, and s199-213.

[56] Nigel Walker and Nicola Padfield, *Sentencing: Theory, Law and Practice* (Second Edition, London, Butterworths, 1996) 139-140.

[57] *R (George) v The Secretary of State for the Home Department* [2014] UKSC 28.

basis of sensible guidance for the use of suspended deportation orders. That guidance gives three factors which indicate that it is appropriate to suspend a prison sentence, and three which indicate that it would be inappropriate:[58]

Factors indicating that it would not be appropriate to suspend a custodial sentence	**Factors indicating that it may be appropriate to suspend a custodial sentence**
Offender presents a risk/danger to the public	Realistic prospect of rehabilitation
Appropriate punishment can only be achieved by immediate custody	Strong personal mitigation
History of poor compliance with court orders	Immediate custody will result in significant harmful impact upon others

These factors serve as a useful starting point for factors which would indicate the appropriateness of suspending a deportation order, excising of course the reference to punishment. The kinds of orders which may accompany a suspended prison sentence are also a useful point of reference for the kind of orders which might reasonably accompany a suspended deportation order. The suspension of the sentence may require the offender to conduct unpaid work, to engage with certain activities or programmes, and order curfews, exclusion from certain geographic locales, or prohibit certain activities, amongst others.[59]

5A. Suspended Deportation Orders as a Solution to "Hard Cases"

Suspended deportation orders are suggested as a targeted measure which addresses specifically the problem of a binary deportation regimes which I identified in section 3; the creation of two kinds of "hard cases" created by the exceptions to deportation carved out by the Immigration Act 2014. The first is where there are hard lines of qualification for one of the exceptions to deportation, the second is where the qualification provisions are drawn up without an objective means of assessing whether the qualification threshold has been met.

The advantage of drawing hard and clear lines in immigration law is that it precludes the application of incremental reasoning *ad infinitum* so as to make the balancing exercise itself

[58] Sentencing Council, 'Imposition of Community and Custodial Sentences: Definitive Guidance' (2016) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive-Guideline-Imposition-of-CCS-final-web.pdf> accessed 9 May 2018, 8.

[59] Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (Fourth Edition, Oxford, Oxford University Press, 2012), 357. Summarising the Criminal Justice Act 2003, ss189-194, and ss199-213.

absurd. One can always take away one grain of sand from one side of the balance and reasonably claim that it is not substantively different from what went before. Eventually, one ends up with a very small pile of sand, but it is impossible to determine at exactly which point the scales became clearly out of balance. An example "hard case" created by the deportation exceptions in the Immigration Act 2014 is a child resident in the UK for 2550 days. Such a child is likely to experience the deportation of a parent no less harshly than a child resident for 2555 days, yet only the second child can qualify for the statutory exceptions to deportation as a 'qualifying' child because their length of residence has reached the arbitrary threshold of seven years.[60] However, if we count down incrementally from 2550 days, at what non-arbitrary point can we say that there *is* a relevant distinction to be drawn between the residence lengths of two different children?

The possibility that the balancing exercise can be made absurd by this kind of reductive reasoning is one of the core difficulties with a balancing exercise which can only result in one of two outcomes; deportation or not. This problem with balancing is not one that can be easily remedied by giving the decision-maker discretion as to the qualifying period for the exceptions as this simply changes the arena of the essential problem from the statute to the discretionary powers of the decision-maker. I argue that the better means of resolving this issue is to introduce a third option for the disposal of deportation cases. This third option – which I argue should take the form of a suspended deportation order – would allow decision-makers to recognise the potential absurdities and injustices which arise from the hard and fast rules of the Immigration Act 2014.

As for the second kind of "hard cases", suspended deportation orders present the decision-maker with greater discretion. Thus where a decision-maker is unsure as to whether deportation is 'unduly harsh' rather than simply harsh, or whether an FNO faces 'significant obstacles' rather than mere obstacles, the decision-maker is freer to give the benefit of the doubt to the FNO but to impose conditions which nevertheless support the prevention of crime and disorder. Alternatively, where the decision-maker believes that the FNO presents a considerable risk of further offending, and yet meets the qualifying criteria for statutory exception to deportation, the decision-maker is able to reflect this concern by suspending the deportation order and imposing conditions, rather than cancelling it outright.

[60] A child resident in the UK for 7 years is a 'qualifying child' for the purposes of the Nationality, Immigration and Asylum Act 2002, s117C(5). 'Qualifying child' and 'qualifying partner' are defined at Nationality, Immigration and Asylum Act 2002, s117D(1).

5B. How Appropriate is it to Use Suspended Prison Sentences as a Model for Suspended Deportation Orders?

This article seeks to justify suspended deportation orders on their own terms, as a solution to the specific problem of "hard cases" which I have demonstrated is apparent in UK deportation law. The analogy between suspended prison sentences and suspended deportation order (or between prison and deportation in general) does not need be exact in order to draw useful, practical ideas from one domain to the other.

