

Hidden Detainees; the Secret Struggle

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There is a radical discord between the number of immigrants detained in the UK and that reflected by the official Home Office figure. This is because government statistics ignore an entire class of immigrant detainees: those held in Prison Service Establishments.¹ This significant omission is problematic for a number of reasons. Firstly, it damages the UK's reputation as a 'gold standard' for human rights and signals to less progressive nations that this behaviour is acceptable. Secondly, it marginalises the experiences of those kept in prison facilities and diminishes their prospects of a timely release. Thirdly, it perpetuates the myth of the 'criminal' immigrant and obscures open and transparent public discourse on the matter.

The Problem in Context

Seeking asylum is not a crime. Under the *United Nations Refugee Convention 1951*, to which the UK is a signatory, foreign nationals have the right to enter a country for the purpose of seeking asylum regardless of how they arrive or whether they possess the necessary travel documents. Thus, immigrants held in prison under the *Immigration Act 1971* have either never committed a crime or have already served their sentence.² They are detained as part of the same administrative system as those detained in Immigration Removal Centres (IRCs), designed to keep immigrants separate from the community until their claims are processed. As the legal status of those detained in prison is no different from those kept in IRCs, the decision to detain them in prison is arbitrary, as is their exclusion from official statistics.

Estimates of how many innocent immigrants are detained in prison vary greatly. In February 2012, the Association of Visitors to Immigration cited 557 immigrants detained in prison each month.³ In December 2013, the then-Minister of Immigration, reported that there were 957 immigration detainees being held in prisons,⁴ and the Secretary of State for Justice reported 1214 in

¹ Office for National Statistics (2013) Immigration Statistics 2013. [Online] Available from: <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2013/immigration-statistics-october-to-december-2013#detention-1> [Accessed 21 January 2013].

² *Immigration Act 1971*, ch 77.

³ HL Deb, 19 October 2012, col 492W.

⁴ HC Deb 12 December 2013 col 319W.

that same month. As the Home Office figures for December 2013 showed 2796 people in immigration detention,⁵ this suggests that the real number of immigrant detainees in the UK is between 20-43% higher than the official figure.

The Home Office has struggled to present a coherent justification for the use of prisons in this manner. It has, at times, suggested that immigrant detainees are only kept in prison when they present a serious risk of harm to the public or to the good order of the IRC.⁶ This is dubious as a significant proportion of these individuals have been assessed as posing a low risk of harm to the public.⁷ Furthermore it is the UK Border Agency itself which determines, non-judicially, whether a detainee poses such a risk.⁸ Alternatively, the Home Office has implied that the detention of immigrants in prison could be a result of overcrowded IRCs.⁹ It has also claimed that detention in prison is sometimes justified on the basis of a lack of cooperation, such as failing to provide travel documents; a process which the Independent Chief Inspector of Borders and Immigration noted was 'potentially a breach of human rights.'¹⁰ In other words, the Home Office's explanations regarding the detention of innocents in prison appear indiscriminate and haphazard. None have been conclusively confirmed nor clarified. Moreover, the Home Office has never explained why these people are excluded from its statistics.¹¹

International Criticism

Keeping immigrants in prison facilities has been consistently criticised by various international bodies. The European Committee for the Prevention of Torture has referred to the detention of immigrants in prison facilities as

⁵ Above n 1.

⁶ Furthermore this status will be determined non-judicially by the UK Border Agency, which presents a serious challenge to the rule of law. See Prison Service Instruction 52/2011 *Immigration, Repatriation and Removal Services* at 2.68.

⁷ Bail for Immigration Detainees (2014) *Denial of justice: the hidden use of prisons for immigration detention*. [Online] Available from: <http://www.biduk.org/162/bid-research-reports/bid-research-reports.html> [Accessed 21 January 15].

⁸ Above n 6 at 2.70.

⁹ Appendix D of Planning Statement 14/01178/F argues there is a 'Special Need' for additional IRC spaces, and thus for the dramatic expansion of Campsfield IRC in Oxfordshire, so that spaces currently used in prisons can be decreased. This implies that insufficient space in IRC facilities is a causal factor in the usage of the prison estate to detain immigrants.

¹⁰ Above n 7.

¹¹ This excludes a half-hearted complaint that obtaining and publishing the number would be disproportionately expensive, a claim that BID immediately rebutted on the grounds that the statistics were already available and could easily be added to the yearly statistics for close to no added cost; above n 7.

