*Special Edition*

# Migration, Nationality and Detention

# 'The right to walk the streets':

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

*Lea Sitkin is a DPhil student at the Centre for Criminology, University of Oxford.*

**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 centre[6] and on a high street in Camberwell where an informal labour exchange was suspected.[7] 'Operation Chefornak' saw fortnightly raids targeting Roma beggars in Marble Arch in the run up to the 2012 Olympic Games[8] and a joint UKBA-police initiative also lead 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 2010-2011[10] 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

> . . . Immigration Officers' requests for information are voluntary. If a person walks away, there is no power to arrest them.

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

---

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 study[35] 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.  Doomernik, J. & Jandi, M. (2009). *Modes of Migration Regulation and Control in Europe.* IMSCOE
30.  The Hamburg 'Gefahrengebiet' 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.  Bunderministerium 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 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 Diceyian 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, 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.