Blurred Lines: Detaining asylum seekers in Britain and France

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Abstract

In this article, we explore the use of immigration detention for asylum seekers in Britain and France who are awaiting removal to other European Union (EU) member states for processing under the terms of the Dublin Convention. As we will show, the emphasis on risk assessment as the grounds for detaining these people recasts humanitarian protections as security matters, effectively folding asylum seekers into a broader criminalisation of migration. A punitive response to those seeking refuge, this practice blurs the line between detention and asylum, and there by hollows out key international human rights protections that have been central to the European project.

Key words: immigration detention; asylum seekers; UK; France;

Introduction

In this article, we explore the use of immigration detention for asylum seekers in Britain and France who are awaiting removal to other European Union (EU) member states for processing under the terms of the Dublin Regulation. First signed in 1990, this EU law, which has been amended three times, most recently in 2013, determines which member state is responsible for examining an applicant's asylum claim; typically that is the country of first entry, unless human rights claims can be made, such as family reunification of children (European Law Institute, 2017; Refugee Council, 2017; Salignat 2018). The Dublin Regulation is supported by EURODAC, the EU fingerprinting data base which allows comparison of asylum applicants across the EU. Since 2015 national police forces and Europol have been able to access the EURODAC database.

In both the UK and in France, immigration detention is officially an administrative form of custody designed to facilitate deportation and removal. In theory and in law, it should be used sparingly and for short time periods of time. In practice, however, evidence suggests that detention is commonly experienced as punitive (Bosworth, 2014; 2018. As we will demonstrate below, the detention of third-country nationals for the purpose of removal under Dublin regulations expands this logic of risk and securitisation through humanitarianism, blurring the boundaries between the asylum and detention systems and rendering both a form of punishment (Aas and Bosworth, 2013). Confined in sites that resemble prisons and police stations, asylum seekers are effectively folded into a broader criminalisation of migration (Bhatia, 2015; Canning, 2017).

It is worth noting at the outset, that although this article focuses exclusively on those awaiting deportation under the Dublin regime, the numbers of other asylum seekers detained across Europe is growing too (Tsourdi, 2016). In France, for example, asylum seekers may be

detained at the border to decide on their right to enter the territory (ECRE and AIDA, 2018). Previously limited to waiting zones within airports and ports, over the last few years this practice has expanded to other sites, including at the border with Italy (CGLPL, 2018). In the UK, until 2000, small numbers of asylum seekers were routinely held in prison while their cases were considered. That year, the government brought in a Detained Fast Track (DFT) policy for asylum cases that were a priori considered unlikely to succeed, which ran until it was suspended in 2015 following a successful legal challenge lead by Detention Action in in the case of *Lord Chancellor v Detention Action [2015] EWCA Civ 840.* Notwithstanding deeply embedded legal and ethical commitments to safeguarding human rights and sanctuary in both countries, in the detention of any of these groups of asylum seekers, we bear witness to a systematic abrogation of such duties.

The article proceeds as follows. First, we describe the detention system in each country. Then we set out the shared legal context in which these systems operate, before turning to the two-country comparison in more detail to tease out the similarities and differences in their treatment of those awaiting removal under the Dublin regulation. By identifying points of commonality as well as distinctions between the two countries, we demonstrate once again the utility of a comparative approach in developing our understanding of the purpose and impact of this form of administrative custody (Bosworth and Vannier, 2016; Latour, 2014; Strban et al., 2018; Arbogast, 2016). We have chosen the UK and France both because they detain the greatest number of immigrants and asylum seekers (Global Detention Project, 2019); and because they exemplify a common turn in the EU towards securitisation. They also share a border. Together, they illustrate how humanitarian legal instruments allow states to ease their own processing of 'risks' and to re-invigorate their sense of national security. As such they help us revisit questions about punishment and security and their relationship to human rights and protections.

