

PRISON SERVICE JOURNAL

January 2013 No 205



Special Edition
**Migration, Nationality and
Detention**

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Cover design by **Stephen Williams**, HMP Leyhill.

The Editorial Board wishes to make clear that the views expressed by contributors are their own and do not necessarily reflect the official views or policies of the Prison Service.

Printed at HMP Leyhill on 115 gsm Satimat 15% Recycled Silk
Set in 10 on 13 pt Frutiger Light
Circulation approx 6,000
ISSN 0300-3558
© Crown Copyright 2013

Editorial Comment

The imprisonment and detention of foreign nationals has increased substantially in recent years. Immigration detention places have grown twelve-fold in the last 20 years, while the number of foreign national prisoners has more than doubled. Currently, around 11,000 foreign nationals are held in English and Welsh prisons, including around 600 immigration detainees. An additional 3,000 people, many with no criminal record, are placed in immigration removal centres¹.

Many prison staff will be aware of the stress and uncertainties foreign national prisoners experience as they near the end of their sentence. They are often confused about what is going to happen to them next and, if they are detained, they enter a kind of limbo. They are neither in the country nor out, unsure whether they will be released or removed, or when they will see progress on their cases. The contrast with the generally rigid certainties of 'normal' prison life is stark as people's lives become dominated by attempts to navigate a complex immigration system, often with inadequate specialist advice. This edition aims to broaden understanding of detention in the UK and abroad, with articles exploring life in detention and the politics of immigration control in the UK and abroad.

The edition is framed by Kizza Musinguzi's absorbing personal account, a man detained (as it turns out, unnecessarily) after fleeing persecution in his home country. Musinguzi offers insights into the day-to-day experience of someone subject to immigration control and detention. Details such as his first impressions of the detention centre, and the kindness of individual staff and fellow detainees, stand out in this thoughtful and fair-minded essay. If there is only one article that you read fully in this edition, it should probably be this one. It is followed by interviews with Karen Abdel-Hady and Jo Henney, respectively deputy director and Head of Detention Operations, in the Returns Directorate, Enforcement and Crime Group at UKBA, and centre manager at Harmondsworth, the UK's largest immigration removal centre. They describe the challenges and satisfactions of some of the most responsible positions in the detention estate.

The MQPL (measuring the quality of prison life) survey tool has become firmly established in prisons as an effective way of finding out about prisoners' experiences. In a logical step forward, a similar approach is being developed in detention. Mary

Bosworth and Blerina Kellezi discuss emerging findings from their MQLD ('Measuring the quality of life in detention') survey conducted in several immigration centres. A key finding is the exceptionally high level of depression reported by detainees. Both staff and detainees identified the open-ended nature of immigration detention and the cumbersome immigration decision-making process as factors contributing substantially to such feelings.

A broader perspective is taken by Judi Moylan, an Australian member of parliament with a long-standing interest in her country's approach to immigration control. Her paper illustrates the strongly politicised nature of immigration control, as she narrates the evolution of immigration debate from an unabashed 'White Australia' policy to current concerns about the number of people who continue to arrive, and die, in boats. She discusses the use of off-shore detention and the fact that a thousand children continue to be detained in Australia, contrary to the country's own guidelines and international law.

Three years ago, it was not uncommon for the UK also to detain 1000 or more children a year. There has been a substantial reduction in numbers since, mainly as a result of a change of policy by the coalition government. Hindpal Singh Bhui critically assesses contemporary child detention practices in the UK in light of this, arguing that the new and substantially improved approach may contain important learning for the management of adult detention. He echoes the concerns over the open-ended nature of detention revealed in Bosworth and Kellezi's piece, and argues that the most important lesson may be the rejection of previous assumptions about the need for indefinite detention to achieve effective immigration control. Children are held for no longer than a week, and there seems little reason why time limits cannot now be discussed for adult detainees.

The politics of immigration control is a theme in Lea Sitkin's paper on the distinct approaches to immigration control in Britain and Germany. Sitkin identifies several reasons for policy differences including geography. Britain's island status means that it is easier to stop people at points of entry, while Germany's more vulnerable land borders mean that more effort is put into identifying illegal entrants when they are already inside the country. She also considers the influence on policy of Britain's colonial history and multi-cultural

1. HM Inspectorate of Prisons and Independent Chief Inspector of Borders and Immigration (HMIP and ICIBI) (2012) *The Effectiveness and Impact of Immigration Detainee Casework. A Joint Thematic Review.*

citizenry on the one hand, and Germany's totalitarian past and 'guest-worker' culture on the other.

Andriani Fili's fascinating and disturbing paper illustrates how far the objectification of migrants and failure to see them as individual human beings can go if unchecked. She describes a system of immigration control and detention in Greece that is in crisis. It is hard to believe that up to 120 people have been locked, sometimes for months, in a space designed for nine people at the Athens airport detention facility. It is a sobering reminder that the inhuman, degrading and in some respects literally deadly system that she describes exists in the EU.

Ana Aliverti's paper moves us beyond immigration detention to a consideration of the criminalisation of foreign citizens for immigration offences. Exploring crown court and magistrate court records, she finds that few migrants are prosecuted for immigration act offences since dealing with them under the administrative immigration system is often easier than invoking criminal powers. However, those who do appear in court almost always receive custodial sentences. Given the range of immigration offences that may be dealt with in this way, she suggests that unless immigration policies shift, it seems likely that the number of foreign citizens in prison will continue to grow.

The final two contributions build on Aliverti's paper to explore the experiences of foreign national prisoners in a variety of jurisdictions. Drawing on the work of the Prison Reform trust in England and Wales, Francesca Cooney argues that foreign national prisoners in this country have suffered in the push to achieve deportation targets. She poses an important question: 'Is the prison service acting as an arm of the

immigration service ... rather than fulfilling its primary purpose of rehabilitation?' There is some evidence to support her position. The rehabilitation of foreign nationals seems to have been de-prioritised partly because of the mistaken view that they will all be deported, and partly because of the somewhat unethical position that reducing the risk of someone being released into another country does not matter.

Finally, Femke Hofstee-van der Meulen reports on her research into the experiences of Dutch nationals imprisoned abroad. The problems they report resonate to a large extent with those identified by Cooney. The major difference is the high level of effective support provided by consular staff, volunteers and chaplains, who regularly visit Dutch nationals in over 50 countries. The human concern shown for fellow citizens, both by the state and by private individuals, makes a big difference to Dutch prisoners, affecting their behaviour in prison and after release.

Spanning several countries and multiple jurisdictions these papers demonstrate both the interconnections between migration policies and punishment, and the range of perspectives from which these developments can be considered. Many of the essays raise tough questions about state practices. Others suggest emerging good practice. As the numbers of foreign nationals incarcerated in both the penal and immigration systems continues to grow, what is clear is that these issues need more sustained critical attention both from academia and from those who work with and for this population. We would like to thank all of our contributors for their thought-provoking papers and we hope this issue will lead to a more general discussion about these matters within the prison service and beyond.

As a child I travelled a lot due to my father's job, a chemical engineer working for Shell. For me, travelling to the UK was not by choice. In 2005, I joined the ranks of people seeking asylum in this country. The UK is signed up to the Geneva Convention and the European Convention of Human Rights. Some people consider these human rights conventions to be an administrative nuisance. I agree there are people who do take advantage of human rights laws but I will also argue that there are a lot more people for whom this protection is their only life line, from Russian oligarchs fleeing to England, to the Tamils in south east Asia and sub-Saharan Africans looking for a safe haven. I am one of those people who fled to the UK seeking protection. I am going to detail my journey through the immigration estate, exemplifying with snippets of scenarios that I remember. While writing this article I could not resist discussing my experience without offering an opinion on my view of the implementation of immigration control procedures.

I claimed asylum on arrival in England in 2005. I was involved in human rights work, following in my father's footsteps. He was unfortunately murdered whilst campaigning for election as the Member of Parliament for his local area upon retirement from Shell, having served Shell for 25 years. He was campaigning against a high-ranking government minister. I was also then persecuted for human rights campaigning. I fled my country with the assistance of a very loyal relative, who used his connections in neighboring Kenya to find temporary refuge. While I did not expect my final destination to be London, my uncle was able to put me in touch with colleagues of his who facilitated my journey there.

I went through the administrative rigors of establishing my reasons for gracing the United Kingdom with my presence. I was then sent away to live in a hostel in south London with about 200 other asylum seekers. The day I was detained I received a letter from the Home Office requesting me to attend an interview to verify my biometric details. The letter asked me to turn up at 9am in the morning the following day, which I did. After waiting for about 10 hours, I was starting to get anxious and agitated; I had not eaten all day, I was worried I would miss dinner and signing in at the hostel (not signing in meant losing your place). At 6.45pm, I was called up to the counter and told to go through to the back office. As I made my way to the

back office I was faced with four private security personnel who ordered me to remove my belt and shoes, I was then frisked. My personals were sealed and tagged in a plastic see-through bag and sent to the waiting area. I asked one of the immigration officers present at the time what was happening and her reply was 'we are going to transfer you to a different hostel where we shall be able to look at your case in detail'. This calmed me down and I complied throughout the process. At this stage, I have to emphasise that I do not and have never had a criminal record. I had always complied and was sure I had nothing to worry about. No stretch of the imagination could have prepared for what I was about to go through.

On arriving at the centre, I was shocked by the exterior of the 'hostel': high walls with barbed wire on them, triple lock gates, security buffer zones and tiny windows — a fortified hostel. We waited outside the centre gates for about 45 minutes as the vans ahead were processed. It was now our turn to go through. The tall gates were clanked open, the driver drove into the buffer zone, switched off the engine, and waited. We were counted and paperwork was exchanged. We remained in the buffer zone for about 15 minutes. At this point my mind was racing. Why was I here? Why so much security? Was I on the set of an upcoming James bond film? We entered the facility and I was led to reception, where we proceeded to wait for about three hours. We were offered a drink of water from the water cooler type cups and a choice of chicken or tuna sandwiches — I chose the tuna. I had been eating combinations of chicken at the hostel and did not want any more chicken. We were fingerprinted again (my first experience of this was at the HO) and I wondered why security at the centre could not access biometric details remotely to save us what would turn out to be routine finger printing throughout my stay. The waiting room was very clinical, white walls, tiny windows and a distant television holstered in a top corner — I felt like was waiting for surgery, only I had not been told of this upcoming procedure.

At about 2am, I made my not so grand entrance into Harmondsworth Immigration Removal Centre (IRC) Wing B — my heart sank! It was late at night and people were wandering around like lost souls — I wandered around too, another lost addition to the population. People were dotted around in the TV rooms, playing cards and elderly men hunched in corners — I had never seen elderly men sob in such a way. My cellmate was a very nice guy and polite, but he

was clearly very depressed — he was a cutter! Everyone knew. I never saw him cut himself but new and old scars were obvious to everyone. I did not sleep that night.

There was a subtle pecking order. Groups (some may call them gangs!) were led by detainees who had been to prison. They had the experience of functioning in a custodial environment with extensive networks across IRCs. Most of the IRC population at that time was of African descent, and African groups were the most dominant. I had really long dreadlocks and I was of a fairly large build — an appearance that offered me some protection against other groups, as simply by my appearance people thought I was affiliated with one of the groups. This look did not serve me well in court or at HO interviews.

One of the worst things I experienced as a resident of the IRC estate was the movement between centres. Imagine having to move house every three months and on occasions every other month, and having to almost instantaneously integrate within a new community. In the IRC estate I had the added benefit of free removal services.

One incident I remember happened on a Friday night. The others had been playing bingo (bingo was not my thing), while we finished off a table tennis game with one of the officers. I sent notes to my friends in other wings through the cleaners who had access to other cleaners in the other wings, asking them to meet in the yard for a lunchtime game of football the next day.

'Bang up!' the officer shouted. I grabbed a few left-over apples and playing cards and entered my cell ready for that dreadful lock up — I hated it! Everyone hated bang up. Chances were if nothing had transpired during the day — bang time inspired the feelings of dread. Anyway, once in the cell it was back to normal bang up routine, watch the distant 14-inch television, play cards and talk about the first meal we would have on release. Personally, a nice cold Guinness was all I wanted.

At about 4am, I heard the cell door open. We both woke up, looked up at the same time — not knowing which one of us was leaving. I was in Colnbrook IRC at this point. 'Which one of you is 45991?' the officer inquired. I responded. 'Pack up your things, you will be escorted over to reception,' he continued. It would not have been wise to question my move amidst three

officers at that time of the night. I dreamily complied. About 15 minutes later I was walking through the yard with all my worldly possessions — a half torn rucksack containing a toothbrush, some crumbled biscuits and a massive load of papers from the Home Office about my case that I never read.

Whilst in the van one of the other detainees informed us we were going to Dungavel IRC in Scotland. Others speculated we had a charter flight waiting. Sure enough, our destination was Dungavel, 12 hours from Colnbrook, London. I spent the night in Dungavel, was issued with removal directions (RDs) early the following morning and by 8pm of the same day, I was in the van again heading back to Colnbrook IRC. On my immediate return to Colnbrook, I was told to pack up again to be transferred to a Heathrow airport holding room. Luckily, by this time I had a solicitor.

Dungavel IRC was one of the most humane centres I had been to: staff were polite and helpful, there was more freedom of movement and Border Agency staff there were extremely helpful and understanding. They seemed to understand that asylum seekers were not criminals. This was very comforting and I felt at home there.

My solicitor at the time suggested I was transferred to Dungavel for purely administrative purposes since my solicitor would not have jurisdiction in Scotland to appeal my RDs. Personally, I did not know what to believe, but I

thought it was a bit odd to be driven 12 hours to be issued RDs and then returned to the same centre the next day.

I think there are convenient administrative procedures in the systems that are attractive to Border Agency staff but cause absolute untold misery to detainees. One would argue that a country has every right to put procedures in place for the efficient management of claimants for the good of the country. This for me is a tough call, but we have to remember that most of the asylum seekers (especially those without criminal convictions) in IRCs, many of the asylum seekers are released and will live with the general population. If such immigration procedures are the norm, what are we saying to newcomers to this country about British society? We share sidewalks and roads with former/present asylum seekers, some of whom will probably treat you in hospital or drive you home after a late Friday night. Next time you have a

One of the worst things I experienced as a resident of the IRC estate was the movement between centres. Imagine having to move house every three months and on occasions every other month . . .

kebab, order Chinese or Indian or conga at the carnival or have a Cornish pasty, think of the richness diversity brings to a community.

IRCs have long periods of uneventful days, periods when nothing of significance happens and it is just going through the motions: sleep, dinner, chess ... sleep, dinner, pool and so on. Following periods of dullness, there are short periods of high intense drama, enough to compensate for the lulls in the week. One particular moment I remember vividly happened 15 minutes before bang up. One of our wing mates who did not interact much with anyone was mercilessly taunted as he had a last minute shower. Having had enough of the taunts he went over to his cell, changed into clothes, and walked over to the group that had been taunting him. No sooner had he reached them than the punches started raining on him. At this point, everyone was out of their cells watching in horror ... I (and a few others) wanted to intervene but I was advised against intervention by my cellmate who had spent about three years in prison and had been detained for more than a year. He told me you should never intervene in a prison fight, otherwise you risk 'tagging' yourself. So we watched helplessly for those intense five minutes as Charles was 'jumped'. Then one of them stepped away for a second to reveal a concealed weapon, which we later found out was a shank made from a plastic fork. Charles was mercilessly 'shanked' in full view of CCTV. These incidents, terrifying as they were, were commonplace. We all hoped we would never be jumped but in IRCs even the slightest altercation with the wrong person could get you 'jumped'. Then there were nightly deathly screams from people banged up with hostile cellmates, attempted suicides, detainees with mental health issues made worse by their personal circumstances, not to mention protests from people picked up in the early hours from their cells for whatever reasons.

Habeas corpus was virtually unheard of in IRCs. It was quite ironic to be asked to prove my case when I did not have sufficient means of communication; the internet was heavily restricted, at the time mobile phones were not allowed, and I did not know a single person on the outside. Besides, buying change from one of the detainees to use the telephone was expensive: £3 in change could cost as much as £2 depending on how urgently you needed to make the phone call, so I was not surprised when I failed at every bail and case hearing for the whole seven months I was detained with no legal representation.

We all hoped we would never be jumped but in IRCs even the slightest altercation with the wrong person could get you 'jumped'.

At this stage my asylum case took a back seat as I just lived day to day.

The duration of my detention was spent in four: IRCs Harmonsworth, Colnbrook, Dungavel, and Dover, and then there were the countless times I spent at Heathrow airport's holding facilities. Around my fourth month into detention I was guaranteed to know enough detainees wherever I was transferred.

The day I was released was one of the happiest days of life. I was at Dover IRC at the time and had to make my way to London. Seating on the train from Dover with my HMP see through bags, rough dreadlocks and a tattered IRC issue sweat suit — I had a whole triple seat to myself. Fitting comfort for a newly released asylum seeker, I thought! Nothing to do with the fact that no one would sit next to me — and this was around 5pm rush hour time.

The next day after my release I registered on the electoral register and have voted in every election ever since. A legacy law that allows Commonwealth citizens to exercise their right to vote in local elections in the UK enabled me to. Just imagine if every Commonwealth asylum seeker exercised this right? Would politicians take more notice of the plight of asylum seekers? Or would the public be so outraged by this legacy law that it would have to be revised? I reserve my opinion on this one.

On occasions, I have been called upon to support on inspections as an experienced IRC 'service user'. I have had the privilege of gaining a holistic understanding of the challenges involved in managing high volumes of immigrants that have to be processed in IRCs some of whom have serious criminal pasts. In all honesty, I have great sympathy for staff within IRCs that have to work in these very challenging environments. Sometimes detainees will take their frustrations out on staff with no regard for consequences. One serious incident I remember at Colnbrook was when a detainee slashed an officer's face. I have no idea what happened to the member of staff or detainee after the incident. The prison-like infrastructure in most IRCs further exacerbates the situation. In contrast, I noticed centres such as Dungavel and Dover that had more of a homestead design were more pleasant environments for both staff and detainees. I also noticed that centres with experienced staff, that is former (or present) prison officers as at Dover and long-serving locally based staff as at Dungavel, were more likely to be pleasant environments. I believe in part this was due to the

presence of staff with solid experience of managing people in custodial environments. Perhaps, custodial services in the immigration estate should be entrusted to fully trained and experienced prison officers. IRCs are prisons in all apart from their legal definitions. Maybe Dungavel should be used as a model for all IRCs? How about ensuring all IRC staff undergo training equivalent to that of prisons officers?

After release, I spent another four years signing on at the Home Office. This was a dreadful experience despite the fact that I had registered with my local borough, was an engineering student and complied fully with the Border Agency. None of that counted in my favor. Every Friday I had to sign on and the threat of re-detention was ever present. The thought of going back to detention was terrifying, but I kept signing on. I had developed a strategy of getting in all my university assignments handed in the day before I had to sign and I always made sure I had a drink with my friends the day before, prepared my emergency contacts and took some money in change, just in case I was re-detained. This was my weekly routine for about three years after release.

I am now a permanent resident of the UK. I graduated in 2010 with a 2:1 in materials engineering and am currently teaching physics. I spent four years completing my engineering degree after release and have been conferred with the right to use the 'Eng' postfix after my name, something some of my students find intriguing. 'Sir! Why are you teaching when you are an engineer?'. My response is 'because you are in year 10 and you need to concentrate on your exams.' Not the fact that the manufacturing industry in the UK has been on the decline and we need to train more scientists to push innovation and invention in the country.

People have previously asked me whether I am angry at having been through this experience and my response is 'not in the slightest'. I have met amazing people on my journey from being known as detainee number 45991 to Engineer Kizza. I have made

wonderful friends in the UK, people who empathised with my plight, people that in my view were the true reflection of British society. These friends have inspired a very strong sense of achievement and Britishness in me (though I will support my country of origin in the Olympics). I feel that I want to be woven into the fabric of this country, teach a subject I have loved all my life and contribute to the wellbeing of a country that has given me so much. I can only wonder what would have become of me if I did not have this support.

I am proud to be able to give something back to UK society by teaching future generations, through charity work I have done and by supporting inspections. Amazingly, my local borough is such a strong believer in my conviction to contribute to society that they have consistently reminded me over the years when and how to pay my council tax.

In these times of austerity, some (including settled immigrants) may be threatened by immigration. Talk of revising or scrapping clauses in the human rights legislation is driven in my view by knee jerk reactions to tabloid headlines. In my view, tweaking human rights clauses is bound to affect all Humans, not only immigrants, keyword here is Human. Personally, I believe current legislation if implemented correctly is solid enough to protect us all.

My journey has taken me to the darkest corners of the UK and shone light on some of the brightest, most inclusive communities I have ever lived in. I recall decent IRC staff with whom I played table tennis, shared a joke and followed diligently to the waiting vans; I also recall friends who offered me accommodation and financial support. As I prepare for the start of the academic year in September, I am very conscious of the fact that I need to use all my experience to instill a strong sense of responsibility to mankind in my students, or to quote Confucius 'Consideration for others is the basis of a good life, a good society'.

I have met amazing people on my journey from being known as detainee number 45991 to Engineer Kizza.

Interviews:

Karen Abdel-Hady and Jo Henney¹

Karen Abdel-Hady is Deputy Director, Head of Detention Operations, Returns Directorate, Enforcement and Crime Group, UKBA. Jo Henney is Centre Manager of IRC Harmondsworth, run by GEO.

Interview with Karen Abdel-Hady

PSJ: What are your primary responsibilities in UKBA?

KAH: My primary responsibility is the management and leadership of several discrete teams who are all part of the process to enforce the removal of those people who have no basis to remain here, and where they have refused to leave the country voluntarily. Specifically I am responsible for:

- ❑ The Detainee Escorting and Population Management Unit, who manage the population by positioning people, for example for documentation interviews with High Commissions and removal directions. This team also monitors the escorting contract.
- ❑ Teams within the Immigration Removal Centres (IRCs) and Cedars Pre-departure Accommodation who provide UKBA contact with detainees and monitor the contractor or prison service that run the IRC.
- ❑ Two small teams, one of which is involved in the family returns process and the other who provide internal audits of the IRCs to ensure compliance with the Detention Centre Rules and Detention Service Orders (DSOs).

PSJ: How did you come to work in this area?

KAH: I have worked in UKBA for over 20 years in a variety of roles, starting out as an immigration officer. In recent years I held a position in the Criminal Casework Directorate who consider the deportation of foreign national offenders and had lots of dealings with staff within detention operations and the immigration removal estate. When the opportunity arose for a role within the team I was keen to take it on and try and make a positive difference in a complex and highly important part of the removal system.

PSJ: How do you see your job in UKBA developing over the next 5 years?

KAH: A requirement to deliver an increased number of removals with a continued emphasis on dignified and safe detention and removal. Whilst increasing removals, my role will need to ensure a more efficient and effective service, providing excellent value

for money, and will continue to involve work with both the private sector and the prison service.

PSJ: What are the things you are most proud of in your work?

KAH: The staff I work with and our role in keeping the public safe by removing those who have no right to be in the UK, particularly those who have offended whilst staying here. The positive impact that my teams have in ensuring that escorting is safe and dignified and that the immigration removal estate is a safe and secure environment where voluntary returns are successfully promoted.

PSJ: What is the most difficult aspect of your job?

KAH: The role of UKBA is challenging but there are some areas that are particularly difficult, for example family returns which must be handled sensitively and in line with UKBA's safeguarding duties. Another particularly challenging area is dealing with those who have exhausted the legal process, have no right to be in the UK but who are non-compliant with the removal process.

PSJ: What is UKBA doing particularly well at the moment?

KAH: Recently there has been a significant improvement in how UKBA work with the prison service, in particular in the arrangements for handling foreign national offenders. There has also been a major improvement in UKBA's work with the Foreign and Commonwealth Office which has resulted in improved processes for obtaining documentation from foreign governments which is needed to facilitate an individual's removal from the UK.

PSJ: What are some of the challenges it is facing?

KAH: The challenges UKBA face remains fairly constant. Like all government departments resource constraints have an impact and the requirement to do more with less. In addition, ensuring that the positive work UKBA does is understood and acknowledged by the public and staff alike can be a challenge, given the potentially emotive subject of removing those who have no right to remain in the UK.

PSJ: What particular issues are thrown up by having a range of IRC providers?

1. The interviewees were sent a number of questions, which were answered in writing and are reproduced here.

KAH: There are not as many as I thought there would be when I came into the Directorate as IRCs are required to follow the Detention Centre Rules and DSOs. However when a DSO is potentially open to interpretation, for example access to the internet, there can be some inconsistencies across the estate. Having identified these issues we are currently working with a variety of organisations and IRC providers to ensure consistency. Despite this I have found that in the main that all the IRC providers have been open to exchanging ideas on better ways of working and will share concerns and potential solutions.

PSJ: Are there any differences between the private companies and prison service?

KAH: I have not seen any real difference between private companies and the prison service, they all raise the same issues, for example the difficulty in removing those who don't want to return home and they are all working to ensure the most efficient and effective service possible.

PSJ: If you could change overnight one thing about how IRCs are run, what would it be?

KAH: Although steps have been taken to improve activities in the IRCs I would like to see more activities that reflect the IRC's population, which meet the high standards of the rehabilitation that is provided by prisons and which can provide detainees with a sound footing for their return home.

Interview with Jo Henney

PSJ: How did you come to work in this area?

JH: My first venture into the custodial environment was at HMP Altcourse as a Prison Custody Officer, progressing to Senior Management. As my knowledge and experience grew I made the step into immigration removal centres at Yarl's Wood as a Deputy Manager. I then moved to Campsfield House to take up my first role as Centre Manager and finally to my current role at Harmondsworth. I enjoy working with people, the dynamics of what motivates a person and working together to achieve a goal, this is where my passion lies.

To encourage new initiatives from those around me and see the positive effect each change can make on a person's life, gives me a sense of achievement that only this environment can provide.

PSJ: What are the things you are most proud of in your work?

JH: I would say I am most proud of the positive relationships that have been created between the staff and detainees. We aim to provide care and support to all those detained at Harmondsworth and creating open channels of communication is vital in achieving this. We facilitate workshops, with the aid of external agencies that provide advice and guidance on the best way to manage their case. In the days leading up to a detainee leaving us, we meet with them to ensure they are suitably prepared and have everything they need before they leave Harmondsworth. This preparation plays a key role in ensuring a successful removal. All of these elements play a vital role in assisting UK Border Agency.

