

**Making home safe?  
The role of criminal law and punishment in British  
immigration controls**

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This thesis is an enquiry into the regulation of immigration through criminal law and its institutions. It looks at the range of immigration offences in British legislation, and whether and how they are being used in practice. The criminalisation of immigration status has historically served functions of exclusion and control against those who defy the state's powers over its territory and population. In the last two decades, the prerogatives to exclude and punish have been enhanced by the expansion of the catalogue of immigration offences and the more systematic enforcement of these powers. The great reliance on the criminal law to regulate immigration is distinctive of a period in which crime and immigration have been increasingly politicised. As a consequence, more offences have been created and more individuals have been subject to the hybrid immigration and criminal justice system. While immigration offences largely remain under-enforced, some of them –particularly those penalising document fraud and identity stripping- are used against foreign nationals who cannot be removed from the country.

In this thesis I explain what I consider to be the most pernicious consequences of this expansion of formal and substantive criminalisation of immigration breaches. The existence of a parallel system of sanctions allows enforcement agencies wide margins of discretion. Therefore, similar cases may be dealt with in very different ways. When the criminal route is chosen, the use of criminal law in the vast majority of cases reaching the criminal courts is unnecessary, disproportionate and extremely harmful. Both the decision to prosecute and the sanction eventually imposed are justified by preventive and regulatory purposes. The actual practice of criminalisation reveals that the criminal procedural safeguards are weakened and those accused of immigration crimes are likely to be convicted and imprisoned for these offences.

I conclude that the formal and substantive criminalisation of immigration represents a departure from liberal criminal law principles and the purposes of criminal punishment. These conclusions cast doubts about the pragmatic, non-principled use of criminal law to regulate immigration flows, and call for the need to look at other, more humane alternatives in the treatment of 'unwelcome' migrants.

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Aliens Act 1905 (AA 1905)  
Aliens Order 1953 (AO 1953)  
Aliens Restriction (Amendment) Act 1919 (AR(A)A 1919)  
Aliens Restriction Act 1914 (ARA 1914)  
Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (AI(TC)A 2004)  
Asylum and Immigration Act 1996 (AIA 1996)  
Asylum and Immigration Appeals Act 1993 (AIAA 1993)  
Asylum Policy Instructions (API)  
British National Party (BNP)  
Border and Immigration Agency (BIA)  
Border, Citizenship and Immigration Act 2009 (BCIA 2009)  
British Nationality Act 1948 (BNA 1948)  
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Crown Prosecution Service (CPS)  
European Court of Human Rights (ECHR)  
European Union (EU)  
Foreign national prisoner (FNP)  
Forgery and Counterfeiting Act 1981 (FCA 1981)  
Freedom of Information (FOI)  
Identity Cards Act 2006 (IDCA 2006)  
Illegal Immigration Intelligence Unit (IIU)  
Immigration (Carrier Liability) Act 1987 (I(CL)A 1987)  
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Immigration Advisory Service (IAS)  
Immigration and Asylum Act 1999 (IAA 1999)  
Immigration and Nationality Directorate (IND)  
Immigration Appeal Act 1969 (IAA 1969)  
Immigration Crime Team (ICT)  
Immigration Directorates' Instructions (IDI)  
Immigration Law Practitioners' Association (ILPA)  
Immigration, Asylum and Nationality Act 2006 (IANA 2006)  
Joint Council for the Welfare of Immigrants (JCWI)  
Local Immigration Team (LIT)  
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Refugee and Migrant Justice (RMJ)  
Special Immigration Appeals Commission (SIAC)  
Special Immigration Appeals Commission Act 1997 (SIACA 1997)  
Standard Acceptable Criteria (SAC)

United Kingdom (UK)  
UK Borders Act 2007 (UKBA 2007)  
UK Border Agency (UKBA)  
UKBA Enforcement Instructions and Guidance (UKBA EI&G)  
United Nations (UN)  
United Kingdom Immigrant's Advisory Service (UKIAS)  
United States (US)  
US Immigration and Naturalization Service (INS)

## INTRODUCTION

## I. Background of the thesis

Being a foreigner today in a globalised world is perfectly normal. For many, it is much easier than it was decades ago to leave one's own country, venture into other cultures, and study, work and settle in a country different from that of one's origin. As Seyla Benhabib puts it, 'individuals no longer enter their societies at birth and exit them at death' (1999, 719). As a consequence, receiving societies have not remained untouched. Along with the conflicts and tensions involved in the process of adaptation, they have become more open to accommodating newcomers and more cosmopolitan, incorporating elements of different cultures into their own (Benhabib 1999; 2002; Melossi 2003; 2005). For some foreigners, especially the well-off, educated and capable of quickly adapting to the vernacular society, this process is smoother than for others (Dauvergne 2004, 602). While the rapid expansion and modernisation of transnational transportation of people and goods, and the globalisation of media outlets have brought the world closer and increased human mobility and communication dramatically, this process has not been equal (Aas 2011). In fact, the experience of migration for some has become ever more difficult.

While the 'best and the brightest' are still a sought-after category by countries imposing stringent controls on immigration –such as Britain,<sup>1</sup> many others struggle to reach the shores (Boswell 2003, 5). The images of people trying to cross the Mediterranean Sea by home-made boats escaping recent political turmoil in North-Africa is but one example. Contemporary western European societies enjoy a relatively high level of social and economic welfare and equality. Economic immigrants, refugees and expatriates are perhaps the constant

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<sup>1</sup> In a recent speech on immigration, British Prime Minister David Cameron referred to the need to limit the immigration flows to Britain while opening up 'a new route for people of exceptional talent –like scientists, academics and artists' and introducing a 'new entrepreneur visa, to roll out the red carpet for anyone who has a great business idea and serious investment.' Transcription of the speech available at: <http://www.guardian.co.uk/politics/2011/apr/14/david-cameron-immigration-speech-full-text> (Last accessed: 13 May 2011).

reminder of an unequal world at Europe's door-steps (Sassen 2002). Even if they are seldom broadcasted, their experiences of exile are dramatic and distressing.<sup>2</sup> So too is the reality that some of them face once they arrive in Europe. Recent practices and policies in rich countries suggest that the international mobility of people from poor regions of the globe is regarded as undesirable and to be avoided (Bigo 1994; Anderson 2000; Torpey 2000; Bigo and Guild 2005). For those who make the journey, the response is to block, detain and eject through practices that resemble those deployed by police to punish outlaws and disorderly sections of the population. In European countries, these exclusionary policies –including the criminalisation of immigration violations- are in part the result of the process of European harmonisation of immigration and asylum matters (Guild and Minderhoud 2006; D'Appollonia and Reich 2008). Immigrants are increasingly considered a new under-class and as a consequence the mechanisms and practices of the criminal justice system are being transposed on the treatment of foreigners. In what Loïc Wacquant calls the 'penal management' of foreigners, non-nationals fill the space of seclusion centres in many countries of Europe and are overrepresented in their prison populations (Wacquant 2005, 40; see also Wacquant 1999; 2006; Melossi 2003; De Giorgi 2010).

This thesis looks at this latter group of 'third-world foreigners' –or immigrants- who might be thought of as the 'new' under-class in contemporary conditions (Wacquant 2005, 32). In particular, it aims at understanding the devices introduced by the British government to control their entry and stay in the country. It examines the system of immigration enforcement and the juxtaposition of different regulatory regimes –administrative and criminal- to control immigration. This is what some authors have named the 'criminal administrative system' (Albrecht 2000, 146), the 'quasi-administrative, quasi-criminal' system

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<sup>2</sup> The perils of forced migration involve being left to criminal gangs, subject to exploitation and humiliation, forced to trade with their own body and being abused, raped and tortured. In many cases this journey leads to family break-downs and children left behind and abandoned (see eg Khosravi 2010; also De Genova 2002; Calavita 2005).

(Pratt 2005, 23) or the ‘hybrid crime/immigration system of social control’ (Miller 2003, 666). In doing so, this study brings together recent criminological and criminal law theory and immigration studies in order to enrich the debate on criminalisation in both fields. This study is both a theoretical and empirical enquiry about the role of criminal law and the criminal justice system in the regulation of immigration. Because of the transposition of the vocabulary, strategies and tools used in the criminal justice system, immigration enforcement has become increasingly hybrid, operating in-between the administrative and the criminal regimes. I focus on a particular aspect of this system: the criminalisation of immigration breaches –so called ‘immigration crimes.’ ‘Immigration crimes’ is a category difficult to circumscribe because of its blurred contours. For analytical reasons, in this study I will consider immigration offences as those inserted in immigration and asylum legislation. These are offences purely related to one’s immigration status and can be committed both by citizens and non-citizens (Demleitner and Sands 2002). In this research I will particularly focus on immigration offences that can only be committed by non-nationals.

Because immigrants –and undocumented immigrants in particular- have become the main targets of state control both in public rhetoric and policy, it is not surprising that the devices to control the outsiders and marginalised within are increasingly applied to the former –including the criminal law. In this context, a number of scholars have argued that a process of ‘criminalisation’ or ‘securitisation’ of immigrants and immigration policies is taking place in western, liberal democracies (Huysmans 1995; 2006; Green and Grewcock 2002; Miller 2003; Weber 2007; Brandariz García and Fernández Bessa 2009). They contend that immigrants are increasingly portrayed by the media and politicians in Europe, North America and Australia as threats to the receiving society and treated in punitive ways by appealing to measures such as detention, deportation and other restrictive orders. While a number of authors (Bloch and Schuster 2005; Bosworth 2007; 2011b; Gibney 2008; Anderson et al. 2011) have recently written about state immigration controls –particularly the detention and deportation of non-

nationals- from legal, sociological and political perspectives, there is little work done on the criminalisation of immigration laws. Despite the fact that the ‘criminalisation of immigration’ as a theme is current in recent scholarly research, the formal conversion of immigration breaches into criminal offences remains under-researched –particularly in the United Kingdom (UK).<sup>3</sup> This is surprising given the enlarged scholarship on immigration studies and the significant expansion of these offences in British legislation in the last fifteen years. It is also curious because the formal criminalisation of immigration law is perhaps the most apparent facet of the criminalisation phenomenon. In fact, it is in the proliferation of immigration crimes that the convergence of administrative and criminal regimes is becoming more visible.

Further, some of the literature on the criminalisation or securitisation is backed by thin empirical evidence about this phenomenon. This is probably one of the reasons why the novelty and strength of the criminalisation phenomenon is often exaggerated.<sup>4</sup> In this research I demonstrate that while certain claims are undeniable –such as the deployment of criminal law control strategies and language in immigration enforcement, other assertions about the dramatic changes in the field of immigration and crime are quite overstated. Not only are immigration offences not new, but neither is this a generalised phenomenon. In fact, the use of criminal law against non-citizens is usually confined to specific cases, particularly when the option of executive removal is not available. Criminalisation is, thus, an accidental, mundane, erratic and discretionary phenomenon than a planned strategy and a synchronised project to keep people behind bars. This study contributes to an understanding of the role of criminal law in immigration enforcement by examining immigration crimes in past and contemporary legislation, and the function they serve in present conditions.

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<sup>3</sup> See though among US scholars: Demleitner and Sands 2002; Miller 2005; Legomsky 2007; Stumpf 2009.

<sup>4</sup> For a critique to the ‘criminologies of catastrophe’ and the ‘dystopias’ of grand criminological theories, see O’Malley 2000; Zedner 2002.

## II. Content and structure of the thesis

This thesis consists of six chapters and a conclusion. A discussion of the methodology used is provided in the Appendix to the thesis. **Chapter I** discusses the literature that constitutes the theoretical foundation for this research. It engages with two different sets of work. First is the literature on the criminalisation of immigration which analyses policies and practices linking immigration to crime and depicting immigrants as security threats. It explains what some authors refer to as the ‘criminalisation’ or ‘securitisation’ of immigration, and critically assesses this body of work. Most of this literature is produced in disciplines other than criminology and criminal law. Second is the criminology and criminal law literature which focuses on the reconfigurations of the crime control field in the last decades. It covers: a) the actuarial justice of modern practices of population management and new models of justice; and b) the phenomenon of over-criminalisation in contemporary criminal law and its use for regulatory purposes. This literature on the transformations in the crime control field has barely been used to explain how non-nationals are currently being handled in recent immigration policies.<sup>5</sup> I will apply the theories and findings from this literature to shed light on the strategies being used to manage immigration inside and beyond the criminal justice system in order to assess the impact of these changes on immigration policies and practices.

**Chapter II** describes the foundations of Britain’s immigration controls from the early nineteenth century to the 1990s. It traces the first sets of regulations in the construction of the British immigration system and its development in the last century in order to understand the origins of and rationale for recent policies. It shows that since the 1800s criminal law provisions have been introduced to enforce immigration legislation, even though there is

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<sup>5</sup> However, see Bosworth and Guild 2008; Zedner 2010.

limited empirical evidence of their actual use. It also illustrates the harsh controls imposed over foreigners through war-time legislation and the progressive expansion of the category of ‘exclusionable aliens’ to cover Commonwealth citizens. Post-war years were dominated by the debate on how to manage Britain’s colonial past and restrict migration from former, poor colonies to the UK. The government’s immigration imperatives shifted in the 1980s following growing concerns about an influx of asylum seekers. The chapter shows that criminal law had a symbolic as well as practical role in the drawing of national boundaries and the policing of non-citizens.

In **chapter III**, I analyse the proliferation of ‘immigration crimes’ in British legislation and their enforcement, particularly since the mid-1990s. The White Paper ‘Fairer, Faster and Firmer’ announced an integral overhaul of the British immigration system and set the tone for subsequent reforms. I will take it as a base to analyse the multiple reforms of the system during Labour’s thirteen-year tenure. I identify three main features of this period. First, there was a huge expansion of immigration legislation including the growth of the catalogue of immigration crimes. Second, there was an enhanced and more systematic enforcement of such legislation and a greater reliance on the criminal justice system. Third, I map an institutional convergence between criminal and immigration enforcement with the creation of a police-like immigration enforcement agency –the UK Border Agency (UKBA). These policy developments have sought to tackle abuses in the asylum system and address loopholes in the enforcement of immigration controls during a period in which the border force and the immigration system as a whole were subject to increased public pressure to deliver.

The following two chapters look at how the criminal-immigration system works in practice. These chapters draw on empirical data from records and hearings at criminal courts, and interviews with key actors in the enactment and practice of immigration enforcement. Interviews conducted with practitioners and policy-makers show that many of the numerous immigration-related crimes in the books are barely enforced (such as overstaying, illegal entry,

obstruction or assault of an immigration officer, etc) and offenders when caught are still often administratively removed rather than criminally prosecuted. On the other hand, the examination of court cases reveals that a handful of these offences are prosecuted in certain circumstances and against certain offenders, and that criminalisation is a relatively frequent experience for some (undocumented) immigrants.

**Chapter IV** analyses the decision to prosecute immigration offenders. Enforcement officers have a number of options when dealing with breaches to immigration laws. They can treat the matter as a criminal or an administrative case. This chapter shows that in the absence of clear guidelines, immigration officers and the police have broad margins of discretion in the decision to proceed against immigration offenders. Because there is no legal constraint on the use of criminal powers, practical considerations are generally taken into account in this decision. One of the most important factors is whether or not the offender can be summarily removed from the country. When this is not an option, criminal prosecution often follows. The practice of prosecuting undocumented migrants is then contrasted with policy statements which emphasise that criminal law should be reserved for the most harmful and serious crimes. This chapter shows that criminal law in the immigration field is used instrumentally. It serves the goals and imperatives of immigration enforcement of restricting and excluding those with no right to be in Britain. As such, its primary function of censuring morally wrong conducts is disrupted.

Once a criminal prosecution is initiated, the normal criminal process follows. In **chapter V** I examine those immigration-crime cases predominantly reaching the criminal justice system. I look at whether and how the immigration case and the immigration status of the defendant influence the criminal case. I analyse the handling of these cases by defence lawyers and prosecutors. In particular, I notice that exemptions to punishment based on the asylum or immigration background of the defendant are barely raised and defendants are often advised to plead guilty. Conversely, the immigration status of the defendant is central to

the bail determination and to the choice of sanction if convicted, as people with weak ties to the country and with irregular status are inexorably refused bail and punished with custodial sentences. Because immigration defendants are subject to a bureaucratic-like process characterised by short hearings, a cursory examination of the facts and the mechanical application of the law, the complexities of these cases are obscured, individual suffering is erased and the imposition of sanctions goes largely uncontested.

In **chapter VI** I explain the causes and consequences of the use of criminal law in immigration enforcement. I discuss the origins of the use of criminal law for regulatory purposes and how this ‘legal tradition’ of backing non-penal norms with criminal sanctions has had an effect on the contemporary criminalisation of immigration laws. I argue that the reproduction of criminal provisions in immigration laws in recent years is as much a result of the attempt by the British government to reassert its sovereign powers to control non-citizens as an outcome of the pragmatic and strategic use of the criminal law in everyday enforcement practices. The first explanation points to the deployment of criminal regulation for symbolic purposes –to be seen as having immigration flows under control. The second one is far from the high world of ‘grand politics’ and grounded in the everyday practice of immigration controls. The expansion of immigration crimes is explained as a necessary outcome of a dual system of immigration and criminal sanctions which is driven by convenience and efficiency. In this latter perspective, criminalisation looks more like a pragmatic exercise of criminal powers aimed at delivering outcomes efficiently rather than punishing morally wrong conducts. I then assess the consequences of an ever expanding criminalisation of immigration legislation and the role of criminal punishment in the policing of non-citizens, and show that the normative justification of punishment in these cases remains weak.

The concluding section of the thesis reflects on the nature of criminal sanctions attached to immigration breaches and the consequences of using criminal law for immigration control purposes. Criminal offences have been historically considered a necessary corollary of

immigration enforcement. They back immigration powers and are conceived as an additional means of intervention. The sanctions attached to immigration breaches are however not merely regulatory. The ultimate goal behind the use of criminal punishment against immigrants is their expulsion. As such, there is a distinctive rationale at play which is neither purely regulatory nor punitive. Criminal law serves immigration policy objectives by supporting enforcement officers in their work, particularly in the expulsion of unwelcome foreigners. So too is the punishment of immigration transgressors driven by the goal of curbing down unwanted immigration rather than aimed at punishing moral wrongs. The role of criminal law in this context is strictly related to the prerogatives of the state to exclude non-members and can only be understood if criminal law is considered as part of the assemblage of the hybrid system of penal/administrative regulation. The distinctive function of criminal sanctions in the immigration field is thus to increase the flexibility and to widening the reach of immigration controls. Beyond this categorisation, criminalising immigration breaches and bringing immigration into the criminal justice forum make possible the bypassing of limiting criminal law principles –such as proportionality, last resort, harm and due process- and contribute to the expansion of criminal regulation. These issues also cast doubts about the instrumentality of the criminalisation vent to achieve immigration control imperatives.

The implications of this thesis are manifold. In addition to enriching the debate about the criminalisation of immigration, this research will contribute to the expansion of the topics of enquiry in criminal law and criminology. Criminal law scholars have concentrated on the criminal justice system and institutions. Along with others (Garland 2001; Ericson 2007; Simon 2007; Bosworth 2008; Aas 2009a; Valverde 2010), I consider that as societies change their ‘control cultures,’ the themes of contemporary criminological and criminal law research should be expanded to explain those changes. This thesis will help to understand how the exercise of a state’s sovereign powers –to control who enter and stay, and to punish- are becoming blurred, and what the consequences of this blurring are. In liberal democracies,

these sovereign powers have been progressively restricted by human rights norms and standards. However, there are still 'rightless zones' where those rules are not fully available to non-citizens, and my thesis will shed light on these.

**CHAPTER I: THE CRIMINALISATION OF IMMIGRATION. A REVIEW OF THE LITERATURE**

## I. Introduction

In recent years, the fields of immigration, refugee and citizenship studies have attracted the attention of researchers from many disciplines. In particular, there has been a growing interest among criminology, sociology and international relations scholars on the processes through which the new patterns of globalisation are addressed by nation-states: how the demands for work and workforce and the population flows that are triggered by them are dealt with by national authorities. Some scholars (Hollifield 1992; 2004; Boswell 2003) observe that liberal democracies face a fundamental dilemma: in an increasingly globalised world, there is a pressing need for freedom and openness –to do business, to move, to consume, etc. At the same time, those conditions threaten the existence of the nation-states erected on sovereign control over their territories and population; a past and current reality built up on enclosure rather than openness. In a sense, migrants encapsulate this challenge because they personify the ‘true modern condition’ (Melossi 2005, 14): in many cases immigrants leave their home countries for elsewhere due to socio-economic or political reasons, and as a consequence, remain somewhat unbounded by national attachments.<sup>6</sup>

Currently, it is estimated that 214 million people live outside their countries of origin, more than double the figure recorded in 1980 (United Nations 2008). Every year an average of 2.4 million people migrate from developing to developed countries and 60 percent of immigrants reside in the latter countries (UNFPA 2004, 12; Global Commission on International Migration 2005, 6).<sup>7</sup> Both because of the magnitude of these migration flows and

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<sup>6</sup> However, Portes and Böröcz dispute the ‘push-pull’ thesis on the origins of immigration and argue that in many cases the receiving countries start recruitment efforts in sending nations (Portes and Borocz 1989).

<sup>7</sup> They make seven of the top ten destinations for immigrants, the United States being the top one (United Nations 2008). However, the importance of South-South immigration should not be underestimated. Research by the World Bank and the University of Sussex found that approximately 71 million people from developing countries have migrated to other developing countries and this is almost as large as the South-North immigration (Ratha and Shaw 2007).

the declining birth rates in many destination countries, immigrants are changing the demographic characteristics of those countries. Between 1990 and 2000, net immigration represented 89 percent of the population growth in Europe (UNFPA 2004, 12) and in 2004, the foreign-born population reached 9.3 percent in Britain, while in the United States (US) it was up to 12.2 percent, the highest rates in these countries' history (Lemaitre and Thoreau 2006, 13). In this context of global mobility, external borders remain important sites for the exercise of state power, especially for western, industrialised countries –such as the US, Canada, Western Europe and Australia- both because they are attractive destinations for people from all over the world and because of their thirst for a cheaper workforce to do the jobs that natives do not want to take.<sup>8</sup> In fact, after recessions in the 1970s and 1980s, European countries put up more barriers to slow down or stop immigration altogether (Hollifield 1992, 32; Joppke 1998; Lahav 1998, 679). Further, the harmonisation and coordination of European immigration and asylum policies bolstered this restrictive approach –particularly, after the Maastricht Treaty and the Schengen Agreement in the early 1990s- (Bigo 2005; Sciortino and Pastore 2004).

As legal controls over external borders have been strengthened, the categories of newcomers allowed to enter and stay in these countries have been redefined. In differentiating between those deemed to be welcome and those who are not, security considerations are becoming increasingly important (Loader 2002; Pratt 2005). This does not mean that security concerns were absent in the control over external borders before. On the contrary, these have been matters germane to the modern nation-state since its origin: one of its *raison d'être* is the defence of the territory and population against external threats, be they states or individuals.

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<sup>8</sup> However, tough economic times in richer countries may decelerate the exodus from poorer countries. During economic crisis, people in the lower end of the social and economic pyramid suffer the most. In the US, the unemployment among Hispanics rose to 8.8 percent in October 2008, 2 percent above the national unemployment rate. A recent poll shows that the number of people caught crossing the southern US borders hit its lowest figure since the 1970s and the number of illegal immigrants fell by 500,000 between 2007 and 2008 (The Economist 2008b; The Economist 2008a).

What seems novel is how these considerations are becoming the driving force of state controls over population flows and the impact this new emphasis on security concerns has on the way national authorities deal with foreigners –particularly, those who are unwelcome.

As a response to migration flows, some scholars observe a phenomenon of criminalisation in various countries (eg Wacquant 1999; 2005; 2006; Aas 2007; De Giorgi 2010; Cecchi 2011) –or in Juliet Stumpf’s terms ‘crimmigration’ (2007).<sup>9</sup> These authors explain that states are increasingly deploying the penal system –or, indirectly, the representations and strategies used by the criminal justice system and its agencies- in the treatment of unwelcome foreigners. In this sense, the policies and practices that have the effect of criminalising immigrants are partly different from purely ‘restrictionist’ policies –understood as those which curtail the enjoyment of rights and liberties of a particular population- in that the former appeal to criminal justice imagery while the latter do not necessarily do so. Often, though, these policies overlap. As Jennifer Chacón (2007, 1840) shows, measures that restrict immigrants’ access to health care, education and other welfare services are frequently backed by depictions of those immigrants as criminals and security threats, and are justified as crime preventive strategies (also Pratt and Valverde 2002).

According to the criminalisation thesis, economic migrants, refugees and asylum seekers are represented in terms of threats in public discourse and treated punitively. They are portrayed as dangerous and criminal; and as cheats and unscrupulous, seeking jobs that are scarce and benefits that they do not deserve (Pratt and Valverde 2002; Pastore 2004, 90; Pratt 2005; Broeders and Engbersen 2007, 1594). Such characterisations are being institutionalised through legislation, policies and administrative practices that seek, on the one hand, to

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<sup>9</sup> Criminalisation literature is mainly produced in criminology and sociology. Scholars in disciplines such as political science, international relations and security studies have identified a similar process of ‘securitisation’ of immigration (see eg Huysmans 1995; Huysmans 2000; Huysmans 2006; Ibrahim 2005; Muller 2004; D’Appollonia and Reich 2008; also Boswell 2007). Jef Huysmans (2006, 80) explains that immigration has been identified in public discourse as a ‘societal security threat,’ that is, a threat to the cultural identity of European societies.

strengthen the external borders and, on the other, to introduce ever more intrusive controls on those who manage to cross them. The first set of measures pre-emptively target migrants before they reach the external borders by making entry more difficult, while the second aim to ensure a smoother and easier process for spotting, punishing and removing undocumented immigrants (Weber and Bowling 2004; Weber 2007; Bosworth and Guild 2008; Bosworth 2008; 2011b).

This thesis takes the literature on the criminalisation of immigration as a starting point. My purpose is to enrich this debate by focusing on a particular aspect of the criminalisation of immigration: the formal conversion of immigration/administrative violations into crimes and their actual enforcement. While many authors have hypothesised about the criminalisation of immigration, it remains unclear how this process takes place in practice: what its specific configurations are and how it impacts on governed subjects. Non-nationals –and particularly undocumented migrants- are not only being treated as criminals in a rhetorical or symbolic way, but are in fact literally criminalised –that is, subject to prosecution and criminal punishment. As a result, criminal law and criminology literature are important to understanding how criminal justice discourses, representations and practices are shaping the administration and policing of immigrant populations.

By engaging theory with empirical enquiry, the general purpose of this thesis is to uncover the concrete, multiple forms in which immigration is governed through crime (Simon 2007; Bosworth and Guild 2008). This chapter will be structured in the following way. The first part is focused on the work of a number of scholars who have hypothesised about the criminalisation of immigration and the convergence of immigration and criminal laws. The second part reviews two sets of literature that account for and analyse the redefinitions of the contours of the criminal law and the criminal justice system during the last decades. Because of the similarities and communicating vessels between immigration and criminal law policies, it is pertinent to look at this literature in order to better understand the changes in policy and

practice in both fields. These two bodies of literature will guide my analysis on the current strategies and practices in the field of migration control.

## II. Immigration and crime: a new, old debate

‘Immigrant’ is simultaneously a broad and a narrow concept to designate a person who lives in a country different from her country of origin. It is broad because it encompasses individuals who leave their own country for different reasons (economic, political, social, professional, etc). Whereas this differentiation is often made by states in the treatment granted to foreigners and is recognised in both national and international law, the determination of the main reasons that prompt a person to migrate is not straightforward (Hollifield 1992, 205; Martens 1997). Many undocumented migrants leave their own countries for reasons that would make them eligible for international or humanitarian protection. Upon arrival to Europe, instead of claiming refuge, they choose a life underground for fear of being refused and returned back to where they came from. They are *de facto* refugees (Gibney 2000).

At the same, ‘immigrant’ is a narrow concept. Even if in theory it designates a foreigner with different backgrounds (professional, ethnic, socio-economic, etc), in public discourse and the media it is increasingly circumscribed to a narrower category of non-citizens: non-white, poor, unskilled workers from developing countries.<sup>10</sup> Robin Cohen (1994, 189) calls this group ‘third world immigrant’ or ‘helots;’ that is, those immigrants who, in addition to being deprived of many rights enjoyed by citizens –principally, the right to vote and be elected, are in a much worse situation than other foreigners in a given receiving country because they belong to an ethnic minority, are unskilled, and are poor. The difference between foreigners coming from poor and rich countries is also manifested in the

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<sup>10</sup> In spite of a number of research on immigration that shows how heterogeneous this phenomenon is (eg, Portes and Borocz 1989; Colombo 1997; Portes 2003).

enforcement of controls over borders: states do not distribute the burden evenly. Foreigners coming from different parts of the globe are treated differently concerning formal and informal practices –visa requirements, restrictions on the right to entry and stay, enjoyment of civil rights, and judicial and extrajudicial treatment- (De Giorgi 2006, 112).

There is a clear intersection between the media and public policy descriptions of immigrants –especially if they are undocumented- and that of the deviant, the anti-social, the offender: they are both socially excluded (Melossi 2003, 375). Immigrants are often represented as threats, as a ‘dangerous’ class by the media –particularly by tabloids, and their social, cultural and sometimes ethnic differences in the receiving society render them as ‘outsiders.’ This may explain why immigrants are quickly identified as outlaws and potential offenders, and why recent policies have emphasised this parallel (Guillén and Vallès 2003; Malloch and Stanley 2005; Chacón 2007). The link between immigration and crime is not new though (Melossi 2000). As I will show in chapter II, in Britain immigrants have been in many instances linked to criminality, social unrest and public disorder (Dummett and Nicol 1990). Elsewhere, in the late nineteenth and early twentieth centuries large flows of immigration – mainly, Jewish, Southern European, Irish and Chinese people- escaping from hunger and wars became a great concern for receiving countries in the Americas not only because of their numbers but also because of their origin. They were accused of bringing to the ‘new continent’ disorder and crime, and anarchist and socialist ideas to agitate the masses.

Early criminological research in countries that hosted the newcomers both in the North and the South –such as the US and Argentina- addressed this relationship, sometimes reinforcing it, other times disputing it. In the US, the city of Chicago was one of the most important destinations of immigrants and the Department of Sociology at the University of Chicago was a prominent site of sociological research about the new arrivals and the process of adaptation to the city. Immigrants were linked to political radicalism, criminality and ethnic conflicts (Melossi 2002, 128; Valier 2003, 10). Further, Chicagoans considered that the

settlement of immigrant communities in particular areas of the city –the centre or downtown- contributed to the displacement of middle classes from those areas towards the periphery and ultimately led to social disorganisation, decay and crime (Burgess 1967 [1925], 56). Immigrants were seen as marginal people with serious problems of adjustment to the new society (Park 1928). This lack of adjustment and their ‘physical visibility’ was deemed as a source of conflict with the indigenous population (Valier 2003). The Chicago School, however, did not assume that crime rates among immigrants were higher than those among the natives living in the same economic and social conditions of the former (Melossi 2002, 133); rather higher crime rates were associated with the rapid growth of the population in urban environments – particularly, due to the ‘invasion’ of large contingents of immigrants- (Burgess 1967 [1925], 57). Thus, the causes of crime were linked to the changing dynamics of the metropolis rather than to social or individual characteristics of the newcomers.

In Argentina, social scientists such as Eusebio Gómez and José Ingenieros identified immigrants –specially, working-class, Southern Europeans- as the cause of crime and other social ills (Rodríguez 2006, 86). Argentinean elites perceived them as a disruptive presence that may undermine the process of institution building in the country and social engineering of the Argentinean society. In fact, during the post-independence period by the end of the nineteenth century the government encouraged immigration from Northern Europe to populate and ‘grow’ the country. However, most of the foreigners came from the poor Southern countries –particularly Spain and Italy. Many of these immigrants and their families were targeted by the police, criminal justice and welfare institutions. Their offspring – especially those selling newspapers of the Communist Party on the streets- constituted the main focus of juvenile justice agencies and social workers because they were deemed as the future criminals. Through their confinement in juvenile prisons –or reformatories, these children were supposed to learn the vernacular customs, be saved from crime, degeneration and promiscuity, and be ‘civilised’ (Aliverti 2002).