Detaining asylum seekers in the UK and France: An incomplete empirical picture

Although immigration detention is increasingly presented as part of EU policy and should be regulated as such, it always occurs within national territories and is, therefore, subject to considerable variation. Indeed, writing this article during the painful lead up to Britain exiting the European Union (BREXIT), draws such matters into relief. Britain, in particular, has always sought to pick and choose which of the EU regulations relative to border control it accepts, insisting on greater amounts of self-determination than many of its neighbours. At the same time, it has benefited from those Directives it has signed. Whether or not BREXIT goes through, the UK's immigration policy will continue to depend on and intersect with the EU. With France, in particular, the UK has signed a series of Treaties about border control, which govern the management of asylum seekers as well as irregular migrants, and includes agreements about offshore detention and policing (see for example, the 2003 Treaty of Toquet and the 2018 Sandhurst Treaty). While scholars have argued that Dublin has amplified the detention of asylum seekers, this claim remains empirically under-researched. Drawing on national figures in the UK and France, we begin to address this gap. The statistical picture, however, remains incomplete.

The United Kingdom

In the UK, immigration detention is officially meant to facilitate deportation and removal. Yet, only half of those detained are expelled. Asylum seekers should not, routinely, be detained, yet some are, in order to process their claims. So, too, the *Detention Centre Rules 2001* allow foreign citizens to be incarcerated for the purpose of identification, and, under certain circumstances in order to process an expedited asylum claim. In 2017 the British high court decision in *R (Gureckis) v Secretary of State for the Home Department* [2017] EWHC 3298 (Admin) determined that the Home Office policy to deport homeless people from the EEA (which resulted in their detention), was unlawful. Two years later, however, in 2019, media sources reported pressures on local authorities by the Home Office to provide homelessness data for this purpose (Mohdin, 2019).

The government releases quarterly and annual statistics about the detained population. There is, in addition, a growing body of academic literature (Hall, 2012; Bosworth, 2014), and a reports produced by civil society organisations (see for example work by Detention Action and Medical Justice). Together these accounts have mapped out the system in some detail: detention is contracted out in the UK, run by private security companies and the prison service. There is also no statutory upper time limit to the duration of this form of confinement, other than for pregnant women and children. Children can only be held within family groups, in the 'pre-departure unit' at IRC Tinsley House near Gatwick airport, for a maximum of one week. Detention in Britain usually follows a period of residence in the country.

In response to a number of factors, including two critical independent reports on the treatment of vulnerable people in detention (Shaw, 2016; 2018) and public condemnation of the deportation of the so-called 'Windrush generation', who had come legally to the UK after WWII to work from former colonies in the Caribbean, the numbers in detention have been declining rapidly over the past two years. At the time of writing, the daily rate sits around 2400, down from nearly 4000. Over this period the government has also closed four establishments, leaving 7 in operation. According to the most recent official statistics, "in the year ending March 2018, 26541 people entered the detention estate", which includes the 7 Immigration Removal Centres, 30 short-term holding facilities and up to 350 bed spaces in prison (Home Office 2018b). The vast majority (around 80%) of these people were citizens of countries from outside the EU, with most drawn from former British colonies and/or recent war zones.

About half of those who are detained in the UK are classified as 'asylum detainees' (Home Office, 2018b). In addition to individuals with open asylum cases, this category includes anyone (about whom the state has documentation) who has ever claimed asylum, whether or not their case was successful, or even withdrawn before a decision was reached (O'Nions 2008; Home Office, 2018b). As the Refugee Council notes, while most asylum seekers in the UK are not detained before their claim is decided, "detention in Dublin cases is more frequent. When a take charge or take back request has been accepted or deemed accepted by the prospective receiving country, the asylum seeker will usually be detained prior to removal." (Refugee Council, 2017)

TheBritish government only published statistics about those awaiting removal under the Dublin Convention for the first time in February 2018. According to these numbers, which covered the previous calendar year, the UK issued 5712 outgoing requests to return

individuals for processing their claim in the country of first arrival, nearly half of which went to Italy. The UK also received 2137 incoming requests to process asylum seekers, nearly half of which were from Greece, as part of the EU deal on burden sharing. Only 314 people were transferred out of the country, of whom more than half (168) were sent to Germany, while 461 were transferred into the country, of whom, reflecting legal efforts to unite families, 187 were from Greece and 91 were from France.