PSJ: What are the main needs of your staff?

JH: Staffing issues.....more money and more holidays!! The staffing needs overlap with the needs of the detainees. They require the correct training, support and guidance and equipment in order to carry out what can be an extremely difficult role. They can then provide all of the practical and mental support that a detainee needs for their stay and for the eventual departure, either in the form of release or removal.

PSJ: If you could change overnight one thing about the way that Harmondsworth is run, what would it be?

JH: This is a difficult question to answer. Harmondsworth is the largest immigration centre in the country and holds the most challenging detainees, both in respect of behavioural and medical issues. As with all custodial environments, we have our day to day problems that arise, but through all this we have created a pleasant environment. So to answer your question, although there may be a few things that could do with being changed, I recognise the achievements we have made at Harmondsworth in conjunction with UK Border Agency in creating a safe and secure environment.

Developing a Measure of the Quality of Life in Detention¹

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Introduction

Over the past ten years, the size of the immigration detention population in the UK has grown steadily. Though small in proportion to the numbers in prison, the sum of people in detention has expanded from a capacity of 250 in 1993 to more than 10 times that number today.² Most detainees are held in one of ten Immigration Removal Centres, with about 100 individuals placed in short term holding facilities at ports.³ These removal centres are typically located in the South of the country near Gatwick and Heathrow airports, although there is one centre in Scotland, IRC Dungavel.

Despite considerable public and political debate about such places, IRCs have not been the subject of much independent academic research. As a result, and in contrast to prisons, where there is an extensive scholarly tradition of investigation, almost all of what we know about the day-to-day life of detention centres is produced by NGOs and the occasional journalist. Work of this kind, particularly that produced by the HM Prison Inspectorate and the IMB, that is based largely on detainee perspective, tells us a great. In this article we hope to add to that material by describing findings from the first national study of life in detention.⁴ Specifically we will detail emerging findings from a survey measure that we designed and tested between November 2009 and June 2011.⁵

Notwithstanding hard work from a number of individual removal centre and UKBA staff, the survey reveals worrying levels of depression among detainees and ongoing concerns about healthcare and regime provision. Detainees appear to differentiate among the centres on various parameters, while certain groups in all centres are more negative about their quality of life than others. On the positive side, most detainees perceive their treatment by custodial staff positively, although the same cannot be said about their views on immigration staff.

The questionnaire is an adaptation of the Measure of Quality of Prison Life (MQPL) (Liebling, 2004) that has been developed for use in immigration removal centres. As such it seeks to measure detainee perceptions of a range of aspects of life in detention as well as the progress of their immigration case, their mental health and their quality of life. This is the first time it has been systematically applied and its findings are preliminary. However, some important issues have been identified which deserve greater scrutiny. As the questionnaire is applied further it will be extended and refined. This will be an on-going process and one that will benefit from further discussion with detainees and staff.

Overview

Between November 2009 and June 2010 Mary Bosworth designed, tested and piloted the Measure of

1. This research was funded by a British Academy Research Development Award, the Nuffield Foundation and the OUP John Fell Fund at the University of Oxford. We would like to thank Alan Kittle, formerly Head of the Returns Directorate at UKBA for facilitating this research project, as well as all the centre managers who opened the doors of their establishments. We would also like to thank the staff and detainees with whom we worked and John Dring for early guidance in developing the project. We gratefully acknowledge the assistance of Alison Liebling and members of the Prison Service Standards Audit Department for supplying us with copies of the MQPL and discussing strategies for adapting it to the detention environment. Others who assisted in administering the survey and provided general research assistance include: Emma Kaufman, Bonnie Ernst, Angela Sherwood, Ana Aliverti, Gavin Slade, Tadeusz Jones and Marie Segrave.
2. Bacon, C. (2005). 'The Evolution of Immigration Detention in the UK: The Involvement of Private Prison Companies'. *RSC Working Paper Series*, (27): 1-36. <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-q4-2011/>
3. Additional numbers are held post-sentence in prison or in police cells awaiting transfer to an IRC.
4. See also, Bosworth, M. (2012). 'Subjectivity and identity in detention: Punishment and society in a Global Age.' *Theoretical Criminology*. 16(3): 123 – 140 and Bosworth, M. (forthcoming, 2014). *Inside Immigration Detention: Foreigners in a Carceral Age*. Oxford: Oxford University Press.
5. For the full report see Bosworth, M. and B. Kellezi. (2012). *Quality of Life in Detention: Results from the MQPL Questionnaire Data Collected in IRC Yarl's Wood, IRC Tinsley House and IRC Brook House, August 2010 – June 2011*. Oxford: Centre for Criminology. Available at: www.borderobservatory.org.

the Quality of Life in Detention (MQLD) survey in IRC Campsfield House and IRC Colnbrook. From August 2010 — June 2011, working together with Blerina Kellezi, she further refined it in IRCs Yarl's Wood, Brook House and Tinsley House where it was administered to 158 men and women. This article refers to that data.⁶

As is standard practice with survey administration, the respondents were anonymized and their responses were not independently verified. Not only would it have been difficult to check without betraying the identity of the participants, thus breaching their confidentiality, but, for much of the information — like time in the UK (at least for the undocumented), contact with family and friends, medical concerns etc — there would have been no independent consistently reliable sources in any case. Though efforts were made to obtain a wide-ranging and random sample, we do not claim that the participants were statistically representative of the whole detained population. Indeed, we are aware that, given that the majority of surveys were completed in English, non-English speakers are under-represented. On other parameters, however, for example in terms of the proportion of ex-prisoners, or in the numbers who had at some point claimed to have applied for asylum, the sample reflects the overall distribution of the total population. In the future we hope to translate the survey into high-frequency languages and to make greater use of interpreters.

The first half of the MQLD records a number of self-reported demographic variables including age, nationality, marital status, history of imprisonment, immigration status and addiction. It asks respondents to disclose whether or not they are currently under an ACDT plan or have been previously and whether they have any health problems. This part of the questionnaire includes a measure of depression in an

abbreviated form of the Hopkins Symptom Check-List (HSCL-D).⁷ The second part of the questionnaire measures views of the 'quality of life in detention'. This section is divided into 12 dimensions addressing detainee perceptions of humanity, staff decency, immigration trust, immigration procedural fairness, relation to other detainees, care for vulnerable, relationships, healthcare, communication, isolation, distress, and drugs. It includes individual statements measuring perceptions of regime, racism, and visits as

well as some open ended questions asking the respondents to list the three best and worst aspects of their life in the current removal centre.

In less than one third of the total cases, one member of the research team read the questionnaire to the participants allowing her to clarify the questions if needed. This approach was taken to address the residents' low literacy rates and their mixed levels of proficiency in English. The remaining participants preferred to read the questionnaire themselves next to the researcher or in the privacy of their own rooms and at their own time. Overall, the questionnaire took between 45-60 minutes to complete. The questionnaire had a number of spaces where the answers to the open questions

could be recorded.

Prior to completing the questionnaire, all participants were given an information sheet and a consent form to read, or had these read aloud to them by the researcher. Detainees at this stage were informed that if they told us of any plan to self-harm or harm others that we would pass that information onto staff. All participants were given the option to sign the consent form though no attempts were made to persuade the participants to sign it if they were hesitant to do so. Verbal consent was obtained from all participants.

It includes individual statements measuring perceptions of regime, racism, and visits as well as some open ended questions asking the respondents to list the three best and worst aspects of their life in the current removal centre

6. Part of the data was collected using open-ended questions like: 'How does this removal centre compare to others you have experienced in UK?' or 'What are the 3 most positive things for you about life in this removal centre?' Such data was coded into communal themes and analysed using content analysis. The aim of content analysis is to describe absence or presence of certain 'words, phrases or concepts' in a text or written data. The remaining data was analysed using a number of inferential statistics as appropriate including correlations, ANOVA, Chi-Square and regression. Internal reliability and Principal Component Analyses were conducted on the health scale and quality of life questionnaire suggesting that both measures can be used with this population.

7. That measure is a self report checklist that aims to detect symptoms of anxiety and depression in a 4 point Likert-type scale ranging from 1='not at all' to 4='extremely'. The items included 'Crying easily' and 'Blaming yourself for things'. The original checklist has 25 items and the one used in this study had 14. The items were chosen due to their appropriateness in the context, and because the participants were already completing a lengthy questionnaire. The 14 items retained in this study measured depression.

Most questionnaires were administered in English. One was administered in Turkish, two in Tigré (to Eritrean nationals, one in Arabic with the help of one of the other detainees. Three were administered in Albanian by one of the researchers. Though it was translated into Mandarin, Mandarin speakers chose to complete it in English.

Different strategies of recruitment were used in the three centres: in IRC Yarl's Wood and IRC Tinsley House the questionnaire was administered as part of an ethnographic study, meaning that participants were only approached after relationships of trust with the researchers had already been established. The researchers had free access in these two centres to all parts of the building, carrying keys in Yarl's Wood and a security pass in Tinsley House. In contrast, in IRC Brook House the majority of the participants were selected at random by UKBA staff from each housing unit and called to the legal corridor for interview. The researchers did not draw keys and spent only a relatively short period of time on one residential unit. This strategy yielded a small proportion of recruits with most who were called simply failing to show up.

Main findings

The men and women in detention who completed the questionnaire came from a variety of countries and presented with a range of family, legal and medical histories. Some of them participated in activities in the centre, but many others found being in detention very difficult and could not take part in any of the activities on offer. Some found support in each other while others felt isolated and rarely left their rooms.

The level of distress among the survey population was very high with four-fifths of the respondents, 82.9 per cent (n=131), classified in the abbreviated form of the HSCL-D with depression. This result reflects similar findings in other jurisdictions, for example with detainees in Norway⁸ and with former detainees in Australia.⁹ Those who were more depressed were more likely to have been in detention longer, to have applied for asylum, to have refused food in protest, to be out of contact with their family and to report health problems.

There were no significant differences between the overall scores (means) of depression among the removal centres. Notwithstanding such high rates of depression on the HSCL-D scale, the current ACDT plan did not extend to all participants who reported thinking about suicide quite a bit or extremely. This gap could reflect communication barriers between staff and detainees or it could signal a lack of trust and willingness on the side of detainees in reporting this information to centre staff.

In the second part of the survey most detainees perceived custodial staff members to be honest and kind, could understand what staff told them and could communicate with them easily. They also felt that detainees in that particular removal centre trusted and respected each other, that there were good relations between custodial staff members and detainees, and that there were no drug problems. On the other hand, most participants did not trust immigration staff and they also did not feel that the removal centre cared for the vulnerable (including those who could not speak English, or who were victims of torture or domestic violence).

The survey suggests that there are five key dimensions to detainee perceptions of the quality of life in detention relating to depression, distress, isolation and quality of relationships. Those five dimensions were: humane treatment, staff decency, immigration trust, immigration procedural fairness and healthcare. In other words, those who (a) believed they were treated more humanely, (b) believed staff were honest, fair and treated them with respect, (c) trusted immigration, (d) felt they knew what was happening with their immigration case and that immigration staff explained their case to them (e) believed that they had better healthcare, were less depressed (HSCL-D), distressed, isolated and had better relationships (with officers and other detainees).

There were some differences among the centres for certain dimensions. Overall, for example, residents in IRC Brook House felt they were treated less humanely than residents in either Yarl's Wood or Tinsley House. They also reported higher levels of dissatisfaction with the healthcare than did residents in Tinsley House or

. . . many others found being in detention very difficult and could not take part in any of the activities on offer. Some found support in each other while others felt isolated and rarely left their rooms.

8. Coffey, G.J., Kaplan, I., Sampson, R. C., Montagna-Tucci, M. (2010). The meaning and mental health consequences of long-term immigration detention for people seeking asylum. *Social Science and Medicine*. 70: 2070-2079.

9. Steel, Z., Momartin, S., Silove, D., Coello, M., Aroche, J., Wei Tay, K. (2011). 'Two year psychosocial and mental health outcomes for refugees subjected to restrictive or supportive immigration policies. *Social Science & Medicine*. 72: 1149 – 1156.

Yarl's Wood. Brook House detainees were more critical of the custodial staff too, reporting that they were less honest and fair and treated them with less respect than similar measures by IRC Yarl's Wood detainees. Brook House detainees felt they understood less what was being communicated to them by staff, and found it harder to make themselves understood than those in Yarl's Wood and Tinsley House.

In all three centres, those detainees who reported health problems also perceived immigration and IRC staff to be less helpful and sincere than those detainees who were healthy. They trusted immigration and custodial staff less, and felt more isolated than their healthy peers. Those who had family in the UK felt they could understand what was being communicated to them by staff, and found it easier to make themselves understood. Those who had stayed longer in detention felt treated less humanely, believed custodial staff members were less honest and fair, thought the centre did not care for the vulnerable, and were most critical about healthcare in detention.

There were also some differences among specific groups of detainees. Those who had applied for asylum, for instance, were in general more negative about most aspects of detention. This population was more distressed and depressed, felt treated less humanely, trusted immigration less, felt and believed that immigration officers neither listened to them nor explained their case to them. This group also felt that they did not understand what was happening in their immigration case nor that could they make progress in it.

Former prisoners had more negative perceptions about levels of communication. Specifically, compared to those who had not served a prison term, ex-prisoners were more likely to report that the induction process was not as good at explaining what to expect each day. They also could not understand what staff were telling them or could not communicate what they wanted to staff. The longer the prison sentence they had served, the less ex-prisoners felt that induction was good and the less they felt they were understood by officers or were able to communicate with them. The authors found during their qualitative

work that ex-prisoners continually compared prisons with immigration removal centres. Their views on the induction process may in this case have reflected their comparison of it with the prison induction process. Similarly, their views on communication with staff may have been relative to their experience of communicating with prison officers. This issue needs to be investigated further.

When participants were asked to report negative aspects of detention their responses focused on the justification of detention itself and the emotional impact of being confined awaiting removal/deportation. More prosaically, many also commented negatively on the food. Positive aspects of life in detention included relationship with other detainees, officers or healthcare staff, and the opportunity to practice and/or reaffirm their religious beliefs.

Since one centre is primarily for women and two are for men, when comparing IRC Yarl's Wood¹⁰ to Tinsley House and Brook House it is not possible to conclude which of the differences in perception is due to gender or which is a result of different regimes or practices in the IRCs. In order to tease out gender differences it might be worth interviewing the small numbers of women held in those centres (eg Colnbrook and Dungavel) which hold both women and men.

When participants were asked to report negative aspects of detention their responses focused on the justification of detention itself and the emotional impact of being confined awaiting removal/deportation.

Discussion

Some of these findings are likely to be disheartening for centre managers and staff as well as for those working in UKBA, many of whom are actively striving to improve conditions in detention and detainee quality of life. They are also likely to be familiar. The question that needs addressing then, is why are these issues so hard to resolve and what, if anything might the MQLD contribute to understanding them better?

It is clear that most people in detention do not wish to be confined. Though some spoke positively about friendships they had forged with other detainees or skills they had learned in art and craft, nobody would choose to be detained. Likewise, though some acknowledged that, given their lack of immigration status, detention was a known risk, or that they were

10. When we conducted our research in IRC Yarl's Wood it held family groups with minor and adult children, so there were some men in the institution. As our research came to an end in December 2010 it stopped housing children under the age of 18 though continued to hold married couples and couples with adult children. In March 2012 it opened a small unit for single men as well.

ready to return, the majority of those we interviewed were also not happy to be deported or removed. Such people are hardly likely to be satisfied with their experiences. Similarly, given their range of language, culture, ties to the UK, and pathways to detention, they present a diversity that is unmatched in other analogous institutions. It is, in short, hard and probably foolish, to generalise.

It is here that a survey tool like the MQLD can be useful, canvassing views from a range of people and identifying patterns. Surveys instruments, however, are best used in conjunction without other qualitative methods like interviews and observation. The MQLD can 'take the temperature' of an institution, identifying potential areas of strength and concern, helping centre managers be more proactive in running their institutions. However, what to make of the data in the MQLD and, ideally, how to resolve any concerns the survey may reveal, requires deeper analysis.

To illustrate by example, the MQLD revealed a startlingly high level of depression. While it also suggested some aspects of detention connected to this distress and certain subsections of the population who were more vulnerable to it, alone it could not fully explain the phenomenon. To achieve greater understanding of this important issue requires careful interaction and observation. What are some of the triggers? What is the effect of depression? Who is better insulated against it and why?

In the qualitative part of the project, we sought to go deeper into the causes of people's distress and their experiences. In this part of the project a common theme emerged, from staff as well as detainees, concerning the open-ended nature of detention and the bureaucratic nature of the immigration decision-making process. Though in legal terms, foreigners should only be detained pending 'imminent' removal or deportation, in practice many are held well beyond an immediate time frame. Sometimes their period in detention is a result of their refusal to engage in the process while other times it is a result of difficulties associated with their Embassy or High Commission. Delays are also caused by problems on the UKBA end.

Without getting into the broader questions surrounding deportation or immigration decision-

making, it is apparent that the lack of clarity over the duration of a period of detention has an immediate and deleterious impact on the experience of custody. As one man in Brook House put it rather poetically, *in this place, there's not an end game. There's no cut off point. There's just a continuous thing. You're on a treadmill and you just jogging and jogging in place. [But] you're not losing weight.*

The lack of clarity over duration did not just affect detainees. It was also a cause for concern for many staff members, who recognised the difficulties many of the individuals in their care were facing. Often the prison served as a comparison, as this female DCO in Tinsley House observed:

People in here, you know, if you were in prison, you know that that's your sentence and at the end of that sentence, I'm outta here. Whereas here they're not, they're in limbo. They've got no idea what's happening and I just think that it's an awful thing for them to mull over all the time.

. . . given their range of language, culture, ties to the UK, and pathways to detention, they present a diversity that is unmatched in other analogous institutions.

Purely pragmatically, the lack of clarity of the duration of detention has a direct impact on the regime provision since without knowing how long the population will be present, centre managers reported that it was financially illogical and impractical to create courses and

paid work for a transient population. Attempts to build detainee support groups likewise suffered from the same problem. Thus, for example, in Colnbrook, a detention custody manager complained that it was difficult to develop a 'buddy scheme' based on the Listeners programme in prison, since *as soon I as I train them up, they go.*

In the survey and in follow-up interviews, detainees spoke of the importance of interpersonal relationships both with other detainees and with custodial staff. Those who felt they had good relationships with centre staff and other detainees found the experience of detention easier to deal with. In contrast, those who were isolated and rarely left their rooms were struggling to cope. As prisons research has found individual actions that made a difference could be small.¹¹ Staff who made a difference, one Sri Lankan woman explained, were patient, compassionate and friendly.

11. Liebling, A. (2004). *Prisons and their Moral Performance*. Oxford: Oxford University Press.

There's a lady here, she is very good. Whenever you meet her, she will be smiling to you... even if you have something hurting you, whenever you meet her, she will smile to you and 'Are you okay? You want to go out?' and you will feel good, you will feel happy.

Conclusion

The development of the MQLD is at the earliest of stages. Having been administered in three centres, it needs to be rolled out further. The MQLD offers an opportunity for the centres and the UKBA to investigate issues and aspects of best practice in detention. Currently IRCs have to wait for a couple of years between HMIP inspections to get a detailed, impartial, sense of what their occupants think of the centre. The MQLD means that managers will have strong ongoing data to inform practice. It also provides the detainees with a forum to express their views and to feed back any concerns they may have about their treatment.

The survey uncovered some differences in detainee perceptions of the centres on specific parameters. While it is important to acknowledge that comparisons of this kind are more difficult to make in the context of IRCs than in prison given that there is no equivalent classification system of the institutions, that detainees identified some diversity in their experiences could be used as starting point to think more holistically about

the centres. Why might detainees in Brook House find officers harder to understand than they do in Tinsley House, when detainees in the former are more likely to have been longer-term British residents than those in the latter? Why might communication in one be more difficult than in the other?

In its current iteration, the MQLD found more commonalities than differences between the three establishments. Asylum seekers across the board had higher levels of distress, and ex-prisoners in each institution were more critical in general. Likewise, detainees in all three centres and populations seemed to have a limited understanding of the privileges and incentives scheme and the varying reasons for removal from association (R40 vs. R42). Detainees, no matter where they were housed, differentiated starkly between custodial staff and immigration staff, trusting the former but not the latter, while in all three places it found a worrying gap between those detainees who had been placed on an ACDT relative to the numbers who reported suicidal thoughts on the HSCL-D.

The issues faced by the men and women in detention are complex and need to be understood in more depth. Future studies are needed on the different stages of vulnerability in detention, and individual strengths and vulnerabilities in coping with detention, depression and distress. A quantitative instrument like the MQLD provides an important starting point for these kinds of investigations.

Desperation, Displacement and Detention:

Australia's Treatment of Asylum Seekers Past and Present

The Hon Judi Moylan MP (Liberal Party) was elected to the Australian House of Representatives in 1993. She is currently the Deputy Chair of the Standing Committee on Social Policy and Legal Affairs¹.

Few matters have been more fiercely debated in the Australian Parliament or more unsparingly ventilated in the media than the recent and ongoing treatment of asylum seekers arriving by boat. To understand what motivates a democratic government in peacetime to implement policies that imprison indefinitely thousands of men, women and children who have not been charged with or convicted of any crime we must turn to historical, social and political attitudes. Though countries around the world guard their sovereign powers jealously to determine who may enter, the treatment of asylum seekers in Australia has been particularly high profile and divisive. This article seeks to understand why.

The White Australia Policy

Immigration has been contentious in Australia since the early days of European settlement. It was an issue during the establishment of the Federal Parliament in 1901 when two early bills underpinned what became known as the 'White Australia Policy'. *The Pacific Islanders Act* prohibited islanders from entering Australia and the *Immigration Restriction Act* imposed an English language test, effectively barring entry for most non-English speaking people. One Member of Parliament (MP) said: 'No matter what measures are necessary, Australia must be kept pure for the British race who have begun to inhabit it.'²

Between 1945 and 1955 one million immigrants came to Australia. Even after the Menzies government signed up to the 1951 UN Convention (the Convention), refugees continued to be selected according to the colour of their skin. It took another seven years for the controversial English language test to be abolished by the passage of *The Migration Act*

1958, and over a decade before skilled Asian immigrants had the same rights as Europeans to settle in Australia.³

In 1972, newly elected Labor Prime Minister Gough Whitlam took the final legal steps to dismantle the 'White Australia Policy,' although he had shown little sympathy for Indo-Chinese refugees.⁴ As waves of Indo-Chinese refugees arrived, concerns grew about porous borders. Following the double dissolution that ended Whitlam's prime-ministership and led to fresh national elections, the incoming Prime Minister, Malcolm Fraser, was determined that Indo-Chinese refugees would not be incarcerated long-term in camps.

For the next decade, regional cooperation between prospective host countries with Malaysia, Thailand and Vietnam saw these refugees resettled in the USA, Canada and Australia.⁵ The government and the Labor opposition forged bi-partisan cooperation on a non-racial immigration and multicultural policy. That cooperation evaporated when the Labor party expressed hostility to large intakes of Indo-Chinese, colloquially referred to as 'boat people' during the 1977 election campaign.

The debate foreshadowed views expressed 25 years later — that 'boat people' were avoiding the proper channels, that they were merely economic migrants, and that they needed to be deterred by harsh policies.⁶ Nevertheless, mature leadership ensured that at this time Indo-Chinese 'boat people' were sympathetically received by the public as 'genuine' refugees.⁷ Asylum seekers arriving by boat were not in locked detention centres although they were held in a facility where they had to attend roll-call each day and which they could not leave until their case was resolved. They were processed by the Immigration Department and provided permanent residence without delay.⁸

1. The Hon Judi Moylan is a former Minister for Family Services, Minister Assisting the Prime Minister on the Status of Women and former Chair of the Joint Standing Committee on Public Works (1999-2007).
2. The Hon William McMillan MP, Member for Wentworth, *Immigration Restriction Bill*, Hansard, September 6, 1901, Australian Parliament.
3. Communications Branch, Department of Immigration, Fact Sheet 8, Australian Government 2009.
4. Fr. Frank Brennan, *Tampering With Asylum*, p74, University of Queensland 2006.
5. The Australian Government pressed the UN to hold international conferences, which then developed these plans to deal with the problem of Indo-Chinese refugees.
6. Senator Mulvihill, argued that 'if a person wants to get into this country quickly he should not line up at an Embassy; he should be one of the artful dodgers.' Hansard, 22nd March, 1977, Australian Parliament.
7. Fr. Frank Brennan, *Tampering With Asylum*, p32, University of Queensland 2006.
8. Janet Phillips and Harriet Spinks, *Immigration Detention in Australia*, January 23, 2012, p3 of 43, Social Policy Section Parliament of Australia.

The Evolution of Punitive Detention

Six years after the Hawke Labor government was elected in 1983, in the face of mounting arrivals from Cambodia, parliament toughened its stand against 'boat people,' passing the *Migration Legislation Amendment Act 1989* with strong bipartisan support. This act was notable for the power which allowed officers to arrest and detain anyone suspected of being an 'illegal entrant'. Although detention remained discretionary until 1992, this Act essentially introduced a policy of 'administrative detention' for all people entering Australia without a valid visa.⁹

Such was the resurgence of onshore arrivals that by 1991 a disused mining camp in Port Hedland, Western Australia became Australia's first remote detention centre. Some Cambodians, after two years incarceration, made an application to the Federal Court to be released on the basis that their detention was unlawful.¹⁰ Goaded by High Court criticisms of its treatment of asylum seekers and anxious to allay public disquiet over the resurgence of boat arrivals, the Keating Government rushed *The Migration Amendment Act 1992* through the Parliament two days before the Cambodians' case was to be heard. The bill authorised mandatory detention making it clear that the government was determined to send a clear signal that migration could 'not be achieved by simply arriving in this country.'¹¹ This tough approach to detaining unauthorised boat arrivals was in contrast to the treatment of visa over-stayers. The differential treatment still applies today.¹²

Echoes of White Australia

As far back as 1988 Coalition opposition leader John Howard echoed the criticisms of immigration and multiculturalism published by conservative historian Geoffrey Blainey.¹³ In his *One Australia* policy Howard expressed concern about the pace of Asian immigration suggesting that 'it would be in our immediate-term

interest and supporting of social cohesion if it were slowed down a little, so that the capacity of the community to absorb would be greater.'¹⁴ In the ensuing public furore the government brought on a debate seeking reaffirmation of the previously bipartisan policy that prohibited race being a factor in the selection of migrants. Howard declared 'I don't believe it is wrong, racist or immoral for a country to say we will decide what the cultural identity and the cultural destiny of this country will be.' Three members of his party crossed the floor against their leader. One MP argued: 'The simple fact is that opinion is easily led on racial issues. It is now time to unite the community on the race issue before it flares into an ugly reproach to us all.'¹⁵ In 1989, John Howard lost the leadership and did not regain it until 1995 by which time he had retreated from his previous views.