There are some similarities between deportation and prison sentences which have led to the claim that deportation is a form of punishment and should be treated as a criminal law sanction.[61] The dissent in the 1893 US Supreme Court case of *Fong Yue Ting* articulated this instinct; 'Deportation is punishment. It involves -- first, an arrest, a deprival of liberty, and second, a removal from home, from family, from business, from property.'[62] In contrast to UK law, US immigration law does not make the distinction between deportation and removal which I outlined in section 2. Under the *Fong Yue Ting* critique any forced removal under immigration powers is a form of punishment because it punishes immigration wrongs (such as breaching a visa condition, visa overstaying, failure to register etc). In the UK context, the distinction between removal and deportation seems to reinforce the idea that deportation is a form of punishment because there is an intimate and undeniable connection between criminal conviction and deportation. After all, the Secretary of State *must* make a deportation order against a 'foreign criminal'.[63]

However, it is not necessary to accept that deportation is a form of punishment in order to accept the rationale behind using suspended prison sentences as a useful model for reforming UK deportation law. Basing support for the idea of suspended deportation orders on the proposition that deportation is a form of criminal punishment would be set it on weak foundations for two reasons. The first is that it is a political opinion which, at the moment, sits on the fringes. The second is that neither UK courts nor the European Court of Human Rights

[61] *Inter alia,* Daniel Kanstroom, 'Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases' (2000) 113 Harvard LR 1890; Victor S Navasky, 'Deportation as Punishment' (1959) 27 University of Kansas City LR 213; Juliet Stumpf, 'The Process Is the Punishment in Crimmigration Law' in Katja Franko Aas and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press 2013), 63.

[62] *Fong Yue Ting v United States* 149 US 698 (1893), 740.

[63] UK Borders Act 2007, s32(5).

(ECtHR) accept that deportation is a punishment for the purposes of Article 6 ECHR (the right to a fair trial).[64]

Instead, this article relies on suspended prison sentences as a useful starting point for a proposal for law reform rather than as an exact analogy. The analogy between suspended deportation orders and suspended prison sentences is not exact. Suspended prison sentences are imposed after the offence is committed, but *before* (or if never activated, instead of) a prison sentence whereas deportation orders, even in the proposed form of suspended deportation orders, occur after the offence is committed and *after* a period of imprisonment is served.[65]

Furthermore, modern powers of deportation are rooted in immigration control. The introduction of *post*-entry powers of deportation in the Commonwealth Immigrants Act 1962 was promoted as a means of forestalling *pre*-entry immigration restrictions.[66] Cox and Posner[67] justify a system of immigration controls which relies heavily on post-entry controls (such as provided for by removal and deportation) on the basis that post-entry controls resolve the asymmetry of information between the immigrant and the state. They argue that screening for the 'desired types'[68] of immigrant is easier post-entry because the immigrant will have revealed their true character to the state, thus furnishing the state with the information necessary to assess the desirability of the individual.[69] The barely spoken assumption underlying these rationales for post-entry powers of deportation is that it is morally legitimate to treat foreign nationals differently to nationals of the state.[70] From this, the argument flows, there will be

[64] *Maaouia v France* App no 39652/98 (Grand Chamber, 5 October 2000) [2000] ECHR 455, [39]; *Mamatkulov and Askarov v Turkey* App no 46827/99; 46951 (Grand Chamber, 4 February 2005) (2005) 41 EHRR 2; *Gudanaviciene & others v Director of Legal Aid Casework & another* [2014] EWHC 1840 (Admin), [31].

[65] However, criminal conviction and imprisonment is not the only legal basis for deportation. For example, in *Mahajna v Home Secretary (deportation hate speech - unacceptable behaviour)* [2012] UKUT B1 (IAC), the SSHD sought deportation on the basis of accusations that Mahajna's past history included instances of anti-Semitic speech and support for terrorism. In *Farquharson (removal – proof of conduct)* [2013] UKUT 00146 (IAC), Farquharson was on multiple occasions arrested or prosecuted for various offences, but never convicted. Despite these examples, criminal conviction remains 'the most common basis' for deportation (Gina Clayton, *Immigration and Asylum Law* (7th edn, Oxford University Press 2016), 566).

[66] Jordanna Bailkin, 'Leaving Home: The Politics of Deportation in Postwar Britain' (2008) 47 J British Studies 852, 860.

[67] Adam B Cox and Eric A Posner, 'The Second-Order Structure of Immigration Law' (2007) 59 Stanford LR 809.

[68] ibid 824.

[69] Ibid.

[70] Eric A Posner, 'The Institutional Structure of Immigration Law' (2013) 80 The University of Chicago LR 289, 290.

inconsistencies between deportation and prison as a consequence of criminal offending, and thereby between the treatment of UK-national and foreign national offenders. These inconsistencies are said to legitimately arise from the nature of deportation as a civil measure, rather than a criminal one like imprisonment: distinctions that are foundational to the ECtHR case law, which rejects the application of criminal law fair trial standards to deportation proceedings.[71]

Finally, the analogy between suspended deportation orders and suspended prison sentences is not exact because many of the instrumentalist reasons cited for the introduction of suspended sentences into the UK's penal regime in the 1960s do not immediately apply to deportation. Many of the reasons advocated for suspended deportation orders were rooted in various failures of the institution of prison.[72]

However, none of these reasons to doubt the aptness of the analogy between suspended prison sentences and suspended deportation orders address the central argument raised in this article: that the binary nature of deportation law in the Immigration Act 2014 creates "hard cases". The proposed suspended deportation order does not require the rejection of the distinction between deportation as immigration enforcement on the one hand, and prison as a criminal punishment on the other; no matter how weak or circular those distinctions are once subjected to scrutiny.[73] Acknowledging that there might be a legitimate role for post-entry immigration controls (such as the deportation of FNOs) does not address the central question in this article about how to justly make those decisions.