France

As in Britain, in France, immigration detention is officially designed as a mechanism to facilitate deportation. Men, women and children may be placed, for this purpose, in *Centres de Rétention Administrative* (CRAs), for up to 90 days, or, for up to 48 hours, in *Locaux de Rétention Administrative* (LRAs).[1] According to statistics gathered by civil society organisation La CIMADE (2018), over the course of 2017, 25274 men, women and children were detained in CRAs in mainland France. The number rises by a further 19683, if we include the sites of detention in French Guyane, Guadaloupe and Mayotte; a figure all the more astonishing given the small populations of those countries relative to mainland France.[2] The same report estimated that around 1900 people were placed in LRAs; 1200 in mainland France and 900 in overseas sites.

Places of detention, and reliance on this form of custody, are not spread evenly across the country. The region around the port of Calais, for example, has the greatest number of bed spaces available within Metropolitan France at 4628, followed by Paris at 3449 (CIMADE, 2018: 10). In both areas, the police have been engaged, for many years, in increasingly harsh attempts to deter asylum seekers and other migrants from creating irregular encampments (Human Rights Watch, 2017). In these examples, we are reminded that detention policy, intersects with other forms of coercive state power but also that it may be shaped by local as well as national and international concerns.

Alongside, yet separate, from sites which are designed to facilitate deportation, France runs a series of waiting zones for asylum seekers.[3] The decision to hold someone there, which is taken by the Head of the National Police service or the Customs and Border Police, or by a civil servant designated by them, must be justified in writing. At present there are 32 of these zones, most of them located at ports or airports, however they can be extended to within 10 km of a border crossing point (Forum Réfugiés-Cosi, 2018).

A number of people in France file asylum claims from detention. Others may enter the system due to an arrest while their asylum process is underway (Salignat, 2018). Statistics on Dublin detainees in France are particularly hard to locate as figures produced by the préfectures are excluded from the annual figures released by the Office of Protection of Refugees and

[1] CRAs are administrative detention centres which are not part of the regular prison administration and which arecontrolled and managed by the border police. LRAs hold immigrants awaiting to be transferred to a CRA or removed from the country.

[2] Within that figure, all but 1749 were incarcerated in Mayotte, a former French colony in the Comores Islands which, in 2011, became the 101st department of France.

[3] Waiting zone are areas where immigrants are held while waiting for a decision on their application for an authorisation to enter the territory on asylum grounds. They include airports, railway stations, harbours and even hotels. Conditions there vary.

Stateless Persons (OFPRA), which rely on numbers provided by the Ministry of the Interior (Forum Réfugiés-Cosi 2018). Available data however reflects a toughened stance towards Dubliners, with 3723 asylum seekers placed in detention in 2017 up from 2208 in 2015 (CIMADE, 2017: 11). This sum represented 14.7 percent of all of those detained that year (CIMADE, 2018). In the next section we turn to the legal framework which helps explain the presence of these people in detention.

Blurring the lines between Asylum Seeking and Detention: The shared legal context

As with other EU member states, the legal framework for immigration detention in Britain and France sits within a wider structure of immigration and asylum law and practice (on which see Achermann et al., 2013; Hailbronner and Thym, 2016; Grange and Majcher 2017). Since 1999, the European Union has been working to create a Common European Asylum System (CEAS), to harmonize practices across the continent (Wilsher, 2007). At the same time, the EU and its member states have invested heavily in border security infrastructure and technology to control and prevent migration. From Frontex (renamed the European Border and Coast Guard, (EBCG) in October 2016), to technological innovation and databases like EURODAC, the EU has designed and implements an array of new mechanisms of control. The March 2016 EU-Turkey Agreement further allows for return of third country nationals beyond the borders of Europe (Council of the EU, 2016).