With Howard at the helm again, the Coalition Party was swept to power in 1996. That same year witnessed the rise of far-right politician Pauline Hanson, a disendorsed Liberal candidate, who as an independent won the federal seat of Oxley, on an anti-Asian immigration platform. In her first speech in Parliament she declared: 'I and most Australians want our immigration policy radically reviewed and that of multiculturalism abolished. I believe we are in danger of being swamped by Asians.'¹⁶ Hanson unsuccessfully attempted to regain her seat in 1998. She remained an influential voice in public debate on immigration.

Boat arrivals remained steady until a precipitate increase beginning in 1998. That year a poll showed the average Australian overestimated by 70 times the number of 'boat people' arriving each year in the country.¹⁷ By 1999 asylum seekers arriving by boat, began to surge.¹⁸ 'Politicians across the spectrum joined in persistent, low level abuse of boat people as 'queue jumpers' for not waiting in foreign camps and 'illegals' for arriving without proper papers.'¹⁹

Processing slowed and with six, now overcrowded, detention centres on the Australian mainland²⁰ the government introduced three year

9. Ibid page 3 of 43.

10. From the outset, Cambodians suffered from the misfortune that their claims for asylum contradicted the peace plan for Cambodia and efforts to repatriate 300,000 Cambodians from Thailand. There was political interest in labelling these 'boat people' as economic migrants. Fr. Frank Brennan, *Tampering With Asylum*, University of Queensland 2006.

11. At the same time as the end of the orderly departure programme in 1989, the High Court found in favour of Chan Yeek Kin, a Chinese stowaway, who had claimed refugee status. The Court criticised the Department of Immigration for having reached a conclusion in the case: 'so unreasonable as to amount to an improper exercise of the power to determine refugee status.' Ibid.

12. Bridging visas were issued to people who satisfied certain criteria, usually over-stayers who had arrived on a visa and then claimed asylum, but never people who came irregularly by boat. Peter Mares, *Borderline*, p30, University of New South Wales (UNSW) 2002.

13. Geoffrey Blainey, *All for Australia*, Methuen Haynes, 1984.

14. George Megalogenis, *Asian Influence Spices up Contest*, The Australian, February 27, 2007.

15. Steele Hall MP, Hansard, 25th August, 1988. Australian Parliament.

16. Pauline Hanson, First Speech, 10th September 1996, Hansard, Australian Parliament.

17. Mary Crock and Ben Saul, *Future Seekers: Refugees and the Law in Australia*, p22 The Federation Press Sydney 2002.

18. Janet Phillips and Harriet Spinks, *Boat Arrivals in Australia since 1976*. p6 9th July 2012 Australian Parliamentary Library, Parliament of Australia.

19. David Marr and Marion Wilkinson, *Dark Victory*, P37. Allen & Unwin 2003.

20. Curtin at Derby in northwest Western Australia (WA), Port Hedland, in northwest WA, Woomera in remote South Australia, Perth WA at the domestic airport, Villawood in Sydney NSW and Maribyrnong in Melbourne Victoria.

Temporary Protection Visas (TPVs), releasing some detainees to live in the community.²¹ The government fed the public perception that the nation was besieged by an 'avalanche' of 'boat people' who had to be stopped. A line had to be drawn.²² Detention centres became increasingly privatised and remote. They were progressively fortified until many resembled maximum-security prisons shocking some MPs during a visit in 2001.²³

'Excision' of Australian Territories and the 'Pacific Solution'

On 26th August 2001 a rescue call was received from the *Palapa 1*, a dilapidated 20 metre Indonesian fishing boat with 433 passengers on board. The vessel was lost and struggling to stay afloat. Australian authorities complied with humanitarian principles and called for ships to locate and rescue the ailing vessel. The Norwegian freighter the *Tampa* came to the rescue. Its captain gave as much assistance as the cramped deck would allow. He asked permission from the Australian government to convey the asylum seekers to Christmas Island. It was refused and the government threatened to charge the captain of the *Tampa* with people smuggling if the ship landed them on Christmas Island.

Determined to prevent asylum seekers from reaching Australian shores, the government orchestrated a ship-to-ship transfer. At the same time it rushed legislation through Parliament so as to avoid giving asylum seekers any right to legal processes in Australia and to force the *Tampa* (or any other boat carrying asylum seekers) back out to sea, providing immunity to the government, its officers and agents from civil or criminal prosecution for such action.²⁴ Although the Opposition was generally supportive of the government resolve to 'stop the boats', they refused to support this legislation labelling it 'ill-considered, draconian and unconstitutional' and only agreed to support the bill if it was specific to the *Tampa*. The government responded by offering to introduce a six month sunset clause and the Opposition eventually supported the legislation.²⁵

More than eight days after the rescue, the Royal Australian Navy (RAN) intercepted the *Tampa*. Special Armed Services personnel forcibly removed asylum seekers onto the *HMAS Manoora*. The Indonesian government refused to take those who had been rescued, leaving the Australian government to cast about for a solution. The asylum seekers were eventually transferred from the *HMAS Manoora* directly to offshore detention centres in Nauru and Manus Island in the Pacific Ocean.²⁶

Two pieces of legislation were passed with bipartisan support to give effect to offshore processing or the 'Pacific Solution': the *Migration Amendment (Excision from Migration Zone) Bill 2001* and *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bills 2001*.²⁷

The Tampa crisis generated fevered controversy in Australia in the lead up to the 2001 election, as did the 'Children Overboard' affair in October 2001. Following an encounter with the Royal Australian Navy frigate the *Adelaide*, the *Olong*, a wooden-hulled boat carrying 223 asylum seekers, experienced engine failure. Amidst the panic on board some asylum seekers abandoned the boat leading to claims, which persisted throughout the 2001 election campaign, that asylum seekers were throwing their children overboard.²⁸ As these events unfolded, the Prime Minister proclaimed: 'We will decide who comes to this country and the circumstances in which they come.'²⁹ A 2002 Inquiry into a Certain Maritime Incident found that no children had been thrown overboard and that the government had known that prior to the 2001 election.³⁰ Government Senators labelled the inquiry 'an undignified sideshow' and produced a dissenting report.³¹

The Howard government was re-elected in 2001 and again in 2004. In 2006 it introduced a bill to extend 'excision' of the migration zone to the mainland. Although it did not mean Australia had entirely abdicated all of its obligations under the UN Convention, its purpose was to stop boat arrivals from reaching the mainland and applying for asylum, with all the domestic legal and administrative protections that

21. After the three-year term, refugees had to reapply and could be returned if their home country was then deemed to be safe. They could not sponsor family members and could access some but not the full range of services available to refugees with permanent status. Following the introduction of TPVs the numbers of boat arrivals with women and children on board increased. Janet Phillips and Harriet Spinks *Immigration Detention in Australia*, January 2012 Parliamentary Library, Parliament of Australia.

22. Fr Frank Brennan, *Tampering With Asylum*, University of Queensland 2006.

23. *Joint Committee on Foreign Affairs, Defence and Trade, Report on Visits to Immigration Detention Centres*, June 2001, P31 Australian Parliament.

24. Nathan Hancock, *Border Protection (Validation and Enforcement Powers) Bill 2001*, Bills Digest, Parliamentary Library, Australian Parliament.

25. *Ibid* p.3.

26. Peter Mares, *Borderline* p126 UNSW Press 2002.

27. Janet Phillips and Harriet Spinks *Immigration Detention in Australia*, P7 of 43 January 2012 Parliamentary Library, Parliament of Australia.

28. David Marr and Marion Wilkinson, *Dark Victory*, Chapter 14, Allen and Unwin 2003.

29. The Hon John Howard MP, Prime Minister, Federal Election Campaign Speech, 2001.

30. Senate Select Committee, *A Certain Maritime Incident*, Australian Parliament, October 23, 2002.

31. Cynthia Banham and Mark Metherrall, Article, *Liberal Senators Slam Children Overboard Inquiry*, Sydney Morning Herald, 24th October 2002.

offered.³² The bill was opposed by a small group of Liberal backbenchers. Despite the revolt, the bill gained passage through the House of Representatives. It was only withdrawn when Liberal Senator Judith Troeth threatened to cross the floor, which would have ensured its defeat in the Senate.

'Out of sight, out of mind' was elevated to a principle of policy.³³ Asylum seekers in offshore facilities did not have rights to legal or administrative review of their claims and Nauru was not a signatory to the UN Convention at that time. Author Peter Mares wrote that 'The detention deals Australia struck with Nauru and Papua New Guinea appeared to violate fundamental laws in both countries.'³⁴ Access to asylum seekers by human rights lawyers and others was limited by both regulation and by the island state's remoteness.³⁵ A Parliamentary Committee visiting Nauru in 2001 found conditions to be unacceptable; there were claims of violence both amongst and against detainees, isolation and handcuffing, unsanitary conditions, hunger strikes and trauma.³⁶

Amnesty International reported that 'conditions were harsh' and Greg Roberts of the Sydney Morning Herald, made an undercover visit to Manus Island in 2002 reporting that 'diseases such as malaria, typhoid and tuberculosis were widespread'. As federal Labor MP Carmen Lawrence put it: '[T]he lack of hope and the brutality, both physical and psychological, produces devastating consequences on human beings.'³⁷

The government ridiculed critics of mandatory detention and the 'Pacific Solution' rejecting adverse criticism and almost all recommendations for improvements. Critics were cast as 'naive' and 'do gooders' who lacked life experience.³⁸ When asylum seekers went on a hunger strike on Nauru, Immigration Minister Amanda Vanstone said: 'it's not in Australian territory: it's on Nauru and being run by other people. If someone doesn't want to be there, they can go home.'³⁹

By 2004 indefinite mandatory detention was entrenched, with the High Court accepting that aliens had fewer rights than citizens.⁴⁰ It accepted that detainees had the power to end their incarceration by voluntary repatriation.⁴¹ The Court also upheld by a slim margin (4-3) the validity of indefinite detention, providing that the immigration minister retained the intention of eventually deporting an individual.⁴²

Minority judges dissented, submitting the argument that 'aliens' power must be subject to the limitations imposed by other parts of the Australian constitution. Justice Michael Kirby observed that while Australia has no equivalent of the US Fifth Amendment the requirement in our constitution that only courts can impose punishment had a similar effect: '[T]he common thread that runs through all these cases is that judges of our tradition incline to treat unlimited executive detention as incompatible with contemporary notions of the rule of law.'⁴³

Public perception of a 'crisis' in border protection persisted, encouraged by anti-refugee rhetoric of politicians and popular media. In the late 1970s, 60 per cent of Australians wanted to let people arriving by boat stay. An analysis by sociologist Katherine Betts in 2001 revealed that in 1993, 44 per cent wanted to send 'boat people' back without assessing their claims and 46 per cent approved of holding them in detention while their claims were assessed. In 2001, 77 per cent of Australians supported the Coalition government's decision to refuse entry to the *Tampa* and 71 per cent believed boat arrivals should be detained.⁴⁴

The Gang of Four — Children Out of Detention

When Parliament resumed in 2005, four Liberal Party Members of Parliament, Petro Georgiou, Russell Broadbent, Bruce Baird and the author (Judi Moylan) met to discuss concerns about indefinite mandatory detention and the impact on children.⁴⁵

32. Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration, Law, Policy and Practice in Australia*. The Federation Press 2011.

33. Stanley Cohen elaborates on this concept in *States of Denial: Knowing about atrocities and suffering*, Cambridge Polity Press.

34. Peter Mares, *Borderline* p131, UNSW Press 2002.

35. It took Joint Committee a year to negotiate their visit in 2001.

36. Joint Standing Committee on Foreign Affairs, Defence and Trade, Human Rights sub-committee, *A Visit to Immigration Detention Centres*, June 2001.

37. Wendy Bacon, *Our Nauru Amnesia*, p5 of 11, <http://newmatilda.com>, July 25 2012.

38. The Hon Philip Ruddock, Minister for Immigration, June 19, 2001, Press Reports.

39. Editorial, Sydney Morning Herald, December 19, 2003.

40. Mary Crock and Laurie Berg *Immigration Refugees and Forced Migration, Law, Policy and Practice in Australia*, p 68, The Federation Press 2011.

41. *Ibid.* p69.

42. Peter Prince, *The High Court and Indefinite Detention: Toward a national Bill of Rights?* Executive summary, p2. Law and Bills Digest, Parliament of Australia, November 16, 2004.

43. *Ibid* p7.

44. Janet Phillips and Harriet Spinks, *Boat Arrivals in Australia Since 1976*. p6, July 9, 2012 Australian Parliamentary Library, Parliament of Australia.

45. Joint Select Committee, *Australia's Immigration Detention Network*, p15. Paragraphs 2.13 and 2.14 Final Report, 2012, Parliament of Australia.

Petro Georgiou had commenced drafting a Private Members Bill to amend the Migration Act. Once the drafting was complete, the group met with the Prime Minister to advise their intentions. To avoid the embarrassment of a split on the benches, the Prime Minister asked for time to speak to his cabinet colleagues.⁴⁶ During the hiatus, the mistaken and unlawful detention of two Australian citizens, Cornelia Rau and Vivian Alvarez Solon, aroused considerable public disquiet and sympathy. Cornelia Rau was erroneously held in immigration detention for ten months and Vivian Alvarez Solon wrongly deported and 'dumped' at the Manila airport in a wheelchair. Inquiries into both cases led to a damning exposé of inadequate care, lack of openness and scrutiny in the system and the pervasive culture of 'denial and self justification' within the Department of Immigration.^{47 48}

Public alarm over detainees covertly held indefinitely heightened with the case of Peter Qasim, a stateless person detained for seven years. Qasim's case became a cause célèbre when it was taken up by prominent businessman Dick Smith. *The Sydney Morning Herald* revealed the government's decision to soften its hard line on mandatory detention. Under a headline *Free at last, but a prisoner still of his tortured mind*, it disclosed that Mr Qasim would be one of 50 people locked up for more than two years, who would now be summarily released on bridging visas.⁴⁹

Intense pressure from church, non-government organisations and a growing number of web-based social media commentators exerted growing pressure on government to change the policy. The threat of a private members bill was a crucial element in the government's turnabout.⁵⁰ The government announced that 'a child shall only be detained as a matter of last resort.'⁵¹ The Ombudsman was to review cases of detainees who had been in detention for more than two years and make recommendations about their release. The Minister was required to report the recommendations to Parliament within 15 days, but could not be compelled to act on them.⁵² Other elements of the changes forced by the

backbenchers included an agreement to place time limits on the processing of protection visa applications and offer the existing 4000 refugees on TPVs permanent protection within 90 days.⁵³

Winding Forward, Winding Back

In 2007 the Rudd Labor government was elected. As the boats slowed, the new government made good its election promise to dismantle the 'Pacific Solution'.⁵⁴ It ended TPVs and abolished detention charges.⁵⁵ Mandatory detention and 'excision' of the migration zones remained firmly in place.

Two years later, boat arrivals bounded from 7 in 2008 to 60. A deepening sense of panic gripped the government. A withering attack was unleashed by the Opposition accusing the government of not protecting the borders and encouraging smugglers. The government suspended processing refugees from Afghanistan and Sri Lanka claiming that the situation in both jurisdictions was evolving and that [the] 'Taliban's fall, durable security in parts of the country and constitutional and legal reform to protect minorities' rights have improved their circumstances.' This led to increased periods of detention, overcrowding and outbreaks of violence. Incarcerated children became a resurgent issue.

Flagging polls, further boat arrivals and a relentless campaign by the Opposition were among the issues which led to a change of leadership from Kevin Rudd to Julia Gillard on June 24, 2010. With an election imminent, the new Prime Minister cast about for her own version of the 'Pacific Solution'. Senior political journalist Michelle Grattan reported 'the dog whistle is sounding like a wolf howl' and quoted part of Gillard's speech announcing the latest proposal: 'Hardworking Australians wanted to know refugees settled here weren't getting special treatment. People like my own [migrant] parents who have worked hard all their lives can't abide the idea that others might get an inside track to special privileges.'⁵⁶ A month later the Prime Minister's plan to send asylum seekers to East Timor had been rejected by their Parliament.⁵⁷

46. Ross Peake, National Affairs writer, *PM in bid to head off rebels*, Canberra Times, June 13, 2005.

47. Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, 2005 Australian Parliament.

48. Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, Report, Commonwealth of Australia, 2005.

49. Joseph Kerr, Sydney Morning Herald, June 21, 2005.

50. Samantha Maiden and Michelle Wiese Brockman, *Howard to Free Families and Limit Detention*. The Australian newspaper, June 14, 2005.

51. Migration Amendment Regulations 2005 (No 2) Australian Parliament.

52. The changes allowed the Minister to make a residence determination to allow people awaiting the outcome of an asylum claim to reside in the community. The Ombudsman also had the power to make recommendations into the management of the detainee caseload.

53. Petro Georgiou MP, Speech, Hansard Australian Parliament 2005.

54. The Hon Chris Bowen Minister for Immigration, Speech to Australian National University July 29, 2008 *New Directions in Detention – Restoring the Integrity to Australia's Immigration System*.

55. It also distinguished all outstanding debts, arguing that the policy was ineffective as only 4% of the 'debts' had ever been recovered.

56. Michelle Grattan, *It is Not a Good Time to Seek Asylum*, The Age, July 2010.

57. Paul Toohey, *Prime Minister Julia Gillard Backs Away From Plan for East Timor Processing Centre for Asylum Seekers*, the Advertiser, July 14, 2010.

In 2011 the Commonwealth Ombudsman initiated an investigation into suicide and self harm in detention facilities.⁵⁸ Later that year the government commissioned the Hawke review following violent incidents and episodes of self-harm by detainees. It noted that a recent surge in boat arrivals had placed the detention network under stress and despite efforts to train additional staff they had been overwhelmed, leading to problems of health, including mental health, anger, frustration and self harm.⁵⁹ Despite the 2008 guidelines favouring the release of families with children, there were still over 1000 children in detention centres in January 2011.

The government began negotiating what later became known as the *Malaysia Swap Deal* with the Malaysian government even though it is not a signatory to the UN Convention. The plan was to send 800 asylum seeking 'boat people', including unaccompanied minors, to Malaysia in return for Australia accepting 4000 refugees. The government believed that under section 198A of the migration legislation the Minister could make a *declaration* in respect of the country to which asylum seekers can be sent, as the former Coalition government had done.⁶⁰

A High Court challenge prevented the removal of the first group of asylum seekers, finding against the Minister's declaration on the basis that Malaysia does not recognise the status of refugees in its domestic law. It also found that the plan breached the (*Guardianship of Children Act*) 1946.⁶¹ The Prime Minister attacked the court decision as 'a missed opportunity' and for turning the current law 'on its head' and shortly after introduced the *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011* to circumvent the court's findings and enable transfers to a third country.⁶²

The Opposition would not support legislation allowing asylum seeker transfers to countries which are not signatories to the Convention. Opposition Leader, Tony Abbott said: 'if the government was serious about stopping the boats she [the Prime Minister] would support the Coalition's amendments'.⁶³ In the end, both the Government's legislation and the Opposition's amendment were defeated.

To quell public criticism as news broke of more deaths at sea, the Prime Minister announced the establishment of an 'expert panel' made up of three eminent Australians, to find a way to break the impasse. Several weeks later, the panel delivered twenty-two recommendations to the government, including the re-introduction of the 'Pacific Solution'. 'No advantage' would be permitted for asylum seekers arriving in Australia by boat. They would be transferred to Nauru and Manus Island waiting the same amount of time they would have waited for asylum claims to be determined in Malaysia or Indonesia. No instrument has been recommended to gauge that timeframe, so re-settlement could take years.⁶⁴

One day after the Report was delivered, the government hastily re-introduced the legislation⁶⁵ to once again allow the transfer of 'boat people' (including unaccompanied minors seeking asylum) to the Pacific Islands. Malaysia or any other country not a signatory to the UN Convention could now become a destination for asylum seekers (including children), subject to the tabling of a Disallowable Instrument.⁶⁶ The legislation passed through both houses of Parliament in August 2012.

In Conclusion

Four decades ago, Australia's response to Indo-China refugees did not invoke such harsh policies as indefinite mandatory detention, temporary protection visas and offshore processing. Neither did it result in the navy being sent to turn back the boats. Instead the government undertook energetic, diplomatic engagement with Indonesia and other nations of the region to share responsibility for successfully resettling tens of thousands of refugees. Despite initial public apprehension, it is widely accepted that these refugees have enriched Australia in a multitude of ways.

It is axiomatic that tough deterrent policies have not stopped boat arrivals and it is unlikely that any civilised jurisdiction can invoke penalties so harsh, that they stop people escaping unimaginable brutalities. Managing the human dimensions of refugees fleeing

58. Alan Asher, Commonwealth Ombudsman, *Inquiry to Examine Suicide and Self-harm in Australian Immigration Detention*. Media release, July 29, 2011. <http://www.ombudsman.gov.au/media>

59. A. Hawke and H. Williams, *Independent Review of Incidents at Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre, 2011* Department of Immigration and Citizenship, Canberra.

60. Elibritt Karlson, *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011*, Laws and Digest Bills Section, pp2 & 3, Parliamentary Library, Commonwealth of Australia September 22, 2011.

61. *Ibid*, p.11.

62. *Ibid*, pp. 7 & 8.

63. The Hon Tony Abbott, Leader of the Opposition, Media Release, September 19, 2011.

64. Angus Houston et al, *Report of the Expert Panel on Asylum Seekers*, Australian Parliament 2012.

65. *The Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011*. Australian Parliament.

66. Disallowable Instrument is sub-ordinate legislation under the Legislative Instruments Act 2003. It is required to be tabled in both Houses of Parliament within a set time and it can be disallowed (repealed) by either House. www.alpn.edu.au/subordinate

war and civil unrest will require a return to regional processing, including 'effective protections' and a commitment to resettlement by participating host countries as indicated by UNHCR.⁶⁷

Notwithstanding the well-documented harmful effects of offshore processing, Australia has now regressed to the principle of 'out of sight, out of mind' by the passage of legislation that once again invokes an offshore policy tougher and more sensational than ever before. This comes on the back of a March 2012 government report revealing that: 'Evidence overwhelmingly indicates that prolonged detention exacts a heavy toll on people, most particularly on their mental health.'⁶⁸

The tragedy is that there is little evidence that the government heeds the facts in its own report, or that its remedy will 'stop the boats' or save people from drowning. Instead it persists with policies that are out of proportion to the so called 'problem'. At the time of writing, with the first transfers of asylum seekers taking place under the reincarnated 'Pacific Solution', boats are still coming. 35 vessels carrying 2,295 asylum seekers have arrived in September — a number far outstripping the capacity of Nauru and Manus Island to accommodate them.⁶⁹



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67. Elibritt Karlson, *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011*, Laws and Digest Bills Section, Pages 14 & 15 Parliamentary Library, Commonwealth of Australia September 22, 2011.

68. Joint Select Committee on *Australia's Immigration Detention Network* March 30, 2012 Australian Parliament.

69. Lainai Vasek, *Record Month for Asylum Seekers*, The Australian, October 1, 2012.

The changing approach to child detention and its implications for immigration detention in the UK

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In 2010, the government announced a new process for deporting children and families, which has, in turn, changed the approach to the immigration detention of children.² Although the degree to which this new policy is affecting children's experiences of detention is disputed,³ it does seem to be a substantial adjustment, resulting in fewer detained children being held for less time and in better conditions. In particular, the length of time that families with children can be detained is now limited to a week — a reform of considerable note given that indefinite administrative detention, stretching in some cases to years, still applies to adult detainees.

The treatment of children in the immigration system is rightly an issue that receives a great deal of attention and this is consequently the area of detention that has seen the most focused thinking and innovative practice. However, there is no reason in principle why changed thinking and improved practices in this area of detention could not be replicated elsewhere. In this article I discuss what these improvements might look like, and argue that they could have far-reaching consequences for the way that detention is viewed. The recent changes have also exposed fundamental questions about legitimacy and justice that are close to the surface of all debates about immigration detention. A mature and progressive dialogue about immigration detention should address such issues directly.

Some context and history

A variety of factors in our rapidly globalising world are fuelling migratory pressures, from economic disparity

and poverty, to climate change, famine, and war. Some people are moving because of persecution in home states, but, as has been the case for centuries, many others leave because they want a better life for themselves and their families. Where easy legal means do not exist, criminal networks have been able and willing to exploit the desire of people to move between countries, facilitating the growth of people smuggling and human trafficking⁴.

Detention is a relatively recent part of the state's response to unwanted migration, only really gaining popularity in the last century⁵. In the UK, it has been used since the 1905 Aliens Act was passed to restrict 'undesirable' elements from entering the country. However, the Act was not enthusiastically enforced and resulted in little use of detention. The First World War increased fear of outsiders and gave greater impetus to attempts at regulation. The more far-reaching 1914 Aliens Restriction Act led to tens of thousands of foreign internees and was the first time that the hitherto relatively liberal approach to immigration control appeared to be substantially undermined⁶. But it is only since a succession of immigration acts, beginning with the 1962 Act, that attempts to limit immigration have become more serious and systematic, with the first immigration detention centres opening in the 1970s⁷. It has taken even longer for detention to become an integral part of immigration control. It has been commonly used since the 1990s, increasing markedly in the last 10 years. In 1993 the immigration detention estate still had a capacity of 250 places; it now holds around 3,000, with three large purpose-built centres — Colnbrook (capacity 308), Brook House (426) and an extension to Harmondsworth (total centre capacity now 615) — opened since 2004.