Even if the analogy is not exact, there remain good reasons for using suspended deportation orders as a starting point for a proposal for creating a third form of disposal for deportation cases and which helps resolve the "hard cases" problem identified in this article. Firstly, some of the reasons for the introduction of suspended prison sentences are directly transferable to the modern deportation context. Suspended prison sentences serve as an 'intermediate form of sentence between custodial sentences and traditional forms of non-

[71] *Maaouia v France* App no 39652/98 (Grand Chamber, 5 October 2000) [2000] ECHR 455, [39]; *Mamatkulov and Askarov v Turkey* App no 46827/99; 46951 (Grand Chamber, 4 February 2005) (2005) 41 EHRR 25; *Gudanaviciene & others v Director of Legal Aid Casework & another* [2014] EWHC 1840 (Admin), [31]; Sheona York, 'Deportation of Foreign Offenders - A Critical Look at the Consequences of Maaouia and Whether Recourse to Common-Law Principles Might Offer a Solution' (2017) 31 JIANL 8, 19.

[72] Nial Osborough, 'The Emergence of the Suspended Sentence in England' (1969) 4 The Irish Jurist 23, 28.

[73] Sheona York, 'Deportation of Foreign Offenders - A Critical Look at the Consequences of Maaouia and Whether Recourse to Common-Law Principles Might Offer a Solution' (2017) 31 JIANL 8, 19.

custodial sentences.'[74] By increasing the options available to sentencing judges, suspended prison sentences sit between custody where custody is too harsh, and yet probation or conditional discharge is considered to be 'too light' or an 'insufficient deterrent'.[75] Suspended prison sentences also allow a judge to balance the communicative functions of punishment by imposing a prison sentence (thereby acting as 'a reminder of the wrongfulness of the criminal's conduct')[76] but suspending the sentence in order 'to take account of personal mitigation and the prospect of rehabilitation.'[77]

Secondly, even though deportation is not recognised in law as a punishment, deportation for criminal acts does speak to some of the same concerns about membership of the community that penal policy does. Both deportation law and sentencing law serve a communicative function to both citizen and non-citizen residents of the community as to acceptable standards of conduct. However, citizen offenders whose conduct places them outside society through imprisonment are re-integrated into the community, whereas the non-citizen has never had full membership of society.[78] Thus, 'The act of deportation establishes, in a particularly powerful and definitive way, that an individual is not fit for citizenship or even further residence in the society'.[79] Deportation communicates what the community believes to be (un)acceptable behaviour.[80] However, imprisonment is not always deemed necessary to communicate the wrongdoing of criminal behaviour. In such cases a non-custodial sanction, such as a suspended prison sentence, is judged to be sufficient. A means of responding to foreign national criminal offending beyond the binary choice offered by the UK's deportation regime would serve the same purpose that suspended prison sentences serves: a means by

[74] Nial Osborough, 'The Emergence of the Suspended Sentence in England' (1969) 4 The Irish Jurist 23, 29.

[75] ibid.

[76] RA Duff, *Trials & Punishments* (CUP, 1991), 236.

[77] Martin Wasik, 'Sentencing – The Last Ten Years' [2014] CLR 477, 482.

[78] Lucia Zedner, 'Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment' in Katja Franko Aas & Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (OUP, 2013), 48.

[79] Bridget Anderson, Matthew Gibney & Emanuela Paoletti, 'Citizenship, Deportation and the Boundaries of Belonging' (2011)15 Citizenship Studies 547, 548.

[80] Matthew Gibney, 'Deportation, Crime, and the Changing Character of Membership in the United Kingdom' in Katja Franko Aas & Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (OUP, 2013), 219.

which to communicate the unacceptability of criminal behaviour but also to exclude the individual from society only when that is necessary.

These reasons for suspended prison sentences reflect some of the problems of "hard cases" identified in the previous part as resulting in binary outcomes to deportation decisions. Firstly, there is need of a middle ground option where deportation is too severe a consequence for the individual or their family, but the possibility of being reassessed for deportation upon further offending does not have sufficient immediacy to act as adequate deterrent to recidivism. Secondly, a middle ground option to deportation allows relief where deportation is too severe an outcome, but where the FNO does not qualify for the outright exceptions to deportation.

Finally, what this defence of suspended deportation orders does not do (and what it cannot do) is respond to the normative claim of crimmigration scholars who argue that the 'importation of criminal justice machinery into migration policy'[81] is always an illegitimate expansion of state power. As a proposed law reform, suspended deportation orders might further legitimise both the 'colonisation'[82] of immigration law by criminal law norms. Suspended deportation orders may also further legitimise the underlying practice of deportation itself by undoing the injustices of "hard cases", thereby rendering deportation more palatable whilst leaving the underlying injustice of deportation (as a discriminatory punishment)[83] essentially untouched. However, Mary Fan argues persuasively that '[r]eform need not mean radical abolition, an accusation that would be ammunition to kill efforts at progress.'[84] Instead she argues that:

> A great challenge for legal scholars seeking progress on fiercely fought and passionately-perceived reform issues such as immigration is bridging the intractable divide in worldviews. Progress requires breaking out of the standard endless loop of values conflicts and talking past each other. To garner support […] visions of

[81] Mary Bosworth and Emma Kaufman, 'Foreigners in a Carceral Age: Immigration and Imprisonment in the United States' (2011) 22 Stanford Law & Policy Review 429, 440.