'fundamentally flawed.'¹² The European Court of Human Rights has held that there must be 'some relationship between the ground of permitted deprivation of liberty ... and the place and conditions of detention.'¹³ Likewise, in 2008, the European Parliament passed the Return Directive 2008/115/EC, which was interpreted by the European Court of Justice (ECJ) in the joined cases of C-472/13 and C-514/13 as establishing that any detention of a third country national 'must, as a rule, take place in specialised detention facilities.'¹⁴

Some of these bodies have conceded that in extreme cases, immigrants may be detained in prison facilities.¹⁵ Furthermore, these rulings function only as a declaration of EU law and not as a binding precedent on UK courts. Nevertheless, the judgments above do demonstrate a broader, European-wide conception of how immigrants ought to be treated and confirm that the detention of immigrants in punitive environments breaches international human rights standards. The UK's continual disregard for these rulings threatens to damage its long-standing reputation as a human rights pioneer. It undermines the UK's commitment to the human rights framework and the European justice system, thereby signalling to less committed nations that denigrating these structures is acceptable behaviour.

Decreased Access to Justice; Practical Difficulties

Detainees in prison suffer from systemic and compounding barriers to justice. This is largely a consequence of the vast differences between the operating instructions used in prisons and IRCs; one designed for criminals, the other for innocent people kept in custody for purely administrative purposes. Immigrants in prison are held entirely outside the scope of the statutory Detention Centre Rules, the Detention Services Operating Standards and Detention Service Orders, all of which provide some, albeit weak, protection to those in IRCs. Rule 35 is perhaps the best known example of a precautionary safety standard used in IRCs, whereby detention review is automatically triggered whenever there are concerns over the detainee's health or where they were a victim of torture. This standard is not available for prison detainees.

Some additional obstacles which immigrants in prison face include:

¹² European Committee for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment, 2013. CPT standards, Strasbourg, Council of Europe [Online] Available from <http://www.cpt.coe.int/en/documents/eng-standards.pdf> [Accessed 21/01/15].

¹³ *Saadi v UK* [2008] 47 EHRR 17.

¹⁴ Joined Case 473/13 *Adala Bero v Regierungspräsidium Kassel* (25 October 2013) and Case 514/13 *Ettayebi Bouzalmate v Kreisverwaltung Kleve* (25 October 2013). Emphasis added.

¹⁵ *Ibid.*

- No automatic access to on-site legal advice
- Financial disincentives for legal advisers who wish to work with detainees in prisons under current Legal Aid Agency contracts
- The prohibition of mobile phones, lack of adequate access to telephones, videolink and internet services during working hours and a slow internal postal system
- Home Office escorting failures resulting in absence at bail hearings
- Delays in receipt of Home Office bail summaries.¹⁶

These factors delay and frustrate timely communication with legal advisers, the courts and the Home Office and make cooperation with these institutions almost impossible. Moreover, they have a significant effect on detainees' prospects for a timely release and on their ability to present and progress their cases.¹⁷

The Myth of the Criminal Immigrant; Symbolic Marginalisation

Refugees and asylum seekers are some of the world's most vulnerable people, escaping from unimaginable and extreme life-threatening circumstances. Nevertheless, the myth of the criminal immigrant remains vivid in the imagination of the British public. This image is no doubt perpetuated by the state-sanctioning of their indefinite detention in prisons. The practice signals a tacit acceptance of the idea that a refugee is a criminal deserving of punishment and reflects a generally dismissive approach to the well-being of immigrants. Those detained in prison are not only marginalised by the fact and condition of their detention but by the symbol of their location and by their pointed exclusion from government statistics.

Conclusion

The difference between the number of reported immigrants in prison and the reality is significant and arbitrary. It disregards the extent to which this practice is frowned upon in international law. In doing so, it threatens the UK's respected position as an international advocate for human rights and provides a green light for other nations to behave similarly. It marginalises the experience of those held in prison by providing additional barriers to justice and perpetuating the public's false interpretation of their criminality. In a similar vein, the exclusion makes it difficult for relevant activist members of civil society to protest. It obscures public discourse on the issue, blocking the possibility of tested, efficient and cost-effective community-based alternatives. It is crucial therefore that this issue is made known to the public so that a healthy and vigorous dialogue can be forged.

¹⁶ Above n 7.

¹⁷ Above n 7.