In addition to asylum, immigration and policing practices, the EU has generated numerous legal and policy instruments relating to immigration detention (e.g. COE, 2017; Achermann et al., 2013). Member states have also codified criteria for immigration detention and the conditions of detention centres into national law. There are a series of relevant international agreements, from the 1951 Refugee Convention to the 1984 UN Convention on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The 2007 Optional Protocol to the Convention (OpCat) created National Preventive Mechanisms, with a mandate to monitor human rights protections in all forms of custody including immigration detention.

According to these international agreements and their national counterparts, deprivation of liberty for immigration or asylum matters should always be a measure of last resort and should only occur after a careful and individual examination of each case (Wilsher, 2017; Basilien-Gainche, 2017). The reason for detention must be kept under periodic review, and non-custodial measures should be developed and used where possible (COE, 2017; UNHCR, 2015). Asylum seekers should not be detained at all while their case is under consideration, other than in exceptional circumstances (Goodwin-Gill, 1986; Hailbronner, 2007). Finally, within sites of detention, people, whatever their status should have certain procedural safeguards; they should have access to legal advice and to medical care, to information about their case in a language they understand, and they should be able to inform someone outside (e.g., family members) of their detention.

Such principles and restraints jostle uneasily with national and international interests, politics, and anxieties (Majcher, 2017). In some places, like Greece, for example, whose detention estate has been heavily criticized by the European Court of Human Rights (ECtHR) and by international human rights monitors, they may be drawn into question by a lack of financial

resources, or at least by a lack of desire to spend funds on detainees in this way (Bosworth, Fili and Pickering, 2018). More broadly, asylum rights and principles are undermined by the lack of clarity over the purpose and nature of immigration detention, as well as by its punitive effect (DeBruycker, P., and Tsourdi, 2016; Noll, 2003). Matters are compounded by inadequate empirical evidence about the numbers and types of populations who are held or about their experiences and outcomes.

At least in part, some of the confusion between detention and providing asylum flows from the European Convention on Human Rights (ECHR) itself. For, notwithstanding the positive obligations[4] it places on member states to "refrain from active infringements of the right to liberty, but also to take appropriate steps to provide protection against any unlawful interference with this right to everyone falling within their jurisdiction," (Pichou, 2016: 117), the ECHR effectively blurs the boundary of the purpose of detention by allowing for:

> The lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. (Article 5, paragraph 1(f)).

As scholars in refugee studies have documented in some detail, these two limbs of Article 5 mean that, despite Article 31 of the Refugee Convention, which "requires States, under certain conditions, not to penalise refugees for irregular entry" (Costello and Mouzourakis, 2016: 47), increasingly across Europe asylum seekers are not treated as potential refugees, (), but instead are considered as potential irregular migrants who can be held for identification purposes or to assist with border control (Anderson et al., 2014; Jubany, 2017). Such an approach, which was upheld by the European Court of Human Rights (ECtHR) decision in *Saadi v UK* (2008), has been further amplified and embedded by other EU-level agreements and strategies all of which have integrated immigration detention practices more deeply within immigration and asylum systems, blurring distinctions between the two.

Most of these practices have had a progressive justification. Thus, as Michael Flynn (2013), notes, the growth in the numbers detained for immigration matters in the region seems to have followed the 2008 EU Returns Directive, which stipulated that member states should use specifically defined and designed institutions for holding individuals for deportation. While conceived as a means to end the use of custody for asylum seekers in the prison system, and thereby improve the system, this reform created a series of new institutions, which, once built, have been filled.

So, too, the Dublin regime itself, which was established in 1990 amended in 2003 and 2013, was conceived as means to manage the asylum process across the EU while still protecting vulnerable claimants. Yet, it has expanded the population subject to detention by creating a category of asylum seekers who can be deported (and, therefore, detained) to have their claims assessed in the country of first entry (Costello and Mouzourakis, 2016). The most

[4] For example, Article 5 paragraphs 2 – 5 lists: the right to be promptly informed, the right to take proceedings to court which must decide speedily on lawfulness of detention, the right to be compensated if terms are violated. This part of the convention stipulates the right to be informed of the purpose and justification of detention, and the applicable national law that authorizes the detention. The legal and factual grounds for the deprivation of liberty must be communicated promptly to the person concerned in a language she understands.

recent iteration of this agreement known as Dublin III, in force since 2013, determines which Member State country is responsible for examining an asylum application by relying on a hierarchy of criteria such as family unity, possession of residence, documents or visas, irregular entry or stay, and visa-waived entry. Yet, the most frequently applied criterion in practice, is irregular entry, which entails that the country through which the asylum-seeker first entered the EU is responsible for examining his or her asylum claim.