[82] David Alan Sklansky, 'Crime, Immigration, and Ad Hoc Instrumentalism' (2012) 15 New Criminal LR 157, 195.

[83] Daniel Kanstroom, 'Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases' (2000) 113 Harvard LR 1890; Victor S Navasky, 'Deportation as Punishment' (1959) 27 University of Kansas City LR 213.

[84] Mary Fan, 'The Case of Crimmigration Reform' (2013) 92 North Carolina LR 75, 148.

> reform must be infused with multiple meanings that appeal to people with different worldviews and values.[85]

Given that deportation has become a 'normalized' and 'essential' aspect of the UK's immigration control apparatus[86] attacking some of the symptoms of crimmigration law, such as the "hard cases" identified in this article, may be all that is immediately achievable.

5C. International Examples of Suspended Deportation Orders

The closest international parallel to the proposed suspended deportation order is found in Canadian deportation law. The Canadian Immigration and Refugee Protection Act 2001 permits that a removal order, including of FNOs, may be stayed if:

> taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.[87]

The rationale for such stays of removal is to 'allow the individual to demonstrate they are unlikely to reoffend.'[88] The stay of the deportation order may be accompanied by the imposition of 'any condition'[89] and the stay will be automatically cancelled, without right of appeal, if the FNO commits further offences.[90] Appeals on the basis of humanitarian and compassionate grounds are 'the most common reason' for a stay to deportation orders given to FNOs.[91] The Canadian stay of a deportation order is therefore a middle ground between the

---

[85] ibid 147.

[86] Alice Bloch and Liza Schuster, 'At the Extremes of Exclusion: Deportation, Detention and Dispersal' (2005) 28 Ethnic and Racial Studies 491, 491.

[87] Immigration and Refugee Protection Act 2001, s68(1).

[88] *Li v Minister of Immigration and Citizenship* 2015 FC 998, [29].

[89] Immigration and Refugee Protection Act 2001, s68(2)(a).

[90] Immigration and Refugee Protection Act 2001, s68(4).

[91] 'Staying Removal at the IAD' (2 February 2011) <https://meurrensonimmigration.com/staying-removal/> accessed 7 September 2018.

cancellation of the deportation order and it being carried out, and is a clear parallel to the suspended deportation order proposed in this article.

Other examples of suspended or deferred deportation orders do exist internationally but must not be confused with the form of suspended deportation order proposed in this article. Because the UK is idiosyncratic in its labelling distinction between removal and deportation (described in section 1), measures labelled as suspended or deferred 'deportation' in other jurisdictions are not comparable. For example, the German 'Temporary Suspension of Deportation' (*Duldung*)[92] applies only to the deportation of asylum applicants whose claim for Refugee Convention protection has been declined but there are other, temporary, barriers to their removal.[93] Significantly, however, one barrier to deportation is that the individual is a parent of a minor child.[94]

In the US, Deferred Action for Childhood Arrivals (DACA)[95] defers deportation action against qualifying children, but the similarities with the proposed Suspended Deportation Order begin and end with the labelling of a deferral of deportation action. What is labelled deportation in DACA would be labelled as administrative removal in the UK, and qualification for deferred deportation under DACA explicitly excludes individuals convicted of criminal offences.[96] However, inspiration for aspects of a suspended deportation order may be drawn from US academic writing. Although the US nomenclature of deportation is wider than in UK law, Juliet Stumpf has written about how US deportation law lacks nuanced public policy options to reflect individual circumstances. Deportation is the only US public policy response to illegal

[92] Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory 2008, s60a.

[93] Federal Office for Migration and Refugees, 'Appeals Against the Decision' <http://www.bamf.de/EN/Fluechtlingsschutz/AblaufAsylv/Rechtsmittel/rechtsmittel-node.html> accessed 6 September 2018; Federal Office for Migration and Refugees, 'Termination of Residence' <http://www.bamf.de/EN/Fluechtlingsschutz/AblaufAsylv/AusgangVerfahren/Aufenthaltsbeendigung/aufenthaltsbeendigung-node.html> accessed 6 September 2018.

[94] Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory 2008, s60a(2b).

[95] The reader may have to read this paragraph as having the past-tense before too long, as the Trump administration is seeking to rescind the executive order upon which DACA is based and is currently only prevented from doing so by ongoing litigation (Department of Homeland Security, 'Deferred Action for Childhood Arrivals (DACA)' <https://www.dhs.gov/deferred-action-childhood-arrivals-daca> accessed 15 November 2019; US Citizenship and Immigration Service, 'Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction' (17 July 2019) <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction> accessed 15 November 2019).