More recently, critical criminology scholars have revisited the link between crime and immigration. Jock Young (1999, 29) disputes that crime rates among first-generation immigrants are higher than among the native population. It is only among the offspring of immigrants where he finds higher crime rates and he explains this by the fact that second generations when assimilated to society are more prompted to commit crimes because of relative deprivation –namely, the perception of injustice due to the unequal economic and social position of a particular individual or group in a given society- (Young 1999, 92). He depicts immigrants in modern societies as scapegoats because they do not cause problems but are blamed for them. While Michael Tonry (1997) agrees that second-generations generally present higher levels of criminal activity, he considers that other factors should be taken into account: among others, the cultural background of a particular immigrant community, the ability to adapt to the new society and the access to ethnic-group networks, the social policies of the receiving country to assimilate immigrants, and the reasons which lead certain groups or people to migrate (Tonry 1997, 22; also Hagan and Palloni 1998; Smith 2005).

As this discussion suggests, the representation of immigrants as a dangerous class and the relationship between immigration and crime have been recurrent themes in academic circles. Perhaps because of –or despite- this bulk of academic research and the long history of linking immigrants to disorder and crime, it is not surprising that current immigration policies enacted in receiving countries –particularly in the ‘advanced west’- are increasingly resorting to strategies traditionally used by law enforcement agencies to deal with offenders and crime in order to control immigrants (Bosworth 2007).

According to Loïc Wacquant (2006, 99, italics in original), what characterises the criminalisation of immigration is ‘the vastly *greater capacity and propensity of the state to deploy its penal resources* at both the national and the supranational levels to “resolve” the problems they pose or embody’ and that this phenomenon is crystallised in three features of contemporary immigration practices: limited legalisation schemes, expanded border control, and mass

deportation. He also relates the over-representation of ‘extra-communitarians’ behind bars in European prisons in comparison to the share of foreigners in those societies to the criminalisation phenomenon. This disproportion, he suggests, cannot be solely explain by higher crime rates among minority groups. In addition, other factors are at play: first, law enforcement agencies differentially target immigrants and courts apply legal standards that make it difficult for foreigners to obtain bail –such as the requirement of a stable job and residence. Second, a large number of crimes for which immigrants are confined can only be committed by non-nationals –the so called ‘immigration crimes’ such as unlawful entry or overstay- (Wacquant 2006, 88; also Wacquant 2005; De Giorgi 2010). Likewise Alessandro De Giorgi (2010, 158, italics in original) refers to the ‘unusual *intensity* of penal practices’ deployed against immigrants by European states through, for example, the criminalisation of immigration status.

In the same line, Katja Franko Aas (2007, 288) observes that the reassertion of national and cultural borders is enacted through punishment and practices of banishment and expulsion. She points out that the link between immigration and terrorism was reinforced after the 9/11 attacks with the consequence of an increase in deportations of foreigners and the extensive use of ‘softer bio-power of surveillance’ over immigrants (Aas 2009b). In the field of international relations, Jef Huysmans (1995; 2000) notes how migration flows are being constructed as a security threat in Western Europe and are becoming a fundamental issue in the security agenda. He explains that the representation of immigrants as ‘cultural others’ and the construction of security threats coming from the outside effectively reinforces European identity. With specific reference to the European Union, Didier Bigo (2005, 75) considers that the measures to close the borders and to keep out third-country nationals illustrate the attempt by European bureaucrats to control what is considered a chaotic outside. Immigrants from the ‘third world’ are depicted as potential offenders and thus those measures seek to pre-emptively eliminate the risk they embody (Bigo 2005, 88). These measures, Bigo

explains, were toughened by post-11/9 counter-terrorism policies as terrorism, organised crime and illegal immigration were placed together as a continuum of security threats (Bigo 1994, 164).

In terms of how this ‘criminalisation’ phenomenon concretely works, other authors have gone further by showing the different intersections between immigration and crime control fields. According to this literature, immigrants are treated punitively as strategies and measures borrowed from the criminal justice system are being imported into the immigration realm and harsher sanctions are imposed for the violation of immigration rules. Mary Bosworth (2007), for example, draws striking parallels between the confinement of immigrants and offenders in Britain. She observes that the borrowing by the British Immigration and Nationality Directorate (IND) of practices and staff from the criminal justice system ultimately reveals that immigrants are considered as actual or potential criminals. Further, both prisons and immigration detention centres operate as ‘exclusionary zones’ that mark the physical and symbolic borders of the British society. Jonathan Simon (1998, 590) examines the systematic imprisonment of immigrants in the US from the 1980s onwards as a response to the massive population flows from Latin-America. He suggests that the use of imprisonment –a ‘specialised penal system’- was a governmental strategy to regulate the global flows of people in a flexible, cost-efficient way. In what she calls ‘cimmigration,’ Juliet Stumpf (2007, 14) notices an overlapping of immigration law and criminal law both in terms of substance (the type of wrongs sanctioned and the measures imposed) and in terms of the procedure followed to enforce those norms.

Others scholars call the attention to the institutional parallels in the contexts of immigration and crime control. Border patrols and other immigration authorities, who have acquired powers to detain and arrest non-citizens, are frequently involved in criminal investigations and overlap with criminal law enforcement agencies (Miller 2005, 1116; also Tumlin 2004). Similarly, the police perform tasks that go beyond crime control and include

immigration controls (Bigo 2005, 83). Still more authors (Bloch and Schuster 2005; Gibney and Hansen 2003; Gibney 2008) document the extensive use and the ‘normalisation’ of deportation and detention to control immigration. Huyen Pham (2009), for instance, calls the attention on a number of laws that made the requirement of proof of legal immigration status paramount not only for crossing the borders but also to enjoy a range of rights and benefits once inside the country. As such, they have the effect of limiting access to a number of social benefits –such as education, medical care, state assistance, etc, to obtain a driving license and to work. Even if the enforcement of those laws does not have the physical removal of those subject to them as a consequence, she observes that their collective impact is the ‘self-deportation’ of immigrants without legal status. As such they serve an important enforcement function: they not only push people out of the country, but also diversify and extend the scope of state’s policing of non-nationals by burdening private actors in the enforcement of immigration laws –such as transportation companies, employers and landlords- (also Pham 2008).

As part of the criminalisation of immigration, other authors discern a link between tougher immigration regulations and anti-terrorism measures. They state that the terrorist acts in western countries –notably, in New York, Washington DC, London and Madrid- and the measures put forth afterwards reinforced this relationship (Tumlin 2004; Miller 2005; D'Appollonia 2008; D'Appollonia and Reich 2008). The impact that counter-terrorism measures has had in recent legislative reforms and public debates on immigration in Western Europe should not be overstated though. Since the 1980s such countries have sought to limit immigration –a trend reinforced by the ‘Europeanisation’ of immigration policies. Then restrictive policies have not been solely generated after the attacks, but rather there has been continuity in the line of policies enacted by these European states.<sup>11</sup> Neither at the public

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<sup>11</sup> Perhaps the most clear attempt to link national security to immigration and border controls was the provision in the Anti-Terrorism, Crime and Security Act 2001 which, as enacted, authorised the detention of a person deemed to be a suspected international terrorist over whom an order of removal or deportation may be taken

discourse level nor at the policy-making one there is enough evidence to affirm that terrorism has impacted how states deal with immigrants (Boswell 2007; 2008; also Neal 2009). Further, the control of immigrants is mostly exercised through measures that are not directly linked to counter-terrorism. At least in Britain, there is a greater concern reflected in the government's policy papers about law breaking (particularly, immigration law violations) and social disorder, the abuse of welfare services by those who do not contribute to the tax system, and the disruptive impact that the arrival of large groups of migrants may have in local communities. In their analysis of parliamentary debates on immigration policies after the attacks, Jef Huysmans and Alessandra Buonfino (2008) find that immigration is often linked to security through a more mundane and managerial discourse about deviance, incivilities and minor offences in order to justify restrictions on immigration (also Huysmans 2006). In the American context, where the link between immigration and terrorism seems clearer, Chacón (2007; 2008) considers that post-9/11 immigration measures merely continue restrictive measures of the past decade. While attempts to strengthening border controls allegedly for national security purposes after the attacks did not result in the increase in the removal of non-citizens on security grounds, they boosted the removals related to crime and immigration controls (Chacón 2007, 1875; also Demleitner 2004, 567).

In recent years, the criminalisation of immigration has been an area of increased interest among scholars. As a consequence, this body of work has encouraged a fruitful debate about the different ways in which immigration and criminal regimes are converging to police non-nationals, in what Leanne Weber and Benjamin Bowling (2004, 195) have called an 'emerging punitive regulatory system.' Despite this growing scholarship, however, the criminalisation of immigration violations –or immigration crimes- remained largely under-

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but could not be executed either temporarily or indefinitely. The British Parliament had to subsequently modify this provision on indeterminate detention –which was replaced by control orders- following a judgement by the European Court of Human Rights (ECHR, *A and Others v the United Kingdom*, judgement of 19 February 2009, Application 3455/05).

researched. While this literature is rich with rhetoric, it falls short on a detailed, legal analysis of the ‘symptoms’ of the criminalisation trend. Particularly in Britain, there is not much work done on the reliance on criminal law to enforce immigration norms despite the increase of these offences in the last two decades or so. Some scholars have called the attention on the existence of immigration offences in Britain and other European countries, and the parallel system of administrative and criminal sanctions for dealing with immigration offenders (eg, Albrecht 2000, 147; Weber and Bowling 2004, 204; Wacquant 2006, 88; Zedner 2010, 381; De Giorgi 2010, 158). Apart from the literature on trafficking in human beings and illegal employment,<sup>12</sup> there are few academic works dealing with the formal criminalisation of immigration breaches and their enforcement.

In the other side of the Atlantic, US criminologists and criminal law scholars have paid more attention to this phenomenon. Some years ago, Maria Isabel Medina (1997) examined the criminalisation of unauthorised labour and marriage fraud. She assesses that enforcement agencies and the US society are morally ambivalent about these offences and this attitude may explain their low enforcement. Teresa Miller (2003) documents the increased enactment and enforcement of immigration crimes since the mid-1980s –particularly illegal entry and illegal working- (also Morris 1997; Chacón 2007, 1837; Stumpf 2007, 16). In a recent article, Stumpf (2009) traces the history of immigration-related sanctions in US legislation and shows that these offences are older than sometimes thought, even though they were seldom enforced. They can be found in laws of the late eighteenth century. She also notes that removal and deportation are relatively new immigration sanctions. Instead, ‘criminal penalties including incarceration, fines and hard labor were the first tools the US Congress chose to enforce its new immigration laws’ until the end of the nineteenth century (Stumpf 2009, 1711). While the enforcement of immigration offences remains relatively low

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<sup>12</sup> See eg Guild and Minderhoud 2006; Ruhs and Anderson 2010; Anderson 2010b; Anderson 2011.

compared to the large number of undocumented migrants caught by enforcement agencies, some authors evidenced a steady rise in the number of prosecutions for these offences in recent years, along with the increase in the number of these offences (Demleitner and Sands 2002, 247; Legomsky 2007, 479; also Coutin 2005).

My thesis endeavours to fill the space left in the literature about the criminalisation of immigration violations –particularly in British academia. I will use the theoretical framework described above and relate it to the literature on the new configuration of criminal law and crime control policies. I turn to its discussion in the following section.

### **III. The governance of immigration through crime control techniques**

In analysing the ‘hybrid crime/immigration control system’ in Britain, I will use part of the body of literature on the new or re-configuration of the criminal law and its institutions. In particular, I examine the literature on actuarial justice, over-criminalisation and criminal law as regulation. This theoretical framework will guide my analysis on the role of criminal law to regulate immigration.

#### **a. Actuarialism and new penology**

The expansion of actuarial practices in the field of criminal justice since the 1980s has drastically affected crime control policies, the work of criminal justice institutions and the purpose of criminal punishment. Building on Michel Foucault’s (1991) studies on security and ‘governmentality,’ Malcom Feeley and Jonathan Simon (1992; 1994; 1995) theorise on the rise of actuarialism and the emergence of the ‘new penology’ –as a replacement of the ‘old’ or ‘progressive’ penology. Driven by a concern about the broad margin of discretion held by judicial decision-makers and the aim of making the criminal justice institutions more efficient,

the new penology embraces a systemic conception of criminal justice and is characterised by its focus on the management of risk populations –particularly, the so called ‘under-classes’<sup>13</sup> (Feeley and Simon 1992, 452).

The new penology is less ambitious than the old penology allegedly concerned with eliminating crime and rehabilitating offenders. Feeley and Simon (1992, 466) argue that the advocates of the new penology hold a particular understanding of crime as a social problem: they are not concerned with the social, cultural and structural determinants of crime but on how to deal with it in a more effective way. The new penology assumes that societies produce certain levels of it and that offending is disproportionately concentrated in specific subpopulations. Because these segments are embedded in a culture of poverty and violence, they cannot be redeemed from crime (Feeley and Simon 1994, 173, 192). According to the authors, the goal of the new penology is to keep crime at tolerable rates through the identification of the offending population, the prediction of their future behaviour through actuarial, quantitative tools, and their incapacitation.

Hence, the main concern of the advocates of the new penology is how to reduce crime in the future rather than to purge the guilt of the past. Instead of reforming offenders or their environment, actuarial justice aims at rearranging the distribution of offenders in society through selective incapacitation of high-risk offenders (Simon and Feeley 1995, 164; Feeley 2004, 62). Feeley (2004, 72) asserts that the emergence of actuarial justice is at odds with other crime control discourses and practices –such as the ‘tough on crime’ one. While the latter is retributive and emphasises offenders’ responsibility and harsh punishment –and

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<sup>13</sup> The idea of ‘under-class’ refers to marginalised social segments –particularly, African-American and Latinos in the US. It was appropriated by the conservatives to point out the deficiencies of the welfare system and the culture of dependency that it generates. The marginalisation of the under-classes and the problems that it involves –including crime- is not explained in terms of the lack of opportunities or resources. Rather it is considered a cultural problem: crime is mainly the product of the ‘culture of poverty’ that dependency generates (see Murray 1990).

thus is focused on the past- actuarial justice is utilitarian and forward looking (see also Feeley and Simon 1992, 451).

Feeley and Simon further argue that, because of the use of administrative strategies and the emphasis on the management of risks –rather than individual justice, actuarial justice has transformed the rules and goals of the criminal justice process (Feeley and Simon 1992, 185). As such, the role of the judges has also been modified in that they are aware and explicitly embrace ‘a regulatory exercise of power operating in and through the criminal justice process that aims at *managing* a population of dangerous people at an appropriate level of control’ (Feeley and Simon 1994, 181, italics in original). By lowering the legal standards and burdens of proof, actuarial justice alters the way in which state intrusions into people’s rights are legitimised and transforms criminal procedure and criminal law into a regulatory activity (Feeley 2004, 70).

The actuarial justice thesis has been the object of several debates. Similar to Feeley and Simon, Bernard Harcourt (2003, 106; 2007a, 16) diagnoses a ‘new model of bureaucratic management of crime’ and a turn towards a ‘highly administrative law enforcement and prison sectors.’ However, he questions the novelty of these techniques, noting instead that actuarial practices have been used long before the twentieth century (2003, 114; 2007a, 186). What is new, he believes, is the refinement of actuarial techniques by more complex statistical models –particularly the narrowing of crime predictors. Unlike Feeley and Simon, Harcourt ascribes these models to rational-action and deterrence theories (Harcourt 2007a; b) and disputes the assertion that incapacitation is its main goal.

Pat O’Malley (1992; 1996) criticises Feeley and Simon’s contention that actuarial practices or risk management strategies emerged mainly because of their efficiency. ‘Efficiency’ is an abstract concept he points out, and largely depends on the ability of certain institutions to achieve a given political programme. Actuarialism can serve a diversity of political ends (ie, welfarism or neo-liberalism). Instead of analysing the ‘inherent’ properties of

actuarial justice, O'Malley suggests, it is important to examine how these practices of governance are linked to a particular political and ideological programme (O'Malley 1996, 190). He finds no contradiction between actuarial practices and discourses and punitive, emotive ones as some authors assert (eg Garland 1996; 2001; Feeley 2004). Instead, he understands the configurations of penal practices and discourses as an amalgam of contradictory but, at the same time, complimentary rationales or approaches (O'Malley 1992, 258; O'Malley 1999, 188). According to O'Malley, actuarial justice is the outcome of a political and ideological alliance of the neo-conservative social authoritarian strand and the neo-liberal free market strand (what he calls the 'New Right'), and the compromises between these two rationalities (O'Malley 1992, 258; O'Malley 1999, 185; also O'Malley 2002). From this perspective, the ascendance of actuarialism can also be connected to penal populism because both approaches depart from the traditional legal standards of criminal law and offers fewer constraints to punitive interventions (Zedner 2009, 43).

**b. Over-criminalisation, 'regulatory offences' and criminal law as regulation in contemporary practices of punishment**

Since the late 1970s the state has retreated from a number of social areas such as health and education, and has seen its influence diminish in certain sectors of the economy in favour of private entrepreneurship and competition. Yet, in the administration of punishment the role of the state remains intact and indeed it has been reinforced (Braithwaite 2000, 43; Garland 2001; Pratt 2006; Downes and Hansen 2006). At the same time, as some authors have argued, new forms of governance in late modern societies are characterised by a broad regulatory role by the state in a myriad of social and economic activities (Braithwaite 2000; Lacey 2004). This regulatory role has been widely backed-up with criminal powers and has resulted in an

increased or over-criminalisation<sup>14</sup> in recent years (Ashworth 2000). In the light of these developments, John Braithwaite (2003) proposes an analytical framework that acknowledges the hybridity of punitive and non-punitive regulation, and thus considers both the ‘criminal justice trunk’ and the ‘business regulatory trunk’ as part of the regulatory state. While the poor are regulated through punishment, the crimes of the powerful are mainly dealt with through non-penal mechanisms (such as risk-prevention and restorative strategies) and criminal prosecution remains a background threat.

In this regard, the intensification of the use of criminal law to regulate an ever expanding range of conducts diagnosed by criminal law scholars can be linked to the rise of the ‘new regulatory state’ (Braithwaite 2000). In the US context, Markus Dubber (2010b) notes that the expansion of the criminal law statute book is largely due to the introduction of regulatory offences. These are ‘offences of disobedience that attach sanctions to the mere violation of a state command’ (Dubber 2010b, 200). Douglas Husak (2008) considers that the most pernicious feature of what he calls ‘over-criminalization’ is the resulting unjust punishment –that is, people are punished for conducts that should not be criminalised at all or are punished disproportionately to the crime committed- (Husak 2008, 14). Instead, William Stuntz (2001) finds the causes of the growth of substantive criminal legislation in the US institutional design which encourages both legislators and prosecutors to broaden the scope of criminal liability and increase the amount of penal regulation. He asserts that ‘[while] the law on the books makes everyone a felon, [...] prosecutors and the police both define the law on the street and decide who has violated it’ (Stuntz 2001, 511).

While one should be careful in extrapolating legal phenomena from one side of the Atlantic to the other, the diagnosis of US scholars resembles that of their British colleagues. In this vein, Antony Duff (2010a) defines over-criminalisation as the criminalisation of

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<sup>14</sup> While this expression seems novel, it has been used earlier by criminal law scholars critical of the pace of the expansion of substantive criminal law (such as in Kadish 1967).

conducts that should not concern the criminal law. He points to two trends in this regard: first, the addition of offences in non-criminal legislation –particularly, the criminalisation of non-compliance- and, second, the creation of a range of ‘ancillary’ offences. As such, the criminalisation phenomenon observed by these authors is both a quantitative and a qualitative shift in the substance of the criminal law.

Like Dubber, Andrew Ashworth (2000) connects the expansion of the criminal law mainly to regulatory offences that ‘form part of statutory schemes for the regulation of certain spheres of social or commercial activity, and are generally enforced by the regulatory authority rather than by the police’ (2000, 228; also Ashworth 2009). Many of these offences are characterised by strict liability, omission liability and reverse onus of proof. The mushrooming of these crimes is not only worrisome because of their departure from traditional principles of criminal law. They are also problematic because they seem to contradict, first, the principle according to which the criminal law should be used against the most serious wrongs and, second, the principle of proportionality between wrongdoing and sanction.

Ashworth addresses a third problem which is related to the unequal enforcement of these offences. Similar to what Braithwaite (2003, 10) explains about the regulation of ‘crime in the suites,’ the agencies in charge of the enforcement of these offences primarily seek to prevent harm so they work through negotiation to enforce compliance and keep the criminal prosecution as a background threat. As such, regulators with enforcement powers –such as the Environmental Agency, the Financial Services Authority or the telecommunications and broadcasting regulator (Ofcom)- have different priorities from those of the Crown Prosecution Service (CPS) and the police: they are concerned with securing compliance rather than punishing wrongdoing. As such, they leave criminal prosecution as a last resort (Garoupa et al. 2011). Concomitantly, they have great discretionary powers in the selection of enforcement mechanisms. Research on the enforcement of factory legislation shows that criminal prosecutions are rare in this context, whereas warning notices or formal and informal

threats of prosecution are more frequently used (Carson 1970, 392). This last aspect casts doubt about the fair and equal treatment of conducts of similar gravity that are dealt with by different enforcement agencies in different ways (2000, 246; also Lacey 2008, 102).

The expansion of the criminal law to regulate an increasing range of activities has altered what at least in theory is its main function, which is censuring wrongdoing, and destabilised the distinction between civil and criminal wrongs (Steiker 1997; Sarat et al. 2011).<sup>15</sup> Yet, as Peter Ramsay (2006) shows, so called ‘regulatory offences’ are not new. In fact, what he brands ‘regulatory criminal law’ –formed by statutory offences which often do not have a fault element and are aimed at distributing the burden of (risk of) harm- was more common and widespread in the nineteenth and early twentieth century than offences based on the subjectivist doctrine –or the paradigm of agency.<sup>16</sup> According to the latter, criminal censure should follow the wrongful action committed with knowledge and intention. In contrast, ‘Punishment for the regulatory public welfare offences is a not a question of desert [...] but of deterring specific injuries to conditions which ensure the single civilisation promoted by social citizenship’ (Ramsay 2006, 50). The different forms of criminal liability (fault or subjective liability and strict or objective liability) delineated by Ramsay are connected to and defines the function of criminal punishment, either as retribution or as deterrent.

Ramsay explains that the post-wars years witnessed an ‘ideological balance’ between two competing paradigms –the paradigm of agency and the paradigm of welfare. The first asserts the formal equality of all citizens by treating them as responsible subjects, while the second upholds the value of welfare protection and risk-avoidance by imposing a positive, social duty on the citizens to refrain from causing harm or creating a risk of harm in their

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<sup>15</sup> The blurring of the civil/criminal law divide has also become apparent with the mushrooming of what some authors call ‘hybrid actions’ (Klein 1999), ‘hybrid legal institutions and practices’ (Steiker 1997) or ‘punitive civil sanctions’ (Mann 1992) in the US, and preventive orders in the UK (Ashworth and Zedner 2010). These developments challenge this clear-cut distinction and forces courts, legislatures and commentators to envisage alternative procedural regimes that lie in-between the civil and the criminal ones.

<sup>16</sup> For a critique of extended forms of criminal liability based on the ‘subjectivist paradigm,’ see Ashworth 2008a.

everyday conduct. Ramsay's analysis of the dual functions of the criminal law and the historical conditions that gave rise to the differentiated forms of criminal liability sheds light on the historically contingent nature of the criminal law, yet it fails to assess critically the rise and expansion of regulatory criminal law. Rather Ramsay seems to legitimatise and justify it as a necessary block of the modern criminal law edifice. He does not question the extensive use of the criminal law for regulatory purposes nor the problematic consequences for both the criminal law itself and those subject to it.

While the quantitative expansion of the criminal law in the last two decades is undeniable, the 'qualitative' aspect of over-criminalisation phenomenon remains contested. Lindsey Farmer, for example, objects to Husak's contention that over-criminalisation consists of the proliferation of *mala prohibita* and questions the very concept of *mala in se* or 'paradigmatic' crimes (Farmer 2010a, 219). He argues that regulatory offences are not "merely technical" or morally neutral' but reflect a social consensus about the function of the criminal law and the role of the state in a particular historical and social setting. Criminal (legal) wrongs should thus be analysed in the context in which they were created and enacted (Farmer 2010a, 228; also Farmer 2010b). Another objection to this literature is the strict differentiation between so called 'regulatory' offences and 'ordinary' offences, and the distinctive functions that each of them serves. Even if this clear-cut distinction is useful for analytical purposes, its legal and empirical base is contentious as the exercise of differentiating one from the other has been unsuccessful so far (Dubber 2005, 129). In fact it is difficult to define the features of regulatory offences: are they strict liability? Does their sanction lack the stigma attached to that of ordinary offences? Are they non-serious offences? (Ashworth 2000, fn 12; Tadros 2007, 16).

While the reliance on the criminal law to enforce a broad range of non-criminal regulations is not new (Lacey 2001, 365; Ramsay 2006, 32), the expansion of the substance of the criminal law in recent years is related to the use of it for symbolic purposes. Faced with

criticisms about the limits of state action in relation to certain issues, governments use criminal legislation to fix them, or at least to be seen as fixing them (Garland 1996; 2001; Pratt 2006; Simon 2007; Loader 2009). As Jonathan Simon (2007, 14) puts it, ‘it is crime through which other problems are recognized, defined, and acted upon.’ This is so in areas that have become politicised in recent years, such as crime and immigration policies, particularly in Britain (Zedner 1995, 521; Tonry 2004a). As such, these two policy fields have become rich soil in which ‘populist punitiveness’ or ‘penal populism’ has flourished (Tonry 2004b, 138; also Bottoms 1995, 39; Roberts et al. 2003).

In this regard, Nicola Lacey (2004, 156) asserts that the impact of the expansion of formal criminalisation is limited in practice. This assessment may be correct judged by the low increase in the number of cases based on newly created offences that reach the criminal courts.<sup>17</sup> Other authors have noted that along the expansion of substantive criminal law, there has been a diversification of the procedural channels to deal with non-serious offending which have contributed to ‘the removal of lesser offences from the hallowed bastions of the criminal trial to the instrumental channels of civil and administrative law’ (Ashworth and Zedner 2008, 39). Zedner and Ashworth consider that these developments are changing the role of the criminal law, the criminal process and the criminal sanction. They identify a range of developments in this direction, including the greater incentives to plead guilty and the use of diversion. The increasing use of these channels to deal with offenders implies a cost-effective analysis based on which the criminal trial is considered a luxury and should be reserved for serious, contested cases. They are an expression of what some authors have described as the ‘administrativisation’ of the criminal justice system. As a consequence, the bulk of the cases that reach the criminal courts are dealt with by the ‘efficient methods of the administrative state’ and the safeguards of the criminal procedure are eroded (Greenspan 1991, 49).

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<sup>17</sup> See the recent consultation paper by the Law Commission which states that the new offences created in regulatory contexts are barely used (Law Commission 2010, 7).

### **c. Relating criminal law literature to the criminalisation of immigration**

The criminal law literature briefly reviewed above is useful as a theoretical background for analysing the hybrid system of administrative and criminal sanctions that applies to non-nationals. The actuarial justice literature analyses the new forms of population management through the classification of individuals into aggregates: ‘The individual no longer has any intrinsic value, he/she is apprehended as part of a collective entity’ (Bigo and Guild 2005, 253). Particularly important in such classification is the idea of ‘harm’ and ‘risk.’ People are treated not as individual subjects but as a part of a group or a risk category –such as offenders, illegal foreigners, suspected terrorists, etc. Based on such classifications, governments target enforcement actions according to the ‘risks’ each group poses. In the immigration field, actuarial practices not only allow the quick and effective identification of welcome from unwelcome newcomers, and the adoption of control measures accordingly (Mathiesen 2006); they serve a number of other immigration control functions. In Britain, the introduction of the ‘harm matrix’ to guide decision making is a clear manifestation of this approach (see eg Home Office 2010c). The categorisation of immigration offenders as high, medium and low risk is being used in recent enforcement strategies not only for classificatory purposes, but also to justify enforcement actions against these people: those who cause more harm are candidates for prosecution and deportation. In this view, the harm broadly defined caused by illegal immigration legitimises state action against both those who benefit from it and the immigrants themselves (Anderson 2011).

In the crime control field O’Malley (2002, 210) notes the coexistence of at least two different conceptions of individuals: a rational, calculative one who, either as a victim or as an offender, may balance the cost and benefits of her conduct, and one who is managed through exclusion because she cannot be persuaded, deterred or reformed. In immigration policies of

recent years, this latter representation prevails (Walters 2004, 248). Immigrants are conceived as an unmanageable class who cannot be persuaded by the rules and who can only be controlled through exclusionary techniques. The underlying idea is that these people are prepared to do anything to get or to stay in the country. Immigration policies heavily rely on hard control measures designed to pre-emptively identify high-risk groups (through visa requirements, on-the-border controls, off-shore operations, etc), punish, detain and remove. Accordingly, as with actuarial justice, criminal punishment of immigration crimes is not justified by rehabilitative or retributive functions because it does not seek to reform and assimilate non-citizens to the receiving society. It rather hopes to incapacitate by physically restraining and excluding migrants from the community, thus preventing them from absconding or disappearing. The ultimate function of punishment in these cases is to eject unwanted migrants from the country.

Likewise, the literature on actuarial justice is useful for understanding how apparently conflicting discourses about immigration control are entangled and coexist in particular programmes. While immigration enforcement largely relies on actuarial practices to manage population flows, this approach is not in contradiction with the punitive turn of immigration policies and discourses that identify them as security threats to the host society. On the contrary, as Bosworth and Guild (2008) explain, actuarial techniques neutralise the individual and her suffering by treating her as part of an aggregate. By doing so, they discourage opportunities for resistance and set the ground for the enforcement of harsher measures against immigrants (also Simon 1988). This approach reflects the shift in penal and immigration policy towards a 'more administrative and impersonal styles of regulation' (Matthews 2005, 188). The application of these techniques to non-nationals, who are outsiders and strangers, is facilitated because of their weak civic and political link to the receiving society (Però and Solomos 2010, 6). As such they can be more easily anonymised, treated as an aggregate, a group of people defined by their 'foreignness' and whose identities –as

members of a class, a community, a neighbourhood, a political organisation, etc- are successfully erased.

Criminal law scholars have recently engaged in a fruitful debate about the legal and normative challenges that over-criminalisation poses and its consequences on the reconfiguration of the boundaries of the criminal law (McSherry et al. 2009; Duff et al. 2010). They have called for a re-evaluation in criminal law theory of the boundaries of the criminal law; or in other words ‘what the criminal law must in its own terms purport to be as a distinct mode of regulation’ (Duff 2010b, 89). As I will explain in more detail in chapter VI, in Britain criminal law has been historically used for regulating a wide range of social and economic activities, one of them being the entry and movements of non-citizens. The expansion of immigration offences in the last fifteen years is part of the over-criminalisation phenomenon observed in other areas of criminal law. The critiques by criminal law scholars of this phenomenon can be extended to the criminalisation of immigration. Backing immigration legislation with punishment represents a departure from many criminal law principles. So too does the practice of enforcing these norms pose a challenge to the equal and consistent application of criminal provisions. As I explain in chapter IV, the goal of the border force is to prevent unwelcome immigrants from entering the country and to remove those who are not authorised. In this context, criminal law is one of the tools to achieve those goals. Its role in immigration enforcement is not to punish moral wrongs but to regulate immigration flows. Immigration officers have broad discretion on the choice of intervention and as a result people accused of breaching similar immigration provisions are treated differently. This reveals a highly pragmatic, non-moral and strategic use of the criminal law.