1. This article is written in a personal capacity and does not necessarily represent the views of HM Chief Inspector of Prisons.
2. 'New Family Returns Process Begins' <http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2011/march/03new-family-returns-process>.
3. Sambrook, C. (2012) *The UK Border Agency's long, punitive campaign against children (helped by G4S and Serco)*: <http://www.opendemocracy.net/ourkingdom/clare-sambrook/uk-border-agencys-long-punitive-campaign-against-children-helped-by-g4s-an>
4. e.g. Griffin, C.E. (2009), 'Deportation and reintegration in the Caribbean and Latin America: addressing the development–security paradox', in William F. McDonald (Ed) *Immigration, Crime and Justice. Sociology of Crime Law and Deviance, Volume 13*. Emerald Publishing.
5. Wilsher, D. (2012) *Immigration Detention*. Cambridge University Press.
6. Ibid.
7. Bacon, C. (2005) *The Evolution of Immigration Detention in the UK: The Involvement of Private Prison Companies*. Refugee Studies Centre Working Paper 27, University of Oxford: http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper27.pdf

The main legal basis for detention comes from the 1971 Immigration Act, which allows administrative detention by immigration officers without reference to the judiciary and without a defined time limit. UK Border Agency guidance⁸ sets out the circumstances in which immigration staff can detain people, and this includes a requirement to detain for the shortest period necessary, primarily to effect removal of people that UKBA does not believe will leave voluntarily. The UK remains one of the few countries in Europe that applies no limit to the length of detention for adults, though guidance to judges suggests that six months is a 'long' period⁹. The majority of other European Union member states are signatories to the EU Returns Directive, which limits immigration detention to six months to achieve removal, extendable in exceptional circumstances by up to a further 12 months. This directive is not considered to be particularly liberal, as it allows for substantial deprivation of liberty without routine judicial oversight¹⁰. In fact, most countries have now set limits of under 18 months for detention including, for example, France (one and a half months), the Netherlands (one and a half months), Spain (two months) and Italy (six months).

On 31 March 2012 there were just over 3,000 people in UK immigration detention centres, 42 of whom had been held for over two years¹¹. Most were held in one of the 10 immigration removal centres (IRCs) and three residential short-term holding facilities, while some families with children were detained at the new 'pre-departure accommodation', which opened in 2011 and was named 'Cedars'. While there are no regular statistics on the number of detainees held in prisons after the end of sentence, the most recent information at time of writing (September 2012) shows that a further 595 foreign nationals were held under immigration powers in prisons at the end of January 2012¹².

There has been particularly severe criticism by campaigning groups and statutory monitoring and inspection bodies of the way that the power has been exercised in relation to children.

The power to detain in the UK is then considerable. It is used frequently, with around 3,500 people held in prisons and detention centres in early 2012. It is exercised without judicial approval or oversight of the decision to detain. There has been particularly severe criticism by campaigning groups and statutory monitoring and inspection bodies of the way that the power has been exercised in relation to children¹³.

Detaining children

Families with children were, until 2011, held in one of three immigration removal centres — Yarl's Wood, Tinsley House and Dungavel in Scotland. Children were also held in most of the 30 or so immigration short term holding facilities, generally at ports of entry across the country, usually for short periods of a few hours¹⁴. However, the extent of child detention has never been easy to establish. Published detention statistics give a snapshot of children in detention during each quarter but do not show cumulative length of detention, that is, the total amount of time that children are held if they are detained, released, and then detained again on at least one further occasion. Parliamentary answers to requests for such information tend to say that it would only be available at disproportionate cost. This response also avoids the embarrassment of providing unreliable figures resulting from weak data gathering systems; for example, in 2008, HM Inspectorate of Prisons found that 450 children had been held for an average of 15 days at the largest centre, Yarl's Wood, during one recent six month period. A number of children had experienced longer cumulative detention, but the centre's own figures on this were in some cases wildly inaccurate; the most extreme example was of children who were initially said to have been held for 275 days and were, much later,

8. This is set out in chapter 55 of the UKBA's enforcement and instruction guidance.

9. Bail Guidance for Immigration Judges, 2011, paragraph 18.

10. See Wilsher (note 5) for discussion.

11. Home Office Immigration Statistics January to March 2012. These figures do not include those held under immigration powers in non-residential short-term holding facilities, police stations or those held in prisons under immigration act powers.

12. http://www.detentionadvice.org.uk/uploads/1/0/4/1/10410823/foi_21786_response.pdf

13. for example, see Aynsley-Green, Al. (2010) *The Children's Commissioner for England's follow up report to: The Arrest And Detention of Children Subject to Immigration Control*. Visit to Yarl's Wood October 2009; Bail for Immigration Detainees (2011) *Last resort or first resort? Immigration Detention of Children in the UK*; Crawley, H. (2006) *Child first, migrant second: Ensuring that every child matters*. Immigration Law Practitioners Association (ILPA) policy paper; HM Inspectorate of Prisons (2010) *Report on an unannounced full follow-up inspection of Yarl's Wood Immigration Removal Centre 9-13 November 2009*.

14. HM Inspectorate of Prisons (2011) *A short thematic review of short term holding facilities: 2004-2010*.

said to have been held for up to 17 days, a mistake that seemed barely comprehensible given the importance of the issue¹⁵. It certainly reflected a lack of focus on the detention of children, who were supposed to be held only as a last resort for the purposes of removal, and for the shortest time possible.

The impact of detention on children has been a major concern, recurring in a few studies¹⁶ and various inspection reports¹⁷. Despite gradually improving processes for the management of children in detention, better collaboration with local authorities, and more focus on the basic needs of children, the finding of successive inspectorate reports was that detention was having a harmful impact that was not being properly mitigated. For example, one inspection of Tinsley House noted a complacent and unfocused attitude to the needs of children, and living conditions that were oppressive and claustrophobic¹⁸. At Yarl's Wood in 2008, the inspection concluded that children were not being detained as a last resort or for the shortest possible time; children themselves reported not being able to sleep, lack of activity, and fear and upset at their environment. One child commented: 'I feel like I'm in prison, as if I've killed somebody'¹⁹.

Lopek et al's²⁰ findings resonate with this, concluding that detained children's mental health was likely to have been negatively affected, even when detention was short. Relevant factors included deterioration in parents' mental health and parenting ability, fear at being in a facility resembling a prison, anxiety over possible return to their countries of origin, and loss of home, school and friends. Robjant et al²¹, looking at studies from the UK, USA and Australia,

found similar evidence of an adverse effect of detention on children. BID's later research²² suggested that families were not detained as a last resort: for half the time that the 82 families in their sample were detained, they could not legally be removed, and nearly two-thirds were subsequently released. The families in this study spent an average of 6.5 weeks in detention.

The consistent and troubling finding of these reports and studies was that detained children seemed to be a lesser priority in terms of national safeguarding responsibilities. It was such evidence that in the summer of 2010 prompted the incoming deputy prime minister to describe it as a 'moral outrage' that the previous government had in the previous year 'imprisoned, behind bars, 1,000 children who were innocent of any wrongdoing whatsoever'²³. Shortly afterwards a new approach was published.

Current arrangements

In December 2010, the government announced that it would end the detention of children, and subsequently announced a new family returns process²⁴. The final stage can include detention in 'pre-departure accommodation', which is intended to be a last resort if families have not left

voluntarily. A charity, Refugee Action, is commissioned to provide information and assistance to help encourage voluntary departures. The new secure facility, Cedars, was opened in August 2011 to be the pre departure accommodation for such families. The facility is used after advice has been sought from the 'Independent family returns panel', which is made up of people who have generally held senior positions in work with children (e.g. an ex-social services director and a child

Despite gradually improving processes for the management of children in detention . . . the finding of successive inspectorate reports was that detention was having a harmful impact that was not being properly mitigated.

15. HM Inspectorate of Prisons (2008) *Report on an announced inspection of Yarl's Wood Immigration Removal Centre 4-8 February 2008*.

16. Lorek, A., Ehntholt, K., Nesbitt, A., Wey, E., Githinji, C., Rossor, E., and Wickramasinghe, R. (2009) 'The mental and physical health difficulties of children held within a British immigration detention centre: A pilot study', in *Child Abuse and Neglect* 33: 573-585; Robjant, K., Hassan, R. and Katona, C. (2009) Mental health implications of detaining asylum seekers: systematic review, in *British Journal of Psychiatry* 194, 306-312; BID (2009), see note 12.

17. HMIP (2008) and (2010), see notes 13 and 15; HM Inspectorate of Prisons (2009) *Report on an unannounced short follow-up inspection of Tinsley House Immigration Removal Centre 13-15 July 2009*.

18. HMIP (2009), see note 17.

19. HMIP (2008), see note 15, p.86.

20. See note 16.

21. See note 16.

22. See note 13.

23. Announcement by Nick Clegg, Hansard 21 July 2010, col 349:

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100721/debtext/100721-0001.htm>

24. 'New Family Returns Process Begins' <http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2011/march/03new-family-returns-process>

psychiatrist). Families can be held for 72 hours, extendable with ministerial authority to a maximum of one week. It is run by the private security firm G4S and has on site UKBA staff and a team working for the children's charity Barnardo's. The latter has received much criticism for accepting the detention of children rather than campaigning against it²⁵, but there is no doubt that it has helped to ensure a much improved experience for children once they are in detention²⁶.

While families with children continue to be detained, fewer children are held for shorter periods, and in better conditions. The number of children entering detention was 53 in the first quarter of 2012²⁷, which is a substantial reduction on the many hundreds of children routinely held each quarter under the old system. Of these 53, 35 were held at Cedars, 12 were detained at a newly refurbished children's unit at Tinsley House as 'border cases' — that is children in families detained at airports and usually held for one night before a return flight. In the remaining six cases, detainees said they were children, and UKBA did not agree. These 'age dispute' cases were held at the adult detention centres, Campsfield House, Colnbrook and Morton Hall. All 53 children left detention within the same quarter, often within a few days.

About half (25) were granted temporary admission to the UK or released. As with the BID²⁸ research, the fact that so many were released into the UK after a period of detention suggests that UKBA's objective of detaining only if absolutely necessary, when removal is imminent, was not being effectively achieved²⁹.

Cedars itself has nine self-contained family apartments, with a library and gym, a family lounge, children's activity areas and grounds that are all of a very high standard³⁰. It is possible to walk around the facility without feeling that it is a place of confinement, something that cannot be said for any other place of detention. Social workers are based on site and Barnardo's workers holding a wide range of child care experience and qualifications are involved in most aspects of the centre with the stated aim of minimising the damaging effects of detention on children. The first

inspection of Cedars in the spring of 2012³¹ found that it had been designed around the needs of children and families. Children were well occupied and, in contrast to Yarl's Wood, all said they enjoyed the care and stimulation they received while at the centre. Parents praised the enthusiastic staff group, especially Barnardo's staff and G4S family care officers, said they felt safe, and had confidence in the staff. The children, particularly the younger ones, were generally lively and happy in the centre.

However, detention and removal were still clearly traumatic for parents and their children; the early morning collection from home by UKBA arrest teams, the obvious distress of parents trying to put in last minute legal challenges, and concerns for the future, all affected children's emotional wellbeing. Some of the older children, with more understanding of what was

happening, were more withdrawn and worried and were in some cases absorbing the stress of poor coping parents. Some elements of life during their short time in detention were also more menacing than their day-to-day experience might have led them to expect. Force could in some circumstances be used against children to achieve removal, and while this had in practice been 'light touch', that is

guiding resistant children by their elbows to the departures area, once initiated there was always a risk of escalation. One issue that was particularly concerning was the use of force to effect the removal of a pregnant woman, using non approved techniques, while her other child was taken into another room by Barnardo's staff. The woman was tipped up in a wheelchair with someone restraining her legs, and wheeled precariously to the departures area, at one point slipping on to the floor. There is no safe way to do this without posing an unacceptable risk to the health of the unborn child and to the woman in question, and to initiate force in such circumstances is not defensible. The requirement to use force to effect removal of children also placed a considerable burden on staff, who were in some cases clearly disturbed and upset by this aspect of their role.

While families with children continue to be detained, fewer children are held for shorter periods, and in better conditions.

25. e.g. see <http://www.guardian.co.uk/commentisfree/2011/mar/10/barnardos-child-detention-play-services>

26. HM Inspectorate of Prisons (2012) *Report on an unannounced full inspection of Cedars pre-departure accommodation*, 30 April-25 May 2012.

27. Home Office detention statistics, first quarter of 2012: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-q1-2012/detention-q1-2012>

28. See note 13.

29. This does not necessarily mean that UKBA staff were wrong to detain under the current guidelines, but it does show that the current system is not succeeding in keeping detention to the absolute minimum.

30. HMIP (2012), see note 26.

31. Ibid.

How much children were affected by such events, and for how long, is unknown, since there is currently very little follow up of detainees to find out what has happened to them after removal or release. But, unlike the consistent finding at Yarl's Wood in particular, the conditions and length of detention at Cedars did not in themselves appear to cause trauma to children and parents. In fact, parents said that if they had to be removed, they would rather be held in Cedars for a short time, both to provide time for applications for judicial review, and to help them settle and prepare their children.

Punishment and equity in immigration control

Immigration detention is not meant to be a punishment. There is no provision in the Detention Centre rules for punitive sanctions. In particular, segregation can only be used for reasons of safety and security, and then for the shortest possible time. However, the theory of non-punitive containment, where detainees are given the maximum possible freedom beyond the obvious fact of detention, is not reflected in practice. The three newest centres are all built to category B prison specifications and look like normal prisons. Other IRCs may be less austere in design and feel, but, with few exceptions, detainees consistently experience them as prisons³². And then there is Cedars, a centre designed explicitly not to feel like a prison, with — notwithstanding the concerns reported above — unobtrusive security, a strong emphasis on welfare and preparation for either release or removal. It is the first place of detention which actually feels like something new, neither a prison nor an IRC, but a secure facility that reflects the spirit of how immigration detention is supposed to feel for children, in accordance with Detention Centre rules and legislation — that is, essentially non punitive. If it is accepted that detention is justifiable, an important question emerges: if it can be done this way for families with children, why not for adults?

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There may be financial and pragmatic obstacles to work through, but in principle the treatment of adults who are not guilty of any crime, or no longer serving a sentence for a previous crime, should be no more punitive than that of children. One of the lasting impacts of the Cedars model could and should be its influence on adult detention. For example, more detention centres could be based on the open and non-institutional design of Cedars. The model of having a strongly welfare orientated non-governmental organisation working alongside UKBA and the detention contractor is certainly worth closer examination. There is no doubt that much of the innovation and common sense seen at Cedars

arose from this balance of control and power in the establishment. A welfare-orientated, open and supportive environment is clearly supported by the Detention Centre Rules³³. These state that detainees should be held in a 'relaxed regime with as much freedom of movement and association as possible' (Rule 3), and this encourages the Cedars approach rather than the prison-like environment of most detention centres.

However, the most obvious difference between the new children's approach and adult detention is that the latter can still be detained indefinitely, giving rise to frustrations for both detainees and staff attempting to manage them. Perhaps the biggest lesson of Cedars then is that it is possible to put a strict time limit on detention and still have a credible and effective system of immigration control. In fact, even at Cedars, many families were subsequently released, suggesting that there is scope for further reducing the use of detention, with its accompanying human and financial costs³⁴. This point needs serious examination and raises a challenge that the government and UKBA could now usefully address.

Equity and legitimacy in the system should be openly discussed. Legitimacy of detention is an issue that is always near the surface of immigration detention practice³⁵ and there is little point in trying to avoid the

32. HM Inspectorate of Prisons and Independent Chief Inspector of Borders and Immigration (HMIP and ICIBI) (2012) *The Effectiveness and Impact of Immigration Detainee Casework. A Joint Thematic Review*.
33. <http://www.legislation.gov.uk/ukSI/2001/238/contents/made>
34. The average annual financial cost of detention in an immigration detention centre is over £37,000 per person. Hansard, House of Lords: <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110629w0002.htm>
35. Bosworth, M. (2013 forthcoming) 'Can Immigration Detention Centres be Legitimate? Understanding Confinement in a Global World', in M. Bosworth and K. Aas (Eds) *Borders of Punishment*. Oxford University Press.

debate. During the Cedars inspection differing family detention practices were found in the north and south of the country — that is far more families based in the north of the country went through the family returns process and were detained. This was considered by some local immigration staff to be a result simply of different practices by immigration teams responsible for deciding who would be detained. It is not clear if this is the whole explanation as no particular research into this had been done. But on the face of it, there was a level of arbitrariness that would not be acceptable in the criminal justice context. There would be justifiable outrage if it was found that for similar offences courts in the south of the UK were imprisoning people at a far higher rate than those in the north. In fact, the perception of inconsistency in the imprisonment of people from different ethnic backgrounds has been enough to trigger institutional self examination, debate and ongoing research³⁶. Progress may have been slow, but it is taken seriously because it is accepted without question that discrimination in the conviction, imprisonment or treatment of those involved in the criminal justice system is wrong in principle, and undermines justice. Such discrimination also reflects on the nature of our society. I have argued elsewhere that the way that the criminal justice system is perceived reflects considerably on perceptions of the fairness of our society³⁷. Similarly, if immigration control is seen as arbitrary, then it reflects poorly on a society that is ostensibly committed to justice and equality. It is disturbing therefore that a common view from detainees is that their treatment within the immigration system is not moral or just. While some prisoners dispute their guilt, most can at least understand and in many cases accept the punishment given to those who are guilty. In the immigration context, even if detainees accept they have transgressed immigration laws, the penalties are rarely seen as proportionate. These can include indefinite detention while having limited access to legal advice or judicial oversight. As one detainee has put it:

*What sort of law is this? You get three month sentence and end up in prison for 3 years. [I] ran from a war situation and now in a prison. [I] feel confused and disappointed.*³⁸

Concluding thoughts

Concerns about the vulnerability of children in the immigration system have, with the caveats discussed

above, led to important and positive changes in the way that they and their parents are treated. This does not mean that the overall impact of immigration control on children is not damaging. The conditions of detention may have improved, but other parts of the 'family returns' process are less well documented or understood. Both supporters and critics of family detention could now usefully focus efforts on the other elements of immigration control, to ensure a process that minimises the negative impact on children. Too little is currently known about the lead up to detention and, importantly, what happens after removal. There may be political and legal arguments for taking little interest in what happens to children once they are removed from the country. But there is no convincing moral reason why safeguarding duties should be seen as dispatched once a child is out of sight. More communication and work with receiving countries to help prepare detainees for their return, perhaps through encouraging reception centres based on the Cedars model, could be a way of ensuring a more humane and caring international approach.

It is also important that other parts of the detention estate learn from Cedars. In particular, its open design and welfare orientation, and the ability to have effective immigration controls based on short periods of detention. It has been recognised that the open ended approach to child detention is not acceptable. It is difficult to see why this conclusion cannot also apply to adults. The way that different agencies collaborate and ameliorate the detention experience is also impressive. It is possible only because a non-governmental organisation has a powerful and influential role in the centre, and is given due deference by the other agencies.

The new approach to immigration control for children reveals fundamental issues of equity in the overall approach to detention, and can help to sharpen thinking about what the different approach means for immigration detention in general. This should drive forward both practical improvements and conceptual thinking about what detention is for and how it should be used. This will become more important as time goes on. The wider challenge — for governments as well as for the agencies implementing policy — is to work out how exclusionary national policies are reconciled with the realities of a world that is likely to see more people moving across international boundaries, whether by choice or necessity.

36. Bowling, B. and Phillips, C. (2002) *Race, Crime and Justice*. Longman; Bhui, H.S. (2009) *Race and Criminal Justice*. Sage Publishers.

37. Bhui (2009), p.2, see note 36.

38. Unpublished quotation collected during research for HMIP and ICIBI (2012) report; see note 32.

'The right to walk the streets':

Looking for illegal migration on the streets and stations of the UK and Germany

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This article compares the legal framework and enforcement of public or 'street' identity checks in the UK and Germany. These are checks performed in public — on streets, on buses, in train stations — with the purpose of uncovering migration offences.¹ The article finds important differences between the two countries in the institutions involved in enforcement, in the concentration of identity checks across the countries, and in the role of race. It suggests that these differences are attributable to geographical positioning, distinct conceptions of the role of the state, Britain's colonial history versus the 'temporary' nature of migration to Germany, and the enduring effect in Germany of Nazism on public discussions of state discrimination. The article supplements an analysis of legislation and policy guidelines with a literature review, interviews with enforcement agents and NGOs, data requested under the Freedom of Information Act and criminal justice statistics.

Public raids: the legal framework

a). United Kingdom

In the UK, both the UK Border Agency (UKBA) and the police carry out public identity checks for illegal immigrants. The involvement of the UKBA, however, is relatively recent. Until the 1970s, detection of potential deportees was seen as a matter largely for the police,² and although the UKBA developed a permanent inland enforcement team in the 1980s they did not use their powers of arrest as a matter of policy. It was not until the

mid 1990s — and especially, since the establishment of independent arrest teams in 2002 — that the UKBA has become more proactive. As before, the police retain a 'key role'³ in the immigration control system.

Today, the UKBA conducts Street Operations or 'StOps' either on their own or as part of police-led 'Crime Reduction Operations' ('CrOps') where there is suspicion that immigration crime will be uncovered alongside other crimes. These kinds of identity checks have been reported on the London Underground,⁴ a number of train, bus, and coach stations across the country,⁵ in Cardiff shopping centre⁶ and on a high street in Camberwell where an informal labour exchange was suspected.⁷ 'Operation Chefnak' saw fortnightly raids targeting Roma beggars in Marble Arch in the run up to the 2012 Olympic Games⁸ and a joint UKBA-police initiative also led to checks on the mostly Latin American audience at a Reggaeton festival in Elephant and Castle. Street raids are fairly low priority for the UKBA. Compared to the hundreds of workplace raids conducted by the UKBA yearly and the 21,298 persons served papers by the UKBA as immigration offenders in the UK,⁹ only 8 public transport hubs had been subject to Stops and Crops in 2010-2011¹⁰ and 32 street-based operations in 2011-2012, of which 19 were in Hammersmith Broadway alone.¹¹

Although public ID operations like these are allowed under British law, they are highly circumscribed. UKBA guidance prohibits inland 'fishing exercises', questioning random people who might be irregular migrants.¹² In particular, immigration officers cannot use racial appearance as a reason for making a check. Instead there

1. These do not include workplace raids, visits to private residences, nor identity checks carried out in the process of other criminal enforcement activities.
2. *Immigration: Detection of Illegal Entrants*. HL Deb 22 July 1970, vol 311, cc974-6.
3. Association of Chief Police Officers. *East Midlands Region Regional Immigration Arrest Policy*. Available at: www.lincs.police.uk/Library/Freedom-of-Information/Publication-Scheme/Our-Policies-And-Procedures/Immigration-Policy.pdf
4. Newham Monitoring. (2012). *Nineteen Years Fighting for Justice*. Available at: www.nmp.org.uk/2012/02/nineteen-years-fighting-for-justice.html
5. Freedom of information request (FOI) 20568.
6. Migrant Rights Network. (2011) *The Fighting Net of Intelligence*. Available at: www.migrantsrights.org.uk/blog/2011/04/fishing-net-intelligence
7. UKBA. (2012). *Thirty Six arrested following illegal working operation in West London*. Available at: www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2012/june/45-operation-west-london
8. City of Westminster. (2012). *Operation Chernofak*. Available at: www.westminster.gov.uk/services/policingandpublicsafety/crimeandlawenforcement/whatsbeingdone/begging/
9. FOI 22081.
10. FOI 20568.
11. FOI 23978.
12. UKBA. Chapter 31 *Enforcement Visits*. Available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectione/chapter31?view=Binary>

is a two-stage burden of proof. First, there must be sufficient intelligence (often a tip from the public) that irregular migrant(s) congregate at a specific place at a specific time.¹³ Second, once at the site of interest an Immigration Officer will need to have information suggesting that the specific person may be of interest. Such detail could include attempts to avoid passing through or near a group of Immigration Officers who are clearly visible, or other 'nervous' or 'suspicious behaviour'.¹⁴ These rules clearly leave lot of room for discretion, yet such power is arguably balanced by the fact that Immigration Officers' requests for information are voluntary. If a person walks away, there is no power to arrest them.