[96] Christina A Fiflis, 'Deferred Action for Childhood Arrivals' (2013) 30 GPSolo 28, 30.

entry and visa overstaying, and criminal offending by foreign nationals.[97] This creates problems identical to the "hard cases" problem in UK deportation law. Stumpf considers how the consequences of immigrant offending may be made more proportionate and she argues that:

> A properly calibrated sanctions scheme should incorporate not only undesirable characteristics and conduct but also the egregiousness of the violation, the values reflected in the admissions categories, and the ties that the non-citizen has to the United States. [98]

She suggests that proportionate sanctions would 'address the concern that the permanent resident's conduct reflects poorly on her fitness to join the citizenry'[99] and some of her suggestions of appropriate conditions may be adapted to better fit the UK context. Appropriate orders to attach to the suspended deportation order proposed in this article could include, for example:

- A mental health treatment order, an alcohol treatment order, or a drug rehabilitation requirement;[100]
- Curfew, residence requirements, or exclusion orders;[101]
- Community service;[102]
- Participation in restorative justice initiatives;[103]
- A citizenship course;[104]
- Attendance on courses in English, maths, or vocational training;[105]

[97] Juliet Stumpf, 'Fitting Punishment' (2009) 66 Washington & Lee LR 1683.

[98] ibid 1729-30.

[99] ibid 1737.

[100] As permitted under a suspended prison sentence under the Criminal Justice Act 2003, s190(1)(h)-(j).

[101] As permitted under a suspended prison sentence under the Criminal Justice Act 2003, s190(1)(e)-(g).

[102] An 'unpaid work requirement' in the language of the Criminal Justice Act 2003, s200.

[103] An 'activity requirement' (Criminal Justice Act 2003, s201).

[104] A 'programme requirement' (Criminal Justice Act 2003, s202). Suggested at Juliet Stumpf, 'Fitting Punishment' (2009) 66 Washington & Lee LR 1683, 1737.

[105] Another 'programme requirement' (Criminal Justice Act 2003, s202).

- A prohibition on sponsoring visas (such as family visit visas) for the duration of the suspended order.[106]

These kinds of conditions accompanying a suspended deportation order could address both the need to prevent reoffending and promote rehabilitation. Other orders such as citizenship courses and restricted access to some of the benefits of immigration (such as sponsoring visas) should align the suspended deportation order with the communication of the suspension of full social membership, and away from the temptation to impose conditions as an additional punishment on the FNO.

5D. The Crimmigration Critique

'Crimmigration law' is a critique of the way in which immigration law 'has become so tightly interwoven with criminal justice norms'.[107] Crimmigration law is not a single critique, but multiple aspects of it are relevant to the proposed suspended deportation orders. The use of suspended prison sentences as a model or starting point imports more of the language and ideas of criminal law into immigration law. However, the crimmigration critique does not undermine the proposed suspended deportation orders.

A central aspect of the crimmigration critique is that 'at bottom, both criminal and immigration law embody choices about who should be members of society: individuals whose characteristics or actions make them worthy of inclusion in the national community.'[108] The sovereign power of states to imprison or deport excludes (and communicate the exclusion) of the offender and immigrant from society.[109] Sumpf's argued that the rates of deportations have increased, just as the rates of incarceration had increased, resulting in the exclusion of more and more individuals from social membership.[110] Yet the rationale for the rise of deportations – restricting access to the tangible and intangible benefits of membership – is a weak foundation

[106] Stumpf suggests 'restricting or delaying access to immigration benefits' (Juliet Stumpf, 'Fitting Punishment' (2009) 66 Washington & Lee LR 1683, 1737).

[107] ibid 1685-6.

[108] Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56 American University LR 367, 397.

[109] ibid 412.

[110] ibid 407.

for state action.[111] Zedner amplifies this, critiquing the logic of crimmigration law which finds that if the foreign national was never a member of society in the first place, they cannot be reintegrated into it after criminal offending. Deportation *must* inextricably follow.[112] However, a suspended deportation order cuts against this by presenting additional ways of supporting the continued social membership of a foreign national (ex-) offender instead of requiring deportation as a consequence of offending.

A second aspect of the crimmigration critique is that criminal justice norms are applied to immigration law selectively and asymmetrically: criminal justice enforcement norms are imported, but not the procedural safeguards associated with criminal law.[113] Suspended deportation orders cannot fully answer the crimmigration critique that there is a lack of procedural safeguards in UK deportation law. These include the lack of legal aid,[114] the permissibility of hearsay evidence,[115] and a lower applicable standard of proof.[116] However, different policy responses are required to these separate issues and neither accepting nor rejecting suspended deportation orders is capable of addressing them. Legomsky argues that the asymmetric incorporation of criminal justice norms results in the worst of both worlds as it 'invites policy makers to abandon any sense of proportionality'.[117] Stumpf also identifies proportionality of outcome as a key criminal justice norm that is not incorporated into US immigration law.[118] Instead, deportation is 'an on-off switch' and '[r]egardless of whether the violation of immigration law is grave or slight, removal from the country is the statutory consequence.'[119] It is this specific ill of the crimmigration law system that the suspended

[111] ibid 413-4.

[112] Lucia Zedner, 'Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment' in Katja Franko Aas and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press 2013), 48.

[113] Stephen H Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (2007) 64 Washington & Lee LR 469, 472.

[114] *R (Kiarie) v Secretary of State for the Home Department* [2017] UKSC 42, [2017] WLR(D) 400, [60].

[115] *Bah (EO (Turkey) - liability to deport)* [2012] UKUT 00196 (IAC), [49].

[116] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, [22].

[117] Stephen H Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (2007) 64 Washington & Lee LR 469, 473.

