

PRISON SERVICE JOURNAL

January 2013 No 205



Special Edition
**Migration, Nationality and
Detention**

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.

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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

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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.

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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.