The situation with the police is slightly different. Police are allowed to stop anyone in a public place and ask persons to account for themselves, without suspicion of a specific crime.¹⁵ 'Stop and accounts' powers invoke no duty to respond. There are no general powers to require persons to identify themselves. Furthermore, the police do not have powers under P.A.C.E. (1984)¹⁶ to stop and search persons for a suspected immigration offence. However, the police are allowed to arrest for another offence than the one that justified the search in the first place where evidence comes up in the course of the encounter. Two further provisions allow for stop and search without reasonable suspicion: The Criminal Justice and Public Order Act 1994 S. 60 introduces the right for inspectors to authorise stops without suspicion in a specified period over a maximum of 24 hours on the basis of reasonable belief that serious crime will be committed. While introduced as a specific measure to prevent violent offences at sporting and other large-scale events, around 10 per cent of stop and searches were carried out under

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S60 powers in 2009-2010.¹⁷ In addition, section 44 of the Terrorism Act 2000 empowered senior police to authorise stops without where they considered it 'expedient' to do so in order to prevent acts of terrorism.¹⁸ The whole of the Metropolitan Police area in London was continuously subject to such an authorisation for most of the decade following the Act coming into force.¹⁹ Severe restrictions have been placed on the use of S.44 subsequent to a European Court of Human Rights hearing.²⁰

To what extent are police powers for street based controls used for immigration enforcement? A report by the Home Office found that there was a regular flow of arrestees who were picked up 'purely on the basis of their immigration status', either through officers picking up suspected illegal immigrants on 'lorry-stop drop offs' or as the result of joint immigration/police targeted operations.²¹ General powers of stop and search do not seem to be used for immigration enforcement: of the 650,000 persons stopped and searched under s.44 powers in the last 10 years, less than 119 were transferred to immigration services.²² Similar figures are not available for section 60 powers,

although these checks have become associated with anti-knife and gun crime operations and more generally with combating gang culture in inner cities rather than immigration offenders. However, the Metropolitan police arrested a not inconsiderable 1285 persons in 2011-2012 for immigration offences following stop and searches.²³

Finally, statistics are patchy but there appears to be cross-country variation in the prioritisation of immigration enforcement by the police. In general, London's Metropolitan police carry out a highly disproportionate number of stop and searches in the UK

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13. Before anything happens, there is a meeting presenting the evidence and a senior member has to authorise the raid.
 14. Program segment, UK Border Force. Available at: www.youtube.com/watch?v=chQVBpA3g68&feature=related
 15. Citizens Advice Bureau. *Police Powers*. Available at: www.adviceguide.org.uk/england/law_e/law_legal_system_e/law_police_e/police_powers.htm#stop_and_account
 16. Or indeed, any of the other stop and search powers requiring 'reasonable suspicion'. See *Police and Criminal Evidence Act 1984, Code A*. Available at: <http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/pace-code-a-2011?view=Binary>
 17. Ministry of Justice. (2011). *Statistics on Race and the Criminal Justice System 2010*. Available at: <http://www.justice.gov.uk/downloads/statistics/mojstats/stats-race-cjs-2010.pdf/>
 18. S 44. also allows police officers to take a suspect's ethnic origin into account when deciding whether to search someone under suspicion of terrorism.
 19. Bridge, J. (2011). *Police-initiated Stop Practices in the United Kingdom — Where are we now?* in Roundtable on Current Debates, Research Agenda and Strategies to Address Racial Disparities in Police-Initiated Stops in the UK and USA. John Jay College of Criminal Justice, New York.
 20. Liberty. (2010). *Liberty wins landmark stop and search case in court of human rights*. Available at: www.liberty-human-rights.org.uk/media/press/2010/liberty-wins-landmark-stop-and-search-case-in-court-of-human-rights.php
 21. Hamilton-Smith, N. & Patel, S. (2006). *Determining identity and nationality in local policing*. Home Office Research Report 42.
 22. Home Office Statistics. (2012). *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops and searches*. *Great Britain 2010/2011*. HOSB 11/12.
 23. FOI 2012080002362.

context.²⁴ They also seem to have a lion's share of arrests for immigration offences: 5152 (2011-2012) compared to South Yorkshire (18 arrests for immigration in 2010);²⁵ Devon (348 in 2011);²⁶ Suffolk (97 in 2011).²⁷

b). *Germany*

The institutional structure of German inland immigration enforcement differs from England. They have no special immigration enforcement unit like the UKBA. Instead, illegal residence is a criminal offence across Germany and as such, the police have the duty to investigate it.²⁸ Furthermore, apart from a brief period under the Third Reich, policing has been federalised since 1871. Today, Germany has one federal police agency (the '*Bundespolizei*') — responsible for border zones, airports and transportation hubs — and 16 '*Länderpolizei*'. Both are responsible for enforcing immigration control.²⁹

The UK and Germany also differ in terms of police discretion around ID checks. Every German citizen has to have an identity card and has to retrieve it within a reasonable time frame when asked. In general, German police need reasonable suspicion of a crime in order to demand ID. However, like s.60 in the UK, a number of '*Länder*' have nominated 'dangerous areas' where this is not a requirement.³⁰ Furthermore, the federal police and all but six of the '*Länderpolizei*' introduced checks without concrete suspicion — known as '*Schleierfahndung*'³¹ — within a 30km reach of a border area and in important traffic areas, like motorways, airports or train stations.³² These powers were introduced on the day that internal borders were lifted between Germany and its continental neighbours under the European Schengen agreement and are linked to the fight against cross border organised crime and illegal migration.

Together, these initiatives have given German police considerable discretion to ask for identification papers and to search individuals without reasonable suspicion or specific incident (ECRI 2003). Yet again, a key question is the extent to which the police use their powers to target

immigration offences. The first point is that 55, 087 persons were arrested for immigration offences in 2010 by the inland police forces of Germany.³³ This means a considerably higher number of illegal immigrants are identified in Germany by the police alone than illegal immigrants in the UK by the UKBA and police forces together.

German 'police criminal statistics' reveals a north-south divide in enforcement. Unlike the UK, where London is a hotspot for immigration action, Berlin — German's multicultural capital, set in the north east of the country — has among the lowest arrest rates for immigration crimes. Similarly, police in the northern harbour town of Hamburg 'rarely' conduct street raids for immigration offences, instead using 'dangerous area' powers to target persons under the influence of drugs or alcohol, football hooligans and protestors. By contrast, the southern states of Hessen and Bayern have the highest arrest rates for immigration crimes. Police in Baden Württemberg are instructed 'to conduct at least one monthly stop and a search operation targeting illegally resident foreigners'. 82 per cent of people stopped under Bayern's checks without concrete suspicion were foreign nationals.³⁴

Finally, in the months following the July 2005 London bombings, Hessen, Württemberg and Bayern and saw mass identity checks in the vicinity of mosques and in Muslim owned business and areas. German officials interviewed in a recent study³⁵ were keen to emphasise that a judicial warrant is required before a raid can be conducted and say that that every raid has a case-specific evidentiary basis linked it to 'criminal Islamic structures'. However, a counter terrorism officer admitted that 'the main goal of these controls is to find people who are living in Germany illegally or [engaged in] other related crime.'³⁶

Germany differs from the UK in another key respect: the legality of using skin colour as a reason for inquiring about immigration status. Recently upheld in a administrative court decision in Koblenz,³⁷ racial profiling,

24. Ministry of Justice. (2011) *ibid*.

25. FOI. Available at: www.whatdotheyknow.com/request/arrests_for_illegal_immigration

26. FOI 002731/12.

27. FOI 597/11/12.

28. 163b *Strafprozeßordnung* (German Criminal Procedure Code).

29. Doornik, J. & Jandi, M. (2009). *Modes of Migration Regulation and Control in Europe*. IMSCOE

30. The Hamburg 'Gefahrengebiete' and the Berlin 'Kriminal belastende Ort' are two examples of this. See Schneider, C. et al. (2010).

'Demokratisierung der Polizei Beiträge zu einer Fachtagung der Fraktion DIE LINKE in der Hamburgischen Bürgerschaft.' DIE LINKE, Hamburg.

31. Graf, S. (2006). *Verdachts — und/oder ereignisunabhängige Polizeikontrollen* Duncker & Humblot.

32. Vogel, D. et al (2009). 'Police cooperation in internal enforcement of immigration control-Germany, United Kingdom and the United States of America.' p. 207-244 in *Immigration, Crime and Justice, Sociology of Crime, Law and Deviance*, edited by W. MacDonald: Emerald Publishing.

33. Bundesministerium des Innern. *Polizeiliche Kriminal Statistik 2010*. (Police Criminal Statistics).

34. Kant, M. (2000). *Stops and Suspicion: Migrants caught in the centre of the investigation*. Civil Rights and Police.

35. Neild, R. (2009). *ETHNIC PROFILING IN THE EUROPEAN UNION: Pervasive, Ineffective and Discriminatory*. Open Society: Justice Initiative.

36. *Ibid* p.66. Between 2001-2003, the German authorities also attempt to identify 'sleepers' of terrorist organisations by the *Rasterfahndung* method, i.e. the screening by the police of personal data sets of public or private bodies in order to track individuals presenting suspects' features. The program was both ineffective (no terrorist suspects were arrested) and hugely disproportionate, with 32,000 persons identified. In 2006, the policy was found to be unconstitutional.

37. Administrative Court of Koblenz, judgement of 28 Feb 2010, document number 5 K 1026/11.KO.

at the time of writing, is allowed in Germany, despite the fact that Article 3 of the German Constitution states that no one must be treated in a disadvantaged or privileged manner due to his/her sex, descent race, language, origin, faith or religious or political opinion or disability. It remains to be seen whether the Koblenz decision will be upheld if the case goes to the Constitutional Court. The case against these checks was on the right to privacy and to self-determination. However, anti-discrimination groups are planning on submitting an amicus brief to the appeal court highlighting equal treatment as a principle that also needs to be considered in the legality of these checks.³⁸

Discussion

Germany has traditionally oriented itself towards internal controls that operate once a foreigner is already in the country,³⁹ while the UK has more often focused on policing its external borders.⁴⁰ The more extensive powers to conduct public identity checks in Germany are part of this legacy. But why did these different systems develop? The first reason is geographical: the UK's position as an island facilitated controls at the port of entry, while Germany faced the difficulty of patrolling borders with nine countries at varying degrees of economic development. However, having land borders isn't a sufficient criterion for concentrating on internal policing of migration. Looking internationally, the USA has a long land border with a less economically developed nation (Mexico), but it concentrates far more of its resources on external border control than on internal policing. Geography is only one reason among many.

The UK and Germany are also marked by important discursive and cultural differences. Identity cards, which have proven to be so controversial in the UK, are an accepted part of state control in Germany. This is partly built into the British system of law: the so-called Diceyan notion of 'residual liberty' in common law implies that everything the citizen does is legal unless explicitly made illegal by government.⁴¹ The obligation for citizens to carry and present national ID cards in the UK has been exceptional: measures introduced reluctantly in the two

world wars were withdrawn in peacetime as 'an unacceptable police power'. Decades later, a proposed clause in the Immigration and Citizenship bill 2008 C. 28 (3) to allow the police and UKBA to be able to demand identification from anyone on permission of the Secretary of State was virulently opposed by civil rights groups and condemned in the media. In discussions about the introduction of identity cards, British politicians often compare the love of freedom of British citizens versus the Prussian acceptance of state control.⁴² The tradition of liberty of which Britons are so proud,⁴³ could perhaps be tempered by the fact they have tolerated lower levels of freedom for immigrants: ID cards (biometric resident permits) were made mandatory for foreigners in 2008. However, put simply, because not everyone in the UK carries an ID card and is ready to show it, identity checks on suspected foreign nationals are more likely to be seen as discriminatory.

By contrast, in Germany accusations of police racism have been centred on maltreatment of ethnic minority youth in custody and not stop and account policies. Arbitrary stop and search approach is facilitated by the fact that personal identification has a long history in Germany and is seen as something 'normal'.⁴³ There is some logic to this: because most Germans carry their ID cards and are ready to show them, the feeling of discrimination is reduced. However, another, less generous, interpretation might argue that if identity checks were more equally distributed across the population there might be greater public antithesis to these police powers. Furthermore, while British police forces continue to be the subject of intense scrutiny in relation to the way in which police discretion can translate into ethnic disproportionality in stop and search practices,⁴⁴ German law explicitly allows identity checks for illegal immigration on the basis of racial appearance. Why is there not a greater public and political opposition to this policy?

One factor is the role of migrants in British and German societies and the extent of their 'actual or perceived belonging to the polity'.⁴⁵ Mass migration to the UK was set against a context of de-colonialisation.⁴⁶ As a part of the conceptualisation of the colonised as

38. Personal conversation with anti-discrimination activist, July 2010.

39. Vogel, D. (2000). *Migration Control in Germany and the United States*. *International Migration Review* 34:390-422.

40. House of Lords Select Committee on the European Communities. (1976-1977). *Illegal Immigration*. House of Lords Papers 91.

41. Wadham, J. et al. (2006). *Blackstone's Guide to the Identity Cards Act 2006*. Oxford Oxford: University Press.

42. In 1977, the Home Affairs Select Committee briefly considered and rejected the idea of ID cards, arguing that identity cards are not 'acceptable to the British people, who are rather fond of their freedom' (See *Illegal Immigration and Employment*, HC Deb 24 June 1977, vol 933, cc1995-2040). Almost thirty years later, David Davis, Shadow Minister for Home Affairs argued that 'the reason the common law countries are unique in this respect is that they are the countries which presume that the citizen is free to do anything unless there is a law against it. That is rather different from the Napoleonic law countries' (See House of Commons Hansard Debate for 25 June 2005 p. 14).

43. Vogel, D. et al (2009) *ibid*.

44. Bowling, B. & Phillips, C. (2003). *Policing ethnic minority communities*. p. 528-555 in *Handbook of Policing*, edited by T. Newburn. Devon, UK: Willan Publishing.

45. Solanke, I. (2005). *The Evolution of Anti-Racial Discrimination Law in the United Kingdom, Germany and the European Union*. Department of Law, University of London, London p. 29, 145.

46. Spencer, I. (1997). *British Immigration Policy since 1939: The Making of Multi-Racial Britain*. London: Routledge.

'subjects' of the motherland, migrants from the Commonwealth held British citizenship and had the free right to enter 'the motherland' until 1962. They were also given the right to vote in national elections, which certainly played into Labour's decision to promote the first Race Relations Act in 1965.⁴⁷ Although successive laws retrenched this right, the majority of long-term resident migrant workers from Africa, Asia and the Caribbean are citizens (and, in turn, most of their children). Ultimately, while resented in some quarters, the settlement of migrants was legitimised by the idea of the returning subject. Despite continuing tensions, there is a discursive framework for understanding Britain as a multiracial and multi-cultural. As a result, 'police raids to find illegal immigrants and the demanding of passports from people long established in this country' can be framed in terms of their inevitable damage to UK race relations.⁴⁸

The German migration story is very different. Although Germany did have some colonies, they were not as extensive as Britain's, largely due to the fact that the unification of Germany only took place in 1871. By the time the country joined the 'Scramble for Africa' most of the continent had already been colonised and the ones Germany managed were confiscated in the Treaty of Versailles in 1914. In contrast to British colonialism, citizens of German colonies in Togo, Cameroon and Namibia were not seen as subjects of the 'Kaiser': they were not able to move freely to the Reich and acquiring citizenship was near impossible because of the principle of blood descent in naturalisation law.⁴⁹ This meant, instead of colonial legacy, the first mass migration came under the ruse of 'Gastarbeiters,' (guest workers) recruited to help with the post-war labour shortage, who were expected to leave no permanent mark on the host country.⁵⁰ Despite the settlement of this group and other mass immigration movements following the breakdown of USSR, Germany continued to deny that it had become a 'land of immigration'.⁵¹ In doing so, it excluded migrants from political debates and stymied wider discussions of race relations. The culture of anti-discrimination in Germany is generally weak.⁵²

Another factor that legitimates racial profiling in Germany arises from the different understandings of what discrimination actually is. State discrimination is not

a developed topic in German public debate. This may seem surprising considering Germany's history, but in fact the Holocaust plays a central role in this invisibility. In this first place, race is still a taboo subject. More importantly, however, is the way in which racism is understood mainly in the context of Anti-Semitism and fascism. As an anti-discrimination activist reminded me, "With the German history and the third Reich, the starting point with anything related to racism is right wing movements and fascism. So, it's almost impossible to think in terms of racism outside of this. A racist is bald head with black shoes. It cannot be a normal person." Thus, generous federal funding is available for fighting right wing extremism while racial profiling continues. However, the issue with 'over identifying the fight against racism with the activities extremist groups is that...they are exceptional'.⁵³ Racism can also be institutional; it can be every-day.

Finally, the tightly co-ordinated political structure of Germany does not privilege the voices of dissenting outsiders. By contrast, a majoritarian and pluralist political system such as that in the UK encourages proactive lobbying from outside groups. For instance, the Liberty think tank was a key player in lobbying against Clause 28 (3) of the Immigration and Citizenship Bill 2008, which would have introduced general powers to ask for ID. German Federalism also inhibits efforts by anti-discrimination activists. As one respondent said, 'With a federal system, you fight against 16 windmills... it's just impossible!' Imagining the complexity of tackling the original Schleierfahndung powers, defined and enforced differently across the Länder, illustrates this point.

Conclusion

The disparate histories of the UK and Germany make it unlikely that policy convergence will occur in the near future. Ultimately, the way each country perceives and manages their foreign citizens reflects a complex mix of past events, some which have very little to do with migration control at all. In turn, policies introduced for illegal migration can shape the way in which citizens — particularly those of ethnic minority background — are policed.

47. Solanke, I. (2005) *ibid*.

48. *Immigration and Race Relations*. HC Deb, 06 December 1973, vol. 865 cc1546-82.

49. The Empire Citizenship Law of 1913 institutionalised blood descent as a central theme in the German nation-building project. The legacy of this policy is that Germany has one of the lowest naturalisation rates in Europe.

50. Rist, R. (1978.) *The guestworkers of Germany*. Society 15:81-90.

51. Joppke, C. (1999). *Immigration and the Nation-State The United States, Germany and Great Britain*. Oxford: Oxford University Press.

52. Peucker, M. (2007). *Equality and anti-discrimination approaches in Germany*. European Forum for Migration Studies, University of Bamberg.

53. Donald, J. et al. (1992). *'Race', culture and difference*. London: Sage.

The maze of immigration detention in Greece:

a case study of the Athens airport detention facility

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Introduction

Greece is currently enduring the worst financial crisis in its modern history. The economic cuts have severely affected the political, economic and social agenda, as well as the everyday lives of people residing in the country. Though the financial crisis springs from other sources, people across the ideological spectrum regularly and explicitly link irregular migration to it, blaming foreigners for rising crime, the degradation of the city centre of Athens and high unemployment rates. Xenophobia, nationalism and racist attacks have, in short, become commonplace¹.

During the pre-election campaigns in May and June 2012, the nationalist, far-right wing party 'Golden Dawn' ran a campaign based almost entirely on their desire to remove immigrants from the country. With virulent posters promising to 'get rid of the dirt off the city streets' and organizations like 'citizen's groups', which act like neighbourhood watch units, the party prides itself in taking action against the alleged social ill of irregular migration. It is not just the far right, however, who express such views. From the top of government to those who work on the ground, such views can readily be found. Thus, the current Minister of Public Protection, Nikos Dendias, recently asserted that the country is in a constant war with anomie, organized crime and irregular migration.² As one detention officer put it, there seems to be a widely held view that *'it's logical and consequential to have some feelings of racism when Greece is full of immigrants'*. While the country teeters on the brink of bankruptcy, racial intolerance surges, leaving irregular migrants to struggle in an inhospitable and increasingly hostile environment.

The issue of irregular migration in Greece and its many aspects cannot be covered in one article. Here, though, I hope to do justice to a small part of it as it

manifests in the Athens airport detention centre. In so doing I draw on 6 months of work at the facility as part of an NGO programme funded by the European Refugee Fund and the Greek Ministry of Health and Social Protection. The NGO, Medical Intervention, offers psycho-social and medical support to economic migrants and refugees detained in 6 migrant detention centres in Athens. I have been working with Medical Intervention as a sociologist, offering advice and basic counseling to detained immigrants and asylum seekers, while also conducting research on detention conditions. During my time at the airport centre I have conducted more than 700 interviews with detainees and held informal conversations with 20 detention officers. The aim of this article is to map the Greek immigration system, focusing mainly on the outflow of migration from Greece and the ways that immigrants and asylum seekers become trapped in a country where they are unwelcome.

An entry point for irregular migration

The Greek-Turkish border has long been portrayed as the main targeted entry point for irregular migrants and asylum seekers who want to get to Europe. A 2011 report by Frontex³ estimated that nearly 90 per cent of irregular migrants to Europe entered through Greece in 2010⁴. While the evidence is that arrivals on Greek islands have decreased due to increased border control operations, land route crossings have seen a dramatic upsurge of 372 per cent since 2009⁵. Greek officials working at the border give evidence of more than 300 people per day crossing into Greece. Asylum seekers and irregular migrants, including children, are routinely detained at the points of entry and within a few hours are issued with an administrative deportation order. The deportation order is usually accompanied by an order for the continuation of detention. Yet very few

1. For a report on hate crimes and violent attacks against immigrants in Greece, see Human Rights Watch (2012) *Hate on the streets: Xenophobic Violence in Greece*, USA.

2. Interview at Police Review (2012), July-August, Issue 274.

3. Frontex is a European Union Agency which aims to facilitate EU countries in external border management (land, sea, air) through cooperation with national border authorities, training, intelligence analyses and rapid responses to extreme cases with specialist and human resources.

4. Frontex (2011) *Annual Risk Analysis*, Warsaw, Poland.

5. Frontex (2010) *Annual Risk Analysis*, Warsaw, Poland.

actually get deported. Most are instead sent from the border to Athens.

While in Athens some may seek to find a getaway to another country while others look for safe ways of staying in Greece. However, as a traditional emigration country, Greece has never had a proactive and realistic immigration system; rather, Greek immigration policy has remained short-sighted, treating immigration as a necessary evil⁶. Despite several regularization programmes (2005, 2007, 2009) that gave the chance to foreign residents to enjoy relative freedom in Greece, a recent report by the OECD came to the conclusion that, in the past three years, immigrants in Greece with residence permits have not exceeded 650,000. The same report estimated the immigrant population in Greece at 1,259,258, meaning that nearly half of the foreigners in Greece are now unauthorized⁷. Testimonies from detained immigrants highlight the insecurity and fluidity between regularity and irregularity that immigrants experience in Greece. Even those with valid residence permits can be detained and deported as Greek authorities have now placed strict restrictions on the renewals of these permits, leading to more and more people lapsing into irregularity.

The fragility of the Greek immigration system does not stop there. If a long-term integration perspective for economic immigrants in Greek society is lacking, the Greek asylum system is not much better. An asylum seeker has almost no chance of being granted asylum in Greece. For many years the rate of international protection granted fluctuated from 0.1 to 0.3 per cent; recently it rose to high point of 3 per cent. In 2011 out of 9311 filed applications only 587 were granted asylum.⁸ Many of the criticisms of the Greek asylum system are highlighted in academic papers⁹ and NGO reports¹⁰, as well as in judgments by the European Court of Human Rights, which deemed Greece unfit for protecting refugees¹¹. All the above document that detainees are

often prevented from seeking protection or sometimes tricked out of the process by the police; for example, they release them before their interviews take place or give them crucial information only in Greek. Based on personal conversations with asylum seekers, long delays and widely known inefficiencies *made them reluctant to apply for asylum at the earliest point*.

The country's recent economic decline, highly porous borders, growing xenophobia, and ineffective legal and institutional framework have made Greece an undesirable place of residence. In 2010, for the first time in 20 years, the immigrant population in Greece started decreasing¹². As an economic immigrant vividly put it, *'you have to understand me. There is nothing for me in Greece. I don't want to steal. I just decided to leave'*. Without papers, however, departure is not permitted.

Leaving Greece

Recent case studies have shown that the severe recession has had a negative impact on low-skilled laborers, particularly Greece's immigrant population¹³. More specifically, the shrinking of the construction and agricultural sectors has put large numbers of foreign nationals out of work. According to the Hellenic Statistical Authority, the unemployment rate in Greece has risen steadily over the past several years and will continue to grow throughout the following years. Immigrants participate in the Greek labor force at high levels, and their rate of unemployment has increased more than the overall rate over the course of the recession, most sharply after the third quarter of 2008. This is reflected in the thousands of applications that the International Organisation for Migration received in 2012 from foreign residents who wanted to return to their countries voluntarily. Out of 9,000 requests, 7,052 came from irregular migrants, 1,661 from asylum seekers and 106 from refused asylum seekers¹⁴.

6. Psimmenos I. and Kassimati, K. (2002) *The Greek case: Immigration Control Pathways: Organisational Culture and Work Values of Greek Welfare Officers*, IAPASIS Project Report, KEKMOKOP, Panteion University, Athens, available at: <http://www.eui.eu/RSCAS/Research/IAPASIS/Reports.shtml> , accessed on 20 August 2012; Triandafyllidou, A. (2005) *The Greek Migratory Policy: Problems and Directions*, ELIAMEP Policy Texts, Nr. 6, 2005, available at: <http://www.eliamep.gr/en/migration/publications-migration/migration-policy-in-greece/> last accessed on 19 August 2012; Triandafyllidou, A. (2009) *Greek Immigration Policy at the Turn of the 21st Century. Lack of Political Will or Purposeful Mismanagement?*, European Journal of Migration and Law, 11: 2.
7. OECD (2010) *International Migration Outlook*, SOPEMI 2010.
8. Statistics from http://www.astynomia.gr/index.php?option=ozo_content&perform=view&id=12630&Itemid=73&lang , accessed on 20th August, 2012.
9. Skordas, A. and Sitaropoulos, N. (2004) *Why Greece is not a safe country for refugees*, International Journal for Refugee Law, 16: 1; Papadimitriou, P. N and Papageorgiou, I. F. (2005) *The New 'Dubliners': Implementation of European Council Regulation 343/2003 (Dublin-II) by the Greek Authorities*, Journal of Refugee Studies, 18: 3.
10. Pro Asyl (2007) *The truth may be bitter but it must be told: The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard*, Frankfurt a. M. and Athens; Human Rights Watch (2008) *Stuck in a Revolving Door: Iraqis and Other Asylum Seekers and Migrants at the Greece/Turkey Entrance to the European Union*, USA.
11. S.D. vs. Greece, 11.06.2009; A.A. vs. Greece, 22.07.2010; Tabesh vs. Greece, 26.11.2009; M.S.S. vs. Belgium and Greece, 21.01.2011; Rahimi vs. Greece, 05.04.2011; R.U vs. Greece, 07.06.2011.
12. Triandafyllidou, A. and Maroufouf, M. (2011) GREECE, Report prepared for the SOPEMI Meeting, Paris, 1-3 December 2010.
13. Maroukis, T. (2012) *Migration and the crisis in Greek society: the parameters of a coordinated departure*; Triandafyllidou, A. and Maroukis, T. (2012) *Migrant Smuggling: Irregular Migration from Asia and Africa to Europe*, Migration, Minorities and Citizenship Series, Basingstoke: Palgrave Macmillan.
14. Private conversation with IOM officials.

However, voluntary return schemes to countries of origin represent only a small fraction of foreigners who want to leave Greece. Thousands of people consider Greece a transit country, which can offer them a ticket to better work and life opportunities somewhere else in Europe¹⁵. These people linger in the streets of Athens until they find a safe (illegal) way of crossing to Europe¹⁶. 'Most of the illegally staying immigrants in Greece that arrived in the country at some point over the last three years (2009-2011) are constantly attempting to leave the country in any possible way'¹⁷. Some of them are arrested and detained at the airport detention centre.

Outflow migration from the Athens airport

For those who wish to exit the country, the journey from the doorway of the Greek-Turkish border, to Athens, and then to a country in Europe passes through the Athens international airport, Eleutherios Venizelos. While there are other routes, which sometimes involve crossing the Western Balkans or being smuggled through intra-EU ferry connections between Greece and Italy¹⁸, Athens airport acts as one of the main exit points from Greece to the rest of Europe. In this it diverges sharply to other airports around the world, which act as the main entry points. In reality, in Europe 'a large proportion of asylum applications were filed by passengers using forged documents on intra-Schengen flights arrived from Athens airport'¹⁹.

