



# Black Lives Matter - Part 2: Gang Mythologies and Deportation

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# Gang Mythologies and Deportation: *Operation Nexus Overview*

Greg Ó Ceallaigh, Garden Court Chambers

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# Operation Nexus Overview

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- The purpose of this talk is to:
  - Give an overview of how Operation Nexus works in the deportation context
  - Look at some of the key authorities and legal principles
  - Analyse and develop some of the problems that arise
  - Suggest ways in which we as lawyers can work together to try to solve those problems



# What is Operation Nexus?

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- There are two strands to Operation Nexus:
  - Nexus Custody: Immigration Officers (IOs) deployed to designated police custody suites to examine all foreign nationals who are arrested. Cases identified as illegal entrants suitable for detention will be referred to Immigration Enforcement's National Removal Command or to the Removals Casework Command for case-progression.
  - Nexus High Harm: Police forces refer "High Harm" cases to the Nexus High Harm team where the individual is deemed to be a threat to the public. The Nexus High Harm team assess every referral and establish whether the known offending justifies referral for immigration enforcement action. This action can include administrative removal, conviction-led deportation and intelligence-led deportation.



# What is Nexus “High Harm” used for?

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- Deportation following criminal conviction (s3(6) of the Immigration Act 1971; s32 of the UK Borders Act 2007)
- Deportation on the basis that a person’s presence is “not conducive to the public good” (s3(5)(a) of the Immigration Act 1971)
- Administrative removal



# What does “High Harm” mean?

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- “For the purposes of Operation Nexus, Foreign National Offenders (FNOs) are considered as ‘High Harm’ cases **where their conduct incurs significant adverse impact, whether physical, emotional or financial, upon individuals or the wider community.**”
- “The team also leads on intelligence-led deportation in cases where disclosable police material is utilised to justify deportation action where there are no convictions.”



# Who is referred?

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- All foreign nationals who receive a custodial sentence are referred for deportation
- Separately, foreign nationals may be referred to the Home Office Nexus team where the subject:
  - Is lawfully present and is the subject of active police interest and there is evidence that their conduct meets the definition of ‘High Harm’ due to:
    - the provision of disclosable police material evidencing a “current and ongoing threat to the public”
    - persistent criminal activity that causes harm to the wider community (e.g. 5 or more convictions within the previous 3 years including non-custodial sentences)
  - Is not lawfully present and is subject to active police interest, which would make the subject a priority for immigration enforcement action to remove
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# Who is that in practice?

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- People the police have been unable to secure convictions for
- Frequently alleged gang members



# What happens in an Operation Nexus deportation case?

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- Police take an active role in deportation proceedings:
  - Providing a bundle of evidence that forms the basis for the decision to deport
  - Appearing at hearings to give direct evidence as to a person's alleged criminality



# How is evidence in the Tribunal different from a criminal court?

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- There are virtually no rules of evidence in the Tribunal – FTT procedure Rules Rule 14(2):

*“(2) The Tribunal may admit evidence whether or not— (a) the evidence would be admissible in a civil trial in the United Kingdom...” – hearsay is allowed*

- Evidence will include ‘police intelligence’
- Standard of proof is the balance of probabilities
- Previous acquittal does not prevent the same case being made again
- Secret sources can be relied upon



# *V v Asylum and Immigration Tribunal* [2009] EWHC 1902 (Admin)

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- The Appellant in that case was alleged to be a gang member
- The Home Office sought to deport him on conducive grounds and relied on:
  - 3 spent convictions
  - an allegation of involvement in a murder (he had been acquitted of)
  - an allegation he had been seen with a gun
  - criminal intelligence saying he associated with gangs (an 800-page CRIS report of data collected mainly from unnamed second-hand hearsay sources)
- Hickinbottom J held that this was not an abuse of process, and such evidence was admissible (§46):

*“...whilst I see that this evidence inevitably loses considerable weight by being anonymous and (in part) hearsay, thereby preventing any direct challenge to the relevant witnesses, I cannot say that this evidence must inevitably be given no weight by the tribunal - or that to admit the evidence at all will inevitably deny the claimant a fair hearing.”*



## *Bah (EO (Turkey) – liability to deport) [2012] UKUT 00196 (IAC)*

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- The Appellant was alleged to be a part of the Anti-Showermen gang, the FTT relying on “*CRIS reports, Crimint and other police intelligence, the sources for which were not disclosed*”
- The Tribunal held that any specific allegations made had to be proved to the civil standard
- At §§53-55 the Tribunal drew a distinction between whether hearsay and anonymous evidence should be admissible and the weight it should be accorded, applying *V*
- However the Tribunal also held:

