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50. Persons liable to administrative removal under section 10

Section 10(1) of the 1999 Act states that a person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer (IO), if

a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave

b) he uses deception in seeking (whether successfully or not) leave to remain.

c) he belongs to the family of a person to whom directions have been given for administrative removal under section 10.

50.1. Criminal Offences

It is an offence under section 24A of the 1971 Act, as amended by the 1999 Act, for a person (a) to obtain or seek to obtain leave to enter or remain by means which include deception by him, or (b) to secure or seek to secure the avoidance, postponement or revocation of enforcement action against him by means which include deception. "Enforcement action"

includes the giving of directions for removal under section 10 of the 1999 Act. In addition, it is an offence under section 24(1) (b) of the 1971 Act for a person to knowingly overstay or otherwise knowingly fail to observe a condition of leave. However, the 1999 Act provides for removal to be carried out under the administrative arrangements contained in section 10 (as above) for which there is no requirement that the person must knowingly have overstayed or otherwise knowingly failed to observe a condition of their leave.

50.2. Categories of those liable to administrative removal

- ◆ Overstayers

- ◆ Those in breach of employment restrictions

- ◆ Those in breach of restrictions to access to public funds
- ◆ Those who have obtained leave to remain by deception

- ◆ Spouse of a person liable to administrative removal

- ◆ Dependent children aged under 18 of a person liable to administrative removal

50.3. Those exempt from administrative removal

The following are exempt from administrative removal:

- ◆ British citizens - This includes:
 - (a) anyone born in the UK or the Falkland Islands prior to 1 January 1983;
 - (b) anyone born in the UK or the Falkland Islands on or after 1 January 1983, or in any other qualifying territory (see below) on or after 21 May 2002, whose father (if legitimate) or mother is a British citizen or settled in the UK or relevant territory (as the case may be);
Note: An illegitimate child whose father is British does not automatically qualify for British citizenship, but may be legitimated by the subsequent marriage of his parents.
 - (c) anyone who was a British overseas territories citizen immediately before 21 May 2002 by connection with a "qualifying territory" (i.e. a British overseas territory other than the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus)

- ◆ those with the right of abode in the UK;
- ◆ under section 7 of the 1971 Act, Irish and Commonwealth citizens who have been ordinarily resident in the United Kingdom and Islands for the last 5 years at the date of any decision to remove;
- ◆ under section 8(3) of the 1971 Act, as amended by section 4 of the 1988 Act, and section 6 of the 1999 Act, those who are exempt from control by virtue of their diplomatic status;
- ◆ under section 8(4) of the 1971 Act, those who are exempt from control by virtue of their consular status;
- ◆ under section 2(1)(b) of the 1971 Act, children born outside the UK prior to 1 January 1983 who are Commonwealth citizens and have a mother who was a citizen of the UK and Colonies by birth at the time of the birth and therefore have the right of abode but are not British citizens;
- ◆ under section 10(2) of the 1999 Act, overstayers who applied for leave to remain in accordance with the Regularisation Scheme for Overstayers (section 9 of the 1999 Act) (see 50.5.1);

50.3.1. EEA Nationals exempt from administrative removal

EEA nationals and their dependent family members who have been resident in the United Kingdom for more than three months and do not have or have ceased to have a right to reside under the Immigration (European Economic Area) Regulations 2006, e.g are not exercising a Treaty right, may be liable to administrative removal under regulation 19(3)(a). By virtue of regulation 24(2) where such a decision is taken the person is treated as if he were a person to whom section 10(1)(a) of the 1999 Act applied.

Further information on the administrative removal of EEA nationals and their family members is available in Chapter 8 section 2 of the European Casework Instructions (ECIs), available on Horizon (link below) and the Knowledge Base.

50.4. Powers of arrest those liable to administrative removal

Section 28A of the 1971 Act created a power of arrest without warrant where a police officer (or IO, when duly authorised) has reasonable grounds for suspecting that a person has committed or has attempted to commit an offence under sections 24 or 24A. Section 152 of the NIA Act 2002 inserts a new S28AA which provides a power of arrest with a warrant for an offence under S24(1)(d) . In addition, persons liable to be detained in one of the above categories may be arrested without warrant in accordance with paragraph 17 of Schedule 2 to the 1971 Act. Further guidance on the exercise of the power of arrest is given in chapters 31 and 33.