Greek border control authorities estimate that around 200 people attempt to fly to a European destination every day, yet only a maximum of 10 are apprehended. The problem is not just one of inefficiency or effective human smuggling. 'We could catch them all if we wanted to' one official claimed, 'but we have nowhere to put them'. Greek border officers are also increasingly critical of the task being demanded of Greece: 'It's a European problem, we want to let them go because we don't want them in the country; let others decide what's going to happen to them'²⁰. Greek border

Thousands of people consider Greece a transit country, which can offer them a ticket to better work and life opportunities somewhere else in Europe.

control is central to European border control. Realising the need to secure another one of Greece's borders, Frontex has been operating at the airport with increased intensity. Guest officers from Rapid Border Intervention Teams (RABIT) have been employed to support Greece's capacity to patrol the border due to exceptional migratory pressure.

Notwithstanding investment in technology and personnel, immigrants and asylum seekers manage to squeeze through, drawing on informal and formal opportunities. Finding a fake passport or ID cards in the centre of Athens is not hard, although the fees, for some, may be prohibitive as they range from 500 to 3000 euros. Detainees report a preference for French or Greek ID cards or passports. They obtain them in a number of ways, either by procuring forged (photo substitution) or counterfeit documents, or they use another person's genuine papers (imposters). Once furnished with ID they take their chances, like EU tourists, preferring smaller regional airports as arrival points in order to take advantage of cheaper connections. As one man put it, 'I can come back again. I will do it again and again until I succeed. Athens is a few hours away from the border and then from Athens you go everywhere you want'. Even so, flying out of Greece with fake documentation does not come without its risks; each day some do get arrested

and detained.

Detention at the airport detention facility

Arrests at the airport do not follow a consistent pattern and can seem arbitrary. Those who are arrested are transferred to the Athens airport detention facility, which has the unenviable — albeit deserved — reputation as the worst detention centre in Athens. International human rights organizations, like Amnesty International (2010) and CPT (2011), have repeatedly expressed their concerns over severe overcrowding and unhygienic conditions. So, too, the European Court of Human Rights has found in the judgment in *M.S.S.* that

15. Papadopoulou, A. (2004) *Smuggling into Europe: Transit migrants in Greece*, Journal of Refugee Studies, 17: 3.

16. Human Rights Watch (2008); Amnesty International (2010) *Greece: Irregular migrants and asylum seekers routinely detained in substandard conditions*, London: Amnesty International Publications.

17. Maroukis, 2012: 2.

18. Antonopoulos, G. A. and Winterdyk, J. (2006) *The Smuggling of Migrants in Greece: an examination of its social organisation*, European Journal of Criminology, 3: 4; Frontex (2011).

19. Frontex (2012) Annual Risk Analysis (p. 18), Warsaw, Poland.

20. For a report on the issues that Dublin II returnees face in Greece see, AITIMA (2009) *Out the back door: the Dublin II regulation and illegal deportations from Greece*, Greece.

the conditions of detention of third country nationals in the Athens airport detention centre violated the prohibition on inhuman or degrading treatment in Article 3 ECHR²¹.

The centre was designed to provide short-term housing prior to transfer to another detention facility in Athens. In practice, however, both economic immigrants and asylum seekers are routinely held in the centre for more than 90 days. The facility itself is divided into two parts: one for those detained on a 'criminal' basis, that is those who attempted to leave Greece with fake documents, and another for women, minors and the small number of people who arrive in Greece by plane.

Women, minors and arrivals are allowed relative freedom of movement and only a few stay for more than one month. However, the men housed in the main section are huddled together in spaces designed as single-occupancy cells (each 9 square metres) behind iron doors with very little natural light and no access to an exercise yard. Their only physical movement is limited to going to the toilet for a few minutes in the morning and the evening. At all other times they are locked inside their cells with nothing to do. At times even this 'trip' to the toilet is not allowed due to severe overcrowding or staff inaction. As detention officers put it: *'We are not their servants here. They cannot go to the toilet whenever they want. They are too many, so we will take them only when we can'*²².

At the time of writing, 67 people are detained in this way in nine single-bed cells, though the number has reached a high point of 120 detainees. These men have to sleep on mattresses or blankets placed directly on the floor. When it is crowded like this, the men cannot all can lie down and sleep at the same time. Other rules restrain them: they are not allowed to smoke more than three cigarettes, they are not given cutlery for 'security' reasons and conditions of hygiene are never properly observed leading to the transmission of contagious diseases. The effect of absolute control is not lost on the

male detainees: *'we are buried alive here. This is like a mass grave' ... 'but we are not animals, we are humans and we have human rights, no?'*

In 2012 Medical Intervention wrote a report, addressed to all the relevant Ministries and officials, to register the main deficiencies of the airport detention area. Although the officials at the airport centre initially responded merely by threatening lawsuits for slander, the leakage of the report in the media appears to have energized the management and staff to create better conditions for the detainees. During the summer, a large number of detainees were released, the frequency of access to toilet was increased, plastic cutlery was offered with every meal and generally officers were more receptive to our suggestions.²³ Such changes, though

welcome, do little to address the basic problems of this facility that, in January 2012, was held by the CPT (2012) to contravene basic standards of decency and humanity.

Trapped in Greece

Greece will soon detain a much larger number of immigrants than its current prison population of 12,000 people²⁴. Operation 'Xenios Zeus', launched in August, 2012 by Prime Minister Antonis Samaras, aims to restore human dignity to immigrants at the same time as it sets out plans to

arrest all undocumented migrants in Greece, indefinitely detain them in web of remote centres located in buildings pressed into service for this reason, before eventually deporting them. According to police sources they have so far arrested 10,000 people and detained more than 4,000²⁵. The government has also announced its intention to build 30 new detention centres by 2014 to hold 30,000 immigrants. The multi-million programme, funded by the European Union, foresees the creation of 'closed hospitality centres' on unused military sites to fight inner-city crime, deter economic immigrants and create local jobs²⁶.

Their only physical movement is limited to going to the toilet for a few minutes in the morning and the evening. At all other times they are locked inside their cells with nothing to do.

21. *M.S.S. v Belgium and Greece*, op cit, para. 231-234; *R.U. v Greece*, ECtHR, Application No.2237/08 of June 7, 2011, para. 63-64; *S.D. v Greece*, ECtHR, Application No. 53541/07 of June 11, 2009, para. 49-54.

22. Detainees claim that they are allowed to go to the toilet for a maximum 3 times a day. Many times they urinate in plastic bottles or against the doors.

23. They have now allowed us to offer them books and detainees can buy food from the canteen at the airport as meal portions are very small.

24. The number of migrant detainees cannot be found in any official police statistics; however, based on rough estimates this number is now around 10,000.

25. See, <http://euobserver.com/justice/117178>

26. The first of such centres built on the outskirts of Athens will soon hold 2,000 immigrants.

According to Greek legislation, immigration detention shall not exceed a maximum of six months²⁷ and shall only be used in cases of danger to public order and with a view to deportation (Law 3386/2005, Article 76). However, the state can do neither at the moment. Once detained, most individuals, including trafficking and smuggling victims and asylum seekers, are given an administrative deportation order. Nonetheless, the number of official deportations from Greece is small compared to the number of persons arrested and detained for illegal entry or presence. For example, in 2008, 20,555 deportations took place out of 81,741 issued orders. Significant challenges to Greece's ability to deport undocumented foreigners have been identified. Such obstacles include low cooperation between diplomatic authorities of the migrant's country and Greece, problems in identifying nationality, difficulties in implementing the return agreement with Turkey²⁸ and lack of diplomatic representation of some countries in Greece (e.g. Somalia, Afghanistan, Sierra Leone).

The number of arrests has risen to unexpected proportions, while the capacity of police stations and detention centres remains small. Consequently, irregular migrants are now released arbitrarily in a move that ironically mirrors their original arrest and detention. Upon release, they are issued with a police notice ('white card') insisting they leave the country voluntarily within 30 days, even though this departure is legally impossible for irregular migrants. This card is almost always in Greek and is not accompanied by any information in their language. It is sometimes mistakenly considered an identity card or a travel document. In essence this white card is seen as a ticket from the border to Athens and then to another country. Thus, the majority remain in the country illegally; released only to be arrested, detained again and issued yet another white card.

This is the reality for most detainees at the airport. They are arrested attempting to leave Greece, they

remain in detention for 6 months and they are then released with the white card which gives them the opportunity to try again. Some of those who make it to Europe are later returned to Greece under the Dublin II Regulation. So, irregular migrants at the airport cannot move onward because of EU law and cannot move back home. They remain 'stored' in Greece, in detention under terrible conditions or on the streets with the legitimate fear of racist attacks. They have no possibility of obtaining legal status because of the country's antiquated immigration system and recent changes that call for a reconsideration of all residence permits and asylum claims. This vicious cycle takes irregular migrants in Greece from the border to the inhospitable streets of Athens in a quest for an opportunity to leave Greece. They then go to a detention centre before they are pushed out the back door on the streets again. This shows the path of illegality on which irregular migrants are trapped while in Greece.

Conclusion

The walls of the airport detention centre are covered with posters of the advertising campaign 'Live your myth in Greece' and beautiful pictures of scenic places on Greek islands. The irony is painful. Not only will the detainees never visit these places but no myth awaits them in Greece either. On the contrary, most will be consumed by the Greek immigration maze, with no way out and no thread that can lead them where they want to be. Immigrants who want to stay in Greece are forced to leave due to the current economic situation of the country and the apparent rise of xenophobia and racist attacks, and those who want to leave are trapped here. Greece does not want the role it has, nor do immigrants want to stay there. However, they get stuck in the country with no realistic options.

27. The maximum period of detention was increased in 2009 from 3 to 6 months, with the possibility of extending it to 12 months under special circumstances, like long prison sentences (Law 3386/2005, as amended by 3801/2009). The new Minister of Public Protection, as part of the new operation, has asked detention centre directors to apply the 12 month period to all detainees. This is the government's last resort to force detainees to ask for 'voluntary' departure from Greece.

28. For a report on this issue see, Human Rights Watch (2008).

Sentencing in immigration-related cases: the impact of deportability and immigration status

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Introduction

Over the last few decades, European prisons have held an increasing proportion of foreigners.¹ In some countries, such as Switzerland (71.4 per cent), Luxembourg (68.7), Cyprus (58.9) and Belgium (41.1), the percentage of foreigners in prison is vastly disproportionate to their numbers in the community.² In the prisons of England and Wales, 14 per cent are citizens of elsewhere, well below the European average of 20 per cent, yet still out of sync with the general community where foreigners constitute only 8 per cent of the population.³ In England and Wales as elsewhere, the numbers of foreigners incarcerated have grown steadily over a relatively brief period of time, expanding from 8 per cent in 1999 to 12 per cent in 2004 and 14 per cent in 2009. These increases have been out of step with the overall growth of the prison estate, with foreign nationals increasing by 113 per cent between 1999 and 2008, a decade in which the overall population expanded by 20 per cent.⁴

These days virtually all prisons in England and Wales hold some foreigners. Nonetheless, the population is not distributed evenly around the country, concentrated instead in London prisons, where they account for 25 to 48 per cent of the total sum behind bars.⁵ As with British citizens, foreigners are incarcerated for a range of offences. They cluster in certain areas, however, and are particularly overrepresented in the group held for 'fraud and forgery' offences and 'drug offences.' In 2009, half of those in prison under an immediate custodial sentence for 'fraud and forgery' were foreign nationals and 20 per cent of the prison population under an immediate

custodial sentence for drug offences were foreigners. For other type of offences, non-nationals serving immediate custodial sentences represent between 4 per cent (burglary offences) and 11 per cent (motoring and sexual offences) of the total prison population by offence. Recent figures from the Home Office show that by March 2012, 1,053 people were in prison for a number of offences under immigration acts and other related offences —such as deception and document fraud.⁶

Despite the increasing number of foreign nationals in prison for so-called 'immigration offences' and the impact of this upward trend on the general prison population, little is known about why this group of prisoners is steadily growing. In this article I explore possible reasons for this trend, finding increasingly restrictive immigration policies, rigid rules that mandate custodial sentences in cases involving immigration-related suspects and the inflexible observance of them by the judiciary as contributing factors.

Immigration, illegality and criminalisation

The growing prison population of foreigners convicted for immigration-related crimes is directly linked to tighter immigration controls. Since the mid-1990s successive administrations have introduced measures to restrict the number of unauthorised immigrants while closing down legal channels for immigration to the country. In the early 2000s, the abuse of the asylum system by 'bogus' asylum seekers became a high priority for the Labour administration after it turned into a point of attack by the opposition and the tabloid media. As a consequence, an important number of criminal offences were introduced during this period. The creation of new offences sent the

1. Eg Melossi, D. 2003. 'In a Peaceful Life': Migration and the Crime of Modernity in Europe/Italy. *Punishment & Society*, 5, 371-397; Wacquant, L. 2006. Penalization, Depoliticization, Racialization: On the Over-incarceration of Immigrants in the European Union. In: Armstrong, S. & McAra, L. (eds.) *Perspectives on Punishment*. New York: Oxford University Press; De Giorgi, A. 2010. Immigration control, post-Fordism, and less eligibility: A materialist critique of the criminalization of immigration across Europe. *Punishment & Society*, 12, 147-167.
2. International Centre for Prison Studies, World Prison Brief, available at http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=132 (last accessed: 8 May 2012).
3. Rienzo, C. & Vargas-Silva, C. 2011. Migrants in the UK: An Overview. *Migration Observatory*, available at <http://www.migrationobservatory.ox.ac.uk/briefings/migrants-uk-overview> (last accessed: 27 September 2012).
4. Ministry of Justice. 2010. Offender Management Caseload Statistics 2009. London: Ministry of Justice, p. 78.
5. Hammond, N. 2007. United Kingdom. In: van Kalmthout, A., Meulen, F. H.-v. & Dünkel, F. (eds.) *Foreigners in European Prisons*. Nijmegen: Wolf Legal Publishers, p. 815.
6. Data provided by the Minister for Immigration, Damian Green MP, and taken from the National Offender Management Foreign National Database (caseworking database owned by the Criminal Casework Directorate).

message to the electorate that all the possible measures were being adopted to tackle immigration law-breaking.⁷ In addition to the existing offences of fraud, others were added to the catalogue of immigration offences.

In turn, these offences started to be more strictly enforced. While criminal law provisions have been used in the past against people with false documents seeking to enter the country — particularly those in transit to other countries to claim asylum,⁸ since the mid-1990s there has been a noticeable increase in the enforcement of fraud-related offences.⁹ Just one of the new crimes introduced in section 2 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 — being unable to produce an immigration document at a leave or asylum interview on entering the UK — accounted for a 44 per cent increase of total proceedings on immigration-related cases at magistrates' courts between 2004 and 2005. In 2005 alone, 475 people were proceeded against for this offence. Similarly, since the offence of using deception to enter and remain was modified by the Asylum and Immigration Act 1999 to cover a broader set of conducts (seeking the avoidance, postponement or revocation of enforcement actions by deception), rates of prosecutions and convictions have sharply increased.¹⁰ Still, most immigration offences are not prosecuted as they are considered by the UK Border Agency as low-level matters best dealt with through administrative removal. Only when removal is not viable is a prosecution initiated.

Restrictive immigration policies which have been increasingly backed up with criminal law powers and stricter enforcement of these powers have led to a rising number of people imprisoned for non-compliance with immigration rules. To reduce the criminal justice system's backlog, in December 2010, the Coalition government launched a number of pilots to divert cases of document fraud and deception

involving foreign nationals away from the criminal justice system through the use of simple caution and removal.¹¹ However, the number of cases diverted was very small: simple caution was used in only five out of 109 eligible cases.¹² Other measures to reduce the number of foreigners in prison include the removal of prosecution targets for immigration offences established by UKBA in 2008 and the introduction of early removal schemes and more effort to repatriate foreign national offenders to serve their sentences in their own countries.¹³

While the green paper in which some of the measures described above were laid out also announced an overhaul of the sentencing framework, no proposal was made to modify pre-trial and sentencing norms applying to non-nationals. These norms as they stand and as they are applied by the courts have contributed to the growing proportion of foreigners accused of immigration offences behind bars. 'Immigration offenders' are not only foreigners; they frequently have no residence or close ties to the country. Many do not have family or friends. They are 'illegal,' 'irregular' and due to be expelled. Such factors generally make it difficult for these people to obtain bail and thus explain the high levels of untried foreigners in prison. In

2009, 15 per cent of foreign national prisoners were untried, compared to 9 per cent among British national prisoners.¹⁴ As I will show below, matters are compounded by the manner in which foreigners in general and those accused of immigration offences in particular are very likely to be punished with custodial sentences in case of conviction.

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Sentencing decisions in immigration-related cases

Concerns about proportionality and social justice in sentencing have tended to focus predominantly on

7. Spencer, S. 2007. Immigration. In: Seldon, A. (ed.) *Blair's Britain 1997-2007*. Cambridge: Cambridge University Press.

8. Dunstan, R. 1998. United Kingdom: Breaches of Article 31 of the 1951 Refugee Convention. *International Journal of Refugee Law*, 10, 205-213.

9. Home Office. 2010. Control of immigration: Statistics United Kingdom 2009. London: Home Office. Cmnd 15/10, p. 35.

10. Home Office. 2006. Control of Immigration: Statistics United Kingdom 2005. London: Home Office. Cmnd 6904, p. 25.

11. Ministry of Justice. 2010. Simple Cautions for Foreign National Offenders Pilot Policy Statement. London: Ministry of Justice.

12. Response to a FOI request, 2 March 2012 (Ref 21732).

13. Ministry of Justice. 2010. *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*. London: Ministry of Justice, p. 66.

14. Ministry of Justice. 2010. Offender Management Caseload Statistics 2009. London: Ministry of Justice, p. 51.

the treatment by the criminal justice system of disadvantaged groups, such as ethnic minorities, the unemployed, the mentally disordered and, to a lesser degree, women.¹⁵ Scholars of criminal justice and sentencing have neglected the situation of foreigners, paying barely any attention to the decision-making process before the courts. The result of this oversight has been that we simply know very little about sentencing patterns in cases involving illegal border crossing.

Most non-nationals convicted of immigration offences are sentenced to a term in prison. In the vast majority of these cases alternative sanctions are not considered. Unfortunately, there is no statistical data on the type of sanctions imposed on foreigners convicted for ‘fraud and forgery’ offences since, unlike the Prison Service data, sentencing data is not disaggregated by the nationality of the defendant. But, sentencing guidelines, case-law and judicial practices suggest that foreigners in these circumstances are very likely to receive a custodial term if convicted.

According to sentencing guidelines and case-law, offences of this kind should be generally punished with immediate custodial sentences.¹⁶ In the leading case of *R v Dhajit Singh*¹⁷ the Court of Appeal stated that cases involving the use of false document ‘will almost always merit a significant period in custody... usually within the range of 6 to 9 months even on a guilty plea by a person of good character’ [at 492]. Such a penalty range was later increased in *R v Kolawole*¹⁸ to between 12 and 18 months. The main justification for this increase was that ‘international events in recent years and the increase in public concern which they have generated, justify deterrent sentences at a higher level’ [at 6]. Similarly, in cases involving the offence of entering the UK without a valid document, the Court has stated that a custodial sentence is the appropriate sanction because of its prevalence and the need to deter others (see *R v Safari and other*; *R v Wang*).¹⁹

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The Court of Appeal has distinguished between using a false document to secure entry to the country or to remain, and using it for obtaining work by a person who has been allowed to be in the country. In *R v Mutede*,²⁰ the Court reduced a conviction from 14 to six months imprisonment because, based on this distinction, it considered that the sentence was excessive. Likewise, in *R v Ovieriakhi*,²¹ the judges explained the rationale for imposing custody — albeit reduced in length — in cases of use of false documents to work, as opposed to enter to the country: ‘What the use of a passport to obtain work does [...] do is to facilitate the offender remaining in the United Kingdom in breach of immigration controls. For that reason a custodial sentence is usually required. But it can justifiably be less’ [at 16].

In its decision in *R v Carneiro*,²² the Court of Appeal judges sustained the principle that these offences should be punished with a term in prison, and can be suspended only in exceptional circumstances. The accused was caught working with a false document. After stating the reasons for considering this offence serious and thus deserving a custodial sentence, the judges upheld the decision of the lower court:

[O]nce it is recognised that ordinarily the appropriate sentence for an offence of this kind does involve immediate custody, there has to be some good reason for the judge to act differently in a particular case for simple reasons of consistency [at 15].

In contrast, in a case involving a Zimbabwe national who had been found using a false document, the Crown Court judge suspended his sentence and ordered that he performed 80 hours of unpaid work on the grounds that the defendant could not be returned back to Zimbabwe. The judge made clear that this was ‘a very limited class of case, very restricted.’ The defendant applied for asylum and his application was

15. Ashworth, A. 2010. *Sentencing and Criminal Justice*, Cambridge: Cambridge University Press, p. 423.
 16. Sentencing Guidelines Council. 2005. *Guideline Judgments. Case Compendium*. London: Sentencing Guidelines Council, p. 96.
 17. [1999] 1 Cr App R(S) 490.
 18. [2004] EWCA Crim 3047.
 19. Respectively, [2005] EWCA Crim 830 and [2005] EWCA Crim 293.
 20. [2006] 2 Cr. App. R. (S.) 22.
 21. [2009] EWCA Crim 452.
 22. [2007] EWCA Crim 2170.

refused. He was found in possession of false identity documents, which he used to obtain work. The Attorney General appealed this decision arguing that it was too lenient. After reiterating that deterrent sentences were necessary to protect the public from terrorism and the breach of immigration controls, the Court of Appeal judge decided that those principles do not apply to the case: 'any possible connection with schemes or arrangements to avoid immigration control could safely be excluded' and added that it was not a lenient sentence but a merciful one: 'It was a merciful sentence, in a case where the exercise of the judicial quality of mercy was entirely appropriate'²³ [at 26 and 32]. In this final case, it appears that the impossibility of returning the defendant to his home country was central in the decision to suspend the sentence. I will return to this point later in the paper.

The lower courts follow the guidelines set by the Court of Appeal. In a review of court files from Uxbridge Magistrates' Court and Isleworth Crown Court (both with jurisdiction over Heathrow airport) on cases involving people accused of various immigration crimes, I found that judges were generally reluctant to consider non-custodial sentences in these cases. In Uxbridge, in all the 229 cases the 232 accused for immigration offences received a term in prison upon conviction.

None of them had their sentences suspended and in none of these cases was a pre-sentence report to examine alternative sanctions ordered. In one of them, the magistrates explained: 'we would normally ask for a [pre-sentence] report before awarding a custodial sentence but, in your case, there are no matters with which probation could assist.' Most of these people were charged with the offence of being unable to produce an immigration document upon arrival to the country. They were caught in the airport when trying to enter the UK. In the crown court, the judges suspended the sentence of ten out of 106 immigration defendants. One other person was discharged. All of the defendants who had their sentences suspended were accused of facilitating others and were either legal residents or naturalised British citizens. In all the cases involving undocumented migrants convicted for an immigration crime the judges imposed imprisonment as a sanction.

The decisions on these cases are primarily based on deterrence, both general and individual: to deter others and to prevent the accused from reoffending.

The conduct penalised by immigration-related offences, the judges argued in their decisions, undermined a number of policy goals, including the control of the borders, the security of the country, and the integrity of international travel documents. They are serious enough to warrant a custodial sentence. However, why the behaviours penalised by these offences are so serious is barely spelt out. Paradoxically, the UKBA does not deem these conducts as serious. As explained above, most of these offences are not prosecuted because they are considered low-level offences best dealt with by removal. In case of conviction, people accused of failing to provide a valid passport are usually punished to a short term in prison that ranges from two to six months. Even though facilitation is considered a more serious offence — punished with a maximum of 14 years imprisonment — people convicted for this offence are more likely to have their sentences suspended than those accused of document fraud. Hence, the seriousness of the offence does not substantiate the sanction imposed.

The decisions on these cases are primarily based on deterrence, both general and individual: to deter others and to prevent the accused from reoffending. As explained above, sentencing guidelines and case-law state that prevention is the main justification for punishment. Because the conducts penalised by immigration-related offences are prevalent — particularly at ports of entry — and have the potential to undermine the system of immigration controls, they should be prevented. Even though this justification is repeated tirelessly by magistrates and judges, the deterrent effect of punishment in these cases is dubious.

First, many of the 'undocumented arrivals' are not aware that their actions are subject to criminal punishment in Britain. Because many travel with the aid of facilitators, they have usually little or no control over travel arrangements and choice over country of destination.²⁴ Second, many of them are escaping persecution and appalling social and economic conditions. In these circumstances, the possibility that the threat of a sanction affects their reasoning and actions is slim. In other words, they are hardly

23. Attorney-General's Reference Nos 1 & 6 of 2008 (Simbarashe Dziruni) (Jean Claud Justin Laby) [2008] EWCA Crim 677.

24. See *R (on the application of K) v Croydon Crown Court* [2005] EWHC 478 (Admin) [at 11] quoted in Brennan, R. 2006. *Immigration Advice at the Police Station*. London: The Law Society, p. 156.

'deterable.' Third, arguably removal might have just as powerful a deterrent effect on some immigrants as a criminal prosecution and a term in custody. Why does deterrence need imprisonment? Finally, the possible deterrence of these sentences is further undermined by the unpredictability of the use of criminal powers in these cases. People caught with false documents or without one are usually summarily removed. As I have already argued, generally only those who cannot be immediately removed are prosecuted. Such practice clashes against the principle of predictability of criminal proscription and dilutes any preventive goal. Further, the justification of punishment solely on deterrence grounds, risks treating people as a means to achieve certain policy goals leading to unfair and disproportionate sanctions. Deterrence should not be used as a blanket justification for punishing and imprisoning people without legal status. In a recent decision, the European Court of Justice made clear that the exclusion of an EU citizen cannot be justified on general preventive grounds, that is for deterring others.²⁵ Even less can a criminal sentence be based on wholesale preventive justifications without any reference to the individual circumstances of the case and as to why the custodial threshold is reached in that case.

Immigration status, deportation and imprisonment

The immigration status of the defendant seems to be crucial in the determination of the sanction, albeit not clearly articulated in sentencing decisions. Even though residence — and the possibility of deportation — should not have any relevance in the final decision, judges appear to take such factors into account when they choose the type of sanction in immigration-related cases. In the absence of legal status and residence, defendants are more likely to spend their sentences in prison. The prospect of removal is central for the determination of the sanction in cases involving unauthorised migrants.