By 2013, according to a report by ECRE (2015: 3), detention had become

> "widespread in the absence of express provisions in EU law providing grounds for detention of asylum seekers subject to a Dublin procedure. For instance, Austria, Bulgaria, France, Germany, Hungary, Slovakia and the Netherlands made standard use of detention for the purposes of carrying out transfers under the Dublin II Regulation."

In an apparent acknowledgment of this problem, Dublin III included a new Article (28) which sought to restrain state detention practices, by permitting detention for the purpose of securing transfer procedures, only under circumstances where individuals posed a "Significant risk of absconding." The Regulation did not specify how to assess this risk nor how to judge its significance, however. Instead, it required member states to engage in an assessment process, noting that detention was subject to conditions of proportionality and used only in so far as alternatives could not be applied effectively.

From the start, critics expressed concerns about the 'overly broad' criteria that could be applied in risk assessments (ECRE, 2015: 4). They likewise called for greater clarity about the threshold of 'significance' and of the processes member states put in place. Yet, such matters remained obscure until 2017, when in the *Al Chodor* judgment (2017), the Court of Justice of the European Union (CJEU) held that asylum applicants awaiting transfer to the Member state responsible for examining their application under Dublin III could only be detained before if there was "a binding provision of general application, objective criteria underlying the reasons for believing that an applicant for international protection who is subject to a transfer procedure may abscond." The reason for this decision, the Court noted, was that any measure on the deprivation of liberty must be accessible, precise and foreseeable, as required by Article 6 of the EU Charter of Fundamental Rights interpreted in light of the case-law of the ECtHR (Case C-528/15 *Al Chodor*, 15 March 2017). The Court could not have been clearer: under the Dublin regime, the line between detention and asylum seeking must be set out and precisely defined (Basilien-Gainche, 2017; Sadowski 2018; Vavoula, 2019).

As we will show below, although *Al Chodor* has been, for some claimants, a welcome intervention, it does not, ultimately, disrupt the logic of detention for this protected population. Rather, however unintentionally, it appears to be further entrenching detention within the processing of Dublin asylum claimants. Specifically, in its restatement of risk as the grounds of detention, this CJEU ruling and the response of members states to it, prioritises administrative convenience while simultaneously, in its emphasis on risk, reinforces a broader criminalisation of migration and mobility. In linking these two issues: administrative convenience and security, *Al Chodor* and the legislation and case law it has inspired, has

widened the net for detaining asylum seekers, subjecting this potentially vulnerable population to a practice that is known to be punitive.

National responses to the Dublin regime

The United Kingdom

Prior to *Al Chodor*, other than a set of policy reasons listed under the Home Office' Enforcement Instructions and Guidance, there were no special grounds for the detention of asylum seekers.[5] After the CJEU's ruling, these pre-*Al Chodor* policies were challenged and found to be unlawful. In a case heard by the High Administrative Court in May 2017, (*SS, R (On the Application Of) v Secretary of State for the Home Department & Anor* [2017] EWHC 1295 (Admin) (26 May 2017)), concerning the detention of an age-disputed minor from Afghanistan who was placed in Campsfield House Immigration Removal Centre outside Oxford after a Eurodac search revealed he had previously applied for asylum in Bulgaria, the detention of the claimant was ruled unlawful as there had been no objective criteria established of his risk of absconding. When taken to the Court of Appeal, (as part of a group of Administrative Court decisions in *R (on the application of Hemmati and Others) v The Secretary of State for the Home Department* [2018] EWCA Civ 2122), the unlawfulness of detention was upheld. The Enforcement Guidance which had been used by the Home Office, was found to have been incompatible with the Dublin III Regulation, specifically Articles 28(2), which states

> When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively

and with 2(n) which notes "'risk of absconding' means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond," as required by *Al Chodor*. The detention of these claimants was neither proportional to their risk of absconding (Article 28(2)), nor was it was based on any 'objective criteria' (Article 2n).