[118] Juliet Stumpf, 'Fitting Punishment' (2009) 66 Washington & Lee LR 1683, 1720.

[119] ibid 1691.

deportation order is designed to help address. By increasing the range of possible outcomes, deportation decisions can be made more proportionate.

A third aspect of the crimmigration critique is that of ad-hoc instrumentalism.[120] This, Sklansky argues, encourages officials to use whatever tools (criminal or civil, criminal law or immigration law) are most immediately effective. Crimmigration on this account is immigration and criminal law tools used together and/or instead of each other in pursuance of the state's agenda of creating the worst possible outcome for migrants.[121] One response is that the suspended deportation order is not the use of a criminal law tool. Although it uses suspended prison sentences as the basis for its construction, it is intended as a different instrument. However, sanction inflation remains a core risk to introducing a suspended deportation order for creating worse outcomes: a risk that mirrors the risks of suspended prison sentences. This is addressed in section 6A, below.

6. Addressing Unintended Consequences of Suspended Deportation Orders

Any reform has the potential for producing unintended consequences. I outline two foreseeable consequences of a suspended deportation regime which are both unintended and unwanted. The first is that creating an alternative to immediate deportation results in a form of sanction inflation. The second is that the conditions set are inappropriate and therefore undermine the rationale or practice of the proposed reform.

6A. Sanction Inflation

The first possible unintended consequence of an introduction of suspended deportation orders is sanction inflation. FNOs who currently benefit from a statutory exception to deportation but do not represent a "hard case" could be made subject to a suspended deportation order, and FNOs who have genuine "hard cases" remain subject to the automatic deportation regime. This is not an idle concern because sanction inflation has resulted from suspended prison sentences. In both the UK[122] and Australia[123], the introduction of suspended prison sentences led to the predominant use of suspended prison sentences where the offender would not previously have

[120] David Alan Sklansky, 'Crime, Immigration, and Ad Hoc Instrumentalism' (2012) 15 New Criminal LR 157.

[121] ibid 202.

[122] Anthony Bottoms, 'The Suspended Sentence in England, 1967-1978' [1981] British Journal of Criminology 1.

[123] Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Sydney, The Federation Press, 2010), 174.

been subject to a custodial sentence. These problems persist. In the UK, a considerable rise in the use of suspended prison sentences from 2004 to 2013 has been attributed to a fall in the number of non-custodial community sentences imposed, rather than because of a drop in prison sentences. Custodial prison sentences actually increased over the same period.[124]

Sanction inflation is foreseeable if suspended deportation orders are introduced. A suspended deportation order may readily be imposed in circumstances where, under the current rules, deportation would be considered a disproportionate interference with Article 8 EHCR family or private life, as defined by statute.

I argue that this could be overcome by shifting the judicial gaze from the question of proportionality to that of necessity. Where Article 8 ECHR is invoked by a foreign national offender seeking to resist deportation, Lord Bingham outlined a logical sequence of five relevant questions:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
> (3) If so, is such interference in accordance with the law?
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?[125]

Where the focus of the judicial gaze is on the fifth question of proportionality, the option of suspended deportation orders will almost inevitably result in the imposition of deportation orders (albeit suspended) in more cases. Because a suspended deportation order is less severe an immediate consequence than an order requiring immediate deportation, its

[124] Julian V Robert, 'The Rise of the Suspended Sentence of Imprisonment in England and Wales' (2014) 1 Sentencing News 10, 10; Martin Wasik, 'Sentencing – The Last Ten Years' [2014] CLR 477, 482.

[125] *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [17].

imposition will almost inevitably look like a more proportionate response in a greater number of cases. In a balancing exercise whenever one takes weight off one side of the scales, less is required on the other side of the scales to match it.

To prevent this anticipated problem, the suspended deportation order should be considered primarily under the fourth *Razgar* question: the test of necessity. The test of necessity is an established element of proportionality review in human rights law and requires that the action be the 'least restrictive means' to pursue the legitimate aim.[126] However, the ECtHR and UK courts takes for granted the necessity of deportation for the Article 8 ECHR legitimate aim of preventing crime and disorder.[127] This taking for granted is perhaps unsurprising when the courts are presented with deportation as a binary outcome with no public policy alternative to reach for as a less restrictive interference with the human rights at stake.

An initial focus on the question of the necessity of the interference of deportation, rather than on its proportionality, will instead require courts to evaluate closely the FNO's risk of reoffending, and the suitability of conditions attached to the suspended deportation order to mitigate any such risk. Where there are more policy options available, such as suspended deportation orders, immediate deportation appears necessary in fewer circumstances than at present. Circumstances in which immediate deportation appears necessary include situations where the FNO presents a high risk or danger to the public, has poor history of complying with court orders, and/or there is no realistic prospect of rehabilitation. These are among the factors already identified by the Sentencing Council as pressing in favour of immediate custody.[128]

Effectively altering the judicial gaze from the question of proportionality to the question of necessity requires the suspended deportation order to be perceived as an individual and unique disposal for cases, rather than as a mere extension of the existing deportation regime. However, such a shift in focus is required to prevent the introduction of a suspended deportation order from resulting in sanction inflation.

---

[126] Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 American J of Comparative Law 463, 464; Carlos Bernal Pulido, 'The Migration of Proportionality Across Europe' (2013) 11 New Zealand J of Public International Law 483, 484.

