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Migration, Nationality and Detention

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.

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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]

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) 49O.
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 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.

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.

'deterrable.' 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.

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.

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.

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.