The UK formally responded to *Al Chodor* by bringing in new legislation on 15 March 2017, *The Transfer for Determination of an Application for International Protection (Detention) (Significant Risk of Absconding Criteria) Regulations 2017*, that is usually referred to as the 2017 Regulations. The 2017 Regulations set out 11 risk factors to be considered in making the determination of the risk of absconding most of which hinge on evidence about the individual's compliance with immigration decisions and their reliability in answering questions and providing evidence about their case.

[5] Home Office, Chapter 55 – Enforcement Instructions and Guidance, available at: http://bit.ly/2t3RRCs.

In a case before the Court of Appeal in February 2019, a group of detainees contested the lawfulness of the 2017 Regulations (*Omar v Secretary of State for the Home Department* [2019] EWCA Civ 207, 21 February 2019). All had previously been finger printed in other EU states, and had been detained in order for return. The problem, their barrister Michael Fordham, QC asserted was that the criteria set out in paragraph 4 of the 2017 Regulations, were "no more than a non-exhaustive list of optional 'relevancies' and a far cry from the exhaustive list of mandatory criteria which are essential safeguards against arbitrary detention" (Omar, 2019: para. 24). The claimants' contentions had already been rejected by the Administrative Court on 28 March 2018, and the Court of Appeal confirmed that judgement. In both courts, the broad criteria of the 2017 Regulations was found to be lawful.

In making their judgement, the Court of Appeal further blurred the boundaries between the asylum and immigration detention systems. The 2017 Regulations respond to Dublin III by requiring an assessment of risk, they pointed out. It is automatic detention that is unlawful, not detention per se. The Dublin III Regulation's rationale was not solely to protect asylum seekers, the Court emphasised, but also "centrally" to ensure procedural efficiency. Detention of those awaiting processing under Dublin, this ruling suggests, is a matter of administrative convenience.

> [I]t must also be emphasised again that the objective of the Dublin III Regulation is not just to afford enhanced protection to asylum seekers potentially within its ambit. It is also – indeed centrally so – to ensure the efficiency of operation of the procedures under which the appropriate Member State is to take responsibility and for that purpose to prevent frustration of such procedures by (for example) absconding. True it is that the 2017 Regulations are geared to the assessment of a significant risk of absconding as a precursor to any potential decision to detain. But the wider objectives have to be borne in mind.' (Omar, 2019: point 59).

By eliding administrative convenience with matters of security, the 2017 Regulations in Britain that were introduced as a response to *Al Chodor* justify the deprivation of liberty of those who are claiming protection. In do doing, as with other forms of 'penal humanitarianism' (Bosworth, 2017; Lohne, 2018), the administrative system of immigration and asylum law have further legitimised a practice that feels like punishment.

France

Following *Al Chodor,* the French *Cour de Cassation* (Cass. 1re civ., 27 Sept. 2017, n° 17-15.160) ruled that the 'significant risk of absconding' criterion for detaining asylum seekers was not clearly and objectively defined under French law. Yet, it took a further CJEU ruling (Adil Hassan 2018), before any new legislation was introduced. M. Adil Hassan, an Iraqi national, was arrested in 2016 at the Calais port. As he had been previously registered with EURODAC in Germany, the préfecture decided to detain Hassan and to transfer him to the country of first entry. Hassan challenged his detention and was released three days later. He also appealed the decision to transfer him to Germany arguing that it had been taken *before* Germany had even replied to France's request for transfer. The French administrative court of appeal turned to the CJEU to determine whether the anticipated decisions to transfer were legal. In

Adil Hassan, the European court reiterated that such decisions violated European law noting that detaining applicants while waiting for their transfer was only legal insofar as there was an established risk to abscond as defined under *Al Chodor*. At the time the case was decided, French legislation did not provide objective criteria by which to determine such risk; Hassan's detention had, thus, been illegal.