This last factor (the prospect of resettling) and the shadow of deportation seems to have an enormous weight in judicial decisions about how and for how long to punish those who defy the boundaries of their status.

The weight of factors such as residence and immigration status is even more acute in the case of those accused of immigration crimes for procuring entry or stay by illegal means. As Rix LJ clearly put it in *R v Benabbas*,²⁶ 'illegality or irregularity can [...] be the essence of the offence for which the defendant is sentenced.' In these cases, the judge continued, 'the essential gravamen of the offence for which the defendant is being sentenced is itself an abuse of this country's immigration laws' [at 40, 41]. Hence the question of illegality is intrinsically connected to the crime for which immigration-related suspects are being called into account. These two aspects cannot be differentiated and in practice they are not. In 'Benabbas,' the Court of Appeal concluded that while the immigration status of the defendant might be irrelevant for the determination about deportation — which is based on the potential detriment to the country of the continued presence of the offender, in immigration-related cases the incriminating conduct is in itself detrimental to public order. Thus, a conviction in these cases per se merits a recommendation for deportation against the person so convicted.

The seriousness of the offence and the need to prevent illegal immigration to the country seem to be weak justifications for imposing custody on these particular types of offenders.

Instead, the central reason for punishing foreigners convicted for immigration-related crimes with custodial sentences is effectively linked to the real or potential prospect of removal and to more practical considerations around how to instrumentalise supervision arrangements in these cases. Bhui reports that prison and probation staff face difficulties when planning and supporting foreign nationals with their sentences.²⁷ As a consequence, he indicates that 'foreign nationals were less likely to be given assistance with education, training, housing, and employment advice, because limited resources were targeted on those who were certain to be resettling in the UK.'²⁸

25. ECJ, Judgment of 10 February 2000. Ömer Nazli, Caglar Nazli and Melike Nazli v Stadt Nürnberg. Case C-340/97. *European Court reports 2000 Page I-00957*, par 64.

26. [2005] EWCA Crim 2113.

27. Bhui, H.S. 2009. Foreign National Prisoners: Issues and Debates. In: Bhui, H.S. (ed.) *Race and Criminal Justice*. London: Sage.

28. Bhui, H.S. 2007. Alien experience: Foreign national prisoners after the deportation crisis. *Probation Journal*, 54, p. 373.

This last factor (the prospect of resettling) and the shadow of deportation seems to have an enormous weight in judicial decisions about how and for how long to punish those who defy the boundaries of their status. As Judge Murphy confessed in the case against a Zimbabwean who could not be removed back to his country, he was not in doubt about the criminal nature of the offence — possession of a false passport. His 'dilemma' was 'the nature of the punishment that must be imposed on these people' who cannot be returned and who can neither work nor claim welfare benefits (quoted in Attorney General *cit* [at 22]). In addition, judges and probation staff do not usually have access to data regarding past convictions and other information that is used by the criminal justice system to routinely assess risk, as pre-sentence reports are generally not ordered. Thus, many of the people accused for immigration-related crimes, particularly those for whom identity cannot be established with certainty, are complete strangers.

Conclusion

The whole criminal justice procedure in cases involving immigration offences, including the decision to prosecute, the judicial decisions and the subsequent prison regime, is mediated and determined by the immigration status of the defendant. This

consideration, which is linked to the prospect of removal, is the key to understanding against whom and in which circumstances a criminal prosecution is initiated. It is also central for determining the type of sanction to be imposed. In prison, few or no resources are allocated to foreigners who are unlikely to be resettled in the UK and due to be expelled.

This reinforcing rationale whereby people are prosecuted because they cannot be removed and are imprisoned so as to facilitate removal has no apparent beneficiaries. For those who fall foul of the hybrid criminal and immigration system the result is longer periods in detention and a criminal conviction on their records. For the government, the imprisonment of petty immigration offenders has little or no substantial effect on illegal immigration rates. Further, it has pernicious effects on prison overcrowding and on the overburdening of the criminal justice system. Instead of reducing the number of foreign nationals in prisons as the government has pledged, the policy of incarcerating immigration offenders is contributing to the growth of the prison population. Finally, the prosecution and conviction of these people is not even effective symbolically. The idea of a government targeting poor and destitute undocumented migrants barely imprints a picture of a powerful, virile state. To the contrary, the image that comes to one's mind is that of a state unable to effectively handle mass global mobility.

Double Punishment:

The treatment of foreign national prisoners

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A foreign national prisoner (FNP) is defined in prison service policy as someone who does not hold a UK passport. It is not easy to generalise about who this term covers as it encompasses people of different nationalities and statuses. Very many will have been in the UK legally at the time of their arrest. Some have lived in the UK for a long time, others are economic migrants looking for a better life, and still others are fleeing persecution from their homeland.

At the end of June 2012, there were 10,861 people classed as foreign national prisoners in England and Wales and 1,949 whose nationality was not recorded.² They came from 160 countries. However, over half were from ten countries — Jamaica, Poland, Republic of Ireland, Nigeria, Romania, Pakistan, Lithuania, India, Somalia and Vietnam.³

The following list is not exhaustive but foreign national prisoners may be:

- Foreign citizens with British partners and children
- People brought into the country as children with their families
- Asylum seekers with indefinite leave to remain
- European and Irish Nationals
- People trafficked as drug carriers or for menial labor or sex work
- People who had legal permission to be in the UK, which expired during time in prison
- People who entered the country on false documentation who were arrested at point of entry

There are significant numbers among this group who have the right to live and work in this country. There are others, such as those trafficked or facing persecution in their country of origin that we have a duty to protect. In addition, there are people in prison who were brought to this country as very young children. Many people come here legally with their

families, who may not have got their status regularised. They therefore have few or no links to other countries. They grow up within the education system and get work here. They may not realise that they are not actually UK citizens until they enter prison and have their status assessed by the immigration authorities. Then, they and their families have to face the prospect of them being deported away from their home and community to a country where they have no connections.

In a fair system, deportation and removal decisions would be made on a case-by-case basis, looking at an individual's situation thoroughly. The pressures on UKBA to deport people and the lack of resources mean this often does not happen. The blanket policies, such as an assumption of deportation for non EEA nationals with a sentence of a year or more and procedures that are driven by an aim to remove as many people as possible from the country, lead to a deeply unfair and biased system.

One reason that the prison system is currently failing to meet the needs of this population is because, all too often, it treats foreign national prisoners as though they are a homogenous group. It is important that UKBA and the prison service have a more accurate understanding of the different circumstances of people in UK prisons and respond accordingly.

The Prison Reform Trust's advice and information service responds to around 6,000 requests for help a year. Through this work, and research with people in prison and prison staff, we are aware of the difficulties many foreign national prisoners encounter when attempting to navigate the dual challenges of the immigration and prison systems. This article looks at the current difficulties that foreign national prisoners are experiencing. It also discusses how the prison service has changed the way it manages and supports foreign national prisoners as a result of the government's proactive agenda of deporting foreign national prisoners.

1. A charity working to create a fair and decent prison system. The PRT receives no government funding in order to maintain independence (www.prisonreformtrust.org.uk).

2. Table 1.6, Ministry of Justice (2012) Offender Management Statistics Quarterly Bulletin, January to March 2012, London: Ministry of Justice

3. Ibid.

Sentencing trends and impact of the prison population

The numbers of foreign national prisoners is increasing and nearly doubled between 2000 and 2012, going up by 93 per cent. This compares to a 24 per cent increase in British nationals. This is due to changes in sentencing and remand practices. As well as the larger numbers of people being sentenced, the numbers of foreign national prisoners held on remand has also increased massively, by 107 per cent since 2000. Remand is supposed to be used only where an offence someone has been charged with is very serious but the majority of people on remand are not being held for violent or other serious offences.

Women are also disproportionately impacted by sentencing practices. The statistics for sentenced foreign national women prisoners show that 25 per cent are in prison for any kind of violent offence, robbery or burglary. This compares with 49 per cent of women prisoners from the UK.

There is a presumption in favour of deportation for any non EEA national sentenced to a year or more. However, sentences have got longer and harsher. Therefore, it is not reasonable to assume that anyone with a sentence of a year or more is dangerous or that it is in the public interest to deport them. Alongside the increase in sentence lengths generally, sentences for immigration matters and using false documents have been enacted in an unsuccessful attempt to curb immigration. This has further impacted on the numbers of people going to prison, and now 7 per cent of foreign national male prisoners and 16 per cent of foreign national women prisoners are in custody for fraud and forgery offences⁴. This is an offence of deception and although it is appropriate for the government to act, it cannot realistically be argued that all these people are dangerous.

The argument for bringing in longer and longer sentences is that it acts as a deterrent to people abroad. However, there is no evidence that people travelling here from other countries have a clear understanding of the UK's laws and policies.

Policy and culture change

*It feels like an offence just to be a foreign national.*⁵

Ten years ago, the prison service's policy was that all foreign national prisoners should be treated as individuals in terms of allocation and services. There was a reluctance to consider allocating them to specific prisons or developing specialist centres. It was believed that all prisons could and should respond to the needs of whomever their population happened to be. There were concerns that having particular establishments holding foreign national prisoners might lead to a two-tier system, build discrimination into the system or lead to tensions between prisoners.

However, this changed as the numbers increased and prisons found that the needs of this population were not being met. Individual prisons began to allocate prisoners they were transferring to prisons they believed had the resources and expertise to support them. Therefore, by 2004 there was an informal policy of grouping female foreign national prisoners in four prisons. In addition, male foreign national prisoners were accumulating at prisons such as The Mount and The Verne.

In 2006, after media reports that 1,013 people who did not hold UK passports had been released from prison without being assessed for deportation, the political interest in this area

increased. The subsequent media attention led to the sacking of Charles Clarke as Home Secretary. Following this, the government's response was to focus on deportation as the 'solution' to a perceived high number of foreign national prisoners. Over time the stated aim of the government to increase the numbers of people deported has trickled down to impact on the attitudes and practices of officers on prison wings.

There is often significant confusion — among both prison staff and prisoners — about the rights and entitlements of this group. The perception of a foreign national prisoner as a deportee, or potential deportee, influences decisions about sentence progression and other opportunities in the prison. Officers have a large amount of discretion over which prisoners can access activities and privileges in prison. In addition, resource-

The perception of a foreign national prisoner as a deportee, or potential deportee, influences decisions about sentence progression and other opportunities in the prison.

4. Table A1.19 Ministry of Justice (2011) Offender Management Caseload Statistics 2012, London: Ministry of Justice.

5. *No Way Out*, Prison Reform Trust 2012:9.

strapped prisons may have fewer incentives to offer opportunities to people who they believe may be deported within a short space of time. The prison service policy, which says it 'does not provide a policy framework for the day-to-day management of foreign national prisoners' does say they should be 'managed in the same way as British nationals while recognising their individual needs.'⁶

One response of the government was to introduce the hub and spoke system for allocating prisoners in May 2009. Previously, people in prison were allocated to a prison primarily by location close to home and sentence progression needs, as much as this is possible in an overcrowded system. However, this system brought in a new allocation process for category B and C male prisoners. The hub and spoke system was brought in to increase the number of people deported from prisons. It is based on a service level agreement between NOMS and UKBA. The six 'hub' prisons⁷ have UKBA staff working in them full time and UKBA also cover other prisons, known as the 'spoke' prisons. People were allocated to these prisons in order to facilitate UKBA working on their immigration cases

There was no consultation before the scheme came in and the usual bodies (Prison Inspectorate and other stakeholders) were unaware that it was being introduced. No equality impact assessment was done before the policy was implemented and therefore the Equalities and Human Rights Commission (EHRC) appealed this. Following the EHRC appeal, it was confirmed that prisoners could keep the right to apply for a transfer to or out of a hub prison. This could be for any number of reasons, such as family visits, court attendance, or the need to do a particular offending behaviour course. Applications must be considered in the normal way and it would be unlawful for a governor to refuse a transfer application on the basis of immigration status alone.

The shift in allocation practice and the process of transferring people meant that prisons were not being used as places of rehabilitation but by default as immigration processing or holding centres. Decisions on

allocating prisoners were taken purely on their assumed immigration status as a potential deportee, overriding the usual prison procedures that look at their closeness to their family home, any health or disability needs and their offending behaviour and sentence progression needs.

However, prisons are not removal centres. The purpose of prison is defined in statute as to encourage and assist prisoners to lead a good and useful life. This should apply to all people in prison and therefore foreign national prisoners should be afforded equivalent rehabilitative and resettlement opportunities to those that British nationals receive.

This leads to the question of whether the purpose of prison has significantly changed when holding this population. Is the prison service acting as an arm of the immigration service and warehousing people who are eligible to be deported rather than fulfilling its primary purpose of rehabilitation? Defining and managing people through the prism of their immigration status leads to discriminatory practice.

It is impossible to predict how this policy change will develop. However, under the payment-by-results agenda, reoffending will be the key assessment of success and the criteria for accessing funding and resources. If people are seen as deportees, there is little interest in whether they will reoffend in another country and no statistics are collected or held on this. Foreign national prisoners are already being excluded from opportunities to reduce reoffending⁸. It is therefore unclear how they will fare and how services to this vulnerable group will be managed under this agenda.

Legal advice

It is like trying to cross a busy road in the rush hour in a foreign country. I do not know whose arm to take to ensure I am not killed by the cars.⁹

Foreign national prisoners are amongst the most vulnerable and in need of protection in prison. They may

The shift in allocation practice and the process of transferring people meant that prisons were not being used as places of rehabilitation but by default as immigration processing or holding centres.

6. Prison Service Instruction 52/2011 1.2.

7. HMPs Risley, Hewell, Morton Hall, The Mount, The Verne and Wormwood Scrubs. Morton Hall has subsequently been re-designated as an immigration removal centre.

8. e.g. see HMIP's Report of an announced inspection of HMP Canterbury, 16-20 July 2012.

9. Prisoner quoted in *No Way Out*, Prison Reform Trust 2012:11.

be people with the least opportunity to understand the system and may not have any form of outside help in this country. They may be experiencing language barriers, cultural difference and isolation and need access to proper legal advice so that they can make informed decisions about their situation. Prison Service Instruction 52/2011, paragraph 2.75, states that it is a mandatory output that prisoners are able to access independent immigration advice, which cannot be provided by UKBA but may come from a solicitor or an organisation such as the Detention Advice Service.

Despite the obvious needs, and the mandatory requirement, in practice it can be difficult for foreign national prisoners to access legal advice and access their rights. Along with cuts in legal aid, prisons are not always located in areas where immigration solicitors have their offices. Prison managers do not always understand that the UKBA does not provide independent advice and do not always commission other organisations to provide this service.

Although it is fundamentally important that people who wish to appeal a decision about deportation get legal advice, there is no automatic process by which this can happen. Immigration matters (asylum deportation, detention and bail) are often inter-related and complex and the immigration tribunal process is not easy to understand. Prison staff are not trained in immigration law and will not have the expertise needed to answer questions prisoners may have. In addition, since 1999 it is illegal for anyone to provide unregulated immigration advice.

Isolation and Language

The main problem we all face in this prison is lack of information from prison staff. Cannot understand them when these speak to you.¹⁰

Many foreign national prisoners speak and read English but for those that don't, prison can be an

overwhelming and isolating experience. Research from the prisons inspectorate has consistently shown that the national language service has been underused. Staff rely too much on using other prisoners to interpret where professional services would be more appropriate. Over a third of foreign national prisoners who were experiencing isolation said this related to communication and language difficulties.¹¹ The interpreting service will not be effective in prisons unless it is properly resourced and staff are actively encouraged to use it.

Additionally, there are particular examples of situations in prison where people should have automatic access to an interpreter to explain what is happening to them. These include (but are not limited to) any time in segregation, ACCT reviews, health care appointments, safer custody reviews, adjudications, categorisation and any internal prison meetings that impact on sentence progression.

Providing information for people in prisons is a constant challenge. Rules and policies change rapidly and it is difficult for prison staff, especially in remand prisons, with a high turnover of prisoners, to predict what languages their population will speak. However, the current situation is that many prison staff individually spend time putting together standard information that could be centrally provided and 'tweaked' for individual

establishments. In particular, easy read information both in English and other languages could be centrally commissioned for induction and reception.

It is also not clear that all prisoners understand the immigration or deportation process. Documents advising on removal (served by prison staff) are still sent in English, irrespective of the language of the recipient. There are 10 days to appeal, and the additional difficulties of accessing external support and advice and accessing documentation and paperwork in prison are not currently taken account of by UKBA. This means that people may not have access to justice.

Despite the obvious needs, and the mandatory requirement, in practice it can be difficult for foreign national prisoners to access legal advice and access their rights. Along with cuts in legal aid, prisons are not always located in areas where immigration solicitors have their offices.

10. Prisoner quoted in *Going the Distance*, Prison Reform Trust 2004:9.

11. HMCIP Foreign National Prisoners: A Thematic 2006:15.

Detention of foreign national prisoners post-sentence

*I was told that I would be leaving today, but after I had packed up my cell and walked to the gate I was brought back in and told there is now an immigration hold on me.*¹²

Currently, people who have finished their criminal sentence but who are being considered for deportation can be kept in prison under immigration powers. The Prison Reform Trust believes that the practice of detaining anybody who is post-sentence in prison is unacceptable. There are a number of alternative options that could be explored including increased use of bail, tagging, curfew and other supervision measures. Conditions in prison are often harsher than in immigration detention centres with people being locked up for longer. UKBA can refuse to take people applying to move from prison to a detention centre. Therefore, holding immigration detainees in prison provides a 'free good' for UKBA whilst creating a number of challenges and strain on staff and resources for the prison service. Subjecting someone to indefinite detention is an extreme form of punishment and should be used only in exceptional circumstances. Research from PRT and others clearly shows that indefinite detention is a profound and extremely distressing experience both for the people detained and their loved ones.¹³

In theory, anyone post-sentence (held under immigration act powers not criminal justice powers) should be held with the same status as a 'remand' prisoner. In practice, remand prisoners are often locked in their cells for longest, sometimes up to 23 hours a day, have less access to work and education and are held in B category — almost high security conditions. In reality, for people post-sentence, access to courses, education and work is more limited. Again this may be because these opportunities are given to prisoners who are not under threat of deportation.

Sentence progression

*'Why is it so hard to get anyone's attention, every day my pleas have been totally disregarded'.*¹⁴

The lack of understanding about foreign national prisoners' needs and the prison service's duty of care and responsibilities towards them impacts on every aspect of the regime. They should be assessed for resettlement opportunities and open conditions on their individual circumstances, as a British national would be. The prison service's own policies support this, as the blanket ban on foreign national prisoners

going to open conditions was lifted and new guidance was issued in 2011. However, there is still confusion about this. Anecdotally we hear from prisoners and officers that foreign national prisoners are not eligible for open conditions.

There is also still a myth in prisons that foreign national prisoners cannot get day release (release on temporary licence). Although these decisions have to be ratified by UKBA, there is nothing in law or policy to stop people getting day release or going to open conditions. Once in open conditions, only British and EEA prisoners are allowed to work but foreign national prisoners, once security cleared, may be able to volunteer.

Some of the difficulties that people in prison experience in making progress are due to an ongoing lack of communication between UKBA and NOMS. Currently, there are a number of situations where prison staff cannot facilitate a decision on someone's progress without input from immigration staff. These include, (but are not limited to) release on temporary licence (ROTL) and access to D category (open prison).

Foreign national prisoners are systematically excluded from offending behaviour courses and other sentence progression opportunities, as there is often an assumption that they will not be released into the UK. Foreign national prisoners often have a limited level of contact with community-based offender managers, who work on the same assumption. This limited contact means that offender managers

The lack of understanding about foreign national prisoners' needs and the prison service's duty of care and responsibilities towards them impacts on every aspect of the regime.

12. Prisoner quoted in *No Way Out*, Prison Reform Trust 2012:10.

13. *Unjust Deserts*, Prison Reform Trust 2010.

14. Quote from a letter to PRT's advice and information service.

cannot always supply detailed information about risk and reoffending. This in turn impacts on decisions about sentence progression and release.

Sometimes, people are excluded from offending behaviour work or resettlement programmes because of their lack of language skills, and because facilitating interpreters is expensive. If it is believed that they will be deported they may not be a priority for a course where there are already large waiting lists. This can be a disadvantage if they have to go to the parole board or for categorisation as they cannot demonstrate that they have reduced risk.

Furthermore, despite efforts by many people and considerable political pressure, the joint working systems and information sharing between the UKBA and MOJ remain inadequate. There are a number of people in prison who have finished their sentence and who would welcome repatriation.

Paradoxically, although the government has said it is committed to exploring ways of removing foreign national prisoners even earlier, the delays receiving information for risk assessments from UKBA continue to impact on people making progress in their sentence. This increases the time people spend unnecessarily in prison.

Welfare and family

Staff are not communicate with us properly. Some of these people should not be working in prison; they stress us out too much. That's the reason some of us hang our self.....We need help.¹⁵

There are prison staff and community-based organisations that are trying to assist foreign national prisoners and support their welfare needs. However, these efforts are hampered, not just by lack of resources and pressure to treat people as potential deportees, but by the lack of prison service policy and strategy. There are prison service instructions that detail immigration processes and the prison officers have the responsibility to facilitate these. However, there is little information for prison staff about the welfare or cultural needs of foreign national

prisoners, and there is a lack of accessible information for staff and prisoners. Some prisons have developed their own local policies and organised their own community support, or commission voluntary sector organisations to provide advice and support. This enables a much better level of service. Since November 2011, it is no longer mandatory for prisons to allocate a dedicated member of staff as a foreign national coordinator.

Recent figures show that for foreign nationals in prison, self-inflicted deaths more than doubled, rising from 6 in 2010 to 13 in 2011. The figure is the highest since 2007, and means that foreign nationals made up 23 per cent of self-inflicted deaths in prison in 2011. Although there are not greater levels of suicide amongst the foreign national population at the moment, uncertainty about deportation, indefinite detention and lack of contact with family are known as risk factors. Paradoxically because foreign national prisoners are perceived as presenting few discipline or control concerns for prison staff, they can be neglected. This population does not have enough contact with their communities in the UK and abroad.

The cost of phone calls to family members in other countries for people in prison is very high and much more than people would pay for calls in the community. The prison service has made a concession to people whose family live abroad and who don't get any visits, which is a free five minutes phone call per month. However, this is small consolation to someone whose is separated from their family. The prison service could do much more to take advantage of technology such as Skype and email to enable prisoners to maintain more meaningful contact with their families abroad.

Conclusion: Legal Aid Sentencing and Punishment of Offenders Act and the future

We are cautiously optimistic that the changes to the remand test, which should means that defendants will not be remanded unless their offences are such that they

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15. Prisoner quoted in *Going the Distance* Prison Reform Trust 2004: 11

are likely to receive a custodial sentence, and the potential for using remand less, will (in time) benefit this population. However, it will be even more difficult for foreign national prisoners to access legal advice for immigration matters. Most controversially perhaps, the new Tariff Expiry Removal scheme means that foreign national prisoners on a life or IPP (indeterminate sentence for public protection) sentence can be deported at or after tariff expiry. Foreign national prisoners who were expecting to spend a considerable time in prison may find themselves being deported with little or no preparation. Conversely, for British citizens on indeterminate sentences, who face the prospect of potentially a long time in prison and no release date, this can appear deeply unfair. British nationals will still need to have their release agreed by the parole board.

Foreign national prisoners are in danger of becoming a population who are seen purely in immigration terms. Their welfare and rehabilitation needs are becoming invisible. They are doubly disadvantaged through being at the mercy of the immigration and

prison systems. The Prison Reform Trust's concerns about the treatment of foreign national prisoners are shared by other charities, visiting groups, lawyers and HMCIP. There has been no assessment of the impact of the hub and spoke scheme on family ties, rehabilitation opportunities and sentence progression. There is no comparative information regarding work, education and other opportunities for post-sentence detainees and other foreign national prisoners. There is no real understanding of the need for preparation for release and resettlement support. Welfare, cultural and language needs are not always addressed. Overall, the failure to recognise the diversity, individual circumstances and different needs of foreign national prisoners leads to unfairness in the system.

The prison service should implement a policy on foreign nationals that sets out a coherent strategy to improve their predicament. This will require leadership, recognition that foreign national prisoners are entitled to be treated as prisoners rather than deportees and a real commitment to preventing unfair differential treatment.

PRISON SERVICE
JOURNAL

Edge Hill
University

The Prison and the Public

27 March 2013

Edge Hill University

Plenary speakers:

Dr Jamie Bennett (Governor of HMP Grendon, Research Associate at the Centre for Criminology, University of Oxford, and Editor of the *Prison Service Journal*).

Eric Allison (prisons correspondent for the *Guardian* newspaper, trustee of the Shannon Trust and a former prisoner).

This one-day conference will focus on the relationship and interface between the prison and the public. The imposition of state punishment has historically kindled the public imagination and, as such, the 'private' world of the prison has become increasingly exposed through a range of modes. The aim of this conference is to explore the variety of means through which the prison becomes connected with the public and vice versa. This conference will be multi-disciplinary, topics will include:

- Representations of prisons in film, TV and literature
- The relationship between the prison, prison service and the public
- The role and methods of the media and journalism in relation to the prison
- Academic analysis (criminological, historical) of the prison and the public
- The construction, purpose and diversity of prison exhibitions
- Visual images of, and from the prison in art and photography.

Speakers will include academics, writers, practitioners, artists, journalists, archivists and curators and those who work within TV and film. Selected contributions to this conference will be published in a special edition of the *Prison Service Journal*.

Please submit an abstract of about **250 words** and a short biography by **Friday 22 February 2013** to either Alyson Brown (browna@edgehill.ac.uk) or Alana Barton (bartona@edgehill.ac.uk). To book whether giving paper or just attending see www.ehu.ac.uk/bookthepreisonandthepublic

Assisting Dutch Nationals Imprisoned Abroad

Femke Hofstee-van der Meulen is Inspector of prisons at the Dutch Inspectorate of Security and Justice.¹

'For those arrested outside their own country, detained hundreds of miles from home, unable to speak the local language, ignorant of the local legal system and with no idea of who to turn to for help, consular assistance provides a lifeline. It is, however, a public service which has been subject to almost no detailed examination whether by academic institutions, bodies like Fair Trials International or even Ministries of Foreign Affairs themselves.'