50.5. Section 10(1)(a) – Overstayers

A person who stays beyond the time limited/specified/given by his leave is liable to administrative removal under section 10.

50.5.1. Regularisation Scheme for Overstayers

Section 9 of the 1999 Act allowed arrangements to be made under which overstayers could apply to regularise their stay. Applications had to be made within a specified period (8 February to 1 October 2000 inclusive). The main consequence of the Regularisation Scheme for Overstayers is that where any application made under the scheme is refused, the applicant will continue to have a separate in-country right of appeal against the decision to make a deportation order.

Directions may **not** be given under section 10(1) (a) above if the person concerned has made an application under section 9.

50.5.2. Evidence of overstaying

There must be proof of overstaying, and the following are indications that the person is an overstayer: Home Office file, passport, landing card or the offender's own admission under caution as to his date of entry and duration of leave. However, you should not accept at face value that the last entry in a passport is the last date of entry. The suspect should be asked to verify his or her last date of entry at interview under caution, as he or she may have left and subsequently re-entered on another passport, clandestinely or in some other way, or because

they last entered on or after 30 July 2000 under one of the provisions of the Immigration (Leave to Enter and Remain) Order 2000 (see Section A chapters 2.1., 3.9 and 3.12).

When a person makes an in-time application for variation of his leave, and the leave then expires before a decision is taken, section 3C of the 1971 Act means that the leave is automatically extended to the point at which the appropriate period for appealing a refusal expires. This protects the immigration status of that person and prevents him from becoming liable to administrative removal as an overstayer during that period (however, he **may** be liable for administrative removal for another reason e.g. working or claiming in breach or obtaining leave by deception. Removal action may still be taken if this is the case regardless of the provisions of section 3C of the 1971 Act where an application is pending but not where an appeal is pending).

Under section 32 of the 1971 Act (as amended by section 118 of the NIAA 2002), an appellant's leave and the conditions attached to it continue while an appeal (under section 82 of the 2002 Act) is pending against a decision to vary or refuse to vary limited leave to remain. This means that someone who has made an in-time application and has appealed against the decision to refuse is not liable to administrative removal until the appeal has been disposed of. Persons who have overstayed for a short period may be served removal directions if there is no evidence of intention to leave the United Kingdom.

Where there is insufficient evidence to support the contention of overstaying, a report should be submitted to the relevant casework section for consideration of further action. Where possible, the report should contain a statement made under caution about the suspect's claimed status and circumstances, and should refer to any other supporting evidence.

Where an endorsement is considered to be illegible and the arrival was *before* 10 July 1988, then that person is deemed to have ILR. Such cases should be referred to the relevant casework section. Where an endorsement is considered to be illegible and the arrival was *on or after* that date, the person is deemed under the 1988 Act, to have six months code 3 from the (claimed) date of arrival. Any person who has overstayed deemed leave may be served removal directions under section 10. If a CIO believes that lack of a passport or legible endorsement takes the suspect out of the scope of "delegated authority" (see chapter 54), the case should be referred to the relevant casework section.

50.6. Section 10(1)(a) - Working in breach

A person is liable to administrative removal under section 10 if found to be working in breach of a restriction or prohibition on employment. The breach must be of sufficient gravity to warrant such action.

There must be firm and recent evidence (within 6 months) of working in breach, including one of the following:

- ◆ An admission under caution by the offender of working in breach;
- ◆ A statement by the employer implicating the suspect;
- ◆ Documentary evidence such as pay slips, the offender's details on the pay roll, NI records, tax records, P45;
- ◆ Sight by the IO, or by a police officer who gives a statement to that effect, of the offender working, preferably on two or more separate occasions, or on one occasion over an extended period, or of wearing the employer's uniform. In practice, this should generally be backed up by other evidence. Statutory codes of practice (under the Regulation of Investigatory Powers Act 2000) regulate the use of covert surveillance and covert human sources (informants), see 32.8.