*“The civil standard is flexible according to the nature of the allegations made, see House of Lords in Re B [2008] UKHL 35, and a Tribunal judge should be astute to ensure that proof of a proposition is not degraded into speculation of the possibility of its accuracy.”*



## *Farquharson (removal – proof of conduct) Jamaica [2013] UKUT 146 (IAC)*

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- The Home Office sought to deport the Appellant on the basis that he had in fact committed a series of offences, none of which had resulted in convictions (including 5 alleged rapes).
- The Tribunal held that he had committed most of these offences and dismissed his appeal. It also held:
  - A criminal charge that has not resulted in a conviction is not a criminal record; but the acts that led to the charge may be established as ‘conduct’
  - If the respondent relied on police CRIS reports, they should be produced, rather than a bare witness statement referring to them, in good time to respond and prepare for the appeal
  - Where the appellant is in detention and faces a serious allegation of conduct, it is in the interests of justice that legal aid is made available
- Also, crucially: *“If the material renders itself capable of more than one interpretation we should only draw one adverse to the appellant if on the balance of probabilities there is no other reasonable explanation on the material before us.”*



# What goes in? A criminal allegation in a non-criminal Tribunal

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- Police ‘intelligence’, including e.g. Crimint reports, anything from the PNC
- Statements (including police statements on ‘gang involvement’, being seen near criminal activity, being associates of ‘known criminals’ etc)
- Cris reports (including allegations resulting in acquittals or even no charge) and CAD
- Victim impact statements (including of acquitted crimes)
- Any allegations substantiated or not, including mere suspicion
- Having been stopped and searched
- Having been stabbed or otherwise a victim of a crime or a witness to crime
- Basically any evidence you can imagine



# Nexus deportation in practice

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- Home Office adduces large volume of ‘evidence’ with a short MG11 witness statement from an officer ‘explaining’ the contents
- An officer will attend the Tribunal to ‘give evidence’ on the contents (the officer may not have prepared it and may not be familiar with its contents)
- The Home Office will in general rely on the entire contents of that bundle as being true and as demonstrating the truth of its contents
- There will be no direct evidence from (or opportunity to cross-examine) any of the people making the factual claims in the documentation
- It may not be clear who is even making those claims
- The Tribunal will decide whether they are true on the balance of probabilities





# How does all this fit with Article 6 ECHR?

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- It doesn't have to – *Maaouia v France* (2001) 33 EHRR 42 establishes that Article 6 ECHR doesn't apply to deportation or removal proceedings:

*“...the Court considers that the proceedings for the rescission of the exclusion order, which form the subject matter of the present case, do not concern the determination of a “civil right” for the purposes of Article 6 § 1. The fact that the exclusion order incidentally had major repercussions on the applicant’s private and family life or on his prospects of employment cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6 § 1 of the Convention...”*



# Time to revisit *Maaouia*?

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- There have been suggestions in Strasbourg that this proposition may be revisited, as in the repeated dissenting or concurring judgments of Judge Pinto De Albuquerque (such as this in *Hirsi Jamaa v Italy* (2012) 55 EHRR 21):

*“With regard to the expulsion procedure, see Maaouia v. France ([GC], no. 39652/98, ECHR 2000-X), and to the asylum procedure see Katani and Others v. Germany ((dec.), no. 67679/01, 31 May 2001). Like Judges Loucaides and Traja, I also have serious doubts about the proposition that, on account of the alleged discretionary and public-order element of the decisions taken in these procedures, they are not to be seen as determining the civil rights of the person concerned. I have two major reasons: firstly, these decisions will necessarily have major repercussions on the alien’s private and professional and social life. Second, these decisions are not discretionary at all and do have to comply with international obligations, such as those resulting from the prohibition of refoulement.”*



# What can the lawyers do?

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- Co-operation is key
- Information:
  - If a prosecution failed, the criminal lawyers will know why, but it may not be clear at all from the CRIS/MG11 – make yourself available to speak to the immigration lawyers
- Documentation
  - Criminal files must be shared quickly with immigration lawyers
  - Files notes such as counsel's attendance notes can be essential – if the prosecution case collapsed or was thrown out *why* did that happen?
- Continuity of care
  - If your client is detained following conviction or acquittal, it's essential to ensure that he has access to immigration lawyers and that he or she is represented in case the police decide to rerun the case without the defence there



# Thank you

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