Fair Trials International, November 2009.

Introduction

Worldwide just over 10 million people are in prison² and more than 460,000 are confined in a country of which they do not have the nationality. This is a considerable sum and it is likely that the total number will continue to rise due to further globalisation. In the European Union, more than one in six prisoners is a foreign national.³ Heterogeneous prison populations are more complex and therefore more difficult for prison staff to manage.⁴ Foreign national prisoners are also considered a 'vulnerable group'⁵ by international monitoring bodies, as they face additional difficulties as a result of their foreign status and have fewer opportunities to exercise their statutory rights. It is also more difficult for them to prepare for their resettlement and address offending behaviour, which is costly for societies as a whole.

Despite the high number of foreign national prisoners in many penal systems, they remain, in many respects, a 'forgotten' group of prisoners. This article examines the particular circumstances of imprisoned Dutch nationals, of whom 2,500 are incarcerated outside the Netherlands.⁶ Drawing on a wider research project with this group it explores how these prisoners experience incarceration, and the particular needs they

have as foreign national prisoners, such as legal information, help in contacting the outside world and preparation for release.⁷ In this context, the article examines the unusually high level of support and consular assistance that is provided to Dutch prisoners abroad, and the impact that it had on their detention experience in prison and their preparation for release.

To gather the data, I sent a questionnaire to all Dutch nationals in foreign prisons, to all prisoners' families, and to a selection of consular staff. In addition to that quantitative data I interviewed 46 prisoners during their period of confinement abroad and 10 after release. I also interviewed some of their relatives, staff at the Ministry of Foreign Affairs, and a selection of staff and volunteers at the International Office of the Dutch Probation Service and 'Epafras'. The latter is a religious organisation that provides support and assistance alongside the Ministry and the Probation Service.⁸

Profile of Dutch nationals detained abroad

In the last 25 years the total number of Dutch prisoners abroad has more than quadrupled: from 579 in 1988 to 2,459 in 2012.⁹ This group is similar in number to the British nationals incarcerated overseas (2,582), despite the fact that the British national population is nearly four times the size of the Netherlands.¹⁰

1. The author has worked at the Council of Europe in Strasbourg, the European Parliament in Brussels and at the International Centre for Prison Studies (ICPS) in London. In the Netherlands, she established Prison Watch (www.prisonwatch.org), an independent organisation that carries out research on prison related topics for national and international (non) governmental organisations and universities. She is planning to finish her PhD in 2013.
2. World Prison Brief, International Centre for Prison Studies at www.prisonstudies.org/info/worldbrief
3. Kalmthout, v. A.M., F. Hofstee-van der Meulen, F. Dünkel, *Foreigners in European Prisons*, (2007) p 7.
4. 14th CoE Conference of Directors of Prison Administrations (CDAP), Vienna, 19-21 November 2007.
5. 4th Annual Report SPT (3 February 2011) Paragraph 107. j) and CoE, CPT Standards (2010) §52, p 16.
6. TK 30010 Letter nr. 18 by Minister of Foreign Affairs to Parliament 'Gedetineerdenbegeleiding buitenland' 10th July 2012, p 1.
7. UNODC Handbook on Prisoners with special needs (2009) p 80-88.
8. The research reported here was collected for a PhD thesis due to be completed in 2013. The data are based on a questionnaire distributed to 2,606 Dutch nationals in foreign prisons (response 584 from 54 countries), a questionnaire for prisoners' family (response 248) and questions for consular staff at Dutch diplomatic missions (response 83 countries). The qualitative data consist of in-depth interviews with Dutch prisoners during detention (46), ex-prisoners (10), relatives of prisoners (15), consular staff at diplomatic missions (14), consular staff at ministry of Foreign Affairs (4), visiting volunteers of Dutch Probation Service (11), staff from International Office of Dutch Probation Service (5), chaplains of Epafras (8), staff from Epafras (2) and letters from prisoners (48).
9. Dutch Ministry of Foreign Affairs, June 2012.
10. BBC about Foreign Office figures in article 'Over 1,000 Britons are jailed over drugs abroad', 3rd February 2010.

In 2012 Dutch nationals were incarcerated in nearly 100 different countries. While the total number of Dutch prisoners has stabilised in the last few years, the range of countries in which they are detained has increased considerably, expanding from 57 in 1995 to 99 in 2012. The most frequent destinations are Germany, Spain, France, the Dominican Republic, Peru, the United Kingdom, Italy, Belgium, the United States and Brazil. The country in which by far the largest number of Dutch nationals is imprisoned, is Germany, which is the largest neighbour of the Netherlands and frequently visited by Dutch citizens. Just over half of Dutch prisoners are imprisoned in the EU, down from three quarters in 1995. South American countries currently imprison the largest group of Dutch nationals outside the EU.

In total, 85 per cent of Dutch prisoners abroad are male and, compared to prisoners in the Netherlands, quite old, with an average age of 41 years compared to 34 years in the Netherlands.¹¹ Less than half (43 per cent) of the Dutch prisoners were born in the Netherlands and 12 per cent were born in one of the countries of the Kingdom of the Netherlands like Aruba, Curaçao, Sint Maarten or in one of the Dutch special municipalities in the Caribbean, Bonaire, Sint Eustatius and Saba.¹² Others were born in places that have seen high migration to the Netherlands, such as Turkey, Morocco and the Dominican Republic, and the former Dutch colony of Surinam.

Nearly two thirds of Dutch nationals imprisoned abroad are incarcerated for drug-related offences. A similar proportion exhibited a range of personal problems before they were arrested related to money, relationships, housing. Two-thirds were addicted to alcohol, drugs or gambling. Many suffered from mental and physical difficulties.¹³ Nearly half of those imprisoned for drugs reported they had engaged in smuggling to 'pay debts.' Three quarters of them claimed they had 'no idea' of the risks involved in smuggling drugs and that they were unaware of the (severe) punishments it would incur. The Netherlands is known for its tolerant approach towards (soft-) drugs and possession of a small amount of soft drugs for

personal use is not prosecuted. The Netherlands is a transit — and distribution country for drugs that contains an active manufacturing industry of synthetic drugs. It is therefore not all that surprising that immigration and custom authorities pay special attention to Dutch nationals when they cross borders.

Detention experience

Since 24 months I am in prison, it is the most difficult period in my life.
(Prisoner, Belgium)

Dutch nationals are usually held under the same prison conditions as national prisoners. Many complained about poor physical conditions though most were able to maintain their personal hygiene.

They were also broadly dissatisfied with the food they received. There was a particular difference between those held in prisons in the EU and those incarcerated further afield where penal systems still rely on family members to bring in food. Such places necessarily disadvantaged foreigners who were less likely to have relatives able to offer this service.

The prison food is horrible. I am paying another prisoner for a self-made meal. Because I do not receive visitors it is difficult to obtain ingredients myself. I am therefore dependant on others to receive food. (Prisoner, Morocco)

Wherever they were held, Dutch prisoners were often unaware of prison rules and their rights.

Wherever they were held, Dutch prisoners were often unaware of prison rules and their rights. Despite the fact that several prison authorities have translated the rules in different languages, in practice it depends on the cooperation of prison staff to actually make prisoners aware of the availability of these documents.¹⁴ The lack of adequate (free) legal support was also often a problem. Not unexpectedly, prisoners complained about language difficulties, lack of awareness of procedures, high fees and complicated legal cases. Many were unable to prepare their legal case, receiving inadequate assistance from an interpreter during their legal case. These practices are against internationally binding rules.¹⁵

11. Mol G.D.,I. Henneken-Hordijk, Gedetineerd in Nederland 2007, DJI (2008) p 41.

12. Ministry of Foreign Affairs, 2007.

13. Vast(gelopen) in den vreemde, p53.

14. Kalmthout, v. A.M., F. Hofstee-van der Meulen, F. Dünkel, Foreigners in European Prisons, (2007) p 21.

15. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) imposes specific and detailed obligations around the process of criminal trials in order to protect the rights of the accused.

Despite the physical distance from their families, most Dutch prisoners managed to maintain contact with the outside world. Due to the costs associated with traveling to see them, only one in three reported being visited by a relative. Instead, they were largely dependent on telephone calls and postal services, the latter of which was often expensive and the former unreliable. Dutch prisoners were usually aware of their right to contact their diplomatic mission and able to establish contact with officials.

They were very negative about their inclusion in the general life of the prison. Many criticised interaction with prison staff. Linguistic barriers were seen as one of the reasons for this but also because they felt that they were treated as a 'number' rather than a human being. They were less negative about their interaction and communication with other prisoners, although they were critical about a general lack of activity.

Dutch prisoners found it difficult to participate in reintegration activities and they did not feel prepared to return to society. In the questionnaire they indicated a long catalogue of needs once released. At the top of their list was the essential requirement of finding a place to stay and an income, followed by needing to see a doctor and to arrange paperwork. Most prisoners regarded their experience of imprisonment as the most important personal reason for not reoffending. One man explained that his confinement abroad felt like a 'nightmare.' His experiences had made him also cynical and suspicious. Another, who had smuggled drugs, concluded that the promised profit of his criminal act was ineluctably outweighed by his loss of freedom. A third man felt he was in the middle of a bad 'B-movie' in which he had to be on his guards all the time. Relatives of prisoners reiterated these views, giving more examples of the negative impact of the imprisonment abroad. For one mother it was a 'devastating period' when she felt completely powerless and uncertain about the outcome of the case and how her son could survive.

Ex-prisoners who returned to the Netherlands found it very difficult to reintegrate. Several admitted during imprisonment that they felt 'scared' about their release and what would happen. One ex-prisoner indicated that the period after release was more challenging than his confinement. He felt completely on his own and unable to solve his new problems. Most

prisoners experienced difficulties, especially in the first weeks and months after release. Obstacles included becoming registered again in a municipality, obtaining official papers, finding a shelter or housing and an income. Municipalities in the Netherlands deregister persons who have not been living in their community for a while, so while they are responsible for providing aftercare to ex-prisoners in their community, without an official registration it is not possible to receive support or to make use of a shelter. As a result many, ex-prisoners have to rely for months on support from their families. One prisoner who already knew he could not receive support from his family expected to camp at Amsterdam Central train station.

Consular assistance to Dutch nationals in foreign detention

In contrast to their sense of being without help after release, a number of the prisoners I interviewed had received considerable assistance during their imprisonment from a range of Dutch organisations and individuals. Whether the Netherlands provides consular assistance to Dutch nationals is up to the Ministry of Foreign Affairs and other organisations involved. In practice the Netherlands consistently provides consular assistance to Dutch

Most prisoners regarded their experience of imprisonment as the most important personal reason for not reoffending.

nationals in foreign prisons, although this is not an absolute right. There is no Dutch Consular Act, like that in Germany, from which prisoners can derive rights, and the starting point of the Dutch Ministry of Foreign Affairs is that, under existing international law, states are not formally required to provide consular assistance.¹⁶

There are three main organisations in the Netherlands that provide consular assistance to Dutch nationals in foreign detention. These are the Consular Affairs and Migration Policy Department at the Dutch Ministry of Foreign Affairs in cooperation with the Dutch diplomatic missions, the International Office of the Dutch Probation Service¹⁷ and the religious foundation Epafra. Each organisation has its own aims.

The conditions under which Dutch nationals are imprisoned abroad and the kind of consular assistance they receive (or not) has been under discussion in the parliament and in the press over the last 25 years. Widespread concerns about these conditions have led

16. Letter from Minister of Foreign Affairs to Dutch parliament in 2002. This statement was supported by a court decision of the Court in The Hague in 2004 and a decision of the Dutch National Ombudsman in 2006.

17. Dutch translation for 'Bureau Buitenland'.

to the establishment of the International Office of the Dutch Probation Service and Epafras. Consular assistance and NGO assistance to Dutch nationals abroad have developed in close cooperation with the Dutch Parliament. The two basic principles of providing consular assistance by the Ministry of Foreign Affairs are to ensure that Dutch nationals are treated correctly in accordance with the rules, and that they are held in humane prison conditions. The main aim of the Dutch Probation Service for providing assistance is to limit the damaging effects of detention and to prevent recidivism.¹⁸ Epafras provides assistance in order to guarantee that Dutch nationals in foreign detention can receive pastoral care.

Evaluation of consular assistance

According to data from the Ministry of Foreign Affairs, the International Office of the Dutch Probation Service and Epafras, more than 14,000 visits were carried out to Dutch nationals in foreign detention in 2010. This is on average more than 5.5 visits per prisoner. Practically all Dutch prisoners who responded to the questionnaire said they received assistance from the Ministry of Foreign Affairs. Most frequently representatives from these organisations visit Dutch citizens in prison (on average two per year), provide them with information about legal proceedings in their country of confinement and, in the case of the consular staff, make contact with their relatives to notify them of the arrest and in case there are emergencies. Consular staff bring along a monthly gift of €30 to those detained outside Europe and, when necessary, toiletries and medicines. Around half of the prisoners are visited by volunteers of the International Office of the Dutch Probation Service. These volunteers live abroad and visit Dutch prisoners every six weeks in order to maintain contact and to monitor their situation. They further help, in cooperation with staff at the International Office in the Netherlands, to arrange matters at home in the Netherlands and to prepare them for release. In some countries prisoners can follow an educational course, which is provided via the Dutch Probation Service. Chaplains of Epafras travel on a voluntary basis abroad to visit Dutch national prisoners to have a

Prisoners are, in general, highly appreciative of the assistance they receive from the Ministry of Foreign Affairs.

personal conversation with them once or twice per year. Epafras further publishes a magazine that is sent periodically to all Dutch nationals in foreign detention.

Prisoners are, in general, highly appreciative of the assistance they receive from the Ministry of Foreign Affairs. In particular, they value the visits by consular staff, the information they provide about the legal proceedings of the country of confinement and assistance with regards to transfer procedures. In terms of the work of the Dutch Probation Service, prisoners singled out the visits by the volunteers and the attention these volunteers paid to their personal situation. They were also happy with the magazine and chaplaincy visit organised by Epafras. The content of the magazine varies from news stories to interviews to stories from other prisoners and advertisements to become pen-pals. Prisoners report reading the magazine 'to pieces' due to the information it provides about what is happening in the world and in the Netherlands. Several prisoners explained that the stories from fellow Dutch prisoners in other countries had made them more accepting of their situation by placing it in perspective.

Dutch prisoners who receive assistance are less negative about their experience of imprisonment compared to those who do not receive assistance from the Netherlands.¹⁹ This noteworthy outcome is true for all aspects of their incarcerated that were measured. One could expect that receiving assistance has a positive influence on the well-being of the prisoner and that providing information about judicial proceedings makes prisoners more aware about the rules. However, an unexpected positive outcome was greater participation in the prison regime and better integration with other prisoners and staff. Assistance had a positive effect on how prisoners perceived matters of hygiene and medical care, feelings of safety and their involvement in activities. Prisoners were particularly impressed that visits by the Dutch Probation Service and Epafras were carried out by volunteers. The fact that someone they did not know beforehand made the effort to visit them on a regular basis and show real interest without being paid for it, was very powerful.

Prisoners appeared to be also very positive about the impact of assistance on the needs that are identified in literature as 'characteristic' for foreign

18. Annual Plan 2010 'Bureau Buitenland', p 5.

19. The fact that the differences are small is likely to be the result of the limited number of prisoners who had not (yet) received assistance from any of the organisations.

national prisoners. The fact that they were being visited gave them the feeling that they were not left on their own, it made them feel emotionally and spiritually supported and they felt that they were treated correctly because 'official' visitors were 'keeping an eye' on them. Information about rules and legal proceedings by consular staff and advice from visiting volunteers had a positive effect on them being aware about the rules and how things work in prison. Consular assistance enabled them to stay connected with the outside world while the work of visitors to let their relatives know about any problems was greatly appreciated. They also indicated that thanks to conversations with a chaplain they knew more about what they wanted in life and assistance from the Prison Service helped them to prepare for resettlement. In sum, Dutch prisoners are not only very satisfied with the different types of consular assistance they receive but it makes a difference to how they experience their incarceration and, more importantly, it addresses their needs.

Conclusion

Providing consular assistance to nationals in foreign detention can make a difference. The fact that in addition to consular staff, volunteers and chaplains

visit Dutch nationals in over 50 countries means that prison authorities accept that other people than consular staff carry out visits and provide assistance. This means that in practice a broad interpretation is given to Article 36 (c) of the Vienna Convention on Consular Relations, which states that consular staff has the right to visit their nationals in foreign prisons and to provide assistance. Further it means that it is possible to provide different types of assistance which can be applied according to the needs.

In interviews it became clear that prisoners were positively surprised by the fact that visitors from the Dutch Probation Service and chaplains from Epafras carried out visits and provided assistance on a voluntary basis. The fact that there are apparently people who, without any personal benefit, make an effort to visit them and show personal interest, made them feel very good because it made them feel human (again) and worthwhile. This phenomenon is called in sociology the 'Pygmalion effect' or 'Belief effect'.²⁰ The greater the expectation placed upon people, in this case a volunteer who shows personal interest and believes in the prisoner, the better they feel and perform. To what extent consular assistance and the involvement of volunteers leads to a crime-free life after release has never been studied but it might be worthwhile to do this in the future.

20. Ben Rovers, 'Ze deugen nergens voor': Het Belief effect in justitiële jeugdinterventies. Lector talk, 9 November 2007.

Reviews

Book Review

Foreign national prisoners: law and practice

by Laura Dubinsky

Publisher: Legal Action Group (2012)

ISBN: 978 1 903307 66 3

(paperback)

Price: £55.00 (paperback)

Foreign national prisoners: law and practice is a comprehensive guide to immigration law, those aspects of prison law that impact foreign national prisoners, and other legal rules relevant to foreign nationals in prison, detention or otherwise attracting the attention of the immigration authorities.

Written by barrister and immigration and prison law specialist Laura Dubinsky, with contributions from Hamish Arnott and Alasdair MacKenzie, the book seeks to provide a detailed analysis and critique of case law from domestic courts and those of the European Union and European Court of Human Rights. Published by the Legal Action Group, the book (unsurprisingly) follows a polemical narrative, taking the side of the prisoner/detainee. This does not in any way detract from a thoroughgoing coverage of the subject. *Foreign National Prisoners* is the first work of its kind, attempting, as it does, to cover as broad a range of topics as the name implies. As such, it is a welcome addition to the bookshelf of the legal practitioner and prison professional alike. It is also an invaluable complement to Creighton and Arnott's *Prisoners: law and practice* — so often seen in the hands of lawyers attending prison adjudications.

Fifty years ago, a book on the subject of foreign national prisoners would have been a thin volume

indeed, as High Court judge Sir Nicholas Blake points out in his foreword. As he says, 'Such a survey would primarily be concerned with the distinction between aliens and British subjects and the broad exercise of prerogative powers available in respect of the former class.' In practice, this meant that the Home Secretary could do pretty much as he pleased. Today, the position is very much more complex and with constant and ever-controversial public debate in progress. Demands for curbs on immigration and fears of foreign criminals compete with the rights of those who wish to claim asylum, or those who have established family ties or, for that matter, those who were born and bred here and whose right to stay has been threatened.

Reading *Foreign National Prisoners* as a non-lawyer, one gets the impression of a deeply researched and splendidly well organised exposition of the subject. The first part, comprising over half the total pagination of around 900 pages, is concerned with deportation. UK legislation is covered in detail, including the 1971 Immigration Act, 2007 UK Borders Act and the 2009 Borders, Citizenship and Immigration Act. The first part also covers EU and EEA rules such as the Citizens Directive and the EEA regulations 2006. The section then goes on to consider the impact of the European Convention of Human Rights (enshrined in English law in the form of the 1998 Human Rights Act). The section concludes with a consideration of the appeals process in deportation cases.

Part Two — *Prison Law* — starts with a useful summary of the prison system, legislation, policy and sentencing practice before

considering the position of foreign nationals in prison. The section continues with a look at temporary and early release, early removal and repatriation. A final chapter in this section considers the position of foreign national prisoners in relation to mental health legislation.

Part Three gives a thorough account of immigration detention, related statutory powers, common law principles and detention policy. The effects of Convention articles are covered in some depth, particularly in relation to children of detainees. A further chapter considers places of detention and how they are used.

The final part looks at remedies available to detainees and foreign national prisoners and includes coverage of claims for damages.

Overall, this book is a valuable source of reference for any lawyers with a need to provide a degree of expertise in this area. It is, however, equally useful to prison managers and those working with foreign national prisoners in prisons and other places of detention.

Ray Taylor is a prison officer at HMP Pentonville in London.

Book Review

Racial criminalisation of migrants in the 21st century

Edited by Salvatore Palidda

Publisher: Ashgate (2011)

ISBN: 978-1-4094-0749-2

(hardback)

Price: £70.00 (hardback)

This collection has been drawn together by Salvatore Palidda, Professor of Sociology at the Faculty of Education in the University of

Genoa, Italy. It explores the intersection of migration and criminal law, drawing upon research from a range of countries including Italy, UK, France, Spain, Belgium, Germany and USA.

In the opening chapters Palidda sets out key features of the context including the fact that foreign nationals are imprisoned at a higher rate than domestic nationals. In Europe, this ranges from two or three times higher in UK, France, Germany, Spain and Scandinavia; to seven or eight times higher in Italy, Netherlands, Switzerland and Portugal — and twelve times higher in Greece. Palidda argues that this rate of imprisonment is disproportionate to any difference in crime rates and is deeply embedded in the history of these countries, dating back over the last two centuries.

Rather than being about crime, Palidda argues that the criminalisation of migration is 'a most elementary mechanism of social control, emerging as being useful, if not indispensable, to the solidity and/or realignment of political cohesion' (p.1). In other words, migrant groups are relatively weak and therefore a convenient group to scapegoat and target through media, politics, state and non-state institutions and everyday behaviours as a means of generating support and consensus. From this perspective, migrants have become the new 'undeserving' and 'dangerous classes', against whom the majority can draw together to protect themselves. This analysis is rooted in critical or radical criminology which is particularly concerned with power and inequality. As with much

of the most challenging new critical criminology, it not only addresses criminal justice system but also other forms of formal and informal control and also highlights the often unreported behaviours and values of the powerful.

The book goes on to explore in detail the operation of migration controls and criminal justice in a number of Western liberal democracies. With some depressing consistency, these chapters identify a pattern repeated across nations at a macro and micro-level. A particular feature of this pattern is a public discourse based upon uncertainty, risk and fear, and a confluence of interests concerned with the exercise and generation of power, and the everyday impact of differential practices. To the extent that these practices are replicated across a range of nations, this is presented as one of the dark sides of globalization.

The theme of globalization is, indeed, central to this book. While the movement of people across nations is a key characteristic of globalization, this book asserts that a set of defensive and discriminatory policies and practices regarding migration is its corollary. Globalization is not a comprehensive and consistent set of beliefs, behaviours and actions but instead comprises a number of loose trends which vary across space and time. In each country, global trends will be mediated through local cultures and individual interpretations and choices. In this way it is more realistic to talk about 'glocal', a mix of global and local. This is drawn out in the case studies of individual countries, but is also central to a

particularly fascinating chapter by Alessandro Dal Lago, based at Genoa University, who explores the historical and philosophical underpinning of concerns about migration.

Dal Lago challenges Samuel Huntington's analysis of a 'clash of civilisations'¹, which asserted that history is characterised by power struggles between different belief systems or national states. Dal Lago's thesis is that rather than being fixed, rigid and impermeable, cultures are organic. From this position, Dal Lago argues that concerns about migration are not rooted in fears about differences between cultures and clashes between different beliefs, but instead because they present an alternative idea of hybridization and threaten the very idea that nationhood and identity are intertwined and certain. Migration is a threat because it brings change, adaptation and integration rather than because it brings conflict and discord. It is in challenging old certainties rooted in place and time that migration brings to life the realities of a changing globalized world.

This book is to be applauded for exploring migration from a novel perspective, drawing together both the global and the local. It is in examining these intersections that the book brings new insights whilst also highlighting some of the deeply concerning issues of power and inequality that exist in the worlds richest nations.

Dr Jamie Bennett is Governor of *HMP Grendon and Springhill*.

1. Huntington, S. (1996) *The clash of civilisations and the remaking of world order* New York: Simon & Schuster.



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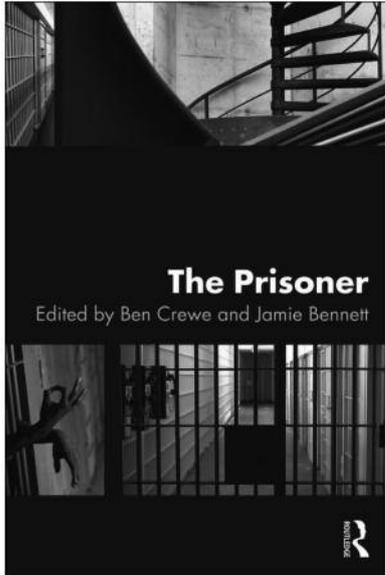
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PRISON SERVICE JOURNAL

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The *Prison Service Journal* is a peer reviewed journal published by HM Prison Service of England and Wales. Its purpose is to promote discussion on issues related to the work of the Prison Service, the wider criminal justice system and associated fields. It aims to present reliable information and a range of views about these issues.

The editor is responsible for the style and content of each edition, and for managing production and the Journal's budget. The editor is supported by an editorial board — a body of volunteers all of whom have worked for the Prison Service in various capacities. The editorial board considers all articles submitted and decides the outline and composition of each edition, although the editor retains an over-riding discretion in deciding which articles are published and their precise length and language.

From May 2011 each edition is available electronically from the website of the Centre for Crime and Justice Studies. This is available at <http://www.crimeandjustice.org.uk/psj.html>

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Six editions of the Journal, printed at HMP Leyhill, are published each year with a circulation of approximately 6,500 per edition. The editor welcomes articles which should be up to c.4,000 words and submitted by email to **jamie.bennett@hmps.gsi.gov.uk** or as hard copy and on disk to *Prison Service Journal*, c/o Print Shop Manager, HMP Leyhill, Wotton-under-Edge, Gloucestershire, GL12 8HL. All other correspondence may also be sent to the Editor at this address or to **jamie.bennett@hmps.gsi.gov.uk**.

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