[127] Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015), 169.

[128] Sentencing Council, 'Imposition of Community and Custodial Sentences: Definitive Guidance' (2016) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive-Guideline-Imposition-of-CCS-final-web.pdf> accessed 9 May 2018, 8.

This shift of judicial gaze away from the question of proportionality also distinguishes the suspended deportation order proposed in this article from the Canadian practice of staying the deportation of FNOs under the Canadian Immigration and Refugee Protection Act (IRPA) 2001. The IRPA requires the Immigration Appeals Division to grant a stay of deportation if, 'taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.'[129] Whether there are 'sufficient' humanitarian and compassionate considerations present is a question for the Appeals Division.[130] This implies an assessment of proportionality; the greater the reasons for deportation, then the greater the preponderance of humanitarian and compassionate considerations must be so as to be a 'sufficient' barrier to deportation. Because the Canadian system places its focus on the proportionality of the deportation with the offence committed, it is a temporary stay of deportation rather than an outright cancellation of the deportation order which is perceived to be the 'usually' encountered outcome.[131] The Canadian experience demonstrates that when decision-makers are required to assess the proportionality rather than the necessity of deportation, the outcome is likely to be an expanded use of the less favourable outcome and that the cancellation of a deportation order outright becomes abnormal. The proposed suspended deportation order for the UK should not become the usual outcome of deportation appeals. Suspended deportation orders are instead designed to respond to the particular kind of "hard cases" which the Immigration Act 2014 throws up and which sit uneasily on the boundaries between the UK decision-maker's binary options of deportation.

6B. Inappropriate Conditions

The second foreseeable but unintended (and unwanted) consequence of introducing suspended deportation order is that the conditions attached may be inappropriate for the individual or for the underlying rationale of suspended deportation orders. Such conditions may be inappropriate for a number of reasons, but I want to highlight four examples.

---

[129] Immigration and Refugee Protection Act 2001, s68(1).

[130] Jamil Ddamulira Mujuzi, 'The Best Interests of the Child as a Factor in Allowing Foreigners with Criminal Records to Enter Canada and in Staying the Deportation of Foreign National Offenders from Canada' (2017) 13 Acta Universitatis Danubius 162, 174.

[131] Community Legal Education Ontario, 'Appealing a Deportation Order' <https://www.cleo.on.ca/en/publications/mentill/appealing-deportation-order> accessed 7 September 2018.

Firstly, the conditions attached to suspended deportation orders must not be used as a punishment additional to the prison sentence already served by the FNO. This is important if the claim that deportation is not punishment is to be effectively maintained with any remaining credibility. It is also a key difference between suspended prison sentences and the proposed suspended deportation order. Sentencing guidelines for suspended prison sentences are clear, 'A suspended sentence is a custodial sentence. […] The imposition of a custodial sentence is both punishment and a deterrent.'[132] In contrast, a suspended deportation order is only aimed at rehabilitation, the reconciliation of the FNO and society, and the restoration of the FNO to full social membership of the community.

The second possible inappropriate imposition of conditions is where deportation, despite the safeguard suggested in the previous part, is disproportionately imposed. If the conditions are breached, then the disproportionate end result is the activation of the deportation order. An example of this can be found in the Israeli experience of suspended prison sentences. The Israeli Supreme Court was confronted with a situation whereby the sentencing court had imposed a suspended sentence on an offender but with a term of imprisonment to be served in the case of breach which was 'excessively severe'.[133] The excessive sentence was imposed in the 'hope that this will provide an extra deterrent factor'.[134] When the offender reoffended (due to drug dependence) the Israeli suspended sentence law of the time provided no option to the lower courts other than to impose the excessively severe sentence.[135] Thus any conditions (or the initial order to deport in the first place) imposed as a means to deter rather than to support rehabilitation or restoration may have the unintended consequence of resulting in deportation where no deportation order would have been imposed under the current regime.

The third possible inappropriate use of conditions to a suspended deportation order would be where the condition imposed interfered with other public policy goals. Example of this can be found in the recent introduction in January 2018 of 'immigration bail' as a

[132] Sentencing Council, 'Imposition of Community and Custodial Sentences: Definitive Guidance' (2016) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive-Guideline-Imposition-of-CCS-final-web.pdf> accessed 9 May 2018, 7-8.

[133] Arnold Enker, 'The Suspended Sentence: Israel's Experience' (1979) 14 Israel LR 369, 370.

[134] Ibid.

[135] Ibid.

replacement of the previous mixture of temporary admission and detention bail.[136] The Coram Children's Legal Centre and Refugee Support Network reported that a bail condition preventing asylum-seeking children from accessing education was frequently being imposed. Refugee Support Network argued that this would negatively affect:

> individuals' mental health and, longer term, on their ability to develop the skills and qualifications they need to move into settled employment once they have been granted leave to remain in the UK.[137]

Conditions attached to suspended deportation orders which ban work or study would also clearly be inappropriate as work and study may help reduce recidivism. Likewise onerous conditions which do not ban but which otherwise make work or study practically impossible would also be inappropriate. The same can be said for conditions that are simply unachievable for the individual in question. A requirement to study should only be imposed where there are no financial barriers to enrolment and where courses are locally available, for example.