50.6.1. Overstaying and working in breach

Persons should not be made subject to section 10 for both overstaying and working in breach; they should be treated as overstayers, unless:

- ◆ they claim to have in-time applications, but this cannot be substantiated.

Evidence of working in breach should be within the last six months (in other cases a warning should be issued and a report submitted).

50.7. Students who work

Students over the age of 16 who wish to work and who are on code 2 conditions no longer need to secure Jobcentre approval, provided:

- ◆ They do not take work for more than 20 hours per week in term time (except where the placement is a necessary part of their studies with the agreement of their educational establishment);
- ◆ They do not engage in business, self-employment or the provision of services as a professional sports person or entertainer;
- ◆ They do not pursue a career by filling a permanent full-time vacancy.

A student doing part-time work does not need permission from his college to work and form OSS1 is no longer required. The leaflet "Information about Students" issued by the Border and Immigration Agency advises students what they are permitted to do. Information is also available on the Border and Immigration Agency, WPUK and DFES websites.

The *Zhou* Judgement

The *Zhou* judgement has been the cause of some confusion when dealing with students who take employment. *Zhou* entered the United Kingdom as a student and enrolled on a full time course of study. He subsequently stopped attending his course but continued to work for 20 hours each week. As he was no longer attending a course, he was removed as a person who was in breach of their conditions (i.e. he was no longer considered to be a 'student'). However, the judge found that despite his non-attendance, he retained the student conditions he had been granted on arrival. He was therefore not considered to be in breach of the conditions of his grant of leave and his removal was deemed unlawful.

The *Zhou* judgement does not affect our policy when dealing with students who are working hours in excess of their permitted employment. Any student found to be working in excess of 20 hours per week during term-time may be liable to enforcement action as a worker in breach.

If a person who has been granted student conditions has ceased attending, but is still keeping to their student conditions of employment, refer the case to the relevant case-worker who may decide to curtail leave.

NVQs

A large part of an NVQ is likely to be of a practical nature and employer based. In order to meet the requirement of 15 hours organised daytime study per week, hours spent on a work placement (paid or unpaid) can be taken into account if they are considered to be a necessary part of the course and undertaken with the agreement of the educational establishment concerned. When investigating whether or not an NVQ student is in breach of their employment conditions, it is important to ascertain from the educational establishment concerned whether or not the amount of work being undertaken is with their consent.

50.9. Domestic workers

IDIs chapter 5, section 12, gives details relating to overseas domestic workers.

If enforcement action is being considered against a domestic worker, the following should be borne in mind:

The person concerned must currently be in domestic employment or domestic-type employment. This may be part-time, but evidence must show that the person can support him or herself without recourse to public funds. Refer to EPU if further advice is needed.

50.10. Off shore working

UK immigration legislation does not cover offshore oil platforms. The Immigration Acts do not apply to the continental shelf, so immigration control cannot be exercised in offshore waters. Overseas workers whose employment is wholly off shore do not require work permits, however they do require leave to enter or remain in the UK.

Refer to OEP (formerly EPU) if further advice is needed.

50.11. Recourse to public funds

The 1996 Act introduced a restriction on the use of public funds for certain persons subject to control. From 8 November 1996, the grant of leave to enter or remain has, where appropriate, included the requirement" that the holder is required to maintain and accommodate himself and any dependants without recourse to public funds".

A person whose leave to enter or remain prohibits recourse to public funds is liable to removal if found to be in receipt of a public fund (see 50.11.1). Action may therefore be initiated under section 10 provided that one of the following is available:

- ◆ an admission under caution that the person has been in receipt of public funds; and/or
- ◆ a statement from an official from the relevant benefit agency that public funds have been claimed.

A person whose passport endorsement does not expressly prohibit recourse to public funds does not breach a condition of his leave nor commit a criminal offence under section 24(1) (b)(ii) of the 1971 Act if he or she is in receipt of public funds (Those on temporary admission or illegal entrants who have not been granted leave are not liable to enforcement action in this category, as they have not been granted leave which prohibits recourse to public funds).