Finally, the analysis of new immigration-based crimes challenges the distinction drawn by some authors between ordinary or mainstream offences and regulatory ones. This distinction oversimplifies the complex and hybrid nature of criminal law in contemporary conditions (Ashworth and Zedner 2011, 282). One example of this hybridity is the

criminalisation of various forms of immigration fraud. Punishing passport fraud aims at making the functioning of border controls smooth and effective. People without documents or with fraudulent ones cannot be monitored and removed. It also conveys a moral judgement about those who take advantage of the immigration and welfare system, and seeks to censure their wrongdoing. More generally, the rationale underlying immigration crimes is neither purely regulatory nor punitive. As I will show, even though their predominant role is to make the system of immigration controls effective by dissuading people from breaching immigration rules, the ultimate object of criminal law in immigration is to assist enforcement so that immigration wrongdoers can be successfully expelled from the country. As such, the exercise of criminal powers is entrenched with the sovereign powers to exclude and eject non-members.

Throughout this thesis I consider the literature reviewed above as a theoretical tool to understand the role of punishment in the management of immigration. The purpose of this study is to enrich the debate on the control of immigrants by exploring how immigration and crime control realms are merging and what the consequences of this intertwining in the regulation of foreigners are. By focusing my analysis on a particular aspect of the ‘cimmigration’ phenomenon, this research aims at grounding this debate in actual policies and practices, and exploring the legal and institutional conflicts and tensions arising from this convergence. In the next chapter, I look at the history of the British immigration system and the function that criminal law played in it.

**CHAPTER II: TRACING THE HISTORY OF IMMIGRATION CONTROLS IN BRITAIN (FROM  
THE LATE 1800S TO THE MID-1990S)**

Britain has a long and established history of immigration. It has been a point of arrival for people from many latitudes, cultures and places. Jews, Irish, Polish, old and new Commonwealth citizens, have all arrived at different times and in large numbers. Britain has one of the largest migrant resident and naturalised populations in Europe, and is still an important destination for asylum seekers (Gibney and Hansen 2003). This chapter traces the first pieces in the construction of the British immigration system and its development in the twentieth century in order to understand the origins of and rationale for recent policies. I will, therefore, provide a brief historical background of immigration legislation and debates before discussing more recent policies in this field. British immigration legislation, since the early twentieth century, established harsh controls over non-nationals and continuously expanded the category of ‘exclusionable’ foreigners. In contrast to the more widely accepted view in criminology (eg, Albrecht 2000; Miller 2003; Wacquant 2006; De Giorgi 2010), I will demonstrate that the criminalisation of migration is not new. Immigration-related offences or ‘immigration crimes’ –some of them punishable by imprisonment- were incorporated in immigration statutes since the early 1800s.

## **I. The development of British immigration controls**

*...and the East End of London was being swamped by aliens who were coming in like an army of locusts, eating up the native population or turning them out.*<sup>18</sup>

While fragmented, immigration legislation to regulate the entry and residence of foreign nationals has been in the statute book for some time. As early as 1813, immigration laws had provisions which sanctioned their infringement.<sup>19</sup> They did not constitute a comprehensive

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<sup>18</sup> Intervention by Major Evans Gordon, Hansard, HC Deb 2/05/1905, col 717.

<sup>19</sup> For example, Public Act, 54 George III, c. 155 1813-4; Public Act, 55 George III, c. 54 1814-5; Public Act, 7 George IV, c. 54 1826; and Public Act, 11 & 12 Victoria I, c. 20 1848.

system of controls, but did establish a set of rules to regulate the conduct of non-citizens in the UK. Illegal entrants were subject to arrest and detention.<sup>20</sup> The provisions for the registration of foreigners with the police were implemented by creating a number of offences for violating them.<sup>21</sup> The master of a vessel faced criminal punishment if he neglected or refused to make a declaration, or made a false declaration about whether he had any ‘alien’<sup>22</sup> on board and if such foreigner had disembarked in the country.<sup>23</sup> Other provisions about control over the arrival of non-nationals, their whereabouts once in the country and their exit from British territory sanctioned any breach with a fine or imprisonment. For example, foreigners were obliged to state in a written document –a certificate, declaration, or proclamation- the place of residence during their stay in the country. Refusing or neglecting to make a statement or making a false one or ‘knowingly and willingly dwelling or residing or being found to be or having been’ in a different place in breach of their established residence constituted a criminal offence punished with fines of up to £50 or imprisonment of up to six months.<sup>24</sup>

An offence penalising any forgery of a residence certificate, a passport or other documents was also part of this catalogue, as was overstaying which was subject to two months imprisonment.<sup>25</sup> Residents in the country for seven years or more, or foreigners under

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<sup>20</sup> S VII, Public Act, 55 George III, c. 54 1814-5.

<sup>21</sup> See Public Act, 7 George IV, c. 54 1826.

<sup>22</sup> The concept of ‘alien’ has been introduced in nineteenth-century legislation and it is still very much in use today. It has an enormous symbolic power. It is used in the law and in public discourse as a synonym of foreigner, but has a pejorative meaning often coupled with ‘undesirable,’ ‘criminal,’ or ‘terrorist.’ In a sense not all foreigners are aliens. This ‘chilling extraterrestrial category’ (Cohen 1994, 34) has historically served the purpose of demarcating the frontiers of ‘us’ and ‘them,’ insiders and outsiders. Further, as a manifestation of the state’s sovereign authority, it constitutes a linguistic device to justify the exercise of discretionary executive powers on a certain group and their exclusion from a series of rights guaranteed to nationals.

<sup>23</sup> S II, Public Act 7 George IV, c. 54 1826.

<sup>24</sup> Ss VI, VII, VIII, IX, Public Act 7 George IV, c. 54 1826; s XIX, Public Act, 55 George III, c. 54 1814-5.

<sup>25</sup> S XIII, Public Act 7 George IV, c. 54 1826, and ss XVII and XXIX, Public Act, 55 George III, c. 54 1814-5, respectively.

fourteen years old were exempted from these provisions. Similarly, people who were not allowed to remain or disembark in the country, or were found in the UK contrary to any such order were subject to arrest without bail until they were 'sent out.' In case of return without authorisation, a person could be convicted and 'transported for life.'<sup>26</sup> The penalty for the first offence was up to one month of imprisonment and for the second, up to two months. Authorities had the option of deciding whether the convicted person should be imprisoned or be sent out.<sup>27</sup> Where the person to be expelled was considered dangerous to the security of the country, detention without time limits was authorised.<sup>28</sup>

An act passed in 1848, called 'An Act to authorize for One Year, and to the End of the then next Session of Parliament, the Removal of Aliens from the Realm' permitted for that limited period the 'removal' of foreigners from the country if authorities had reasons to believe that this was necessary for the 'Preservation of the Peace and Tranquillity.' Failure to comply with such order constituted a misdemeanour and carried for the first offence imprisonment for up to one month, and for subsequent offences, imprisonment of up to twelve months.<sup>29</sup>

A brief review of nineteenth century provisions shows how widespread the use of criminal punishment to enforce immigration controls was. Perhaps because of the absence of a comprehensive system of immigration control, criminal law was a key enforcement tool for disciplining foreigners entering and residing in Britain. While the introduction of criminal law provisions in the books does not necessarily mean that they were enforced in practice, the number and variety of offences included in immigration laws reveal an early reliance on the

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<sup>26</sup> Exile and transportation were criminal sanctions. Peter Markowitz argues that these criminal punishments were the predecessors of the contemporary expulsion or deportation (Markowitz 2008, 320).

<sup>27</sup> Ss II, III, V, Public Act, 55 George III, c. 54 1814-5.

<sup>28</sup> S XVII, Public Act, 55 George III, c. 54 1814-5.

<sup>29</sup> S XX, Public Act, 11 & 12 Victoria I, c. 20 1848.

criminal law in this field. Even though data about the use of criminal powers is not available,<sup>30</sup> between mid-1800s and early 1900s Britain witnessed a period of lax controls over foreigners when powers of expulsion were seldom used against them. Bernard Porter (1979, 4) describes Victorian Britain as a period in which ‘the British government deliberately denied itself any control over immigration, and appeared indeed for the most part to take no interest in it’ (also Craies 1890, 39; Feldman 2003, 167).

The first system of controls to restrict the arrival and settlement of foreign populations was created in 1905. Prompted by the enforcement of the May Laws of 1882 by Czar Alexander III, a number of Jews were expelled from Russia and Eastern Europe. Many came to the UK. The arrival of Jewish immigrants was not without controversies. Confrontation and xenophobic expressions from the general public and the press were widespread. As a consequence, the government appointed a Royal Commission on Immigration to work on a proposal for a bill (Holmes 1988, 73; Dummett and Nicol 1990, 102). The result of the work of this body was the Aliens Act 1905 (AA 1905), the first comprehensive legislation on immigration controls. Parliamentary debates on the bill concentrated on the problems that aliens –particularly, Polish Jews- caused to the native population in terms of housing overcrowding, unemployment rates and labour competition, the reliance on public services by the poor among them, and their impact on crime rates and the expansion of sweating diseases. There was also a concern among Members of Parliament (MPs) about the country being used ‘as the refuse heap of the whole of Europe’ with reference to the provisions in the bill recognising the right to request refuge in Britain.<sup>31</sup>

The act stipulated that non-British subjects –or ‘alien immigrants’- may only cross the borders through specific ports and that authorised immigration officers could deny entry to

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<sup>30</sup> Statistical data on foreigners convicted for offences under immigration acts is not available for this period (personal correspondence with Mark Pearsall, The National Archives).

<sup>31</sup> Cfr Hansard, HC Deb 2/05/1905, col 708.

those considered ‘undesirable’ and entitled the Secretary of State to issue an expulsion order against them.<sup>32</sup> This law, however, was not systematically enforced and few were denied entry or expelled after arrival (Pellew 1989, 384). The AA 1905 also incorporated criminal sanctions against immigration violations. It penalised the unauthorised landing of an immigrant, being found in the UK in contravention with an expulsion order,<sup>33</sup> and making a false statement or representation to an immigration officer, medical inspector, immigration board, or to the Secretary of State, among others. Penalties ranged from fines to a term of imprisonment and hard labour. A foreigner landing in contravention of the act was ‘deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and [was] liable to be dealt with accordingly as if the offence were an offence under the section four of that Act.’<sup>34</sup> The sanction prescribed by that act was the confinement in a house of correction with hard work for up to three months. The act also punished ship masters who allowed the unauthorised entry of a foreigner or failed to comply with an order to return him. In an early example of the regulation of carriers’ liability, ships were fined for bringing ‘undesirables’ to the British shores and were obliged to pay the costs of their return.<sup>35</sup> Only third-class or ‘steerage passengers,’ were subject to these controls. By contrast, ‘cabin passengers’ were exempted from them (Pellew 1989, 373).

A few years later, the outbreak of the First World War and the wave of displaced people throughout Europe prepared the ground for further legislation. First enacted as an emergency law during wartime, Parliament passed the Aliens Restriction Act (ARA 1914) in

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<sup>32</sup> S 1(3), AA 1905. There were further two grounds for expulsion, followed by a recommendation of a court: first, conviction for a crime punished with imprisonment; and second, for vagrancy (s 4(1)).

<sup>33</sup> Eg, *R v Richter* (1906) *The Times*, 27 January 1906; and *Attorney-General v Sutcliffe* (1907) *The Times*, 20 July 1907 (quoted in Dummett and Nicol 1990, 161, fns 4 and 5).

<sup>34</sup> S 7(1).

<sup>35</sup> Ss 1(5), 3(2), 4(3), 5(2) and 7(4). Similar offences can be found in contemporary British immigration legislation: see eg, ss 24 (1)(a) and 26 (1)(c), Immigration Act 1971.

1914. This act imposed a number of restrictions on foreigners who, in order to be admitted, had to possess permits issued by the Secretary of State.<sup>36</sup> It was particularly directed at enemy aliens –most notably spies. Under its provisions, a significant number of Germans living in Britain were deported.<sup>37</sup> The act granted the Home Secretary a wide range of powers to deport foreigners and control their movements while in British territory: prohibition from landing and imposition of restrictions or conditions on landing or on arrival, prohibition from embarking, requirements to reside and remain within a particular area or district, prohibition from residing or remaining in particular areas, requirement to register with the police, etc.<sup>38</sup> Failure to comply with such rules carried a fine of up to £100 or imprisonment for up to six months with or without hard labour. The exercise of these powers was not subject to appeal or review by the courts. So great were the powers conferred to the Executive that a MP expressed astonishment: ‘I find it hard to imagine any more absolute police power given over individuals than that which we are being asked to enable the Government to have by that Act.’<sup>39</sup>

The ARA 1914 was extended by one year after the end of the war by the Aliens Restriction (Amendment) Act 1919 (AR(A)A 1919). Though this act was initially passed as a temporary, exceptional measure, it was extended by annual Expiring Laws Continuance Acts until 1971 –when Parliament passed permanent legislation. The AR(A)A 1919 aimed at regulating foreigners who were already in the UK, rather than their entry. In terms of criminal offences, the act incorporated two very broad provisions which criminalised any contravention or failure to comply with the act ‘or of any order or rules made or conditions

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<sup>36</sup> Cfr Hansard, HC Deb 5/08/1914.

<sup>37</sup> Between 1914 and 1919, 28,744 foreigners were repatriated, of whom 23,571 were Germans (Holmes 1988, 96).

<sup>38</sup> S 1(1).

<sup>39</sup> Intervention by Reginald Paget, Hansard, HC Deb 26/11/1953, col 531.

imposed thereunder,' as well as assisting, abetting or harbouring those in contravention. In 1920, an Order under this act authorised the Secretary of State to deport a foreigner if his or her presence in the country was not 'conducive to the public good,' even if the person had never been subject to investigation or questioned before (Gordon 1985; Cohen 1994); however, this power was exercised only under exceptional circumstances (Bloch and Schuster 2005, 494). People denied entry were detained while awaiting removal. At that time there were no special facilities so foreigners were confined in prisons (Cohen 1994, 108). In 1953, the Aliens Order (AO 1953) replaced and consolidated the provisions on immigration controls incorporating the requirement of work permits for those foreigners wishing to seek employment in Britain (Gordon 1985, 11). This order also introduced a number of immigration-related criminal offences through a broad provision similar to that in the AR(A)A 1919. The reliance on the criminal law and its institutions to enforce immigration rules during the period reviewed was never subject to question and it was considered as an inherent attribute of any legislation in order to be properly enforced.

Since the enactment of the AR(A)A 1919 and until 1971 the entry and residence of foreigners into Britain were almost entirely regulated by orders-in-council over which Parliament exercised very limited review and scrutiny. Neither were the courts prepared to question the exercise of executive powers.<sup>40</sup> Until 1969, refusals of leave to enter and deportation orders were not subject to any appeal. While the AA 1905 provided for an appeal process against those decisions, it was suspended in 1914. Review was re-instituted in 1955 but it had a limited scope (Dummett and Nicol 1990, 152). Thus, emergency regulation which extended for over 50 years with limited judicial or parliamentary checks created a whole category of persons whose liberty was almost entirely subject to the discretion of the

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<sup>40</sup> See *The King v Inspector of Leman Street Police Station, Ex parte Venicoff*. *The King v Secretary of State for Home Affairs, Ex parte Same* [1920] 3 KB 72 (on the validity of a deportation order on 'conducive to the public good' grounds; the Court upheld the discretionary power of the Secretary of State to issue a deportation order); also *The King v Secretary of State for Home Affairs. Ex parte Duke of Chateau Thierry* [1917] 1 KB 922 (quoted in Griffith 1960, 163).

Executive. When the need for permanent legislation was discussed in the Parliament in 1953 – and in relation to the AO 1953, the government representative Hugh Lucas-Tooth recognised that while the regulation of non-citizens by yearly renewable orders was ‘an anomaly’ it ‘does not create practical difficulties and it has produced a flexible and useful piece of machinery’ and justified it as needed in a still unstable world.<sup>41</sup> While many MPs demanded an act of Parliament, they had to wait almost two decades to see it passed.

The legislation that regulated the entry and residence of foreigners in Britain in the nineteenth and early twentieth centuries bears some resemblance with the laws to control the ‘outsiders’ within –so called ‘poor laws’ such as the laws of settlement and the vagrancy laws. The first ones imposed residence requirements in order to be eligible for ‘pauper relief’ and authorised the removal from a parish of unwelcome sojourners. Established during the seventeenth century, these laws inhibited the physical mobility of the ‘working poor’ in order to prevent a large influx of poor people –likely to be unemployed and thus a social burden– into more prosperous parishes (Taylor 1976, 55; Snell 1992, 152). Another example of the control of lower-class migration in early modern England can be found in the vagrancy laws against those who lacked permanent settlement and means of subsistence; many of whom were victims of restrictive settlement laws (Slack 1974). Vagrancy laws punished vagabonds for a broad set of loosely defined conducts, from begging, idleness and moving from one place to another. Vagrants ranged from labourers in search of employment, casual workers and ‘professional’ tramps. Runaway apprentices and servants, and the Irish<sup>42</sup> were among the most noticeable groups caught by vagrancy laws (Slack 1974, 365; Feldman 2003, 173). Those

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<sup>41</sup> During debates on the 1914 Bill the then Home Secretary Reginald MacKenna promised that ‘[t]his measure applies only to a state of war [...]. The Order will cease to have effect as soon as the war ceased or a state of national danger or grave emergency no longer exists’ (Hansard, HC Deb 5/08/1914 col 1990).

<sup>42</sup> While Irish people were not subject to immigration controls in the early 1900s, the Irish population in Britain has been historically perceived as the ‘Others.’ They have been considered an ethnic minority and stereotyped as dirty, drunk, lazy and violent. The ‘Irish foreignness’ was built upon their religion, and their distinct culture and ethnic background (Ghail 2000, 138). While until 1962 they were not liable to deportation, since the 1920s when Ireland gained independence from Britain, many Irish were ‘repatriated’ to Ireland (Hickman 1998, 292).

deemed to be vagrants were placed in ‘casual wards’ where they were obliged to work and provided with shelter and food. Social relief was granted in order to prevent them from turning into criminality, begging or starvation, and thus it was a form of suppressing disruptive behaviour (Vorspan 1977). In view of the similarities between the poor laws and early immigration norms, it is no coincidence that the first comprehensive immigration legislation in 1905 sanctioned the unauthorised landing of an immigrant with the penalties imposed on ‘rogues and vagabonds’ and vagrancy was one of the grounds for expulsion of foreigners from the British Isles.

Nineteenth and early-twentieth century legislation gave government officials substantial powers over non-citizens and remained the same –except for minor changes- until the Immigration Act 1971 (IA 1971). Those provisions which had been envisaged for war times remained well after the end of the war to ensure tight regulation of certain foreigners. By the mid-1950s immigrants from Commonwealth countries started to arrive in large numbers over whom British officials had no control. In the post-war period a number of reforms targeted the rights of Commonwealth citizens which substantially modified their status as British subjects and the *laissez-faire* policy towards them.

## II. Citizenship in post-war Britain from 1945 to 1960

*...if the skins of the Irish had been green instead of white, they would have met a similar reception as the*

*Asians are meeting today.*<sup>43</sup>

Citizens of the British Empire and Great Britain were considered British subjects with equal rights under the protection of the Crown. However, due to the independence of many British colonies and the attempt of the Canadian government to create a Canadian citizenship

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<sup>43</sup> Intervention by Peter Mahon MP, Hansard, HC Deb 27/02/1968, col 1314.

independent of the British one, it became increasingly important to differentiate between the independent Commonwealth countries, on the one hand, and Britain and its colonies, on the other. Therefore, the British Nationality Act 1948 (BNA 1948) introduced the category of ‘Citizens of the United Kingdom and Colonies’ (CUKC), while the independent Commonwealth countries adopted their own national citizenship. This was however just a formal distinction between the two. In fact, both UK citizens and Commonwealth citizens remained British subjects<sup>44</sup> –and thus British citizens- entitled to freely enter and reside in the UK until 1962 (Cohen 1994, 6; Hansen 2000). This *laissez-faire* policy, one of the most generous and liberal immigration policies in the world (Freeman 1994, 297) which allowed around one-quarter of the globe’s population unrestricted rights to enter and stay in the ‘Mother Country,’ was never aimed at attracting Commonwealth citizens and even less from ‘new’ Commonwealth countries, ie from South-Asia, Africa and the Caribbean. It sought, rather, to remedy the ‘legal inconsistency’ resulting from the introduction of Canada’s citizenship, to preserve the well-regarded relationship with the Dominions and to prevent any nationalist outbreak in the former colonies (Hansen 2000, 37).

After the Second World War, in search of workers to rebuild British cities and re-establish the industrial sector, the government launched the European Volunteer Workers programme. This programme though was limited in scope and imposed restrictions on residence and family reunification rights. Faced with labour shortages, employers often turned to workers from Commonwealth countries who were free from these restrictions (Sivanandan 1976; Kay and Miles 1988). As a consequence, the number of citizens from the new Commonwealth significantly rose: from 3,000 in 1953 to 46,800 in 1956 and to 136,400 in 1961.<sup>45</sup> In 1952 and 1953, immigrants from West Indies barely exceeded 2,000. In 1954, the

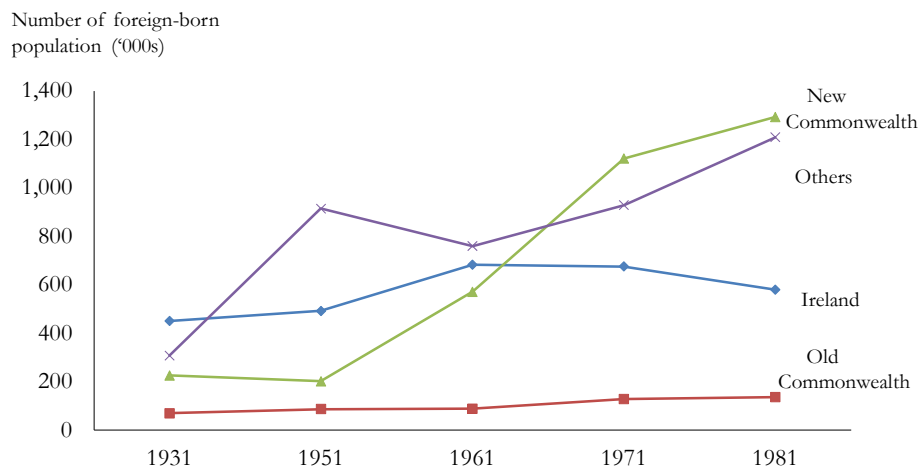
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<sup>44</sup> The concept of ‘subject’ is related to the relationship between the monarch and his subjects: the King grants rights and privileges to his subjects. All subjects are equal in the bond that links them to the monarch (Dummett and Nicol 1990, 22).

<sup>45</sup> Quoted by Andrew Turner MP, in Hansard, HC Deb 19/03/2003, col 270WH.

number rose to 9,000 and in 1961 to over 74,000. After then, the number started to fall. Similarly, the number of immigrants from the Indian subcontinent increased from around 11,000 in 1955 to between 70,000 and 100,000 a year by the early 1960s. After then, it declined to 27,000. In the 1960s, the Indian subcontinent was the main source of non-white immigration (Tranter 1996, 30). Graph 1 (below) shows the gross increase of new Commonwealth immigration: from 1951 (202,000) to 1961 (571,000) it almost tripled. In 1971, the figure was more than double in 1961 (1,121,000).

**Graph 1: Birthplace of foreign-born population in England and Wales (1931-1981)**



Source: Coleman, D. and J. Salt (1992), *The British Population. Patterns, Trends, and Processes*, New York, OUP: p. 482, Table 12.1.

While newly-arrived migrant workers from former colonies had in theory the same civil and political rights of British nationals, they occupied a subordinate position in employment compared to (white) British workers and were subject to discrimination (Wrench 2000). Sections of the native population were concerned about these immigration flows. Until then, immigration to Britain was predominantly white Anglo-Saxons and Europeans (Hampshire 2005, 10).<sup>46</sup> Non-white, non-European immigration was considered by many to be undesirable

<sup>46</sup> While non-white immigrants arrived before then, they did so in smaller numbers. For example, by the late eighteenth century there were 20,000 blacks in London (Dummett and Nicol 1990, 79; also Walvin 1973; Shyllon 1977).

due to fears about their integration and social problems (crime, social unrest, unemployment and housing shortages, etc) (Layton-Henry 1992, 28). Immigration from the new Commonwealth to the UK was thought to undermine white racial hegemony and generate public disaffection prompting the government to adopt restrictive measures (Layton-Henry 1992, 36; Hansen 2000; Weber and Bowling 2004, 196).<sup>47</sup> It should be remembered however that before the arrival of people from the former-colonies, the Irish and Jews met with similar hostile reaction from the locals. Even though they were white, they were considered to be ethnic minorities and treated as racially different from the British/Protestant population (Dummett and Nicol 1990; Cohen 1994, 11, 41; Hickman 1998). Further, the assumption that non-white immigration to Britain was homogeneous neglects the differences between the multiple groups in terms of language, religion, education, economic and social position, and political culture. For example, because of their closer ties to Britain, Afro-Caribbean groups were less culturally diverse than South Asian ones from India, Pakistan and Bangladesh, and the former adapted more easily to Britain (Smith 2005, 67).

As a response, the government initially tried to discourage these immigration flows from the former colonies through informal controls, such as information campaigns and controls over passports in sending countries. In 1950, the Labour government established a special committee in charge of ‘finding ways which might be adopted to check the immigration into this country of coloured people from British colonial territories.’<sup>48</sup> This committee concluded that such restrictions were not necessary as the numbers were too small to adopt legislative measures. So a decision was held-up (Layton-Henry 1992, 30; Carter et al. 1996). Successive Conservative administrations faced the same dilemma.

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<sup>47</sup> See however, Solomos (1989) who argues that the government engaged in a ‘concerted campaign’ to stop non-white immigration, rather than merely responding to public or economic pressure (Solomos 1989, 50).

<sup>48</sup> Quoted by A Turner MP in Hansard, HC Deb 19/03/2003, col 270WH.

Within the Cabinet there were opposing views and interests on the proposal of restricting the rights to entry to Commonwealth citizens. One of the main concerns – articulated most strongly by the Colonial Office in charge of foreign relations between Britain and the Commonwealth- was that a restrictionist approach would disregard the historical ties that linked Britain to its former colonies and damage diplomatic and economic relations with them. Additionally, within the Conservative party there was a wing which favoured maintaining strong relations with the ‘Old Dominions,’ and accepted as a necessary –but less desired- consequence the right to enter of new Commonwealth citizens, as a differentiation between the two groups was politically and morally unacceptable (Hansen 2000, 55). For example, in the Commonwealth Affairs Committee, the Chief Whip stated: ‘Why should mainly loyal [...] and hard-working Jamaicans be discriminated against when ten times that quantity of disloyal [...] Southern Irish [...] come and go as they please?’ (quoted in Carter et al. 1987, 8). On the other hand, a number of MPs –particularly those from constituencies with many newcomers- were concerned about the increasing number of British subjects coming from the former colonies and pushed for immigration reforms. The same position was held by the Ministry of Labour, which favoured a controlled policy towards admitting migrant workers.

The riots in Notting Hill and Nottingham in 1958 put the issue of racial discrimination and public outrage in the national spotlight (Panayi 1996; Paul 1997). These were racially-motivated riots against Afro-Caribbeans residing in West London and Nottingham, organised by gangs of white, working-class youth with the slogan of ‘Keep Britain White.’ While there had been a number of isolated events against non-white British before, these are considered among the most violent riots in British history and illustrated the increasing tensions between white and ethnic minority groups at the time. In recently released police witness statements from an internal police enquiry on the riots, a policeman recounted that around 300 to 400 white people were shouting: ‘We will kill all black bastards. Why don’t

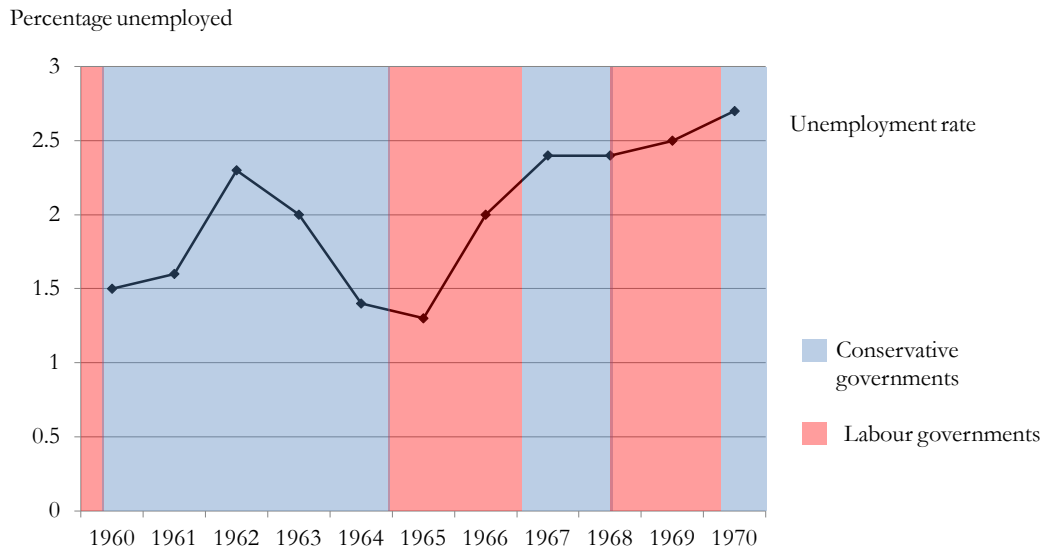
you send them home?’ Another official was told by this mob: ‘Mind your own business, coppers. Keep out of it. We will settle these niggers our way. We’ll murder the bastards’ (quoted in Travis 2002a).

Some MPs responded by proposing barriers against newcomers based on the argument that the arrival of people from different cultures generated unrest and instigated violence in the native population (Solomos 1989; Layton-Henry 1992, 39). Thus, in order to ensure harmonic racial relations, they argued that the number of Commonwealth citizens coming to Britain should be controlled. Labelled the ‘numbers game’ thesis (Solomos 1989; Cohen 1994; Layton-Henry 1994, 275; Hansen 2000), this approach gained currency within the cabinet in the early 1960s. While a minority of MPs –among others Enoch Powell, Peter Griffiths and Cyril Osborne- made incendiary speeches in favour of limiting entry to newcomers of alien cultures, their proposals permeated and contributed to shape immigration policies of both mainstream parties. Enoch Powell, a Conservative MP, advocated tighter controls and re-emigration, and is (in)famous for his ‘river of blood’ speech of 1968 where he warned about the transformation of the fabric of British society by the inflow of an ‘alien element’ into the country. Even if he was viewed with disdain in the Conservative Party (Hansen 2000, 73) and widely condemned inside the House of Commons, many of his colleagues also supported restrictions. Because of his support from a large section of the working class electorate, Powell’s rhetoric was taken up by others, albeit in a tempered fashion, in subsequent electoral campaigns.

Post-colonial immigration legislation in Britain was strongly dominated by fears of social fragmentation. Politicians worried about the impact on a predominantly white Britain of the arrival of people from different races, languages, customs and cultures, and the future of Britain as a multi-ethnic society. The racial issue was connected to other social and economic concerns about the pressures that newcomers may pose on housing, the welfare system and

employment, and the social tensions arising at the community level in a period of steady increase of unemployment, as shown in Graph 2 below.

**Graph 2: Unemployment rate in Britain between 1960 and 1970**



Source: Global Financial Data (<http://www.globalfinancialdata.com/index.html>). Last accessed: 9 March 2011.

In the early 1960s, Britain experienced an economic recession which ended the era of prosperity driven by economic growth and full employment that characterised the post-war years and which set the base for the emergence of Britain as an ‘affluent society’ (Lowe 2005, 110). The economic downturn unleashed a political, social and cultural crisis, and exposed social divisions and inequalities (Seldon 1994; Fraser 2000). As Kenneth Morgan describes it, from 1961 ‘paternalist one-nation Tory Britain began to sink into various forms of disarray’<sup>49</sup> (Morgan 2001, 198). In this socio-economic context, newly arrived immigrants encountered a hostile environment where allegations of ‘parasitism’ became prevalent. By the mid-1950s, negative coverage in the press contributed to generalise the view that Commonwealth citizens were taking advantage of the welfare system and represented a charge on public funds (Hampshire 2005, 96).