Finally, in imposing conditions a clear distinction should be maintained between immigration bail and suspended deportation orders. Immigration bail applies to those who do not have leave to remain and are therefore liable to immigration detention.[138] Individuals on immigration bail do not have leave to remain, individuals on suspended deportation orders would have leave to remain. This fundamental difference means that conditions such as reporting to an immigration officer, usually at one of fourteen Immigration Reporting Centres,[139] would be inappropriate in the case of suspended deportation orders, whereas they are a normal condition imposed on those on immigration bail.[140] Again, suspended deportation

---

[136] Colin Yeo, 'Immigration Act 2016: Changes to Immigration Bail and Detention Powers Now In Force' (Free Movement, 2 May 2018) <https://www.freemovement.org.uk/immigration-bail-commencement-15-january/> accessed 9 May 2018.

[137] Maeve McClenaghan, 'Young Asylum Seekers 'Face Blanket Study Ban' (*The Observer*, 8 April 2018) <https://www.theguardian.com/uk-news/2018/apr/08/young-asylum-seekers-education-ban> accessed 9 May 2018.

[138] Immigration Act 2016, s1. Colin Yeo, 'Immigration Act 2016: Changes to Immigration Bail and Detention Powers Now In Force' (Free Movement, 2 May 2018) <https://www.freemovement.org.uk/immigration-bail-commencement-15-january/> accessed 9 May 2018.

[139] Gov.uk, 'Immigration Reporting Centres' <https://www.gov.uk/immigration-reporting-centres> accessed 10 May 2018.

[140] Ines Hasselberg, 'Reporting to the Home Office: Control, Risk and Insecurity' (*Border Criminologies*, 11 May 2015) <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/05/reporting-home> accessed 15 May 2018.

orders have a rationale based on rehabilitation, and the reconciliation of the FNO to mainstream UK society, and not on control. Whereas reporting requirements 'discipline deportable bodies as power is exerted intensely and constantly over their lives.'[141]

Avoiding the imposition of inappropriate conditions to a suspended deportation order can be achieved by careful policy design, such as restricting the types of conditions that a decision-maker can impose in the first place, as well as a right to appeal the imposition of conditions or their scope, and a right to request that they are altered should the circumstances of the individual FNO change. Being alive to the possibility of inappropriate conditions – and the reasons that such conditions may be inappropriate in the context of the policy – is important for ensuring that any policy design is capable of avoiding this unintended consequence.

7. Conclusion

The deportation of foreign national offenders from the UK presents few nuances. Deportation is a binary institution whereby the foreign national offender (FNO) is deported or they are not. The statutory exceptions to deportation in the Immigration Act 2014 draw hard and fast lines between those individuals who qualify for relief from deportation, and those who do not. This lack of nuance in deportation law contrasts with sentencing policy. Non-custodial sentences can set orders which are crafted in order to reflect the offending and the offender. Prison sentences can be made longer or shorter based on a myriad of considerations. And custodial sentences can be suspended.

The lack of nuance in the deportation regime can lead to unjust outcomes in "hard cases". There is therefore a clear and distinct need for additional policy options to be made open to deportation decision-makers in order to inject some nuance into deportation decisions and thereby avoid some of the injustices presented by a binary system of deportation.

Adopting a form of "suspended deportation orders" may be an appropriate public policy tool to address these issues. Suspended prison sentences offer an alternative to custody where prison is perceived as too harsh a consequence of offending. By allying the threat of prison with the rehabilitative and restorative orders associated with probation and non-custodial community service, suspended prison sentences offer offenders the 'chance to stay out of trouble'[142] and evidence that their offending was aberrational or that they have engaged

---

[141] Ines Hasselberg, 'Coerced to Leave: Punishment and the Surveillance of Foreign-National Offenders in the UK,' (2014) 12 Surveillance and Society 472, 475.

[142] Sentencing Council, 'Suspended Sentences' <https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/suspended-sentences/> accessed 14 February 2018.

effectively with rehabilitation and thereby no longer pose a threat to society. Suspended deportation orders would work in a similar fashion, so as to encourage the effective reintegration of the foreign national offender back onto the pathway to 'good citizenship'. Deportation would remain the ultimate public policy backstop, but only where the FNO presents a substantially high risk of reoffending, or deportation is proven to be necessary by breach of the orders accompanying the suspension of the deportation, or by further offending.

As well as sharing a common rationale and practical basis, suspended deportation orders would share with suspended prison sentences many of the same risks of unintended and unwanted consequences. However, forewarned is forearmed, and therefore the policy design of suspended deportation orders must avoid these pitfalls. In particular, suspended prison orders have frequently resulted in fewer non-custodial sentences, rather than fewer prison terms and the introduction of suspended deportation orders would clearly risk a similar outcome whereby decision-makers impose more suspended deportation orders whilst levels of full deportation orders remained high. The solution, I argue, is to require the deportation decision-maker to consider the possibility of suspending the deportation order at the point of asking whether the interference with the family life right (Article 8 ECHR) of the foreign national offender is necessary; i.e. the least intrusive means by which to obtain the public policy goals pursued by the state. In order for there to be a less intrusive means to obtain the public goal of preventing crime and disorder by foreign national offenders, policy makers must find a means by which to expand the options of disposal of deportation cases from a binary choice. A suspended deportation order would serve this function.