When a person started claiming public funds before a restriction was endorsed in his or her passport, there may have been a legitimate entitlement to claim e.g. Child Benefit. In such a case, a report should be sent to the relevant casework section to enable an approach to be made to the relevant benefit agency with a request that they review the claim. If, after interview, it appears that the person may qualify for benefits, submit a report to the relevant casework section.

50.11.1. List of public funds

attendance allowance	child benefit	council tax benefit
disability living allowance	disabled person's tax credit	housing benefit
income support	invalid care allowance	jobseeker's allowance

publicly-assisted housing and homelessness assistance	Severe disablement allowance	social fund payment
working family's tax credit		

50.12. Section 10(1)(b) - Leave to remain by deception

The offence of seeking or obtaining leave by deception was first introduced by the 1996 Act. Section 24A of the 1971 Act (inserted by the 1999 Act) replaced and extended this offence (see 50.1). Any person who uses deception in seeking leave to remain (whether leave has been granted or not) since 1 October 1996 comes within the terms of section 10 of the 1999 Act. Where an offence of deception appears to have been committed prior to that date, the facts should be reported to the relevant casework unit for possible deportation action on non-conducive grounds under section 3(5) (a) of the 1971 Act.

The evidence of deception should be clear and unambiguous in order to initiate action under section 10. Where possible, original documentary evidence, admissions under caution or statements from two or more witnesses should be obtained which substantiate that an offence has been committed before authority is given to initiate action under section 10 of the 1999 Act. The deception must be **material** - in other words, had the officer known the truth, the leave would not have been given. The evidence must always prove **to a high degree of probability** that deception had been used to gain the leave, whether or not an admission of deception is made. The onus - as always in such situations - is on the officer making the assertion to prove his case.

50.13. Section 10(1) (c) - Removal of family members

To ensure parents are in no doubt as to our removal intentions with regard to their children, removal action may be initiated under section 10(1)(c) against the non-settled spouse of a person liable to administrative removal action and against any dependent children who have neither the right of abode nor are settled here, (but those listed in paragraph 50.3 are exempt from administrative removal).

The following categories of children are liable for removal action:

- ◆ Children born abroad, or in the UK on or after 1 January 1983, where neither parent is a British citizen or settled here. (Children born in the UK after 1 January 1983 are entitled to

apply for British citizenship once they have completed 10 years' residence, or 5 years if the parents are BOTCs. This does not, however, preclude enforcement action being initiated against them prior to their entitlement to British citizenship).

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

Paragraph 395C of the Immigration Rules states that when considering the removal of family members, full account must be taken of paragraphs 365-368 of the Rules, as outlined below, as well as to any compassionate circumstances of the case.

Removal action will not normally be taken in respect of a spouse of a person who is being removed where:

- ◆ he has qualified for settlement in his own right
- ◆ he has been living apart from the offender

A child will not normally be removed where:

- ◆ he and his mother or father are living apart from the offender, or
- ◆ he has spent some time in the UK and is nearing the age of 18, or
- ◆ he has left home and has established himself on an independent basis, or
- ◆ he married before removal came into prospect

The following factors should also be taken into account:

- ◆ the ability of the spouse to maintain himself and any children in the UK, or to be maintained by relatives and friends in the UK without charge to public funds, not merely for a short period, but for the foreseeable future, and

- ◆ in the case of a child of school age, the effect of removal on his education, and
- ◆ the practicability of any plans for the child's care and maintenance in this country if one or both his parents were removed, and
- ◆ any representations made by or on behalf of the spouse or child.

Directions may not be given under section 10(1)(c) above *unless* the person concerned has been given written warning of such an intention that such action is intended (i.e. served with an IS151A Parts 1 & 2). This warning should be given at as early a stage as possible, and ideally before the first person is actually removed. It cannot be given more than 8 weeks after the other person's removal and where more than 8 weeks have elapsed, removal under section 10(1)(c) is not possible. (*Note:* The written notice required for removal under section 10(1)(c) may be served by first class post to the last known address of the person concerned and is taken to have been received on the second day after the day of posting. Where the notice is served in this way, a dated copy should be placed on the file and the time and date should be noted on the file.) Action is not possible under section 10(1)(c) if the person concerned ceases to be a member of the other person's family.