<sup>49</sup> While Labour’s Clement Attlee governed from 1945 to 1951, Conservative administrations dominated the post-war period: Winston Churchill (1951-1955); Anthony Eden (1955-1957); Harold Macmillan (1957-1963); and Alec Douglas-Home (1963-1964).

While the race issue is no doubt key to understanding this period and the response by the government, it is also important to consider these other factors which were closely related to race and in many occasions were used to veil the latter. Together they contributed to generate restrictionist immigration policies. During parliamentary debates on the 1962 Bill, most of the interventions did not raise the race issue but the social and economic impact that uncontrolled flows would have in an already ‘thickly populated country.’ Ultimately, as Cohen (1994) puts it, the immigration debates in this period reproduced the struggle of British people and their leaders to ascertain the frontiers of their identity. Skin colour was a salient feature – or to quote John Hall MP in his intervention during the debates on the Commonwealth Immigrants Bill 1968, ‘an identifiable factor’<sup>50</sup> of those who ought to be excluded from the new shapes of British identity. The restrictions introduced by 1960s legislation were not only about colour, though. They were also an attempt by the British government, in the context of the dismantling of the Empire, to prevent the ‘hordes’ from its poorer, third-world colonies coming to Britain.

### **III. Expanding exclusionable populations: the Commonwealth Immigrants Acts 1962 and 1968**

Political interests against restricting Commonwealth immigration delayed the enactment of legislative measures. However, with the increase in the number of immigrants from the new Commonwealth in 1961, these political forces started weakening. Obstacles to restrictions on Commonwealth citizens were then lifted, and the new legislation found its way (Hansen

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<sup>50</sup> He expressed: ‘one of the problems of such groups who form a new community in a town is that, if they are easily identifiable, they come constantly to the notice of the community [...]. People from European or near-European stock are not so easily identifiable [...]. Wherever they live, the local inhabitants can identify them. This tends to become impressed on people's minds, who then say that there are a number of strangers in their midst [...]. They fear that they will be overwhelmed by them. Wrongly or rightly, these views are held and we must be aware of them’ (Hansard, HC Deb 27/02/1968, col 1318).

2000). The adoption of the Commonwealth Immigrants Act 1962 (CIA 1962) coincided with the end of a period of relative open-door policies towards immigration throughout Europe. Many European countries –mainly, Germany and France- stopped their guest worker programmes by the time the post-war shortage of workers ended and the unemployment figures started to rise (Hollifield 1992; Huysmans 2006, 65).

The CIA 1962 made British subjects party to immigration controls, except for those born in the UK or whose passports were issued by British authorities. It restricted the right to entry and settle in mainland Britain to certain British subjects without introducing any changes in the law of citizenship. Commonwealth nationals retained their British citizenship yet lost certain citizenship rights. Thus, the act effectively created a second-class group of citizens who were not allowed to freely enter and stay in the country. Commonwealth citizens subject to controls needed an employment permit –or voucher- issued by the Ministry of Labour in order to migrate to Britain.<sup>51</sup> Those criminally convicted were also, for the first time, subject to deportation following the recommendation of a court.

The act also made illegal entry of Commonwealth citizens a *criminal* offence.<sup>52</sup> This is the first time that an immigration-related offence was introduced in British legislation against Commonwealth citizens. The manipulation of citizens' rights through immigration laws made it possible to criminalise British subjects for their illegal entry to the country. However, this provision was not subject to scrutiny by Parliament. When he presented the Bill to Parliament, Home Secretary Richard Butler briefly referred to the offences introduced: 'I need not trouble the House in great detail with Clauses 3, 4 and 5. Clauses 3 and 4 provide the necessary

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<sup>51</sup> The system of vouchers for Commonwealth citizens was different from the work permit system which applied to aliens. Aliens were required to obtain a work permit which was subject to a strict pre-admission labour market test, while Commonwealth citizens could access the labour market by obtaining a voucher in any of the following three categories: a pre-arranged job, special skills, or where there were specific domestic needs for unskilled workers. These vouchers were not subject to labour market conditions (Salt and Kitching 1990). However, they were severely reduced after 1964 and eliminated in 1973, when the two systems merged so both aliens and Commonwealth citizens were equally required to obtain a work permit.

<sup>52</sup> S 4A, CIA 1962.

ancillary provisions for the enforcement of the scheme proposed.<sup>53</sup> Historically, law-makers have taken for granted the inclusion of criminal offences in immigration statutes as a necessary corollary of the control over foreigners. This ‘legal tradition’ of backing up immigration legislation with criminal sanctions has barely been subject to critical examination. During the debate on the CIA 1962, some MPs questioned the use of criminal law against those who helped illegal immigrants, which Labour MP Arthur Irvine called an ‘unnecessary edifice of penal legislation.’<sup>54</sup> While the act introduced fourteen different offences –most of them criminalising Commonwealth citizens for their illegal entry and stay, it was the provision which criminalised harbourers that attracted most attention. Mr Irvine questioned it because it was unnecessary to achieve ‘What the authorities are legitimately after [:] the apprehension of, and penalty for, the illegal immigrant.’<sup>55</sup> The harbouring offence was also criticised for its potential to damage racial and community relations: the new provision either would make people more cautious to assist others –especially if they were non-white- due to the threat of being punished or would provide them with an excuse to discriminate against non-whites.

In reply, and to reassure his colleagues in the House, the Attorney General, Sir Reginald Manningham-Buller, explained that the harbouring offence was necessary but unlikely to be used because of the evidentiary difficulties involved in its prosecution:

I doubt very much whether there will be any prosecutions under it, because the difficulties of proving that a particular individual has reasonable grounds for believing the man to be an illegal immigrant, or that he knows it, are not likely to lead to many prosecutions. At the same time, it is desirable that we should have this in the Bill so that if need be, in appropriate cases, a prosecution can be brought, and as a deterrent to those who might otherwise participate in the evasions of the provisions of the Bill (Hansard, HC Deb 7/02/1962, col 438).

Similarly the Lord Chancellor, the Earl of Kilmuir, explained to his peers in the House of Lords that the harbouring offence ‘should provide a deterrent to those who might otherwise

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<sup>53</sup> Hansard, HC Deb 16/11/1961, col 698.

<sup>54</sup> Hansard, HC Deb 7/02/1962, col 435.

<sup>55</sup> Cfr Hansard, HC Deb 7/02/1962, col 436.

participate in deliberate evasion of the basic control; and, if you have a control, you must be seen to have the machinery to enforce it.<sup>56</sup> Both the Attorney General and the Lord Chancellor put in very clear and unusually frank language the rationale underlining most of immigration-related offences. Still today they are, first and foremost, ‘necessary ancillary provisions’ of the legislation –if there is a law there should be a mechanism to enforce it- which does not necessarily mean that they will be enforced in practice; and second, they serve as a deterrent to ensure compliance with immigration norms.

When Labour came into power in 1964, it ratified the principles underlying the CIA 1962. In particular, the White Paper *Immigration from the Commonwealth* published in 1965 anticipated the continuation and tightening of restrictions on Commonwealth citizens. It justified the need for immigration controls by appealing to the ‘numbers game’ thesis and claiming that in order to ensure good race relations and prevent ethnic conflict, it was necessary, first, to integrate those already in the country and, second, to impose strict controls over the number of new arrivals. This dual interventionist strategy which consisted of pairing immigration controls with integration measures<sup>57</sup> depicted non-white citizens as a source of potential social problems and, therefore, legitimised the need for controls. From then on, the two policies became inextricably connected in the public agenda. As Labour MP Charles Pannell put it bluntly during the debates on the 1968 Bill, ‘My plea is that we had better behave rather better to the people already here before we take on this extra-commitment [...]. We shall have a sort of civic indigestion if we try to digest all this lot at one time.’<sup>58</sup> Among other measures, the White Paper proposed the reduction of the quota for workers and the

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<sup>56</sup> Cfr Hansard, HL Deb 20/03/1962, col 476.

<sup>57</sup> In fact, the first and second Race Relations Acts which sanctioned anti-discriminatory measures were passed under Wilson’s administration in 1965 and 1968, respectively, at the time when the debate on whether to maintain and tighten immigration controls was taking place.

<sup>58</sup> Hansard, HC Deb 27/02/1968, col 1284.

elimination of the quota for unskilled workers. It also significantly restricted the right to family reunion.<sup>59</sup>

In 1968 under the Premiership of Labour's Harold Wilson, Parliament adopted the second Commonwealth Immigrants Act (CIA 1968). One of its main objectives was to prevent the Asian population living in Africa –particularly, in Kenya- from migrating to Britain. As Kenya was a British colony in 1962, Kenyan citizens were issued passports by the colonial governor –and thus they were subject to immigration controls given the provisions of the CIA 1962. However, after Kenya's independence in 1963, passports to British subjects were issued by the UK's High Commission in Kenya –the direct representative of the British government- and therefore they were not anymore subject to controls over entry and settlement in the UK (Hansen 2000, 171). After independence, East African governments, such as Kenya, Uganda and Tanzania, denied non-African populations automatic local citizenship and most Asians, instead of applying for it, opted for British citizenship (Hansen 2000, 169).<sup>60</sup> 'Africanisation' policies which discriminated against non-citizens adversely affected British Asians and provoked an important wave of emigration to Britain.<sup>61</sup> The CIA 1968 was the response of the British government to this situation and an attempt to prevent future movements of British Asians from Africa. As with the previous act, the CIA 1968 did not modify the law of citizenship. Instead, it recognised British citizenship of East African Asians but it ended their unqualified right to settle in Britain: the fact that their passports were

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<sup>59</sup> One of the main critiques of the CIA 1962 was its ineffectiveness. Even if it helped to reduced 'primary immigration,' it did not deal with the dependents of those Commonwealth citizens already residing in Britain as it did not set limits on their entry.

<sup>60</sup> In a case against the UK, the European Commission on Human Rights found that the CIA 1968 had racial motives because it singled out a group for differential treatment on racial grounds and thus violated art 3 of the European Convention on Human Rights (cfr European Comm HR, *East African Asians v The United Kingdom* (3 EHRR 76) 15 December 1973, known as 'the *East African Asians* case'). For a comment on this case, see Lester 2002.

<sup>61</sup> Between 1965 and 1967, the number of people exercising the right to settle in British jumped from 6,150 to 13,600. In the first two months of 1968, the number of entries was calculated at 12,800 (ibid., 54). In 1972, President Amin expelled 40,000 Ugandan Asians and Britain accepted 28,000 of them, as an attempt to loosen up the already damaged relations with the Commonwealth and a response to domestic pressures (Gupta 1974).

issued by British authorities did not exempt them from immigration controls any longer. British passport holders were only exempted from such controls if at least one of their parents or grandparents was born, adopted or naturalised as a British citizen in the UK.

Both the CIA 1962 and 1968 were aimed at tackling the increasing arrival of ‘a large number of holders of United Kingdom passports who do not, “in common parlance belong” to this country,’<sup>62</sup> in an attempt to manage one consequence of dismantling the Empire. In recently released secret cabinet minutes, Home Secretary James Callaghan justified the introduction of the bill in the following terms:

It is sometimes argued [...] that we can take a less serious view of the scale of immigration and settlement in this country because it could be, and currently is being, more than offset by total emigration. This view overlooks the important point that emigration is largely by white persons from nearly every corner of the United Kingdom, while immigration and settlement are largely by coloured persons into a relatively small number of concentrated areas. The exchange thus aggravates rather than alleviates the problem (quoted in Latimer 1999).

The influence of the working class movement and the trade unions on the Labour Party significantly shaped its policies towards immigration. The interest of the party to attract the vote of a large group of ethnic minorities and the party’s liberal concern with minority rights clashed with the interest of the trade unions. In 1968, Labour was divided between those who wanted Commonwealth citizens to remain foreigners and those who advocated their full integration (Harrison 2010, 197). Labour’s strategy to focus on race relations and integration while limiting incoming numbers of immigrants to the country attempted to reconcile the two opposing sectors of the party (Hampshire 2005, 31).

The CIA 1968 introduced the offence of landing without proper examination by an immigration officer. A Commonwealth citizen was guilty of such offence if she could not demonstrate that she was properly inspected upon arrival, thus reversing the burden of proof. It also made responsible the master of the ship or aircraft who allowed that landing. The act also extended the period during which an illegal entrant could be subject to examination, from

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<sup>62</sup> Home Secretary Callaghan paraphrasing Home Secretary Butler (Hansard, HC Deb 27/02/1968, col 1249).

24 hours to 28 days. One of the justifications given by some MPs for extending or eliminating altogether the 24-hours rule was that the police found it difficult to distinguish ‘coloured’ people from each other and required extra time to bring them to justice.<sup>63</sup> The offence of landing without submitting to examination and the extension of the 24-hours rule were directed at tackling the problem of people who were exempt from enforcement actions even though they entered illegally because they were not caught during the 24 hours after their arrival. They also sought to facilitate the swift return of illegal entrants at the port without keeping them in the country for prosecution and subsequent removal.<sup>64</sup>

The CIA 1968 provoked strong reactions and public demonstrations, especially from Asian communities. In response, Prime Minister Harold Wilson introduced the Immigration Appeal Bill which was passed in 1969 (IAA 1969). This was considered a progressive piece of legislation. It created a whole administrative system consisting of Adjudicators and an Appeal Tribunal to review appeals against immigration decisions, which until then were not subject to any form of judicial or administrative re-examination.<sup>65</sup> While these administrative judgements were final and could not be appealed before the courts, it provided for the first time the possibility of reviewing decisions in a field where immigration authorities had broad margins of discretion (Hepple 1969). Even so, there were few trained lawyers operating in this field. A barrister practising immigration law at that time explained that the Joint Council for the Welfare of Immigrants (JCWI) was the only organisation that filed appeals and had only two caseworkers working on them (Respondent 8, 17/05/2010). In 1970, the United Kingdom Immigrant’s Advisory Service (UKIAS), a publicly funded independent organisation, was established to provide legal aid on immigration appeals.

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<sup>63</sup> Interventions by Charles Mapp and John Farr, Hansard, HC Deb 28/02/1968, cols 1655-6.

<sup>64</sup> Hansard, HC Deb 27/02/1968, col 1245.

<sup>65</sup> The only action available against immigration decisions was by way of *certiorari*, *mandamus* or a *declaration* to question the ‘unreasonable’ exercise of discretion by an immigration officer (Macdonald 1969, 237).

Things only began to change by mid-1970 when immigration law and practice started to grow as a separate field developing courts, specialised practitioners, law reports and academics, and became an independent legal branch. Three decades later, immigration would be the lead subject in judicial review proceedings. The institutionalisation of immigration law as an independent subject coincides with the enactment of the IA 1971 which is still in force and the basis for a much more complex legislative framework that regulates the field today.

#### **IV. Immigration Act 1971: the institutionalisation of the immigration system and its legacy**

In order to distance himself from Labour Prime Minister Harold Wilson and his liberal stance, in his political campaign Conservative candidate, Edward Heath, deployed thinly veiled rhetoric, appealing to ‘the nation,’ ‘the British people,’ and ‘the national interest,’ promising that under his Premiership ‘the silent majority,’<sup>66</sup> left aside by liberal politicians, would be listened to (Hall et al. 1978, 274). In his electoral manifesto, he had promised to reduce large scale, permanent immigration, a pledge he honoured in the enactment of the Immigration Act 1971. Even though numbers were in decline, the government justified the new legislation on migration control grounds, as explained by Conservative MP John Hunt:

[T]he argument is not only statistical but psychological, that it is a question of immigration not only being effectively checked but being seen to be effectively checked. That is why it is important to realise that the provisions of the Bill for conditional entry and, most important, for tightening control of illegal entry are important not so much for the net reduction in numbers which will result as for the reassurance which the measures will bring to those, particularly in our large cities, who feel themselves in danger of being swamped and overwhelmed (Hansard, HC Deb 8/03/1971, cols 92-3).

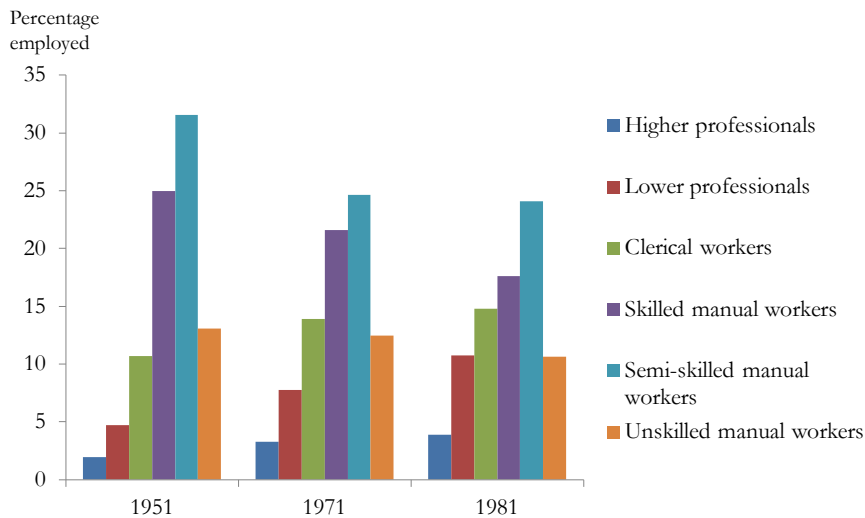
The impact of further waves of arrivals on community relations was one of the reasons expressed during parliamentary debates and cabinet meetings. Additionally, there was a

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<sup>66</sup> A term already used by Republican candidate Richard Nixon in his presidential campaign (Dallek 2008).

concern about its effect on already rising unemployment rates, particularly in low- and semi-skilled jobs due to changes in the occupational structure of the labour market, as Graph 3 below illustrates.

**Graph 3: Changes in occupational classes (1951-1981)**



Source: Routh, G. (1987), *Occupations of the people of Great Britain, 1801-1981*. Basingstoke: Macmillan

The IA 1971 repealed the ARA 1914, the CIA 1962, the CIA 1968 and the IAA 1969 and introduced a unitary regime regulating the conditions for entry and residence of both non-nationals and Commonwealth citizens. It was the first immigration legislation equating certain Commonwealth citizens to foreigners in terms of their right to freely enter the UK. Commonwealth citizens still retained their status as British subjects but their immigration rights were further restricted by the introduction of the concept of ‘patriality.’ Only those with British parents or grandparents and those who had been ‘ordinary residents’ for the last five years before the entry into force of the act had the ‘right of abode’ and thus were granted indefinite leave to enter and remain.<sup>67</sup> This measure disproportionately affected non-white Commonwealth citizens who were less likely to be descendants of British-born relatives (Cohen 1994, 49; Hansen 2000, 195). Indeed, recent disclosure of secret cabinet minutes

<sup>67</sup> S 2(1)(a) to (d), IA 1971.

shows that the idea of ‘patriality’ was aimed at concealing a discriminatory ban against non-white Commonwealth immigration. As the Home Secretary, Reginald Maudling, put it,

The number of aliens who want to settle here is relatively few, and for this reason –because they come from a cultural background generally fairly akin to our own- it is not difficult to assimilate them. But of those wishing to come here to work from the Commonwealth, particularly the new Commonwealth, the vast majority would want to settle permanently and by reason both of this factor and of the fact that they come generally from a different cultural background, the task of assimilation –as experience so bitterly shows- is all but impossible. If we put the Commonwealth citizen on the same basis as what at present is the practice for aliens, and abolish the quota which presently applies only to Commonwealth citizens, the result would be a great increase in coloured immigration (quoted in Travis 2002b).

The decision to dispossess most Commonwealth citizens of their rights even further sharply contrasted with the provisions entitling Europeans to freely enter and work in the UK following the signing of the Treaty of Rome in 1973. The restrictions imposed on Commonwealth nationals, at the time when the rights of many citizens of Europe to settle in the UK were recognised, was one of the main controversial sides of the new legislation (Joppke 2005, 100) and remains a polemic aspect of Britain’s foreign policy: its drift apart from the Dominions and turn towards Europe. The IA 1971 also made more apparent the problems of curtailing rights to a category of citizens without reforming nationality laws. Immigration and nationality laws were decoupled only in 1981 when Parliament passed the British Nationality Act (BNA 1981). This act created a single British citizenship, eliminated the concept of British subject and recognised the right of abode only to British citizens (those born from British parents or grandparents, or naturalised).<sup>68</sup> From then on, only British citizens enjoyed all the rights granted to citizens. By contrast, non-British citizens were deprived of these rights and therefore subject to immigration laws.

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<sup>68</sup> It established the principle of *ius sanguinis* (citizenship is transmitted through blood –parenthood-) as the basis to grant citizenship. The act also created two residual categories: British Dependent Territories Citizenship and British Overseas Citizenship. People with such citizenships did not have the right anymore to enter and settle in the UK.

Along with extending the grounds for deportation of aliens and non-patrial Commonwealth citizens<sup>69</sup> and restricting appeals against certain deportation decisions<sup>70</sup> (De Smith 1972, 3), the IA 1971 reproduced the provisions of repealed legislation on ‘immigration crimes.’ They included illegal entry,<sup>71</sup> assisting illegal entry and harbouring a person who illegally entered the UK or overstayed,<sup>72</sup> obstructing the normal administration of immigration controls under the act,<sup>73</sup> and offences committed by captains, owners or agents of ships or aircrafts and managers of ports who breached their obligations under the act.<sup>74</sup> The offence of assisting or facilitating was meant to be applied against human smugglers who until then were proceeded against under the general offence of conspiracy to contravene the law. Further, it was intended to cover a large range of conduct, not limited to aid the evasion of immigration controls, but also any act intended to furthering illegal entry –as for example providing a job or a place to stay.<sup>75</sup> With the exception of the offence of facilitation, Parliament did not address provisions incorporating criminal offences in detail, again because they were considered ‘necessary ancillaries’ of a system to control population inflows and outflows. In fact, the introduction of these offences was unanimously welcomed by the members of both Houses.

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<sup>69</sup> S 3(5).

<sup>70</sup> S 15(3).

<sup>71</sup> S 24(1). Moreover, ‘illegal entry’ was interpreted extensively by the courts later on, encompassing lying to obtain leave to enter and entering by deception of a third party. The court also allowed the retrospective application of the IA 1971 thus permitting the criminalisation of those who entered the country illegally before the act was in force (Couper 1984; Gordon 1985).

<sup>72</sup> S 25(1) and (2).

<sup>73</sup> S 26(1). This provision was interpreted by the courts as requiring from the accused granted entry clearance ‘a positive duty of candour on all material facts which denote a change of circumstances since the issue of the entry clearance.’ Non-disclosure of changes –such as getting married- was considered a breach to that positive duty and thus a criminal offence (*Zamir v Secretary of State for the Home Department* [1980] AC 930).

<sup>74</sup> S 27(a), (b) and (c), IA 1971.

<sup>75</sup> See intervention by Lord Windlesham in Hansard HL Deb 02/08/1971, col 975.

While the IA 1971 incorporated an important number of immigration offences, little is known about their actual use. Statistics prior to 1980 do not compile data on the prosecution and conviction of people for offences under immigration acts. From 1973, control of immigration statistics compiled data on the number of people who were detected entering the country illegally and how they were dealt with; however there is no mention of criminal charges brought against them (Home Office 1979, Table 15). Data from 1979 until 1983 show that the number of people prosecuted –and even more so convicted- for these offences was very low. Except for the offences of overstaying and the failure to observe the conditions attached to a leave, the number of prosecutions for other offences was far below one hundred (Home Office 1985, Table 21). During the debates on the Police (Drugs and Illegal Immigration) Bill,<sup>76</sup> the Minister of State for the Home Office, Mark Carlisle, explained in the House of Commons that between the passage of the CIA 1968 and the 31<sup>st</sup> December 1972 only 74 cases of ‘illegal immigration offences’ were brought before the courts involving 307 illegal immigrants.<sup>77</sup> Likewise, three senior immigration barristers practicing at that time referred to prosecutions of such offences as very rare. Instead, people accused of illegal entry or breaching the conditions of a leave were simply removed or deported without being prosecuted.<sup>78</sup> One of these practitioners, a retired barrister at Garden Court North Chambers, told me that the attitude of the judiciary was also very different when any such cases reached the courtroom: ‘In the 1970s there were very few prosecutions [...]. I remember I represented someone working in breach or overstaying, or a student who is not supposed to work but

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<sup>76</sup> This bill formally established two central intelligence units: the Drugs Intelligence Unit and the Illegal Immigration Intelligence Unit (IIU). Drugs and people trafficking were considered related because of their transnational nature and the need for greater enforcement coordination to deal with them. The IIU was first created by a Home Office press release in October 1972 (see below).

<sup>77</sup> Hansard, HC Deb 31/01/1973, col 1532.

<sup>78</sup> Respondents 6, 8 and 11, interviews held on 20/04, 17/5 and 29/04/2010, respectively.

who was working, and magistrates would very often just let the person off' (Respondent 6, 20/04/2010).

The IA 1971 set up a system which modelled –and to some extent conditioned- the way in which immigration laws are enforced today. Even though, immigration offences are much older and have been inherent to the construction of British immigration controls since its early foundations in the 1800s and early 1900s, the IA 1971 institutionalised a system of controls, systematising and expanding immigration powers, and served as the basis for recent legislation in the field. Particularly, it created a system in which criminal sanctions are attached to most breaches of immigration rules. Even though most of the offences introduced were under-used, it provided the tools for future enforcement. In fact, one year after the IA 1971 was passed, a new branch of the Metropolitan Police specialised in immigration issues was established –the Illegal Immigration Intelligence Unit (IIU).<sup>79</sup> Its primary function was related to information gathering and exchange about 'known or suspected offenders' (Home Office 1972). The IA 1971 extended police powers in immigration procedures –particularly, the power of arrest without warrant- and the involvement of the police in these proceedings was amplified after the adoption of the act (Gordon 1985, 24).

At that time there was no special force responsible for the enforcement of immigration regulations so the police was entirely in charge of that role. The police were not particularly pleased to be granted these prerogatives over migration controls because of the impact that such responsibility might have had on the already poor relations with ethnic communities. Violent encounters between the police and non-white youth, the harassment experienced by the latter due to selective policing of ethnic communities, and a shared perception of disbelief made the relations between them tense and difficult. This tension was apparent when, during the parliamentary debates on the bill, the inclusion of a requirement by

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<sup>79</sup> Cfr Hansard, HC Deb 4/08/1976, col 786W.

Commonwealth citizens to register with the police was discussed.<sup>80</sup> Even if requirements for reporting before the police had been established for aliens early on, the extension of the measure to Commonwealth citizens was criticised by some MPs because it would give the police further control on immigrants' lives and was not welcomed by the force. The police's reluctance to perform immigration controls has been one of the motives for creating a special border force –the Border and Immigration Agency (BIA)- in April, 2007 (Weber and Bowling 2004, 204).<sup>81</sup>

The IA 1971 completed a shift in the status of (non-patrial) Commonwealth citizens that had started with the 1962 and 1968 legislation. This trilogy of laws operated a 'manipulation of categories and rights of citizenship' (Gilroy 1982, 145) that resulted in the creation of second-class British subjects equated to aliens. In so doing, it generated a new, whole population of individuals subject to the state's sovereign powers of exclusion. The IA 1971 also introduced a substantial number of immigration offences and extended immigration powers, thus marking the beginning of a period of increasing reliance on criminal law powers in immigration enforcement.

## **V. The (re)discovery of the criminal law for immigration enforcement: the asylum crisis and the 'fight' against illegal immigration**

*[O]ne does not tear up passports and documents if one has nothing to hide.*<sup>82</sup>

Margaret Thatcher's Premiership (1979-1990) furthered a period of restrictionist policies aimed at cutting down both primary and secondary immigration with the intention to attract

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<sup>80</sup> Cfr Hansard, HC Deb 08/03/1971.

<sup>81</sup> Likewise, housing authorities were reluctant to police immigrants when granting accommodation to them before legislation enacted in the 1990s made these controls compulsory (Morris 1998, 966).

<sup>82</sup> Intervention by Michael Morris MP, Hansard, HC Deb 16/03/1987, col 746.

voters of the National Front which at that moment was gaining electoral appeal with some Conservative Party<sup>83</sup> voters (Layton-Henry 1994, 286; Spencer 1997, 147). While there was little legislative activity on immigration during the first years of Thatcher's Premiership, the government enacted a number of immigration rules through secondary legislation.<sup>84</sup> Whereas primary legislation only deals in general terms with the matter, it is in the 'half-world of executive closure' of immigration rules where the specifics of the procedure are shaped (Joppke 1999, 115). Moreover, legislation already in place was more strictly enforced: peak removals of illegal entries of both foreigners and Commonwealth citizens were reported for 1979, 1980 and 1981, and deportation orders served were also higher after 1979 (Cohen 1994, 51, 61; 2006, 81; Bloch and Schuster 2005, 496).

Alongside changes in secondary legislation, during the government of Thatcher the Immigration Act 1988 (IA 1988) was passed to tackle the problem of visa overstayers. This act introduced restrictive measures against those who breach their conditions of leave. With the slogan of 'firm but fair,' the government justified these new measures as a 'realistic' approach considering the immigration flows and anxious public opinion (Holmes 1991, 5). This act made it a continuing criminal offence to exceed the time limitation of the leave, or overstay,<sup>85</sup> thus loosening the time-limits for prosecution. Section 6 states that this offence is committed 'on the day when [the person] first knows that the time limited by his leave has expired and continues to commit it throughout any period during which he is in the United Kingdom thereafter.' The act also restricted the right of appeal against deportation orders in

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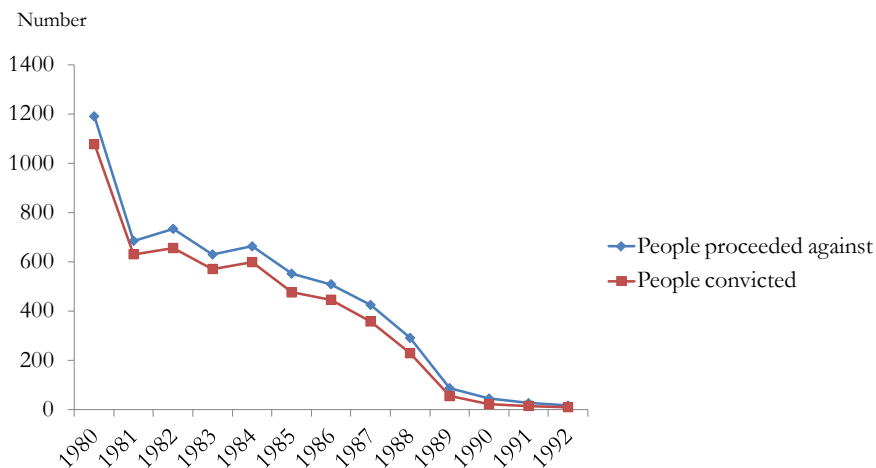
<sup>83</sup> The Conservative Party's 1979 election manifesto contained a number of measures to restrict immigration.

<sup>84</sup> For example, in 1986 the Minister of State at the Home Office, David Waddington, issued four sets of guidelines in order to cut down the number of representations by MPs on behalf of members of their constituencies on immigration matters (Cohen 1994, 64).

<sup>85</sup> S 24 (1A), IA 1971. This provision was enacted in response to the interpretation made by the courts of the offences of overstaying and illegal entry. They were considered as non-continuing ones and so the three-year prosecution bar started to count on the day the person illegally entered or overstayed his visa (*Grant v Borg* [1982] 2 All ER 257).

cases of breach of limited leave,<sup>86</sup> which made them more strictly enforceable. The impact that this last clause has had in the use of section 24(1)(b) (breach of limited leave or overstaying) is particularly interesting. Before the new provisions on deportation came into force, overstaying used to be the most frequently enforced immigration offence (Macdonald 2010, ch 14) as the numbers of prosecutions and convictions for this offence were relatively high compared to those for other immigration offences.<sup>87</sup> With the restrictions on appeal rights to deportation orders against overstayers, the prosecution of this offence became rare. As shown in Graph 4 below, from 1980 to the early 1990s there was a progressive and sustained drop in the number of prosecutions in magistrates' courts.