Like the British 2017 Regulations, the French bill adopts a broad definition of the risk to abscond, including twelve non-exhaustive criteria. Rather than curtailing the detention of asylum seekers and ensuring their humanitarian protection, however, this new bill paves the way to longer detention periods. The requested state must reply within one month (or 15 days if there is a record on EURODAC). Then, the transfer must be completed within 6 weeks from the explicit or implicit acceptance of the transfer. Dubliners can thus be detained for several weeks (57 to 70 days). Separately, the March 2018 law simplifies the procedure for placing Dubliners under house arrests, expanding and modifying the span of the state's power to retain.[6]

The March 2018 bill provides a few safeguards. An asylum seeker cannot be detained when first filing their application, and the duration of their detention should not exceed the time strictly necessary to finalize the transfer, which the CJEU has limited to two months once the responsible Member State has accepted the transfer (CJUE, 13 sept. 2017, aff. C-60/16, Amayry). If the country of first entry however refuses the transfer, the detention must cease immediately. If the asylum seeker is already detained, the decision can only be appealed within 48 hours.

However, by expanding the confinement of Dubliners, this bill circumvents attempts to limit and monitor asylum seekers' detention. As in the UK, it privileges efficacy over humanitarian protection, effectively contravening the CJEU's repeated stance that preserving asylum seekers' human rights was Dublin III's most important objective (CJUE, C-19/08, *Migrationsverket v Edgar Petrosian and Others*, 2009; *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, C-63/15 , 2016).

Conclusion

In harmonizing the management of asylum seekers, the EU and its member states have long sought to regulate and indeed to reform and ameliorate the spaces of immigration detention. Instead, however unintentionally, they have increasingly blurred the boundaries between administrative detention and reception practices. Thus, as we have shown, even as Dublin III and *Al Chodor* ostensibly sought to restrain the detention of Dublin cases, France and the UK continue to hold asylum seekers under immigration act powers. In comparing their practices, we have demonstrated the flexibility of detention and its ability to latch onto distinct populations, over-riding established human rights protections.

Such matters are not occurring without critique, and the jurisprudence in this field is continuing to develop. In France, in particular, there has been significant outcry over the new legislation which has been criticized by a range of actors from the academy to civil society for

[6] This topic forms the basis of a new study we are currently conducting into the use of hotels as sites of detention for asylum seekers in France (Bosworth and Vannier, forthcoming).

legitimating the widespread detention of asylum seekers who are awaiting their transfer under Dublin III (Editions Legislatives, 2018, Baumard, 2018; la CIMADE, 2018). While in the UK, considerable activism has always existed around the detention of asylum seekers.

As the lines blur between detention and asylum a number of consequences flow. First, and most dramatically, the detention of asylum seekers calls into question the purpose of the Dublin regime at all. While some discretion among member states is inevitable, the enduring lack of clarity created by national rules and legislation create vastly different regimes. In the context of the rise of the Far Right, who continue to instrumentalize and to exacerbate fears about migration to gain votes, such lack of legal clarity becomes an easy target. Dublin regulations, as illustrated by our comparative case study, can ease the political processing of 'risks' and serve to re-invigorate some countries' sense of national security.

Similarly, and with broad conceptual, legal and political ramifications, the linkage of asylum seekers to notions of risk effectively criminalises a population who otherwise legally demand aid and assistance. Despite being particularly contentious, not least among those countries at the edges of the EU, the processing of Dubliners also means that people are being detained and deported on ever-widening grounds. The detention of asylum seekers to ensure removal under Dublin Regulations reiterates the expansion of punitive measures against other 'non-citizens' and in so doing reflects a continuum of incarceration across multiple sites. This secondary move, which fits with broader criminological analyses of migration control, reminds us of the complex interconnections between what were previously distinct areas of law and practice, and the expansive nature of criminalising migration.

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