**Graph 4: Overstaying trends at magistrates courts (1980-1992)**



Source: Home Office, Control of Immigration: Statistics United Kingdom.

The amendment to deportation provisions has had an important effect in the way criminal provisions inside immigration laws are used to deal with immigration offenders. This amendment made it easier for authorities to remove immigration offenders, rendering the use of criminal punishment against them redundant, unnecessary or inconvenient. The impact

<sup>86</sup> S 5.

<sup>87</sup> See Home Office 1983, Table 21; Home Office 1985, Table 21.

that these reforms had on the way overstayers are dealt with demonstrates how closely interconnected the two regimes –administrative and criminal- are and how criminal punishment acquires specific functions in the context of immigration management. Because criminal punishment is one of a number of alternatives that public officials have at hand to deal with immigration offenders, it is used only when it serves immigration objectives and where a calculation of costs and benefits involved make it a reasonable option. As I will explain in chapter IV, a similar rationale underpins the criminal prosecution of immigrants who cannot be removed from the country.

Until the mid-1980s, a major concern for the government was to manage decolonisation in terms of the population movements generated by social, economic and political changes in both Britain and its former colonies. From then on, attention turned to the growing number of people claiming asylum and undocumented migrants. Previously, there were few refugees –mainly Hungarians, Chileans and Russian dissidents- so it was not a noticeable phenomenon.<sup>88</sup> However, civil wars and political turmoil in South Asia, Africa and, later on, East Europe produced a large ‘stock’ of people claiming asylum in many western countries, including Britain. In the UK, this inaugurated a period of ‘asylum hype’ and the beginning of a two-decades-long period characterised by an obsession of the tabloid media with ‘bogus refugees.’ This put enormous pressure on the government and resulted in draconian measures on asylum seekers.

The Sri Lankan conflict, which intensified in 1983, was the precursor of the ‘asylum crisis.’ Because of the large amount of asylum petitions, a visa for nationals of that country was introduced in 1985. In the following years visa requirements were extended to nationals of other Commonwealth countries (India, Pakistan, Nigeria, Ghana and Bangladesh),

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<sup>88</sup> It could be argued though that many immigrants arriving before then from former colonies were *de facto* refugees –particularly, Asians from East Africa- even though their ‘shady’ status as British citizens would have impeded them from being recognised as such. See also Porter 1979.

considered main ‘producers’ of asylum seekers.<sup>89</sup> The imposition of visas places an important obstacle for people fleeing persecution because they often do not have the time and the resources to apply for it. In addition, asylum seekers are fearful to resort to official authorities as applying for a travel document or a visa may alert them of their intention to leave the country. To enforce the visa regime, the government introduced measures to ensure that passengers do not arrive in Britain with improper or no documentation, thus preventing people with no right to enter from leaving their own countries.

The first specific legislation on carriers liability –the Immigration (Carrier Liability) Act 1987 (I(CL)A 1987)- established a duty on carriers which transport people (ships and aircrafts) to check passenger’s travel documents and visas, imposing fines of up to £1,000 for any breach. As early as 1905, the AA 1905 obliged the masters of ships to comply with regulations on the entry of foreigners to the country and their return to the ports of embarkation; failure to comply with those norms made them liable to fines.<sup>90</sup> These were strict liability offences and so there was no need for the prosecution to prove intention or knowledge by the defendant (Dummett and Nicol 1990, 161). Later on, the offence of facilitation introduced in the IA 1971<sup>91</sup> penalised any person ‘*knowingly*’ concerned in making or carrying out arrangements for securing or facilitating the entry into the United Kingdom of anyone whom he knows or has reasonable cause for believing to be an illegal entrant.’ This offence applied to carriers transporting undocumented immigrants. However, because it required proof of the fault element (reasonable cause to believe), it was difficult to enforce. The civil penalty regime introduced by the I(CL)A 1987 facilitated the enforcement of the obligations on carriers thus virtually turning airline employees into first-line immigration officials (Pham 2008). By the time this piece of legislation was passed, the imposition of civil

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<sup>89</sup> Visa requirements are now in place for citizens of over a hundred nations worldwide.

<sup>90</sup> Eg ss 1(5), 4(3) and 5(2).

<sup>91</sup> S 25(1).

sanctions on reckless carriers was a policy measure already mandated at the European Union (EU) level by the Convention Implementing the Schengen Agreement of 14 June 1985.<sup>92</sup>

Both visa requirements and carrier liability severely restricted the possibility of people escaping persecution in their home countries to travel with valid passports and visas to Britain, and made the resort to ‘agents’ who provide the required (false) documentation the only alternative (Dunstan 1998, 209; Macdonald 2010, ch 14).<sup>93</sup> The introduction of these measures shows the underlying distrust by the British government of asylum claimants, believed to be economic migrants or ‘bogus’ asylum seekers, rather than genuine refugees, who would be discouraged from migrating to the UK and would choose a different destination (Cohen 1994, 81). In fact, the enactment of the I(CL)A 1987 was a response to the arrival at Heathrow airport of 68 Tamils from Sri Lanka in February of that year. The decision by the courts rejecting claims for asylum in most of these cases was used by the government to argue that the refugee route was being abused by economic migrants: ‘[t]he one loophole that has been exploited [...] is the claim to refugee status [...]. [M]any of these unfortunate people are seeking to leave their own country for economic reasons and not strictly for reasons of oppression.’<sup>94</sup> It is not surprising then that government policies towards asylum seekers were driven by the rhetoric and methods deployed to control (illegal) immigration (Joppke 1999, 129).

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<sup>92</sup> Official Journal L 239 of 22.09.2000 (‘Schengen Convention’) (art 26). The provisions in the Schengen Convention were later supplemented by the Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, Official Journal L 187 of 10.7.2001 (‘Carrier Liability Directive’).

<sup>93</sup> The problems arising from establishing such sanctions against airlines with UK’s obligations under art 31 of the Refugee Convention are clearly exposed in *R v Uxbridge Magistrates’ Court, Ex parte Adimi*; *R v Crown Prosecution Service, Ex parte Sorani*; *R v Secretary of State for the Home Department, Ex parte Kazim* [1999] INLR 490 (‘Adimi’), and *R v Asfaw (United Nations High Commissioner for Refugees intervening)* [2008] UKHL 31 (‘Asfaw’). See ch III.

<sup>94</sup> Intervention by Home Secretary Douglas Hurd, Hansard, HC Deb 16/03/1987, col 734.

The post-Cold war years brought an increase in number of applications for asylum from citizens of former Communist countries.<sup>95</sup> This was the context in which the two further acts specifically directed at asylum seekers were passed in 1993 and 1996: the Asylum and Immigration Appeals Act 1993 (AIAA 1993) and the Asylum and Immigration Act 1996 (AIA 1996), respectively.<sup>96</sup> They were fundamentally directed at reducing bottlenecks in processing applications in a system increasingly overwhelmed by the volume of work (Flynn 2005). They did so by limiting opportunities to appeal and restricting housing allowances for applicants. They also increased penalties for certain offences and the powers of immigration officers to arrest and search without warrant.

These acts also expanded the catalogue of immigration crimes. The AIAA 1993 made it an offence to conceal or provide information to induce an immigration official to believe that someone is or is not an asylum seeker or a dependant.<sup>97</sup> The AIA 1996 introduced the offence of obtaining leave to enter or remain by deception,<sup>98</sup> which has been applied against failed asylum seekers who aimed to seek asylum once again under a different identity (Macdonald 2010, ch 14). Nevertheless, it has not been systematically used.<sup>99</sup> Finally, the offence of facilitation of illegal entrants was amended to include those assisting an asylum

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<sup>95</sup> In 1989, Britain received around 11,640 applications whereas for 1990 and 1991 the figures jumped to 26,205 and 44,840, respectively. With the adoption of the AIAA 1993 these rates decreased as refusal rates increased from 14 percent in 1992 to 74 percent in 1994 (Bloch 2000, 30, 35).

<sup>96</sup> A third piece of legislation was introduced in 1997: The Special Immigration Appeals Commission Act 1997 (SIACA 1997). This act created the Special Immigration Appeals Commission (SIAC) and regulates its operation. The SIAC examines appeals against decisions to deport someone on national security grounds and for other public interest reasons, and against decisions to stop someone to become a British citizen. The SIACA 1997 was modified by the Antiterrorism, Crime and Security Act 2001.

<sup>97</sup> Sch 1, par 5, AIAA 1993.

<sup>98</sup> S 24(1aa), IA 1971.

<sup>99</sup> In 1997, only one prosecution –though unsuccessful– was brought under this provision in magistrates’ and crown courts; in subsequent years prosecution and conviction rates increased but at a slow pace: in 1998, seven prosecutions and one conviction; in 1999, 19 prosecutions and eleven convictions; and in 2000, four prosecutions and no conviction (Home Office 2001, Table 7.5).

seeker or someone seeking to obtain a leave by deception.<sup>100</sup> This amendment was subject to a heated debate in Parliament, particularly regarding the criminalisation of assisting asylum seekers. It was aimed at filling a gap in the legislation as evidenced by the courts in *R v Naillie*. In this case, the House of Lords examined the question on whether assisting a person who arrived without a valid passport and subsequently claimed asylum was covered by the offence of assisting an illegal entry, under section 25(1), IA 1971. It concluded that that offence did not cover the case of facilitators where the person assisted is an asylum seeker.<sup>101</sup> While the offence of assisting an asylum seeker was directed at targeting racketeering groups and despite the assurance given by the government, there was a widespread concern about that provision being applied against lawyers advising people about their asylum cases, not-for-profit organisations, churches, airline staff, etc. This offence resulted in a number of successful prosecutions until the mid-2000s after which the rates dropped.<sup>102</sup>

These new offences targeted abuses in the quest for asylum and those helping asylum seekers. Paradoxically, even though by the time the catalogue of immigration-related offences was expanding, immigrants and asylum seekers trying to enter or leave the country with false documents were prosecuted for offences in non-immigration statutes (Hales 1996; Dunstan 1998). From 1994 on, a growing number of people were caught in British airports –mainly Heathrow- using false documents and were charged, imprisoned and convicted for the use of a false instrument under section 3 of the Forgery and Counterfeiting Act 1981 (FCA 1981) or for attempting to obtain services by deception under section 1 of the Criminal Attempts Act 1981 (CAA 1981).<sup>103</sup> In 1993, there were 53 arrests under these sections. In the subsequent

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<sup>100</sup> Ss 25 and 25A, IA 1971.

<sup>101</sup> Cfr *R v Naillie*; *R v Kanesarajah* [1993] AC 674, HL [at 680].

<sup>102</sup> This drop is in part due to legislative changes and the use of other offences to deal with ‘humanitarian’ or ‘commercial’ smugglers (see ch III).

<sup>103</sup> Cfr Hansard, HC Deb 08/07/1996, vol 281 cc 31-2W, quoted in Dunstan 1998, 208.

two years, arrest numbers increased to 126 for 1994 and 376 for 1995. The rise in the enforcement of fraud-based offences was a reaction to the growing number of asylum claimants resorting to smugglers and false documents to enter the country. It also reflects a change in the response by the government to migrants and asylum seekers using false documents. The British government started to use the criminal law in these cases to punish those who sought to bypass immigration controls and to deter others prepared to follow the same route. The use of criminal law to control immigration has severely affected asylum seekers and is one of the most problematic aspects of the criminalisation of immigration as it has reduced the level of protection offered in Britain<sup>104</sup> and throughout Europe (Black 2003, 42; Council of Europe 2010, 20).

The AIA 1996 also introduced for the first time a criminal offence of employing illegal workers.<sup>105</sup> Working without entitlement had been a crime since 1971.<sup>106</sup> The introduction of this offence marked a shift in the legal framework against illegal labour which from then on was directed also at the demand side of the equation.<sup>107</sup> Illegal employment of foreigners has been a constant feature of certain businesses –such as restaurants and hotels- in metropolises like London. These businesses largely depended on foreign workers with no right to work because they were illegal entrants, visa holders with no permission to work or, simply, overstayers. In a recently released record of a cabinet meeting held in May 1971, it is recognised that the hotel and catering industries largely and ‘unduly’ relied on foreigners who were ‘prepared to accept low wage rates and inferior standards of living.’<sup>108</sup> This ‘black

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<sup>104</sup> For instance, legislative changes introduced in 1996 contributed to the reduction of asylum applications to 14,320 applicants that year (Hansard, HC Deb 11/05/1999).

<sup>105</sup> See s 8.

<sup>106</sup> See s 24(1)(a), (b), and (c).

<sup>107</sup> See ch III.

<sup>108</sup> Cfr Cabinet Papers, *Conclusions of a Meeting of the Cabinet held at 10 Downing Street, S.W.1, on Thursday, 13 May, 1971, at 10.30 a.m.*, 5-6. In this meeting, the Secretary of State for Employment affirmed that, because of the

economy' was largely overlooked by the government not only because it served economic needs, but also because it was not considered a serious problem. Hiring illegal workers was certainly not considered a criminal matter and so the offence of illegal working was seldom enforced. The government attempted to address this situation, identified as a major pull factor of illegal immigration to the country, by making employers hiring illegal workers criminally liable. As a strict liability offence, it did not require knowledge on the part of the employer about the lack of entitlement to work of the foreign employee. The absence of a fault element in the offence was supposed to facilitate prosecutions; however, even without it, there were no prosecutions under this provision until 1997. It was not until 2006 that new legislation was introduced to deal with illegal employment, in the light of the poor outcomes following the AIA 1996.

The tightening of both external and internal controls in Britain coincided with a period of increasing openness within the EU and closure to non-European immigration, particularly after the adoption of the Schengen Convention and its incorporation into EU law by the Amsterdam Treaty in 1997.<sup>109</sup> Even if Britain did not completely lift its external frontiers –in fact, it did not relinquish its power to control passengers coming from Schengen states, the adoption of an array of 'compensatory measures' to strengthen external borders in continental Europe was an opportunity to tighten up external controls on ports of entry (its traditional strategy) while introducing inland ones (Anderson et al. 1995; Morris 1998, 954; Kaye 1999). The UK's 'legal tradition' to rely on the criminal law to enforce immigration rules has in turn influenced the recent drive towards criminalisation at the European level, in part encouraged and even mandated by EU rules (Council of Europe 2010). The explicit support from European institutions of a system based on the criminalisation of immigration breaches

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various 'incentives' to employ foreigners, businesses were less likely to hire nationals. He proposed to introduce a quota to fill unskilled seasonal vacancies in the hotel and catering industries to tackle the increasing domestic unemployment.

<sup>109</sup> What some commentators have called 'Fortress Europe' (eg, Albrecht 2002).

is an important factor in the continuation and expansion of such a system and in the ruling out of any alternative option.<sup>110</sup>

## **VI. Conclusion**

The contemporary contours of the British system of immigration controls have been largely shaped by the struggle to strip British privileges from Commonwealth citizens during the dismantling of the empire. Immigration and race have been crucial themes in the history of forging Britain's 'frontiers of identity' and the drawing of the line between those who belong and those who do not. Not surprisingly then immigration debates bring to the fore not only the relation of the British society with 'its outsiders' but also how such interaction contributes to create and recreate the community within. A quick look at this debate throughout the last century shows continuities in the portrayal of foreigners as disruptive of vernacular customs, producers of unemployment, housing overcrowding and crime, and more recently, abusive of the immigration and welfare system.<sup>111</sup>

It also shows the existence of an immigration enforcement system that has appealed to the criminal law since early legislation, even before a comprehensive framework and institutional organisation had been put into place to police the borders –or the shores. As I have discussed above, immigration offences are older than sometimes thought; they constituted an important part of legislation passed during the nineteenth century. They are even older than other enforcement mechanisms to deal with foreigners –notably, deportation– which in these days is considered inherent to contemporary systems of immigration controls in western countries. This coincides with what Juliet Stumpf (2009) tell us about the American

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<sup>110</sup> See ch VI.

<sup>111</sup> Similar depictions can be found in recent media reports (eg, Harper and Leapman 2007; Malkin 2007; Whitehead 2008).

context where immigration offences were widespread in eighteenth-century legislation, albeit seldom used, and criminal sanctions appeared in federal statutes before deportation.

Perhaps because of this 'legal tradition' –as the Attorney General clearly put it in the parliamentary debate on the 1962 Bill- criminal sanctions have been considered a constitutive part of the immigration control system and have not been subject to strict scrutiny over their need, proportionality or convenience.<sup>112</sup> Criminal sanctions attached to immigration rules have barely been applied to immigration offenders, as evidenced by the few charged with these crimes. Except for overstayers until the mid-1980s, foreigners in breach of immigration rules have been largely dealt with through the exercise of administrative powers of deportation and removal. The practice of immigration controls has been focused on such powers up until the mid-1990s when the appeal to criminal law started to become more frequent.

Because the British immigration system drew on the model of criminal punishment, developments in both areas of law are closely related. In order to understand immigration 'management' it is necessary to look at the role that criminal law plays in it, particularly the intended or unintended consequences of criminalisation in and beyond the criminal justice story. Vice versa the convergence of criminal and administrative regimes broadened up possibilities for decision-making and made immigration policy imperatives a key element in the administration of discretion. This focus will guide the analysis of contemporary policies and practices in the field of immigration which follows in the rest of this thesis.

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<sup>112</sup> In 1979 the JCWI proposed the decriminalisation of immigration offences and the use of administrative powers to deal with immigration offenders. It was held that decriminalisation would send a message that 'breaches to immigration law do not in any sense represent the serious threat to society which crime in the ordinary sense of the word does' (quoted in Couper 1984).

**CHAPTER III: THE LABOUR YEARS: CONTEMPORARY CONTOURS OF IMMIGRATION  
POLICY AND ENFORCEMENT FROM 1997 TO 2010**

In this chapter, I examine the recent history of immigration legislation in Britain during the New Labour tenure from 1997 to 2010. While this is a long period, its consideration as a whole is important to identify changes and continuities in immigration policy-making. As this chapter will show, while policy objectives and targeted groups changed during Labour's years, broad ideas about how the immigration system should work and how both British people and foreigners subject to controls should perceive such a system were relatively stable.

I identify three main features characterising this period. First, there was a significant expansion of immigration legislation including the growth of the catalogue of immigration crimes. Second, there was an enhanced and more systematic enforcement of such legislation and a greater reliance on the criminal justice system. The criminal law was increasingly deployed against undocumented migrants –many of whom were asylum seekers. Third, criminal and immigration enforcement agencies converged following the overhaul of the BIA in 2007 and the creation of a police-like immigration enforcement bureau, the UKBA, in 2008. The creation of immigration crimes –and the greater enforcement of them- was part of the government's plan to tighten up an arguably obsolete immigration system and to increase public confidence in it.

### **I. Promises (un)fulfilled: New Labour and the immigration debate**

While in opposition, the New Labour Party was careful in criticising Conservative policies, especially on social issues. It adopted a 'twin track approach,' publicly opposing Conservative initiatives, but in a way that it could not be seen as too liberal. Regarding immigration, this meant that the party wanted to avoid being portrayed as lax on immigration controls (Kaye 1999, 28; also Gibney 2008, 155). Labour was concerned about the increasing support for the British National Party (BNP) among its electorate (Schuster and Solomos 2004, 280) and it worried that a 'too' liberal stance would be 'out of touch' with the reality of large sections of

the population<sup>113</sup> and at odds with their demands for a firmer intervention by the state. This may explain the fact that, as far as immigration is concerned, the Labour Party's policies resembled its opponent's in many ways (Bloch 2000; Schuster and Solomos 2004).

When New Labour won the general election, immigration was not a priority for the new government. In fact, it did not even appear in Labour's electoral manifesto. As Sarah Spencer (2007, 341) puts it, as far as immigration was concerned, Labour 'came to power with no vision, no policy goals, no anticipated "third way".' Soon after the 1997 elections, however, immigration became a major political issue. At the peak of asylum applications in 1999,<sup>114</sup> and with a steady increase in foreign population flows particularly since 1997, the issues of asylum, family reunification and labour migration lay at the top of public concerns (Boswell 2005; Home Office 2006a, Fig 1).<sup>115</sup> They also had become the focus of attack by the Opposition and the popular press (Düvell 2007; Spencer 2011, 55).

By the late 1990s, the 'immigration issue' –and particularly the abuse of the asylum system- became a major concern. Prime Minister Tony Blair was for some years personally involved in policy making in this area. In Spencer's (2007) account, he pushed targets to increase removals of failed asylum seekers –even over the objections of the Home Secretary, David Blunkett- and succeeded in silencing dissenting voices within the cabinet. An academic closely involved in the immigration debate during the Blair years explained: 'a lot of the movements to develop the framework to deal with illegal entry was really to do with asylum seekers [...]. So, politically asylum is just the huge, huge driver of all of that' (Respondent 16,

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<sup>113</sup> Particularly, working classes and trade unions. The latter has been one of the most combative groups against immigration, concerned with the economic effect that immigration has on internal wages and its alleged distortion of fair competition. The racist exclusion from trade unions experienced by ethnic minorities during the post-war years together with the reluctance of the unions to engage in more radical action to address the exploitation of non-white workers later on have contributed to a hostile relationship between unions and ethnic minority workers (Wrench 2000). See however, Avci and McDonald 2000.

<sup>114</sup> Applications for asylum, excluding dependants, rose by 25,000 in 1999. There was an increase of 55 percent and nearly 119 percent in claims, compared to 1998 and 1997, respectively (Woodbridge, et al. 2000, 2).

<sup>115</sup> In 2002, immigration and asylum appeared as the second most important issue for the British public –after health care- (Ipsos Mori 2002).

1/07/2010). She recalls that the decision to introduce a new bill in Parliament was not made – as it would usually be – by bureaucrats, but was ordered directly by the Home Secretary because of the strong political pressure to bring immigration under control: ‘So he would say: “I’m Home Secretary, I’m under fire from all sides for failing on this, I’m going to do something about it. I’ve got these administrative problems which really... I haven’t got any money to solve them, so I’ll legislate”’ (Ibid).<sup>116</sup>

From this moment onwards, the state began to use its powers to detain and remove more systematically. This included the resort to the criminal law and its agencies to enforce immigration rules.<sup>117</sup> As some scholars (Bloch and Schuster 2005; Bosworth and Guild 2008; Gibney 2008) show, both deportation and detention of immigrants were used sporadically until the 1980s and 1990s, largely because of practical difficulties and legal and moral objections to them. Before 2000, there were only four immigration detention centres. During the 2000s, the government opened five more and redesigned three detention facilities to hold immigrants.<sup>118</sup> The Labour administration significantly expanded the detention estate – particularly to detain ‘destitute’ and ‘failed’ asylum seekers- (Malloch and Stanley 2005; Bacon 2005; Welch and Schuster 2005a; b). It also increased the UK’s capacity to enforce deportation and removal orders since 1999, with 2002 being a peak year for removals (Home Office 2008a, Fig 13; also Gibney 2008; Anderson et al. 2011, 550).

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<sup>116</sup> See also Gibney 2008.

<sup>117</sup> See Home Office 1998, ch 11.

<sup>118</sup> The first centre to hold immigrants opened in 1969 next to Heathrow airport was Harmondsworth removal centre with a capacity to hold between 40 and 50 detainees at a time (Hansard, HC Deb 22/01/1969, col 559). More than two decades later, the government re-opened former juvenile prisons as detention centres: Haslar in 1989 and Campsfield in 1993, and it opened Tinsley House in 1996. After then, four more establishments were opened: Oakington in 2000, Yarl’s Wood in 2001, Colnbrook in 2004 and Brook House in 2009. Additionally, three other centres were re-designated to accommodate immigrants (Lindholme, Dungavel and Dover). More recently, UKBA opened Morton Hall, which was previously a women’s prison. Nowadays there are eleven removal centres throughout the country under the authority of the UKBA. Cfr <http://www.ukba.homeoffice.gov.uk/managingborders/immigrationremovalcentres/> (Last accessed: 18 October 2011).

The New Labour administration inaugurated a new way of governance adopting a ‘tough but fair’ approach to crime, anti-social behaviour<sup>119</sup> and immigration (Stenson 2001). Particularly in relation to immigration, the underlying rationale was to transform the terms of the debate and create a ‘third way’ (Young 2003). The objective was to avoid polarised positions held by the Right (that advocated for increasingly tighter controls and disregarded asylum claimants as bogus) and the Left (that condemned those backing immigration controls as racists). In its public rhetoric, New Labour explained people’s concerns about large number of newcomers as not necessarily racist and recognised the existence of abuses in the system.<sup>120</sup> Successive Home Secretaries advocated stricter but ‘fair’ scrutiny to filter out the ‘deserving’ migrants (considered to be refugees, skilled migration, business travellers, tourists) from the ‘undeserving’ ones (among whom they numbered bogus asylum claimants, unskilled and poor economic migrants and foreign ex-offenders).<sup>121</sup> Keeping with its new approach, the government deployed a managerial logic to ‘administer’ immigration flows. Aware of the impossibility of suppressing immigration altogether and convinced about the need for legitimate migration, Labour organised controls to smooth the way of legitimate travellers and restrict unwelcome ones (Amoore 2006; Wilson and Weber 2008; Aas 2009b).

**a. Fairer, Faster and Firmer**

*The criminal law has a role to play in stamping out abuse of immigration control.*

1998 White Paper

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<sup>119</sup> In fact, a famous motto of the Labour Party was ‘tough on crime, tough on the causes of crime;’ a reference to the idea that combating social exclusion as a cause of crime is not contradictory to punishing offenders and defending the society from them (see Aliverti 2008).

<sup>120</sup> See for instance intervention by Parliamentary Under-Secretary of State for the Home Department, Mike O’Brien, during the debates on the 1999 Bill in Hansard, HC Deb 22/02/1999, col 122.

<sup>121</sup> See examples in Home Office 1998; Home Office 2002; Home Office 2005b; Home Office 2006b; Home Office 2007b; Home Office 2008b; and Home Office 2010c.

The Labour administration laid out its plans for the reform of the entire immigration system in the White Paper *Fairer, Faster and Firmer* (Home Office 1998) which underpinned and shaped the Immigration and Asylum Act 1999 (IAA 1999). The point of departure of the White Paper was that the current system was inefficient because of its complexity and fragmentation, and because it allowed abuses. It was a magnet for bogus asylum claims, and allowed multiple appeals and the use of procedural tricks to violate immigration laws (Sale 2002; Flynn 2005). The promise of the White Paper to undertake a complete overhaul of the immigration system was reflected in the size of the bill presented to Parliament, characterised as ‘by far the biggest piece of legislation in this area ever seen in the UK’ (JCWI 1999). The first aim of the bill was to introduce and strengthen a number of measures aimed at deterring asylum seekers from choosing the UK as final destination<sup>122</sup> and at economic migrants from ‘abusing’ the asylum route.<sup>123</sup> The second was to respond to the general criticism of the IND’s inefficiency in the management of such applications which caused considerable backlogs<sup>124</sup> and to adopt a swifter and tougher approach towards those who ‘keep playing the system.’ Finally, a more general purpose was to restore the public trust in the immigration system.

Among other measures, the IAA 1999 enacted 35 different immigration-related offences –many of them targeting asylum seekers. When introducing the bill in Parliament, the then Home Secretary, Jack Straw, announced that ‘[e]nforcement must be backed by the

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<sup>122</sup> For example, the government rejected proposals to introduce exemptions to carrier liability regimes in cases where the undocumented or clandestine entrant was a refugee (see Hansard, HC Deb 20/04/1999, col 712; HL Deb 18/10/1999, col 862).

<sup>123</sup> In fact, one of the objectives of the Ministry of Justice’s Public Service Agreement was to ‘Reduce unfounded asylum claims as part of a wider strategy to tackle abuse of the immigration laws and promote controlled legal migration.’ Available at <http://www.justice.gov.uk/publications/docs/dca-sr-2004-notes-2008.pdf> (Last accessed: 15 January 2011).

<sup>124</sup> The department was criticised for its malfunctioning and inefficiency, apparent in the finding that 16,000 pieces of mail were unopened, the failure to computerise files due to problems with the contractor (Siemens), and delays in enforcement actions in as many as 67,000 cases. See, eg, Hansard, HC Deb 22/2/1999, col 105; and HL Deb 2/11/1999, col 773.

criminal law.<sup>125</sup> Accordingly, this piece of legislation introduced more immigration-related offences than any other in history.<sup>126</sup> It extended the offence of deception by criminalising those who deceive to circumvent in any way enforcement actions against them<sup>127</sup> (originally, the offence covered only those who used deception to enter or remain in the country<sup>128</sup>). According to the explanatory notes, this extension was intended to deal with ‘failed asylum seekers whose claims have involved blatant deceit.’ The IAA 1999 also increased the maximum penalty for deception from six months to two years. Other offences introduced relate to the provision of support for asylum claimants (false representation, dishonest representation, delay or obstruction, and failure of sponsor to maintain).<sup>129</sup> As Ian Macdonald (2010, ch 14) observes, many of these criminal offences are modelled on crimes to enforce social security provisions. The act includes another group of offences related to the enforcement of discipline inside removal centres.<sup>130</sup> These offences are equivalent to those existing in regulations of prisons and they are aimed at bringing the rules governing prisons into immigration detention.<sup>131</sup> Even if these provisions considerably increased criminal powers, the debates in Parliament gave little or no consideration to them. In fact, during the parliamentary debates on the 1999 Bill there was no substantial scrutiny over the penal powers introduced.

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<sup>125</sup> Cfr Hansard, HC Deb 22/02/1999, col 37.

<sup>126</sup> Until 1999, the legislation that introduced the highest number of immigration crimes –21 offences– was the IA 1971, followed by the CIA 1962 which added fourteen offences to the statute book.

<sup>127</sup> S 24A, IA 1971.

<sup>128</sup> S 24(1)(aa), IA 1971.

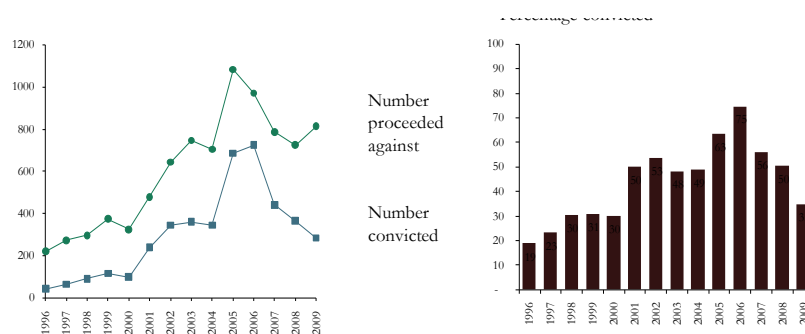
<sup>129</sup> Ss 105 to 108.

<sup>130</sup> Sch 11 pars 4 and 5; and sch 12 pars 3, 4, 5 and 6.

<sup>131</sup> Cfr Hansard, HC Deb 16/3/1999.

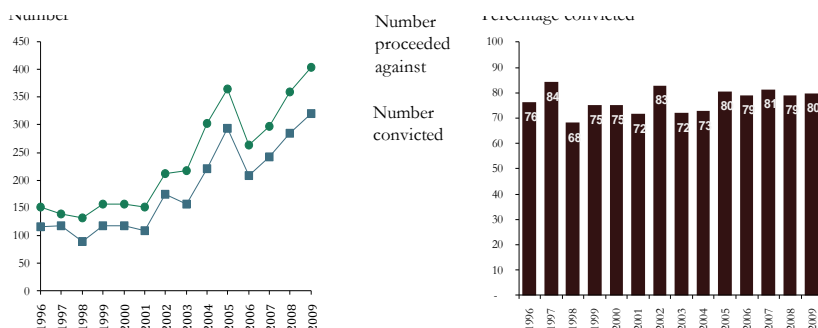
The new powers to penalise immigration offenders were followed by a steady increase in prosecutions and convictions for immigration-related crimes, both in magistrates' and crown courts. This trend picked up in 2000 and 2001, and continued until 2005 and 2006, when the rates started to fall, as illustrated in Graphs 5 and 6, below. A note of caution is due though when considering these numbers. First, between 2004 and 2008 there has been an under-recording of immigration offences in magistrates' courts due to inconsistencies in data. Similarly, since 2005 crown courts' data present other inconsistencies (Home Office 2009a, Table 6.7). Second, many people are charged with related offences of fraud and deception, such as those in the Identity Cards Act 2006 (IDCA 2006). These cases are not included in immigration statistics because the IDCA 2006 is not an immigration act; however, the behaviour incriminated could well fall under immigration acts (such as the IA 1971).

**Graph 5: Magistrates' court immigration crime case trend**



source: Home Office, Control of Immigration: Statistics United Kingdom

**Graph 6: Crown court immigration crime case trend**



Source: Home Office, Control of Immigration: Statistics United Kingdom

Along with introducing a number of criminal offences, the IAA 1999 included two provisions which are closely connected to the criminalisation of immigration: the creation of civil penalties for carriers and the regulation of the prohibition to impose penalties on refugees under the Refugee Convention. I will address each of them in the next two subsections.

**b. Civil penalties: making immigration offenders pay?**

The IAA 1999 introduced a civil penalty on carriers responsible for clandestine entrants and for carriers who transport people without proper documentation. This provision extended carrier liability to all forms of transportation of human beings.<sup>132</sup> In response, lorry drivers’ organisations argued that the penalty was unnecessary because there was a criminal offence sanctioning the same conduct –the offence of facilitation under the IA 1971.<sup>133</sup> The government, on the other hand, claimed that due to evidentiary difficulties in proving criminal

<sup>132</sup> Ss 32 and 40, respectively.

<sup>133</sup> S 25(1).

intention by the facilitator this offence was hard to enforce. During the parliamentary debate and in response to a question by a MP, the government's representative, Mike O'Brien, explained:

There can be a criminal prosecution when someone who has the intention of carrying illegal immigrants then carries them [...]. One of the difficulties is that lorry drivers can simply say, 'We didn't know they were in the back.' Unless we search the drivers and find the £2,000 per illegal immigrant that is sometimes paid to those who bring them in deliberately [...] it is difficult to prove that they were aware that the illegal immigrants were in the back. It is necessary to have a system of civil penalties (Hansard, HC Deb 22/02/1999, col 121).

A similar rationale lay behind the enactment of the civil penalty regime for hiring illegal workers. As I explained in chapter II, the AIA 1996 introduced a criminal offence of employing a person aged 16 and above subject to immigration control punishable by summary conviction with a fine of up to £5,000.<sup>134</sup> This was a strict liability offence where proof of *mens rea* was not needed to secure a conviction. Until 1997, though, there was not one prosecution for this offence (Home Office 2001, 95). In 1998, one person was proceeded against and convicted for this offence. In 1999, four defendants were charged and only one of them was convicted for the same offence (Home Office 2003, 97). While in later years these numbers went up slightly, the prosecution and conviction rates for this offence remained low.<sup>135</sup> Between 1997 and 2006 only 37 people were convicted. The under-enforcement of this offence was due in part to the costs involved in mounting criminal prosecutions and the low conviction rates. Moreover, when the defendant was found guilty and convicted, the fines imposed were so low, far below the maximum limits, that they were insufficient to cover even the prosecution costs (Law Commission 2010). It was also due to a lack of concerted political will and consistent enforcement to stop illegal working, a lax regime of exemptions for

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<sup>134</sup> This provision was subsequently amended by the AI(TC)A 2004 which made hiring an illegal worker a triable either way offence (s 4, AIA 1996). The Accession (Immigration & Worker Authorisation) Regulation 2006 (11) introduced similar offences for workers from Romania and Bulgaria (ss 12 and 13).

<sup>135</sup> For 2000, there were ten prosecutions and four convictions; for 2001, five and two; for 2002, two and one; for 2003, two and one; for 2004, eleven and eight; for 2005, 23 and thirteen; and for 2006, ten and six (see Home Office 2005a, Table 6.5; Home Office 2008a, Table 6.7).

employers (Ryan 2006, 37), and the difficulties in changing the social perception of illegal employment as ‘wrong but not so wrong’ (Ruhs and Anderson 2010).<sup>136</sup>

In view of these poor outcomes and concerns about illegal working as a pull-factor for illegal immigration, in 2006 the government introduced reforms to this legal framework. It explicitly recognised that a strict liability offence, which puts all employers at the same level regardless of knowledge, was not an adequate tool to address the allegedly widespread problem of illegal working (Home Office 2005c). Further, advocacy groups complained that a strict liability offence for illegal employment was disproportionately severe and potentially damaging to race relations (eg, IAS 1999). The Immigration, Asylum and Nationality Act 2006 (IANA 2006) repealed section 8 of the AIA 1996 and introduced an offence for *knowingly* employing adults subject to immigration control along with a civil penalty regime which currently carries a maximum penalty of £10,000 for each illegal worker employed. This dual system of sanctions aimed at ‘increasing the risk and speed of receiving a penalty for non-compliance, proportionate to the level of non-compliant behaviour’ (Home Office 2005c) by differentiating between, on the one hand, careless employers who hire foreign workers without undertaking a proper check of their documents and entitlement to work or where intention of criminal wrongdoing cannot be proved, and on the other, those who knowingly employ undocumented migrants.

Under the new system, most cases fall into the first category where wrongdoers would be subject to fines and cases decided in quicker and less cumbersome proceedings, freeing up courts’ time to consider more serious and complex cases of illegal employment. Thus the two regimes created a ‘hierarchy of wrongdoing’ by diverting low-level misconduct from the courts and reserving criminal law for the most serious offenders. As expected, the number of

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<sup>136</sup> A similar pattern is observed in the US where the numbers of prosecutions and convictions for knowingly hiring ‘unauthorised aliens,’ under the Immigration Reform and Control Act 1986, has been historically low. Medina explains low enforcement rates as a function of the moral tension arising from the employment prohibition given that private labour relations are at the core of the US economic system and constitutionally protected from state intervention (Medina 1997; also Welch 2003, 329).

employers fined under the civil penalty regime has increased since its introduction,<sup>137</sup> whereas the prosecution numbers remain low.<sup>138</sup> The average fine imposed was £5,000, higher than those imposed by the courts under the AIA 1996, and the costs involved in proceedings were much lower than a criminal prosecution (Law Commission 2010, 45). While a substantial portion of cases of employing illegal migrants –by mainly British citizens-<sup>139</sup> have been diverted from the criminal justice system, the situation of non-British workers is drastically different. Working without entitlement or entering the country without proper documentation are still crimes very much enforced in practice.<sup>140</sup>

The decriminalisation of most cases of illegal employment and the stricter enforcement of employers' sanctions has been detrimental to migrant workers. A study by Martin Ruhs and Bridget Anderson (2010, 206) suggests that the stringent enforcement of this framework during the last few years has had a harsher impact on workers than on employers (also Ryan 2006, 55). This is because employers caught with undocumented workers in their work sites have incentives to report them or to cooperate with investigations against them. The former may have their fines reduced if they report 'any suspicions about [their] employees' entitlement to work' or when they 'co-operate[] with the Border and Immigration Agency in any investigation, or in any consequent operation to detect and detain illegal

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<sup>137</sup> While in 2008, UKBA imposed 1,164 civil penalties against employers, worth £11.2 million, in 2009 the number almost doubled: 2,210 fines were levied amounting to a total of £22.1 million (according to a Freedom of Information (FOI) request by Giant Precision). However, the Independent Chief Inspector of the UKBA, John Vine, recently launched a report in which he uncovered that in 2010 only over £5 million in fines have been effectively recovered and at least 23 percent of penalties have been reduced or cancelled following an objection (Vine 2010, 12).

<sup>138</sup> Since the provisions of the IANA 2006 came into force in 29 February 2008, only two and five successful prosecutions were recorded for 2008 and 2009, respectively (Home Office 2010b, Tables 3.11a and b).

<sup>139</sup> Though, some businesses are more frequently penalised under this regime: for example, Asian or Chinese take-away restaurants or off-license stores. Because they usually hire foreign workers and in many cases do not keep proper paper work, they are regularly targeted (Webber 2009). See, for example, the names of businesses fined by UKBA in London and South-East in the agency's website: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/listemployerspenalties/civil-penalties-region/london-and-southeast.pdf?view=Binary> (Last accessed: 15 January 2011).

<sup>140</sup> These cases are criminalised under various provisions of the IA 1971 and the AI(TC)A 2004. Where there is document fraud involved, immigrants may also be prosecuted under other acts –such as the IDCA 2006.

migrant workers within [their] workforce' (Home Office 2008c, 15). Evidence indicates that business in certain sectors, such as cleaning companies, may be aware that their employees have no right to work in the UK. If their employees complain about their labour conditions, the companies have little qualms about reporting them to the authorities. Though the companies, officially, are at risk of prosecution, the precariousness of their employees is far greater (Anderson 2007; 2010a; De Giorgi 2010; 2011, 116). In his statement before Parliament during debates on the UK Borders Bill 2007, Jack Dromey, a trade union leader, quoted the case of a cleaning company where 200 employees were subject to compulsory redundancy. While the dispute was resolved in favour of the workers, 24 hours later they received a letter requesting a number of documents and warning that failure to provide those documents would result in them being sacked.<sup>141</sup>

This stricter enforcement has also increased the criminalisation of workers for document fraud. The intensified pressure on employers to ensure that their employees are entitled to work contributed to a rise in the use of fraudulent documents to access work and resulted in an increased rate of prosecutions against employees for forgery (Ryan 2006, 33). When employees are caught using forged documents, they are more likely to be prosecuted than their employers being fined as the latter are penalised only if the falsity of the document is 'reasonably apparent' –thus, apparent for an average person without the aid of technological devices- (Home Office 2008c, 11). In this regard, a high-ranking official in the Criminality and Detention Group at UKBA told me that when an employee is caught with a false document the practice is to prosecute the worker, and not to fine or prosecute the employer (Respondent 5, 16/09/2010).

The new civil penalty regime increased the pressure on the supply of labour –the immigrant. This conclusion is consistent with the general objective of employers' sanctions

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<sup>141</sup> Cfr Hansard, HC Deb 1/03/2007, col 82.

which is to control illegal immigration rather than to punish employers' wrongdoing. When there has been any discussion or scrutiny over the extension of criminal law powers for immigration enforcement during parliamentary debates they were focused on offences which penalised those who aid or harbour illegal immigrants, not on offences which punished immigrants directly. The use of criminal law against the latter has not been generally subject to criticism. The debate has rather concentrated on the legitimacy and proportionality of criminal or civil liability on 'third parties' in order to pursue immigration control objectives.<sup>142</sup> Parliamentarians have historically been concerned about striking the right balance between firm border controls and the economic interests of third parties affected. For example, during the debates on the Aliens Bill 1905, Lord Tweedmouth asserted that

[The provision regarding shipowners] was a great hardship on them that they should have to bear the expense of taking aliens who were refused admission into this country back to the place from which they came. That was still more intensified by the fact that not only were the shipowners so obliged to take back alien immigrants as defined by the Bill, but they had also to take back at their own expense cabin passengers (Hansard, HL Deb 3/08/1905, A2 6).

The introduction of civil penalty regimes for carriers and employers –and the diversion of low-scale wrongdoing from the criminal justice system- are consistent with the recent over-criminalisation of a variety of conducts. As criminal law scholars (Ashworth 2000; Ashworth and Zedner 2008; Duff et al. 2007) point out, along with the addition of a large number of offences in many fields, in recent years there has been a trend to repress conduct without subjecting the offender to a criminal trial. In the case of civil penalties, the main reason for their 'mass production and "consumption"' (Hildebrandt 2009, 64) is their effectiveness to deal with the problem of illegal immigration: they are cheaper and more effective as deterrent than criminal proceedings.

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<sup>142</sup> Cfr Hansard, HC Deb 20/04/1999.

### c. Prosecuting asylum seekers and the limits of the sovereign state

*Although under the convention subscribing states must give sanctuary to any refugee who seeks asylum [...], they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it.*<sup>143</sup>

The IAA 1999 introduced section 31 which regulates Britain's international obligations under the 1951 Convention Relating to the Status of Refugees,<sup>144</sup> particularly in relation to article 31. Under this article, contracting states to the Refugee Convention 'shall not impose penalties, on account of their illegal entry or presence, on refugees,' providing certain conditions are met.<sup>145</sup> The main aim of this provision is purely instrumental: to prevent refugees from going underground once they arrive at a 'safe haven' and to encourage them to regularise their status. It intends both to protect refugees and aid the receiving country by reducing the incentives of refugees to become 'illegals' (Hathaway 2005, 388). Britain as contracting party to the Refugee Convention was bound by article 31 since its entry into force. However, until the IAA 1999 that provision was not incorporated into domestic law and was poorly observed in practice (Bye 1999).

Until 1994, the arrival of people into Britain or en route to another country without proper documents was largely dealt with through immigration powers. The person was either refused entry and sent back to her port of embarkation, or held in detention while her claim was assessed (Hales 1996, 2). From 1994, however, the immigration service started to refer these cases to the police and the CPS. This change in policy increased the detention and criminal prosecution of asylum claimants, particularly, for use of a false instrument under the FCA 1981 and for attempting to obtain services by deception under the CAA 1981 (Dunstan

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<sup>143</sup> Simon Brown LJ in 'Adimi' cit [at 523].

<sup>144</sup> Herein, 'Refugee Convention.' It was adopted on 28 July 1951 and entered into force in 22 April 1954. The UK ratified this convention on 11 March 1954.

<sup>145</sup> That refugees come 'directly from a territory where their life or freedom was threatened,' 'present themselves without delay to the authorities' and 'show good cause for their illegal entry or presence.'

1998). Criminal lawyers rarely invoked article 31 of the Refugee Convention and advised their clients to plead guilty. Upon conviction by magistrates' courts, asylum seekers were typically sentenced to between six and nine months of imprisonment (Bye 1999). Many of them had their asylum applications considered and, if successful, were recognised as refugees only after serving their criminal sentence.

The 'Adimi' case is an example in point. An Algerian asylum seeker, Mr Chouki Adimi was charged with the offence of using a false instrument soon after arriving at Heathrow airport and claiming asylum. Adimi's defence counsel interposed article 31 as a defence but it was dismissed by the magistrates. Even after he was granted refugee status, the Crown refused to discontinue his prosecution. On appeal, Simon Brown LJ called attention to the limited knowledge and practical application of the convention provision:

So far as the police and CPS are concerned, no consideration had ever been given to the immunity provided by art 31. Until Mr Adimi's counsel took the point in the magistrates' court, no one involved in the criminal justice system ever addressed their mind to the problem ('Adimi' cit [at 526]).

Lord Justice Brown offered a generous interpretation of article 31, asserting that not only refugees but 'presumptive refugees,' who claim asylum in good faith, were covered by this provision. He also argued that refugees should have 'some element of choice' on where to claim asylum and consequently stated that a short stopover en route to the preferred country does not deprive the claimant from international protection.

To the problem of how to properly incorporate article 31 into domestic law, Lord Justices Brown and Newman favoured a 'Secretary of State' solution in which the Executive would decide on both the asylum claim and the immunity of the applicant, and where prosecution would be brought only in 'the clearest of cases and where the offence itself appears manifestly unrelated to a genuine quest for asylum.' This solution would not require any legislative amendment. Similar proposals were put forward by a member of the House of Lords and the applicants in 'Adimi' which sought to prevent the initiation of a criminal

proceeding when there was evidence that the accused was a potential refugee or to suspend those proceedings until the Executive decides on the asylum claim.<sup>146</sup> The government, though, disregarded these proposals because they would have insufficient deterrent effect and lead to abuses.<sup>147</sup> In response to the ‘Adimi’ judgment, the legislature introduced section 31 in the IAA 1999. This provision creates a defence which is based on article 31 of the Refugee Convention, but restricts the scope of the latter in two fundamental ways.

First, section 31 adds two further requirements not included in article 31: it requires that the person ‘make the claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom’<sup>148</sup> and it precludes protection when the journey to the UK included a stopover in another country, unless the person ‘could not reasonably have expected to be given protection under the Refugee Convention in that country.’<sup>149</sup> It also specifies the offences which shall be covered by the defence,<sup>150</sup> which are largely restricted to fraud-type offences.<sup>151</sup>

Second, the fact that section 31 was made a defence<sup>152</sup> –rather than a ban on or suspension of prosecution- means in practice that prosecutions can be brought against asylum

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<sup>146</sup> See, respectively, amendment proposed by Lord Bishop of Southwark, in Hansard, HL Deb 18/10/1999, col 845, and the position of the applicants as summarised in ‘Adimi’ [at 530].

<sup>147</sup> See the position of the government in ‘Adimi’ [at 534] and in the debate in the House of Lords (Hansard, HL Deb 18/10/1999, col 856).

<sup>148</sup> S 31(1)(c).

<sup>149</sup> S 31(2).

<sup>150</sup> For England, Wales and Northern Ireland, offences under (a) Part I, FCA 1981 (forgery and connected offences); (b) s 24A, IA 1971 (deception); or (c) s 26(1)(d), IA 1971 (falsification of documents) (s 31(3)) and for Scotland, offences (a) of fraud, (b) of uttering a forged document, (c) under s 24A, IA 1971 (deception), or (d) under s 26(1)(d), IA 1971 (falsification of documents), and any attempt to commit any of those offences (s 31(4)). The explanatory notes state that the Secretary of State may amend this list.

<sup>151</sup> The House of Lords in the ‘Asfaw’ case, however, found such list to be only enumerative and extended the catalogue of offences in s 31 to those ‘attributable to the attempt of a refugee to leave the country in the continuing course of a flight from persecution even after a short stopover in transit’ (‘Asfaw’ cit [at 1087]).

<sup>152</sup> This defence is equal to the common law defence of necessity providing immunity for criminal offences that are considered reasonable responses to an imminent harm.

seekers before their status is verified (Harvey 2000, 185). In this regard the Asylum Policy Instructions (API), which regulate the government's policy on asylum and guide caseworkers decisions, make it clear that the CPS has the ultimate decision on whether to prosecute or not, and the role of the immigration service is restricted to advising prosecutors about the potential application of section 31.<sup>153</sup> The domestic regulation is problematic not only because the mere opening of criminal proceedings may be considered punitive, but also –and most importantly- because the ultimate decision on the matter relies on criminal justice actors who often have insufficient information about the refugee case and limited knowledge of immigration and asylum laws.

The ultimate goal of the protection in article 31 is to avoid prosecution. As Guy Goodwin-Gill (2001, 9), a leading authority in refugee law, explains, '[i]f Article 31 is to be effectively implemented, clear legislative or administrative action is required to ensure that such proceedings are not begun and that no penalties are in fact imposed.' What happens in practice though is that, even if there is a pre-screening of the asylum claim by immigration officials, this check is superficial and a potential defence under section 31 is often not adequately discussed in court. As a consequence, a considerable number of asylum seekers are convicted of document fraud offences (Bye 1999; Darlington 2006).<sup>154</sup> While not against the wording of section 31, this practice seems in conflict with the government's API which state that 'it would normally be appropriate to await the Secretary of State's decision on the asylum claim before proceeding with a prosecution (and then only if it was considered to be in the public interest to do so), **unless** the person falls outside the scope of the defence for another

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<sup>153</sup> See API on Section 31 of Immigration and Asylum Act 1999 & Article 31 of the 1951 Refugee Convention, p 5. The API were launched in 2006 (and modified in 2009) to assist case workers on asylum decisions. These instructions adopt a restrictive approach towards the content of art 31 stating that '[t]he correct approach is that the protection afforded to refugees is found solely in section 31 of the Act and that there is no scope, in any case, for superimposing on the statutory protection the protection contained in Article 31 of the Convention.' For example, against the terms of the Refugee Convention and the 'Adimi' case, they establish that a stopover en route to the UK in a safe country precludes the application of s 31.

<sup>154</sup> In many criminal cases examined for this study, the accused had or was intended to claim asylum (see ch V).

reason.<sup>155</sup> In fact, despite the assurance given by the Attorney General that these cases will not reach court and, if they do, will be covered by section 31,<sup>156</sup> prosecutions and convictions of asylum seekers for document offences regularly occur.

The restrictive regulation of article 31 by British law –and its interpretation by the courts-<sup>157</sup> is one of the examples of the progressive ‘resiling’ from obligations under refugee law by rich western countries noted by Catherine Dauvergne (2008). Without walking away from the Refugee Convention, Britain has successfully limited the impact of article 31, thereby retaining control over the administration of punishment and amnesties. In addition to domestic restrictions, refugee law is itself limited in scope (Dauvergne 2004). Because it aims at offering subsidiary protection, only a circumscribed group of people who comply with a number of requirements can invoke it. States are not obliged to offer protection to asylum seekers before reaching their borders. For these reasons, measures intended to prevent the latter from arriving to Britain have not been considered in breach of the Refugee Convention.<sup>158</sup> Further, the scope of certain requirements –such as ‘coming directly’- is still subject to different interpretations and state practices are not necessarily bound by the most generous ones (Juss 2005). Finally, asylum determination is complex. Caseworkers and judges

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<sup>155</sup> Cfr API, p 7. Similarly, the legal guidance for Crown Prosecutors in this regard states: ‘the fact that a defendant’s application for asylum remains undetermined should not of itself prevent or delay prosecution or conviction.’ However, it advised prosecutors that ‘where a suspect’s refugee status remains to be determined by the Home Office or is the subject of an appeal to the Immigration Appellate Authority, yet the suspect has complied with all the conditions set out in sub-sections 31(1) and (2) it would normally be appropriate to await the outcome of the asylum proceedings before commencing a prosecution.’ Available at: [http://www.cps.gov.uk/legal/h\\_to\\_k/immigration/index.html#rstatu](http://www.cps.gov.uk/legal/h_to_k/immigration/index.html#rstatu) (Last accessed: 8 April 2011).

<sup>156</sup> Cfr Hansard, HL Deb 2/11/1999, col 784.

<sup>157</sup> See, eg, R (*on the application of Hussain*) v Secretary of State for the Home Department and others [2001] EWHC Admin 555; R (*on the application of Gjovalin Pepushi*) v Crown Prosecution Service [2004] EWHC 798 (Admin); R v *Narabi*; R v *Embaye* [2005] EWCA Crim 2865. In these cases British courts established the prevalence of statutory provisions –ie, s 31, IAA 1999 and s 2, AI(FC)A 2004- over international obligations arising from the Refugee Convention. See, however, ‘Asfaw’ cit.

<sup>158</sup> See, eg, R (*on the application of Hoverspeed*) v Secretary of State for the Home Department [1999] INLR 591 (on carrier liability); and R (*on the application of European Roma Rights Centre*) and others v Immigration Officer at Prague Airport and another [2004] UKHL 55 (on the decision to refuse leave to enter to asylum seekers in the country of origin by liaison officers).

make these decisions with limited information and a number of cultural and communication barriers which leave many refugees without state protection (Bohmer and Shuman 2008; Thomas 2011, 48). So in addition to the restrictive nature of international protection and the various, conflicting interpretations of refugee law, states frequently choose to restrict international norms even further.

## II. The (indefinite) overhaul of the immigration system

The policy objectives set down in the 1998 White Paper continued to drive government policy in its second term (Home Office 2002). However, particularly after the early 2000s, there was a shift in strategy from ‘control’ to ‘managed migration’ in relation to economic migrants (Sale 2005). Due to shortages in certain sectors of the labour market, the government opened up some avenues for skilled and unskilled labour migration.<sup>159</sup> The launch of programmes for low-skilled workers was justified as a legal channel for migrants who would otherwise resort to illegal means (Spencer 2007, 350). At the same time, tougher measures were introduced to tackle illegal immigration. The Nationality, Immigration and Asylum Act 2002 (NIAA 2002) and the White Paper that anticipated it, *Secure Borders, Safe Haven*, linked unlawful immigration to different forms of organised crime and fraud, where foreigners are involved as perpetrators or victims (Kostakopoulou 2006; Somerville 2007, 44).<sup>160</sup> The White Paper explicitly sought to

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<sup>159</sup> The number of work permits for high-skilled migrants increased significantly since 1995 and new channels were opened for low-skilled workers –mainly, the Seasonal Agricultural Workers Scheme and the Sector Based Schemes Workers- (Somerville 2007, 30).

<sup>160</sup> The focus on smuggling was very much at the centre of EU policy-making at the time. In November 2002, the Council of Europe approved a directive defining the ‘facilitation of unauthorised entry, transit and residence’ and a decision providing for minimum penalties for such offence: respectively, Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, Official Journal L 328 of 5.12.2002 (‘Directive on unauthorised entry, transit and residence’), and Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorised entry, transit and residence, Official Journal L 328 of 5.12.2002 (‘Framework Decision on unauthorised entry, transit and residence’).

[C]lose the gaps for illegal entry, illegal working and abuse of the system. Irregular migration undermines the integrity of the system. It profits traffickers, smugglers and unscrupulous employers, damages legitimate business, makes illegal migrant workers vulnerable to exploitation and social exclusion, and may be costly through lost revenue from taxation and National Insurance contributions (Home Office 2002, 16).

The offences incorporated by the NIAA 2002 were either new offences or amendments to those already contained in the IA 1971 (particularly, in section 25) which were widened to encompass a broader range of conducts. Most of these are ‘crimes of solidarity’ (Fekete and Webber 2009) or ‘organised immigration crimes:’ assisting unlawful immigration to a Member state by a non-EU citizen inside or outside the UK,<sup>161</sup> helping an asylum-seeker to enter UK ‘knowingly and for gain,’<sup>162</sup> assisting entry to the UK in breach of a deportation or exclusion order,<sup>163</sup> and trafficking in prostitution inside or outside the UK.<sup>164</sup>

While the Refugee Convention does not preclude penalisation of organisations helping asylum seekers,<sup>165</sup> it is evident that punishing those who aid refugees to flee from persecution negatively affects the ability of the latter to seek protection (Hathaway 2005, 403). Due to the need for false or forfeited documents, the resort to ‘agents’ is for many the only option to escape persecution. While the law punishes those who help asylum seekers to enter the UK only if ‘knowingly and for gain,’ and exempts from penalty organisations that assist

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<sup>161</sup> S 25(1), IA 1971. This offence covers a broad range of conduct: assisting illegal entry or assisting someone to remain by deception and other forms of assistance which facilitate a breach of immigration laws. It includes harbouring (s 25(2), IA 1971) which was thereon abolished. The maximum penalty for the new ‘generic’ offence of assisting was increased from ten to fourteen years of imprisonment, the same maximum penalty for helping an asylum seeker and trafficking for exploitation. By amendment introduced in the UK Borders Act 2007 (UKBA 2007), this offence may be committed overseas and regardless of nationality.

<sup>162</sup> S 25A(1), IA 1971.

<sup>163</sup> S 25B(1) and (3), IA 1971.

<sup>164</sup> S 145, NIAA 2002. Other trafficking offences are included in the Sexual Offences Act 2003 (for sexual exploitation) and in the AI(TC)A 2004 (for exploitation).

<sup>165</sup> Neither do other international instruments. For example, the Directive on unauthorised entry, transit and residence does not preclude Member states from penalising ‘humanitarian assistance’ (art 1, 2). The Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (‘UN Protocol against Smuggling’) prescribes the criminalisation of smuggling without subjecting that imperative to any exceptions (art 6).

asylum seekers without charging for their services,<sup>166</sup> in practice some ‘humanitarian smugglers’ are caught by the penal system (Weber and Grewcock 2011). For example, in a court-file I examined for this study at Isleworth Crown Court, both the mother and her eldest son were charged with the offence of assisting unlawful immigration for facilitating the entry of her youngest son to the country. The son assisted claimed asylum upon arrival to the UK.<sup>167</sup> He was charged with the offence of obtaining leave to enter the UK by deception –he was accused of using his brother’s passport. To the charge of assisting unlawful immigration, his mother pleaded guilty and was convicted to an eight-month suspended sentence and his eldest brother was found not guilty (ICC, Court-file, Case 57). At the same court, fourteen out of 58 defendants charged with assisting unlawful immigration had allegedly facilitated the entry of someone who subsequently claimed asylum. In seven of these fourteen cases, the person assisted was a relative of the defendant.

This pattern can be explained by the fact that the offence of assisting unlawful immigration is being used against ‘commercial’ and ‘humanitarian’ smugglers, and evidence of ‘humanitarian instinct’ is usually taken into account for the purpose of mitigation, but not immunity.<sup>168</sup> Those who facilitate the arrival of asylum seekers regarded as illegal entrants are usually charged with the assisting offence which, unlike the offence of helping an asylum seeker, does not require proof of gain. As noted by immigration barrister Frances Webber (2008, 9), immunity is only given to people who assist asylum claimants to reach the port without resorting to deception or other illegal means –for example, using false passports.<sup>169</sup>

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<sup>166</sup> S 25A(1) and (3), IA 1971.

<sup>167</sup> According to information in the file, this family is originally from Iraq. Some years ago, the mother and eldest son left Iraq and were granted refugee status in Britain. They are naturalised British citizens.

<sup>168</sup> As evidenced by the number of people helping family members charged with facilitation: see ch IV. In *R v Van Binh Le; R v Stark* [1999] 1 Cr.App.R.(S.)422 [at 3] the facts that facilitation is committed for gain and the person assisted is not a family member are considered aggravating factor for this offence.

<sup>169</sup> For the difference between ‘asylum claimant’ and ‘illegal entrant’ in the jurisprudence, see *R v Naillie* cit [at 680C].

English courts have rejected arguments grounded on the Refugee Convention against conviction for this offence precisely because the person being helped used deception. In the case of ‘*R v Alps*,’ the defendant, Mr Alps, was charged with assisting the entry of his nephew into the UK by passing off a passport as belonging to his nephew. His nephew claimed asylum but because he tried to enter the country with a false document he was deemed an ‘illegal entrant.’ According to the Court of Appeal, the fact that his nephew claimed asylum did not exempt the defendant from penalty for attempting to bring his nephew to the country by deception. Thus, it concluded that Mr Alps was rightly charged with the offence of assisting –rather than with the offence of helping- and that he was not covered under the protection of article 31 of the Refugee Convention because he facilitated the entry into the country of someone who he knew or had reasonable cause to believe to be an illegal entrant.<sup>170</sup>

The NIAA 2002 also introduced offences of failing to disclose information by private individuals or institutions;<sup>171</sup> relating to false or altered registration cards;<sup>172</sup> of possessing immigration stamps or replicas;<sup>173</sup> and of returning to the UK after leaving under arrangements made by the Secretary of State.<sup>174</sup> In total, it added twenty further immigration offences making it the third act –after the IAA 1999 and the IA 1971- which introduced more

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<sup>170</sup> *R v Alps* [2001] All ER (D) 29 (Feb) [at 23 and 24].

<sup>171</sup> Ss 137 and 138, NIAA 2002, respectively.

<sup>172</sup> S 26A(3), IA 1971.

<sup>173</sup> S 26B(1) and (2), IA 1971.

<sup>174</sup> Sch 3, par 13, NIAA 2002.

offences in history. It also expanded police powers of immigration officers<sup>175</sup> and made further provisions regarding the liability of carriers.<sup>176</sup>

Just two years after the NIAA 2002 was enacted, the government introduced a new immigration and asylum bill in Parliament. The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (AI(TC)A 2004) sought to reform a still congested system by cutting down appeals and speeding up proceedings. It introduced a number of provisions directed at tackling the main obstacles to a 'seamless' asylum and immigration process: the concealment of identity and the lack of cooperation with immigration authorities.<sup>177</sup> The act criminalised these behaviours in two separate offences which I address in the following subsections.

#### **a. No papers, no excuses: entering the country without a passport**

Even though the House of Lords during the hearing in *R v Naillie* ridiculed the suggestion that a duty to submit a passport upon arrival may give rise to a criminal offence for its non-production (Macdonald 2010, ch 14), the AI(TC)A 2004 made the failure to produce a passport a crime in 2004.<sup>178</sup> This is currently one of the most frequently used immigration-related offence (Brennan 2006, 158). The increase of 54 percent of immigration-related cases heard at magistrates' courts from 2004 to 2005 was largely due to the introduction of this offence. 475 persons were charged with this crime in 2005 which represents 44 percent of total proceedings (Home Office 2006a, 25). For subsequent years the rate of prosecutions

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<sup>175</sup> Ss 152 to 154, NIAA 2002.

<sup>176</sup> Particularly, it increased the fine imposed on carriers that transport passengers without proper documents from £ 1,000 to £2,000 (sch 8, par 40, NIAA 2002).

<sup>177</sup> Some of the behaviours criminalised by the AI(TC)A 2004 are already contained in the IA 1971 under the title of 'General offences in connection with administration of Act' (s 26 (1)). Further offences related to the possession of false identity documents, providing false information and tampering with the Register were later criminalised by the IDCA 2006 (ss 25, 28 and 29, respectively).

<sup>178</sup> S 2(1), AI(TC)A 2004. A similar offence in s 2(2) of the act relates to dependent children arriving without passports.

remained considerably high in comparison to other immigration offences.<sup>179</sup> Still, these rates are quite small if they are considered in relation to the number of undocumented migrants caught and the number of people claiming asylum.<sup>180</sup>

The new clause punishes those who deliberately destroy or dispose of their passport between embarkation and claiming asylum. According to the government, the provision would not be applied against those who have never had a passport or did not destroy their documents –false or genuine ones. The main objective was to stop people from concealing their identities, nationalities and the routes they travelled in order to make a proper asylum determination and to remove those who are not eligible for entry.<sup>181</sup> This offence is connected to the provisions introduced by the AI(TC)A 2004 on the credibility of an asylum claimant. They state that the deciding authority should take into account as damaging to the claimant's credibility the 'failure without reasonable explanation to produce a passport on request to an immigration officer or to the Secretary of State' and 'the destruction, alteration or disposal, in each case without reasonable explanation, of a passport.'<sup>182</sup>

The offence of 'no document' has its own statutory defence: including, to have a 'reasonable excuse' for not being in possession of a passport, to produce a false document and prove that this has been used for all purposes in connection to the journey to the UK, or to prove that the person has travelled without any immigration document.<sup>183</sup> The government was explicit in not extending the defence under section 31, IAA 1999, to this offence, and so

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<sup>179</sup> Magistrates' courts report the following numbers of prosecutions for this offence: 492 (2006), 272 (2007), 177 (2008) and 131 (2009) (Home Office 2010b, Table 3.11a).

<sup>180</sup> The government envisaged from the outset that between 10,000 and 12,000 asylum applicants would be subject to such provision (cfr Hansard, HC Deb 13/01/04, cols 99-100).

<sup>181</sup> Cfr intervention by the Minister for Immigration, Beverly Hughes, Hansard, HC Deb 8/01/2004, cols 44-75.

<sup>182</sup> S 8 (3)(a) and (c), AI(TC)A 2004.

<sup>183</sup> S 2(4)(c),(d) and (e), AI(TC)A 2004.

were the courts.<sup>184</sup> By making section 31 not applicable, the government was clear that it would not grant immunity to those disposing or destroying their travel documents:

We do not think that a person should be automatically protected against prosecution or conviction for such behaviour when they are a refugee who can show that they meet the other requirements of Section 31. In such cases, the person will have had a passport when he left the country where he feared persecution. Having left that country, there is no reason why he would need to destroy or dispose of his passport (intervention by Baroness Scotland of Asthal, Hansard, HL Deb 5/04/2004, col 1629).

Such a view ignores the fact that most asylum seekers travel with the aid of ‘agents’ or facilitators who have absolute control over travel arrangements.<sup>185</sup> People are required to follow their instructions which in most cases include the handing back of the passport used to travel. The provision in section 2 recognises this element of ‘duress,’ when ‘in the circumstances of the case it is unreasonable to expect non-compliance with the instructions or advice [given by a person who offers advice about, or facilitates, immigration into the United Kingdom].’<sup>186</sup> However, reasonable non-compliance has been restrictively interpreted by the courts to cover only extreme cases.<sup>187</sup> The government’s position also demonstrates that international obligations against the penalisation of asylum claimants can be sacrificed for the sake of immigration imperatives.

A decision by the High Court in *Thet v DPP* mitigated the restrictive scope of the defence under section 2. The Court interpreted it as covering those who travel without a ‘valid immigration document’ from the beginning to the end of the journey, even if the appellant entered with a false passport and subsequently destroyed it, if he can prove that he was unable

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<sup>184</sup> See respectively, Hansard, HC Deb 13/01/2004, col 119; 1/03/2004, cols 620-1; and HL Deb 5/04/2004, cols 1629-30. See also *R v Navabi and Embaye* cit.

<sup>185</sup> See, eg, *R (on the application of K) v Croydon Crown Court* [2005] EWHC 478 (Admin) [at 11].

<sup>186</sup> S 2(7)(b)(iii), AI(TC)A 2004.

<sup>187</sup> The influence of the agent has been considered as a mitigating factor in *R v Ai* [2005] EWCA Crim 936 [at 14]. While an outstanding asylum claim has not been considered as a ground for impunity, it has been taken into account as a mitigating factor together with the age of the applicant in *R v Wang* [2005] EWCA Crim 293 [at 11].

to obtain a valid document in his country of origin.<sup>188</sup> In that case, Lord Phillips of Worth Matravers stated that the person is likely to disclose the country from which he comes from. Therefore the purpose of the legislation would be fulfilled.<sup>189</sup> This interpretation implicitly recognises that those who have never had a passport would necessarily resort to a false one in order to flee their countries and reach a ‘safe haven.’ A different interpretation would deprive such defence of any practical application. A later judgement by the Court of Appeal, however, disregarded this interpretation as illogical. In *R v Mohammed*, Mr Justice Elias reasoned that the conclusion reached in *Thet v DPP* would provide the defence to those who travel with a false document and then disposed of it, whereas the holder of a genuine document in similar circumstances would be deprived of such defence.<sup>190</sup> As a consequence, he concluded that defendants who travelled with a false document are required to submit it upon arrival in order to avoid criminal liability.

Such an ill-drafted provision in section 2 leaves room for variable and conflicting interpretations. In practice, it creates confusion among criminal lawyers who are doubtful of its application in a concrete case and the interpretation that the courts will follow. This together with the fact that it is a strict liability offence –and does not require proof of *mens rea*– may contribute to the high rates of conviction for this offence.<sup>191</sup>

## **b. Criminalising non-cooperation**

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<sup>188</sup> *Soe Thet v Director of Public Prosecutions* [2006] EWHC 2701 (Admin).

<sup>189</sup> See also House of Commons 2004, 4-8.

<sup>190</sup> *R v Farida Said Mohammed; R v Abdullab Mohamed Osman* [2007] EWCA Crim 2332 [at 36].

<sup>191</sup> In 2009, 78 percent of defendants charged with this crime in magistrates’ courts were found guilty; 100 percent of them were found guilty in crown courts. For previous years, these figures are also high: for 2008, 92 and 64 percent; for 2007, 93 and 100 percent; and for 2006, 97 and 92 percent (cfr Home Office 2010b, Tables 3.11a and b).

From 2003, when asylum applications started to go down, the government's priorities shifted. No longer as concerned with stopping arrivals, it began to pay more attention to identifying and removing failed asylum seekers illegally residing in the UK (Home Office 2005b; Somerville 2007, 44). The removal of failed asylum seekers was the underlying objective of the offence of failure to cooperate with deportation or removal procedures without a reasonable excuse,<sup>192</sup> introduced by the AI(TC)A 2004. Cooperation in this context is related to the re-documentation process when the person to be removed is a national of a country with which the UK has no bilateral agreements to return people without passports.<sup>193</sup>

As with the 'no document' offence, the offence of failure to cooperate addresses the obstacle for removal posed by people without documentation. Both are non-compliance offences. They create a duty and then make a criminal offence to fail to comply with it. Such crimes are regulatory in nature –that is, they support a 'regulatory scheme' (in this case, immigration controls)- by enforcing compliance with a (non-penal) requirement, duty or obligation (Ashworth 2000; Law Commission 2010). The mushrooming of these offences is responsible for the expansion of criminal law in the last two decades (Ashworth 2009; Duff 2010a). Because of their common characteristics –strict liability, omissions liability, and reverse onus of proof- which depart from traditional principles of criminal law, their reproduction is worrisome (Ashworth 2000). The reverse burden of proof in the context of immigration could be considered as part of the strategy to decentralise immigration controls through 'burden-sharing norms' (Lahav 1998). In the same way that the government imposes

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<sup>192</sup> S 35(3), AI(TC)A 2004. See *R v Tabnak* [2007] All ER (D) 223 (Feb) interpreting the scope of such defence as limited to inability to comply, not unwillingness to do so. The Appeal Court states that 'fear of persecution' under the Refugee Convention is not considered 'reasonable excuse' [at 2].

<sup>193</sup> It involves complying with the following: '(a) provide information or documents to the Secretary of State or to any other person; (b) obtain information or documents; (c) provide fingerprints, submit to the taking of a photograph or provide information, or submit to a process for the recording of information, about external physical characteristics (including, in particular, features of the iris or any other part of the eye); (d) make, or consent to or cooperate with the making of, an application to a person acting for the government of a State other than the United Kingdom; (e) cooperate with a process designed to enable determination of an application; (f) complete a form accurately and completely; (g) attend an interview and answer questions accurately and completely; (h) make an appointment.'

a ‘duty to control’ on carriers, local authorities, financial institutions, hotels, and employers, it obliges the person subject to investigation to provide evidence which facilitates his removal. The relaxation of criminal law principles eases the work of prosecutors. However, according to the government, this offence is supposed to be a ‘lever’ or deterrent for ‘stopping people from being obstructive’ and may only be used ‘in the most extreme circumstances.’<sup>194</sup> Even though in recent years the number of prosecutions slightly increased, since its introduction in 2004 the enforcement rates are still quite low.<sup>195</sup>

Still, the use of criminal law may prove unsuccessful to force removals (Simon 2007). Because of their (lack of) legal standing, undocumented migrants are deprived of any positive incentives to comply voluntarily with state orders, particularly if that state seeks to push them out. Identity stripping (the destruction of identity documents and the refusal to cooperate with re-documentation) are indeed acts of resistance and a clear limit to state coercion (Ellermann 2010). More coercion –through criminal punishment- is unlikely to disrupt this ‘cycle of non-compliance’ and yield positive outcomes.<sup>196</sup> A barrister specialising in immigration offences put it clearly,

[T]here is a certain futility because someone says ‘look I’m happier spending my time in prison here than being sent to somewhere where I’m gonna get killed.’ So they sit in immigration detention, you prosecute for this, then they get to prison for three months or whatever, they come back into immigration detention and you start all over again. What does it actually achieve? (Respondent 15, 28/04/2010).

A particularly problematic aspect of this offence and its enforcement is the policy of repeated prosecutions to force compliance. It is not only a disproportionate measure, it is also

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<sup>194</sup> Cfr Hansard, HL Deb 27/04/2004, col 274.

<sup>195</sup> Since the entry into force of this offence, the number of prosecutions in magistrates’ courts has been very low: for 2005, nine; 2006, fourteen; 2007, twelve; 2008, 35; and 2009, eleven (Home Office 2010b, Table 3.11a).

<sup>196</sup> This is a problem facing other countries. Identity stripping has been identified as a main reason for long periods of immigration detention in Holland and Germany (Broeders 2010). While non-cooperation is not a criminal offence in those countries, the Dutch and German governments use administrative detention to force foreigners to cooperate.

impractical. The case of ‘Rostami’<sup>197</sup> clearly illustrates this. Feridon Rostami, an Iranian national whose application for asylum was refused, was prosecuted three times for failing to cooperate. The immigration judges reasoned that in a case where there is no prospect of prompt removal, the detainee should be generally granted bail. Uncooperative persons are instead criminalised, with the consequence of acquiring a criminal record and facing deportation. This ‘smacks of oppression’ and is unlikely to have any practical effect on removal.<sup>198</sup> His detention of thirty four months –administrative and penal- was declared unlawful because it was too lengthy and there was no evidence that removal would take place in a reasonable time.<sup>199</sup>

The resort to the criminal law did not substitute the government’s administrative powers to remove immigrants. Rather the former supplemented the latter. New Labour not only created an unprecedented number of immigration-related crimes; it also started to use those powers more systematically, as evidenced by the sharp increase in the rate of prosecutions against immigration offenders. Graph 7 below shows that in addition to the rise in the use of criminal powers against immigration offenders, there was also a sharp increase in removals. While prosecution and conviction rates remained considerably low compared to the number of removals, the use of criminal powers was enhanced during a period of stricter enforcement of immigration rules.

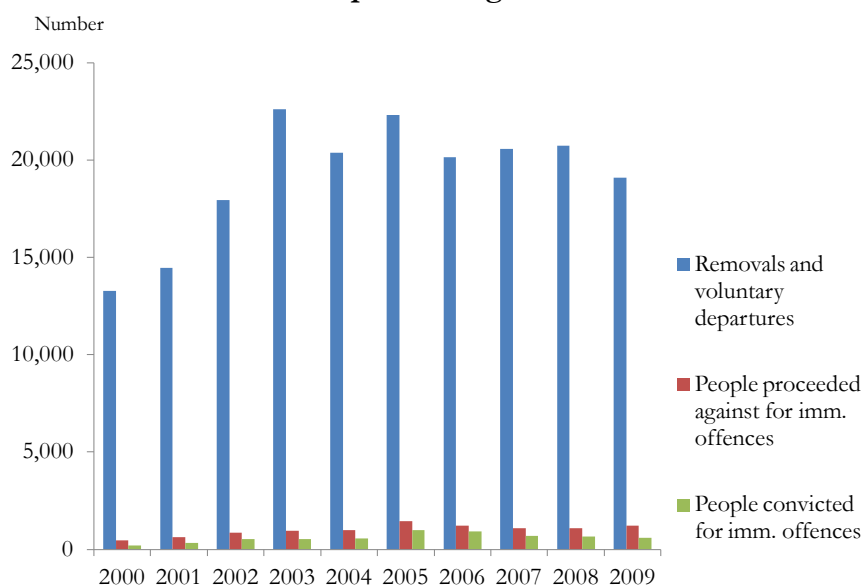
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<sup>197</sup> R (*on the application of Feridon Rostami*) v Secretary of State for the Home Department [2009] EWHC 2094 (QB).

<sup>198</sup> Quoted in *Rostami* cit [at 54].

<sup>199</sup> *Rostami* cit [at 73].

**Graph 7: Administrative actions versus criminal proceedings**



Source: Based on Home Office (2005, 2010), Control of Immigration: Statistics United Kingdom.<sup>200</sup>

The main source of criminalisation of immigrants has been through document offences which particularly target asylum seekers. Strictly speaking, then, it seems more accurate to refer to the criminalisation of undocumented migrants (Melossi 2003, 381).

### **III. The new directions of immigration enforcement: the FNPs crisis and its repercussions**

From mid-2000s onwards government policy continued to focus on the people illegally remaining in the country after their asylum applications were refused. In addition to the emphasis on the borders—a traditional British immigration strategy, the government expanded the reach of immigration controls to police immigrants within the country (Boswell 2003, 64). Legislation passed during this period did not significantly expand the catalogue of immigration

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<sup>200</sup> The number of enforced removals and notified voluntary departures includes both non-asylum and asylum cases (principal), but excludes dependents in asylum cases. It also excludes non-asylum cases refused entry at port and subsequently removed.

offences.<sup>201</sup> In fact, the main relevant feature of the period starting in 2006 is not the extension of the crime list, but rather changes on enforcement, particularly after the foreign national prisoners' scandal.

In April 2006, it was revealed that over 1,000 foreign national prisoners (FNPs) were released from prison before the IND had considered them for deportation. The Inspectorate of Prisons qualified this as 'an acute symptom of the chronic failure of the two services [immigration and prisons] to develop and implement effective policies and strategies for people who were not seen as a "problem"' (HMIP 2006, 1). The Home Office's (mis)handling of the matter was quickly exploited by the Opposition and the tabloid media. The media focused on those released describing them as dangerous and threatening individuals who instead of being sent back home were released on Britain's street (Toner 2009, 190).<sup>202</sup> In the words of some parliamentarians, the wrongly released prisoners were not only serious criminals; they abused the hospitality offered by the British people.<sup>203</sup> 'Foreigners' and 'criminals' in this context resulted in a toxic combination. The competence of Home Office officials was called into question and prompted the resignation of Home Secretary Charles Clarke. These events impacted the whole immigration system, which once again came under the spotlight.

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<sup>201</sup> The IANA 2006 introduced six offences: illegal employment (s 21(1)), failure to comply with requirement to provide information (s 34(1)), absconding from detention (s 41(6)(a)), absconding while carrying arrangements to put the person in detention (s 41(6)(b)), and obstructing (s 41(6)(c)) and assaulting an authorised person performing immigration powers (s 41(6)(d)). The UKBA 2007 introduced the following offences: absconding from detention (s 3(1)(a)), assaulting an immigration officer in the exercise of power of arrest (s 3(1)(b)), assaulting an immigration officer (s 22(1)) and obstructing an immigration officer in the course of an arrest (s 3(1)(c)). It also modifies a number of offences already in the statute book (facilitation of entry of asylum seekers and assisting illegal immigration (ss 29 and 30) and people trafficking (s 31)). The Border, Citizenship and Immigration Act 2009 included only one offence: the wrongful disclosure of information in s 18(1).

<sup>202</sup> See eg Daily Mail 2006: 'Home Office blunders left foreign rapists in UK.'

<sup>203</sup> See eg interventions by the Minister of State, Baroness Scotland in Hansard, HL Deb 13/06/2007, col 1697; and by the Minister for Immigration, Citizenship and Nationality, Liam Byrne in Hansard, HC Deb 20/03/2007, col 440.

The consequences of this crisis were manifold. FNPs became a top priority of the immigration agency after the scandal (Home Office 2006b). They were the first target for removal actions. The government deployed immigration officers in prisons to identify at an early stage FNPs to speed up repatriation or deportation after they finish their sentences (Home Office 2006c, 25). As part of the same strategy, it introduced the ‘Hubs and Spoke’ policy, which segregates FNPs in particular prisons (‘hubs’),<sup>204</sup> and the automatic deportation of those sentenced to custody for twelve months or more (Bosworth 2011b).<sup>205</sup> It also affected the detention regimes for FNPs who were now less likely to be allowed into open prisons and more likely to be detained in ‘hub’ establishments with tighter security arrangements (Singh Bhui 2007). Caseworkers were less likely to grant temporary leave to remain in cases involving FNPs. The Head of Law of an organisation supporting asylum seekers told me that these cases are those in which caseworkers would ‘fight and fight and fight’ to try to remove ‘people like that’ (Respondent 13, 14/06/2010). The political pressure not to release foreigners subject to deportation also led to longer terms of post-sentence, administrative detention (LDSG 2009, 6).<sup>206</sup>

The impact of the FNP crisis on immigration offenders is obvious. In a context of tougher enforcement of immigration crimes, some<sup>207</sup> of the people falling into the category of

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<sup>204</sup> In 2007, there were only two ‘hub’ prisons (Bulwood Hall in Essex and Canterbury Prison in Kent); in 2009, six others were added: HMP Risley (North West); Hewell (West Midlands); Morton Hall (East Midlands); The Mount (Eastern region); The Verne (South West); and Wormwood Scrubs (London region). There are also 36 ‘spoke’ prisons holding foreigners.

<sup>205</sup> S 32, UKBA 2007.

<sup>206</sup> See *R (on the application of Abdi and others) v Secretary of State for the Home Department* [2008] EWHC 3166 (Admin) in which an unpublished policy of the Home Office which mandated continued detention for FNPs awaiting deportation on public security grounds was uncovered. According to this policy, FNPs should be detained as a matter of principle to protect the public and due to a high risk of absconding. This ‘secret policy,’ that operated between April 2006 and November 2008, was a direct consequence of the FNP scandal. The High Court declared it unlawful because it was contrary to legal provisions in relation to FNPs and because it was not made public.

<sup>207</sup> The proportion of FNPs who have been convicted for immigration offences is not possible to estimate because of lack of data. Estimates on foreigners in removal centres suggest that around 50 percent of the population has criminal convictions (NAO 2009a, 8). However, there is no disaggregated data according to criminal offences.

FNPs are immigration offenders. Because people convicted for immigration offences are part of the universe of FNPs, the more stringent conditions imposed on the latter since 2006 have had an impact on immigration offenders. The supervising solicitor at Refugee and Migrant Justice (RMJ) explains that this scandal had the effect of extending these unfavourable conditions to immigration offenders and blurred the line between them and people convicted of non-immigration crimes:

[B]ecause in 2006 there was a big push to get rid of foreign national prisoners from the UK, and they are not necessarily people who've committed immigration offences, they are just foreign nationals who have committed crimes, so it could be immigration offences or it could be other crimes. So those sort of tended to kind of merge into one (Respondent 10, 8/06/2010).

The impact that this crisis had on immigration offenders shows that criminalising immigration breaches has not only symbolic effects but also important practical consequences. Because of criminalisation, foreigners with irregular status 'end up being treated by systems which are designed to deal with people who have committed offences.'<sup>208</sup> As the FNP crisis shows, once someone is caught by the criminal justice system there is little differentiation between 'real' and 'immigration' offenders (Bosworth 2007).

Most importantly, the focus on foreign national offenders in immigration policy as a result of this crisis had important institutional repercussions. It forced the government to boost the resources of the IND's Criminal Casework Department. It also prompted changes in the enforcement approach and priorities of the department, which was replaced in April 2007 by the BIA and later on, in 2008, by the UKBA. It also provoked a new overhaul of the immigration system aimed at simplifying the legal framework<sup>209</sup> and improving the enforcement of immigration laws. In 2007, then Home Secretary John Reid diagnosed that the

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<sup>208</sup> Cfr Hansard, HC Deb 16/03/1999.

<sup>209</sup> To that aim, the government launched the 'Simplification Project' in 2007. It was supposed to revise both primary and secondary legislation. It included a review of criminal offences under immigration legislation to group them in one place, eliminate overlapping and duplication, and close loopholes (Home Office 2009b). The product was a Draft Immigration Bill –that reduced the number of immigration offences- which was presented to Parliament in November 2009. However, the project –including the Draft Bill- was discontinued by the present Coalition government.

IND was ‘not fit for purpose.’ In the government there was a perception that the immigration system was increasingly complex, there was no consistency throughout the organisation and that it was failing to face the challenges of mass migration in a globalised world. In the Home Secretary’s words, ‘we have not been tough enough in enforcing the rules’ (Home Office 2007a, 3).

Two documents set up the shape of the new immigration agency –*Enforcing the Rules* (Home Office 2007a) and *Enforcing the Deal* (Home Office 2008b). The titles of these documents imply an emphasis on enforcement. They define the abuse of the immigration system as criminal and offer criminal prosecution and punishment as a response for many immigration breaches. Immigration enforcement seems in this context tailored to that of a crime control agency (Weber and Bowling 2004; Bosworth 2007).<sup>210</sup> In fact, both documents give great importance to criminal powers. They announced an addition of prosecution staff in the BIA to increase the rate of prosecutions (Home Office 2007a, 25) and established prosecution targets for immigration crimes at a rate of 1,400 successful prosecutions for 2008 and 2009 (Home Office 2008b, Appex C; also Home Office 2009c, 21). Consistent with this approach, immigration officials have progressively gained police-like powers with respect to many immigration offences.<sup>211</sup> This was aimed at decreasing the dependency on the police in the arrest and removal of immigration offenders which is now carried out almost entirely without police intervention. Providing immigration officers with these powers has virtually transformed the agency into an ‘immigration police force’ (Macdonald 2010, ch 14.1; also

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<sup>210</sup> An institutional parallel is the reorganisation of the US Immigration and Naturalization Service (INS) as part of the US Department of Homeland Security in 2003 which incorporated security and crime-related considerations into immigration enforcement (Tumlin 2004, 1179; Coutin 2005, 15).

<sup>211</sup> They cover the powers to arrest with or without warrant, to detain a suspect for a limited time, and to enter and search premises, and seize evidence. These powers granted by the IA 1971 have been progressively extended by the IAA 1999, NIAA 2002, AI(TC)A 2004 and UKBA 2007. The BCIA 2009 furnished UKBA officers with new powers similar to those exercised by HM Revenue and Customs staff.

Vogel et al. 2009, 218).<sup>212</sup> Police officers, who are reluctant to intervene in immigration enforcement operations and consider most of this work as ‘rubbish,’ benefited from this change. It also favoured immigration officers who prefer operational work to casework (Weber and Landman 2002, 12; Weber and Bowling 2004, 205).

The creation of the UKBA in 2008 was part of this overhaul of the immigration system. The agency integrates the work of the BIA, UKvisas and the border related work of HM Revenue and Customs, both inside and outside the UK (Cabinet Office 2007). The purpose was to develop a more comprehensive and coherent system of controls at the borders and inside the country. As such the establishment of UKBA has not brought fundamental changes to immigration enforcement but rather consolidated ongoing reforms. Its creation sent a symbolic message of ‘a strong force at the borders’ with uniformed and better resourced staff. A securitised, unified border force was deemed necessary to face the new threats of terrorism, organised crime and illegal immigration. Irregular immigration was positioned within a ‘criminal law-enforcement paradigm’ (Spencer 2011, 168)<sup>213</sup> not only because it is alleged that criminal gangs are behind three quarters of illegal immigration (Webb and Burrows 2009), but also because it is considered as damaging to public services and to fair labour competition (Home Office 2007a; 2010c).

As part of the strategy to increase enforcement capacity and strengthen internal controls, the agency regionalised its work into different Local Immigration Teams (LITs) in charge of low-level immigration offences –mainly dealt with by administrative action. It also created Immigration Crime Teams (ICTs) formed by immigration and police officers in

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<sup>212</sup> With the creation of UKBA and its restructuring as a police-like enforcement agency at the border, the cooperation between the two agencies –the police and UKBA- has been strengthened (see eg, ACPO and UKBA 2008).

<sup>213</sup> The identification of illegal immigration as a main security threat appeared early on at the European level, particularly in the Schengen Convention. The strengthening of the external borders against organised crime, terrorism and illegal immigration were measures to ‘compensate’ the lifting of Europe’s internal borders (Anderson, et al. 1995; also Bigo 1994).

charge of more serious crimes. As another feature of the move towards a police-like enforcement agency, in 2010 the UKBA set up the Crime Directorate to tackle organised crime both at the borders and inside the country. Additionally, the immigration agency has increasingly borrowed the tone and rhetoric of the police. References to ‘Immigration Crime Partnerships,’ ‘watchlist’ for immigration offenders, immigration ‘hotspots’ or naming an enforcement visit as ‘Operation X’ (Home Office 2008b) very much resemble terms used by the police.

The new enforcement agenda was translated into a series of measures aimed at differentiating levels of illegality and by targeting those who cause the most harm. In policy papers (Home Office 2006b; 2007a; 2008b; 2010c), the agency distinguishes between breaches to immigration laws in terms of their actual or potential ‘harm’<sup>214</sup> and tailors different ‘interventions’ to ‘minimise’ the harm caused by them. In this vein, a number of actuarial devices have been introduced to prioritise enforcement action against certain conducts. Similar to Feeley and Simon’s (1992; 1994) view of criminal justice, decisions in the immigration arena are largely shaped by actuarial instruments (Miller 2003; Weber 2007; Bosworth and Guild 2008, 712; Bosworth 2008). The ‘harm’ criteria has permeated many facets of UKBA work including the decisions on who to take action against first,<sup>215</sup> on whether to prosecute (Home Office 2010c), on where to allocate foreign prisoners once their sentences have expired,<sup>216</sup> and on who to remove first (Home Office 2009a).<sup>217</sup> The

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<sup>214</sup> Defined as ‘all the potential negative consequences of illegal migration’ (Home Office 2007a, 10).

<sup>215</sup> In the agency’s policy statement it is made clear that ‘enforcement priority would be to take action against the most harmful people first and deny the privileges of the UK to those here illegally’ (ibid.).

<sup>216</sup> In a response to a FOI request, David Goggin from the UKBA’s Criminality and Detention Group explained that ‘[ex-foreign national prisoners] are subject to a *risk assessment process* and will only be transferred if it is assessed that they present no specific risks. Those considered presenting a *high security risk* due to the nature of their offence or behaviour will remain in prison on completion of their sentences. The type of offences range from drug related offences and robbery to individuals using false documentation’ (Letter dated 18 August 2010, italics added).

<sup>217</sup> An actuarial instrument has also been introduced to assess the suitability of an enforcement visit (‘scoring matrix’). See ch 31.4 (Joint Intelligence Units), UKBA EI&G.

introduction of the ‘harm matrix’ seeks to regulate decision-making and guide immigration and police officers in their work. Those who cause the most harm are targeted for prosecution and removal (Home Office 2007a; 2010c). However, I will show in the next two chapters that the cases which continue to crowd the criminal courts are what the agency would characterise as ‘low-level’ offences.

The new approach to immigration enforcement has not resulted in a substantial increase in prosecution and conviction rates for immigration offences; in fact, they started to decline between 2005 and 2006 in the magistrates’ courts.<sup>218</sup> Prosecution targets were removed in 2010 because they were not considered an appropriate measure of the agency’s performance. As a high-ranking official at UKBA’s Policy and Strategic Group told me, ‘[i]t is quiet easy to do lots of variable prosecutions and tick the box against targets’ but this does not necessarily have an impact on the strategic objectives of the agency (Respondent 14, 12/08/2010). Even for the most used immigration offences –documented-related ones- in November 2010 the Ministry of Justice (MoJ) and the UKBA launched pilots to divert these cases from prosecution through the use of cautions, mainly to facilitate removals and reduce the burden on the criminal justice system and prison estate (Ministry of Justice 2010b; also Home Office 2010c, 27).

#### **IV. Conclusion**

The last two decades of immigration law can be characterised as a period of hyper-activity resulting in an overregulation in many areas of immigration policy concomitant with increasing complexity. As Cathy Gardner (2006, 4) observes, there is a tendency in recent policy-making ‘to add to, rather than exercise existing powers.’ As a consequence of its

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<sup>218</sup> This trend is not so clear in crown courts, where there was a drop in 2005 and a new upward trend starting in 2006.

enlargement and sophistication, immigration legislation has become increasingly difficult to interpret and enforce (Demleitner 2004). A number of conducts not regulated before or dealt with by administrative law have been criminalised and those breaching these rules are now subject to criminal sanctions. Currently, ‘almost all breaches of immigration and customs law have a criminal sanction attached to them’ (Home Office 2010c, 26).

Likewise immigration officials have been gaining powers similar to those granted to police officers to investigate immigration crimes. This has created a hybrid system in-between administrative and criminal law. Internal controls are increasingly important as a large portion of illegal immigrants come to the country through legal means but become illegal once in Britain (House of Commons 2006, 25). Alongside the expansion of immigration crimes and their enhanced enforcement, the government seeks to prioritise enforcement actions against the most harmful people and to divert low-level offences away from the criminal justice system (such as illegal employment and minor fraud offences). This is largely due to the lack of deterrence and high costs of the criminal justice route. Still, most of those caught in the net of criminal justice are undocumented migrants.

Even though more restrictive measures to deal with different faces of the immigration system have been continually introduced, these changes do not seem to leave the British public at ease with the ‘immigration problem.’<sup>219</sup> Moreover, the efficiency and fairness of these measures continue to be put into question.<sup>220</sup> The increasing restrictiveness of British immigration laws may be explained in part by the fact that they are directed at ‘Others.’ Immigrants –particularly if they are undocumented- have no voice and little possibility to

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<sup>219</sup> In fact a recent poll reported Britain as ‘by far’ the country least happy with immigrants among six European countries plus America and Canada (The Economist 2009b).

<sup>220</sup> Even after numerous reforms to speed up the resolution of asylum claims, huge backlogs make it impossible to achieve the UKBA targets (The Economist 2009a; BBC News 2009; Travis 2010). Moreover, the measures introduced to expedite asylum claims, such as the fast track procedure, have been applied improperly to cases that deserved more in depth examination leaving a lot of people, particularly women, unprotected (Mawson 2010).

influence decisions because illegality forfeits the exercise of civil and political rights, and many are pushed underground. As such, there is an asymmetry in the distribution of benefits and burdens of these policies: the benefits are for 'Us' whereas the burdens are for 'Others' (Loader 2002, 143; also Melossi 2000; 2005).

**CHAPTER IV: THE USE OF CRIMINAL POWERS AGAINST IMMIGRATION OFFENDERS: THE  
DECISION TO PROSECUTE**

The next two chapters describe and analyse the use of criminal law against immigration offenders. They are based on empirical data obtained from interviews with UKBA officials and practitioners and from court cases. An account of the methodology used for collecting and processing empirical material, and a description of the sample is provided in the Appendix. In this chapter I analyse the decision to prosecute immigration crimes: what are the criteria followed by authorities and how is this decision made in practice? In the next chapter I look at the cases which reach the criminal courts and the criminal process that follows.

Police and immigration officers have several alternatives when dealing with immigration offenders. One of them is to pursue a criminal prosecution. While the use of criminal powers to enforce immigration controls has increased since the early 2000s, most immigration offences are dealt with administratively. Instead of being prosecuted, a person who has been caught in breach of immigration laws may be subject to an often long administrative process before removal directions are issued. This process may include reporting to immigration authorities, the initiation of an appeal process against removal orders before the Asylum and Immigration Tribunal and the detention of the applicant. Immigration officials have the discretion to grant leave to remain in certain cases, therefore, removal is not necessarily the final outcome of this process (Macdonald 2010, ch 16.46).

This chapter seeks to unravel the criteria involving the determination to instigate a criminal prosecution. In the first two sections I explain the existing system of parallel (criminal and administrative) regulations, the guidelines for the authorities and the role of different enforcement agencies in the prosecution of immigration offences. The third section looks at how the decision to prosecute is made in practice: which cases are candidates for prosecution and based on what considerations? I find that in the absence of strict rules, enforcement officials have wide discretion to choose which system to trigger and they give significant consideration to practical factors, particularly the possibility to summarily remove the offender. Because of the existence of different regimes to deal with the same issue, the

lack of clear guidelines to determine which system to use and the resulting wide margin of discretion for decision-makers, it is almost impossible to know in advance which cases will be prosecuted and which ones will not. The final section contrasts the government's priorities in the use of criminal powers with the everyday practice of prosecuting immigration offenders. Evidence from court cases suggests that the matters which more frequently reach the criminal courts are those involving individual offending, particularly cases related to different forms of document fraud and small-scale facilitation. I argue that such contradiction between policy objectives and practices can only be explained in the light of the dual system of parallel criminal and immigration sanctions where criminal law and punishment are instrumental to the exercise of administrative powers.

### **I. The hybrid system of immigration and criminal sanctions**

The convergence of immigration and criminal laws in recent years has created a system of juxtaposed controls over non-citizens. The increased criminalisation of immigration laws has expanded the alternative interventions that enforcement officers can follow against immigration offenders. The overlapping enforcement mechanisms and strategies include refusal of entry, executive removal, deportation on 'conducive to public good' grounds by the Secretary of State, and criminal prosecution –which may include a recommendation for deportation. Furthermore, these strategies are not mutually exclusive but can work together, as the principle of double jeopardy –which proscribes multiple prosecutions for the same act– does not apply in immigration proceedings.<sup>221</sup> For those who fall foul of these rules, foreignness may trigger a 'double sentencing' (Wacquant 2005): first, the criminal process for

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<sup>221</sup> Cfr s 28(4), IA 1971; also ch 33.4, UKBA EI&G.

breaching the boundaries of their status; and second, the administrative action of removal from the country.

The existence of an array of mechanisms and the convenience of using administrative removal to deal with ‘low level foreign national offenders’ explain the under-enforcement of immigration offences. A criminal prosecution and the proceeding that follows are more time-consuming and expensive than an administrative one (Home Office 2010c, 27; 2011b). Further, the removal of the person from the country –rather than his or her punishment- is the ultimate objective of the immigration agency and so it is the often preferred choice.

At this point, it is important to differentiate between deportation and administrative removal. Even though both measures aim at expelling a non-national from the country, they differ in the grounds on which they can be ordered and in their consequences. A deportation order has the effect of cancelling an existing leave to remain and may proceed in three circumstances: when the Secretary of State decides that the deportation of a person is ‘conducive to the public good;’ when a court recommends deportation of a person convicted of a crime punishable with imprisonment; and when a person is convicted of a crime in the UK and sentenced to either a period of imprisonment of at least twelve months or imprisonment of any length of time for a particularly serious offence.<sup>222</sup> This last ground is known as ‘automatic deportation’ because a recommendation by the court is not required. A deportation order entails the prohibition to return to the UK until it is revoked.

In contrast, administrative removal is an immigration decision which proceeds against a variety of foreigners including those who have been refused entry, illegal entrants, overstayers and those who have breached their conditions of leave, those using deception to

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<sup>222</sup> Cfr respectively, s 3(5)(a) and (6), IA 1971; and s 32, UKBA 2007. Family members of a deportee are also liable to deportation (s 3(5)(b), IA 1971).

remain, former refugees, and crew members remaining unlawfully.<sup>223</sup> Unlike deportees, people who are removed from the UK have in principle no restrictions to return, according to section 5(1) of the IA 1971. However, recent changes in immigration rules established a presumption of rejection of visas for people who have been removed. Therefore, they may have their future applications to enter the UK refused for a specified period of up to ten years.<sup>224</sup> A further difference between the two is the applicable appeal regime. While a deportation order can be subject to appeals on several grounds, appeal rights against removal orders are limited. When allowed, appeals do not suspend removal orders. Other than in exceptional cases, they generally occur out-of-country. Non-British, immigration offenders are liable under both regimes. Even if they are not summarily removed, they can be deported following a criminal sentence.

## **II. Rules and rulers in the decision to prosecute**

The decision to prosecute has a number of stages, depending on the circumstances of the case. At the port of entry, an immigration officer is generally the first to interview the suspected offender. The case may then be referred to a chief immigration officer for review. When the latter considers that a criminal offence has been committed and there are grounds for a prosecution, the case is subsequently referred to the police. In this regard, it should be remembered that despite the fact that immigration officers have been granted a number of police-like powers, they cannot press criminal charges. Specially trained (or ‘designated’)

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<sup>223</sup> Other non-nationals who can be removed are: family members of those liable to removal; persons who attempted but failed to obtain leave to remain by deception; and UK-born children of all those liable to removal. Cfr sch 2, IA 1971 and s 10, IAA 1999.

<sup>224</sup> HC 321 amended para 320 by the insertion of para 320(7B) (quoted in Macdonald 2010, ch 3.57).

immigration officers<sup>225</sup> are bestowed with arrest powers and can arrest suspected offenders without warrant for a wide range of immigration-related crimes. Immigration officers can gather evidence and question the person arrested. They can detain individuals who are liable to arrest by a constable or who are subject to a warrant of arrest for up to three hours. However, they still rely on the police to detain individuals for longer periods and to charge the arrestee with an offence.

Following the assessment by the police, the CPS will then make a final decision on whether to initiate a prosecution or not, and on which charges. A senior CPS policy advisor told me though that at the port of entry, immigration authorities –particularly the chief immigration officer- have a major role in deciding whether or not to send the case to the CPS, while there is more involvement of the police in this decision when the offender is encountered inside the country (Respondent 19, 14/06/2010). This process will generally take place within a short period. In major international airports, such as Heathrow, there are special immigration prosecution units on-site which make the decision-making process swifter.

#### **a. The role of the police**

Immigration officers generally work with the police in enforcement operations, even though police participation in these operations is diminishing as some UKBA employees have acquired police-like powers and training to operate independently.<sup>226</sup> While immigration authorities are more likely to detect immigration offenders at the port of entry, the police play

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<sup>225</sup> In order to be able to exercise these powers, immigration officers are required to attend a three-week training course and annual two-day training courses. On a recent inspection of an arrest team by the Independent Chief Inspector of the UKBA, see Vine 2011.

<sup>226</sup> A senior member of the UKBA's Crime Directorate told me that this department has at present 183 seconded police officers and 147 UKBA officers. In four years, it plans to increase the participation of the latter to 237 and decrease that of the former to only 80 (Respondent 20, 28/04/2011). See also Home Office 2010a.

an important role in the policing of foreign nationals and the identification of those who are in breach of immigration rules. In many circumstances, the police encounter immigration offenders during street raids or the investigation of other crimes –such as, for example, motoring offences. The police have broad powers of stop and search. A police officer may stop someone if he has grounds to suspect that she is carrying drugs, guns or other items to commit a crime or to cause criminal damage. A vehicle can be stopped at any time and the driver asked to show her driving license to the police officer. The vehicle can also be searched. The police may search anyone in a certain area when serious violence has taken or may take place.<sup>227</sup> These powers are comparatively broader than those of immigration officers. Particularly when exercised ‘in-country’ (as opposed to at port of entry), the latter can only examine people in public areas to determine their immigration status when they have reasonable suspicion that they are immigration offenders. At port of entry, in contrast, immigration officials have ample powers.<sup>228</sup>

Given such broad powers and the discretion the police have in dealing with immigration offenders, it is difficult to draw any conclusion on how the police generally intervene in these cases. While in certain circumstances police officers may open a criminal investigation, in others they may refer the matter to immigration authorities without opening a criminal case. For example, the head of a Local Immigration Team near Heathrow airport told me that the police ‘bring a lot of work to our attention.’ LITs handle low-level immigration offences and mainly use administrative channels to deal with them as they do not have prosecution-trained officers and cannot pursue a criminal prosecution. He referred to cases in which the police come across foreign nationals with no legal status and hand them over to immigration authorities without pressing charges:

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<sup>227</sup> These powers are sanctioned by different acts, such as s 23(2), Misuse of Drugs Act 1971; s 1, Police and Criminal Evidence Act 1984; and s 60, Criminal Justice and Public Order Act 1994.

<sup>228</sup> See ch 31.19.1, UKBA EI&G.

[I]f the police picks somebody up for simply speeding, for example, or driving without a license –say a minor offence for example- or they just encounter them –you know, there is somebody in the back of a car, the car has been stopped for speeding and they question the person. [I]f the person does not have a right to remain in the UK, the police will have no interest in that (Respondent 18, 10/06/2010).

The chief of the LIT explained that in these cases, ‘the police will normally not pursue a criminal case [...] because it’s a low level crime and it will be expensive to the taxpayers to pursue that as the person is leaving the UK anyway’ (Ibid). Likewise, sometimes judges defer the decision on cases of non-serious crimes involving undocumented foreigners to the immigration service. During a hearing of a case involving a person who entered the country illegally accused of driving without license and without insurance, the district judge at Uxbridge Magistrates’ Court addressed the police officer in the room: ‘Can you please communicate with UKBA? If they want to do something, tell them to do it now.’ The hearing was then adjourned awaiting the UKBA’s decision on whether the accused would be subject to removal proceedings. Such determination may affect the fate of the criminal process for motoring offences. If the person was liable to removal, the latter would probably be discontinued.<sup>229</sup>

A similar account was given by a lawyer specialising in immigration and criminal law at Fisher Meredith Solicitors. He explained to me that, unlike minor ‘ordinary’ offences –such as petty thefts- where criminal prosecution is the only option, immigration offenders can be dealt with by immigration powers:

I just think it’s a knowledge thing, it puts under the heading of immigration and I think in the head [of the police officer] it’s considered separate [...] I just think the bigger picture takes over. That’s considered so minor, that there’s a much bigger consequence, whereas [in the case of] a minor criminal offence [if] they don’t prosecute, nothing really happens. If you commit [an immigration offence] and they don’t prosecute it, at least there’s someone else to deal with the bigger picture which is their asylum and their removal (Respondent 4, 16/07/2010).

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<sup>229</sup> This case is not part of the ones analysed for this study as the defendant, Mr Singh, was not charged with immigration offences. The hearing was held on 3 September 2010 before Uxbridge Magistrates’ Court.

A barrister at Doughty Street Chambers referred to reluctance by some police officers to pursue immigration-related cases –such as document fraud- and mentioned that they do not want to interview ‘the petty person who doesn’t have a passport.’ He also claimed there was a ‘tension’ between police and immigration officers within prosecution teams: ‘so you’ve got these immigration officers [as part of the prosecution team] [...] [who] are dedicated to the prosecution of these offences and the police [...] [who] are far less interested’ (Respondent 15, 28/04/2010). The police have historically been reluctant to engage in immigration matters. As Weber and Bowling (2004, 205) affirm, except when it involves organised criminality, such work is by large perceived by the force as ‘rubbish,’ ‘draining police resources and unlikely to lead to any result in terms of prosecution or crime control’ (also Vogel et al. 2009, 222).

While the testimonies quoted above suggest that the police may refer cases of individual, immigration offenders to the UKBA, in the absence of ‘hard data’ it is difficult to be certain about the consistency of police response to immigration offenders. Connected to this issue is the question on whether or not the identity of the law enforcement agency –ie the police or the UKBA- in the investigation of these crimes has an impact on prosecution rates. The response to this question is again loaded with speculation. In this regard, a senior official at the UKBA’s Criminality and Detention Group conjectured that the expansion of police-like powers for immigration officers may have contributed to the rise in the enforcement of immigration offences in the mid-2000s:

[A]bout 2001 [there] were seconded police officers to this agency who came in and worked alongside to train enforcement officers and it was about then that our enforcement officers got powers of arrest, so before that UKBA or the immigration group couldn’t prosecute anyone [...]. So that’s why you see a sort of a spike [in prosecution rates] then I guess (Respondent 5, 16/09/2010).

The expansion of the powers granted to immigration staff in recent years had an effect on policing practices and the way immigration offences are enforced. It steadily diminished the participation of the police in immigration enforcement and enhanced the role of immigration staff in decision-making (Brennan 2006, 195). A senior immigration barrister explained that

she noticed some changes during the investigation of such offences since the creation of the immigration border force:

In the past [...] any prosecution was something that was run by the police. The immigration officers would be in an associated capacity where they might be there for interviewing and asking about the immigration offences. But basically the case was the police officer's case. But now that you have the sort of border agency and you have these functions associated with borders –much more extensive powers [...]– you have immigration people being the dominant people in a lot of these things (Respondent 11, 29/04/2010).

It remains unclear however if these institutional changes have had any impact on how immigration offences are handled and, particularly, whether the involvement of forces with different priorities –the police and the UKBA– affects prosecution numbers.

#### **b. Rules and guidelines for prosecuting immigration offenders**

The criteria on when to pursue a criminal case remain largely unclear and vague. The CPS guidance on immigration offences states that ‘The fact that a defendant is to be administratively removed by the immigration authority does not, in itself, justify discontinuance [of a prosecution].’<sup>230</sup> However, a rule that seems to be important in UKBA manuals is that removal should take precedence over a criminal prosecution, except in cases of ‘serious’ offences and repeated offenders. The UKBA Enforcement Instructions and Guidance (UKBA EI&G) states that: ‘offenders are not charged with immigration offences unless serious criminal offences and/or a history of immigration deception are disclosed.’<sup>231</sup> It also mentions that a removal is preferred for a number of reasons: ‘it is more effective and practicable [...]; it is normally desirable that an offender is removed from the UK as soon as possible; courts are often unwilling to recommend deportation except for serious criminal

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<sup>230</sup> CPS, ‘Legal Guidance: Immigration.’ Available at [http://www.cps.gov.uk/legal/h\\_to\\_k/immigration/](http://www.cps.gov.uk/legal/h_to_k/immigration/) (Last accessed: 23 October 2011).

<sup>231</sup> Ch 33.6 (underlining in text).

offences; bail may be granted and the offender may then go to ground.<sup>232</sup> The Immigration Directorates' Instructions (IDI) prescribes that 'overstayers' 'who come to notice when embarking' should not be 'detained for prosecution.'<sup>233</sup> It also states that illegal entrants encountered after they entered the country should be referred to the Enforcement and Compliance case-working units only if they involve: re-entry in breach of a deportation order; clandestine entry or on forged documents; or deception on arrival as to the person's true intention.<sup>234</sup> In relation to the offence of non-cooperation with removal proceedings, the UKBA issued a detailed guidance on the procedure to follow in these cases.<sup>235</sup> According to it, when the person fails to attend the documentation interview or answer the questions asked during it without a reasonable excuse, 'non-compliance action' should be initiated. In addition, the offender should be removable, that is when there is a 'reasonable expectation of removal.'<sup>236</sup> So in these cases the removability of the suspected offender is a prerequisite for prosecution.

Other guidance, however, remains confidential, such as the instructions from the Immigration Service Enforcement Directorate which cover evasion of control, illegal entry, deportation work, offences against the immigration laws and procedures for investigation (referred to in Macdonald 2010). The Standard Acceptable Criteria (SAC) which define the

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<sup>232</sup> Ibid.

<sup>233</sup> S 1, ch 20, IDI (par 3.1).

<sup>234</sup> Ibid (par 2.5).

<sup>235</sup> See 'Amended Instructions for Documenting Removals and the Implementation of section 35 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 in Non-compliant Cases.' Available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsection/section-35?view=Binary> (Last accessed: 8 March 2011).

<sup>236</sup> Ch 17.11.5, UKBA EI&G. This document states that: 'This department has assured Parliament that the Secretary of State will only request an individual to take such steps as are required to document him/her if the department intends/is able to remove or deport the individual. If policy, instructions or a significant legal judgement prevent removal then such cases will not qualify for Section 35 action.'

UKBA's criminal investigation priorities are not publicly available.<sup>237</sup> After stating that low-level offences should be preferably dealt with through administrative means, they mention that strategic UKBA priorities 'such as entry to the UK without a passport, or cases with aggravating features' should be referred to the UKBA crime team. While these criteria prescribe that immigration offences should be considered on the basis of their seriousness, the UKBA's priorities and the 'impact on the integrity of the UK immigration control and its communities,' they do not provide detailed, specific guidance on when to employ criminal powers.

According to a senior policy advisor at the CPS, there are other informal guidelines followed in practice by immigration and police officers and prosecutors. She told me that 'low-level offences' –such as the possession of a false passport or other identity document–without aggravated features are often not prosecuted and the person is returned to her port of embarkation. Prosecutors take into account the circumstances surrounding the case when deciding which criminal charges to file in a prosecution. Normally, people caught with a false document on the street –ie, a raid– are prosecuted under immigration acts, whereas those attempting to use a false document to open a bank account or access work are generally charged with offences under the FCA 1981 or the IDCA 2006 (Respondent 19, 14/06/2010). Due to the scope of prosecutorial discretion, however, these outcomes are not fixed and vary considerably.

In the absence of clear guidelines, the decision to prosecute is made on a 'case-by-case' basis. According to my interviewees, there are no 'hard and fast lines' to guide the decision in a particular case and this is ultimately based on a pragmatic approach. At UKBA, both policy and operational staff referred to the lack of rules to determine in advance which

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<sup>237</sup> SAC. Version 1.0 28 April 2009, p 5 (unpublished document). An official in the UKBA told me that these guidelines cannot be 'disclosed.' Another official in the agency with a higher rank gave me a copy of this document.

cases are candidates for criminal prosecution –except in cases involving trafficking and other forms of serious, organised criminality.

#### **IV. Exercising discretion**

The absence of clear parameters and the availability of different mechanisms to deal with immigration offences results in substantial discretion for decision-makers. In British law –as in other common law systems- discretion is recognised as inherent to the exercise of police and prosecution powers. Unlike other jurisdictions where a more rigid rule mandates prosecution of each and every breach of criminal provisions (‘principle of legality’), the British legal system recognises that this is just impossible, unwise and unfair because in practice discretion is exercised anyway. So enforcement agencies and the CPS are given some margin of discretion in deciding whether to proceed in a particular case. According to the Code for Crown Prosecutors, there are two stages in the decision on whether to prosecute: first, an evaluation of the sufficiency of the evidence; and second, an assessment of whether the prosecution of the case is in the ‘public interest.’ ‘Public interest’ however is a lax and vague concept which grants prosecutorial authorities certain margin of choice.<sup>238</sup> There are no set criteria on how to interpret this term and decide which cases are candidates for prosecution, even though the ‘seriousness’ of the offence is generally an important factor (see eg, Ashworth 1987; Fionda and Ashworth 1994; Daw and Solomon 2010).

In immigration enforcement, such margins of discretion are even wider because of the different options to deal with a similar issue and the priorities of the immigration agency. The main concern of the UKBA is not to punish wrongdoing. Rather its primary goal is to enforce

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<sup>238</sup> Keir Starmer QC, Director of Public Prosecutions of England and Wales, has recognised that ‘the articulation of the public interest discretion has largely gone unnoticed.’ However, he defended a system which provides some margin of discretion against one that mandates the rigid application of the legality principle, and stated that in order to ensure that this is exercised according to the rule of law, scrutiny by the public, the courts and the DPP are necessary. Cfr CPS Annual Lecture, delivered by the Director Keir Starmer QC on 21 October 2009.

compliance with immigration rules, so that controls can be exercised effectively, and to exclude and eject people who do not comply with immigration norms. Within this ‘compliance approach’ which characterises non-police, regulatory agencies, the UKBA often reserves criminal prosecutions to cases in which other mechanisms are ineffective (Ashworth 2000, 247; Garoupa et al. 2011, 242). The SAC make clear that in addition to the evidence or threshold test and the public interest test, UKBA’s policy to prosecute should also be considered in the decision to proceed against immigration-related offences. In this regard, they state that ‘[w]e must ensure that our use of the criminal justice system supports the maintenance of an effective immigration control; furthermore, we must also take into account administrative means of dealing with immigration law breaches.’<sup>239</sup>

For decision-makers, the existence of a parallel system of sanctions that allows administrative or/and criminal penalties

[P]rovides for much more flexibility in responding to criminal offences committed by immigrants than does criminal law alone. Expulsion and deportation thus become repressive measures and a punishment which is added to, or exchanged with, ordinary criminal penalties. Administrative procedures may replace criminal procedures, providing greater administrative convenience and fewer safeguards derived from the rule of law (Albrecht 2000, 147).

A number of academics have referred to the exercise of this unregulated, discretionary power against immigrants and asylum seekers (Schuck 1984; Juss 1997; Kanstroom 2006). Leanne Weber and Todd Landman (2002) documented that the decision on whether to order detention for asylum applicants is highly unpredictable and greatly depends on ‘extra-legal’ considerations such as practices, stereotypes and the individual characteristics of decision-makers, rather than on official guidelines and rules (also Jubany-Baucells 2003; Weber 2003). Wendy Chan (2005) shows variations in decisions to deport non-citizens convicted of crimes from Canada. She demonstrates that judicial authorities rely on the personal characteristics of the deportee (gender, ethnicity, links to the country, etc) as a main consideration for their

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<sup>239</sup> SAC. Version 1.0 28 April 2009, p 3 (unpublished document).

decisions, while the offence is relatively unimportant. They exercise what she calls ‘moral regulation’ in immigration by differentiating ‘good’ from ‘bad’ immigrants and assessing their possibility of ‘moral redemption’ and integration to mainstream Canadian society. Similarly Anna Pratt (2005, 64) in her study of immigration detention and deportation in Canada refers to the influence of the officers’ ‘professional identity, location and preoccupations’ on the decision to detain. She makes the point that despite a growing regulation of immigration, discretion in decision-making persists because it is considered necessary and desirable to humanise and individualise decisions.

The wide scope of discretion present in the exercise of immigration/criminal powers contributes to the selective enforcement of immigration laws. In the same situation, a person can be prosecuted and deported, or administratively removed from the country. Because offenders can be dealt with by different regimes and through different interventions, failure to prosecute does not mean that they will go ‘scot-free,’ as is the case in most minor criminal offences. This feature makes the system of immigration and criminal regulations highly unpredictable for immigrants because there is no way of knowing in advance through which regime they are going to be dealt with (Macdonald 2010, ch 14.2). Often, the decision to prosecute is based on pragmatic considerations and results in inconsistencies.

**a. Removability and the decision to prosecute: an example of the pragmatic use of the criminal law**

The decision to prosecute is based on a number of factors. The most important one is the possibility to remove the offender from the country. When removal is not a feasible option – for instance because of the lack of genuine identity documents, a prosecution generally follows. In fact, state authorities of the country to which removal is proposed may refuse to admit people without proof of nationality and so removal of undocumented migrants is

practically impossible (Macdonald 2010, ch 16.65). Defective or non-existent documentation has been identified by the government as a major obstacle to immigration controls (Home Office 1998, ch 11). The disguise or concealment of identity by foreigners –by using a false identity or by not revealing one’s real identity- jeopardises the state’s ‘rational bureaucratic administration’ over its population and particularly hinders its capacity to identify and sort a ‘society of strangers’ in global conditions (Lyon 2009, 36).

The lack of genuine documentary identification brings enormous practical problems to the governments –especially in asylum cases- (Bohmer and Shuman 2008). As explained in chapter III, the prohibition on imposing penalties on refugees in the Refugee Convention was mainly aimed at preventing them from going underground and to make them ‘legible’ for the hosting state. As an academic expert in refugee law put it, ‘If you’ve got an asylum seeker who has no papers and nothing on them whatsoever, how do you deal with them? How can you establish their identity with confidence? How can you know which country they come from with confidence?’ (Respondent 7, 12/05/2010). In addition, asylum seekers cannot be removed while their applications are being examined and until their appeal rights are exhausted.

Faced with practical difficulties in carrying out administrative removals, immigration officials often choose to prosecute. It is not surprising then that the most frequently used immigration offences are those that penalise the lack of documents and the possession of forged ones. In fact, the impossibility to remove undocumented migrants from the country was a driving force for the introduction of the offence of no document and non-cooperation in removal proceedings, under sections 2 and 35 of the AI(TC)A 2004 respectively.<sup>240</sup> In a case involving a person who refused to comply with the re-documentation process, the

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<sup>240</sup> See ch III.

intervening prosecutor made it clear that this negative response posed serious difficulties for immigration authorities:

These [three] convictions [for the offence of non-cooperation] show a propensity to commit the same and similar offences [...]. It is clear that he has refused thrice before and on the third refusal he was charged [...]. In effect *he is playing the system as without co-operation the government have no way of removing him* as they cannot confirm which country to remove him to or have documents applied for which would facilitate the same (UMC, Court-file, Case 143, italics added).

While foreigners arriving into Britain without a passport or with a false one are usually returned back, those who cannot be returned end up being prosecuted. As a retired immigration barrister told me,

If the person isn't an asylum seeker and if the person is just trying [...] to come [in] as a visitor or trying to come in [on] an EU passport which is put through the machine and is fraudulent, then the most likely outcome is that the person will simply be refused leave to enter and will be gone on the next flight. [He] won't even be detained or be detained for hours or less (Respondent 6, 20/04/2010).

Similarly, a UKBA official at the Criminality and Detention Group explained that the first response is to remove. Prosecution is used against those foreigners who are not 'readily removable' because their identity is unknown and because they claim asylum:

If we deal with false documents [...] if we can't remove them immediately we probably will prosecute those and they go to prison for that. Anyone trying to enter the country with false documents our first thing we will try to do is just return straight back to the country they came from [...]. Sometimes of course [...] they claim asylum so you've got false documents, claim asylum, so we have to admit them to do that process and we'll probably prosecute at that stage anyway, we'll prosecute this (Respondent 5, 16/09/2010).

The impossibility to remove or to remove within a reasonable time also constitutes a legal obstacle for holding someone in immigration detention.<sup>241</sup> The use of criminal law in these cases justifies the subject's detention during the period in which she may be identified –

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<sup>241</sup> See *R v Governor of Durham Prison Ex parte Singh* [1984] 1 All ER 983 [at 706]. This leading case states three fundamental temporal limits to administrative detention of foreigners: the detention should be imposed only when the making of a deportation order or a removal is pending; detention should be limited to a 'reasonably necessary' period to undertake that actions; and when it is apparent that the removal of the person will not take place within a reasonable period, detention will cease to be lawful. See also the decision by the European Court in ECHR, *Chahal v the United Kingdom*, judgement of 15 November 1996, Application 22414/93, par 113.

especially if there is a claim for asylum being considered. In this regard, the same UKBA official told me that:

[I]f [immigration officers] can't remove the person, we've got difficulties to detain them because we find we couldn't remove them in a reasonable period of time, we might seek to prosecute because that gives us more hold on the person and buys us the time we need [...] [I]t will be a pragmatic decision based on the particular case (Ibid).

A criminal procedure is then conceived as an alternative to the administrative proceeding leading to removal, when the latter cannot take place because of legal and practical obstacles. The criminal law in the immigration context plays a pragmatic role: it is deployed when the primary sanction against immigration offenders is fruitless or ineffective. Its aim is purely utilitarian, to bypass the obstacles for removal. A criminal sanction makes possible the detention –imprisonment– of a person when immigration law mandates release. As my interviewee from the UKBA clearly put it, a criminal proceeding ‘buys’ immigration officials time to prepare the expulsion of a person while keeping her behind bars. As such, it ‘aids’ immigration law and constitutes another means of immigration enforcement. The interchangeable nature of administrative and criminal sanctions reveals a non-moral, non-principled regulatory use of the latter which clashes with liberal principles of criminal law (Ashworth 2000). Criminal punishment does not have a differentiated function but rather is an extension of or an alternative to immigration/administrative proceedings. Criminal punishment is then used as an ancillary sanction. The government representative, Mike O’Brien, in the parliamentary debate on the Immigration and Asylum Bill 1999 clearly explained this rationale to his peers in the House of Commons:

We know that most people who obtain their entry by deception are not prosecuted. That will continue to be the case because they will be removed from the UK quickly. It is difficult to see why we should prosecute if simple removal from the UK will deal with the issue. [...] There are some people who, because of the way in which they behave, make their removal extremely difficult, but have nevertheless set out systematically to deceive and breach our immigration control. In those cases we need such effective and tough legislation that will deal with people who deliberately set out to break our laws (Hansard, HC Deb 20/04/1999, col 712).<sup>242</sup>

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<sup>242</sup> See also s 3(10), UKBA EI&G: ‘Where leave to remain has been obtained by deception, administrative removal [...] will be the correct course of action.’

Conversely, when removal is possible, immigration offences are generally not enforced. In these cases, the use of criminal law is generally considered inappropriate and unnecessary. For example, overstaying and illegal entry are seldom proceeded against as evidenced by the low rates of prosecutions during the last five years.<sup>243</sup> Overstaying used to be the most common prosecutable offence but since 1988, when overstayers had their right of appeal against deportation orders restricted and were subject to summary removal,<sup>244</sup> this offence has been barely used.<sup>245</sup> They are generally not charged and the enforcement action against them is removal, unless they are involved in other offences –such as working with false documents. In the case of illegal entry, its under-enforcement is mainly to do with evidentiary difficulties. This offence requires proof of *mens rea*. That is, it requires that a person *knowingly* entered the UK without the leave of an immigration officer or in breach of a deportation order.<sup>246</sup> It is different from the status of ‘illegal entrant’ which does not require intention or knowledge. The latter includes people who are not aware they were in breach of an immigration rule or who have obtained a leave by the deception of a third party. Even though illegal entrants cannot be prosecuted, they can be summarily removed and this is the option generally pursued in cases of illegal entry.<sup>247</sup>

**b. Why me? The impact of nationality, resources and local practices in the use of criminal powers**

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<sup>243</sup> Cfr Home Office 2010b, Tables 3.11a and b.

<sup>244</sup> See ch II and s 10, IAA 1999.

<sup>245</sup> See ch II.

<sup>246</sup> S 24(1)(a), IA 1971.

<sup>247</sup> While the number of people refused entry at port and subsequently removed in 2009 was 29,160, the number of prosecutions for the offence of entering the UK without a leave was 35 for the same year (Home Office 2010b, Tables 3.1, 3.11a and 3.11b).

Because pragmatic reasons weigh heavily on the decision to prosecute, factors which have little to do with the charge itself are of paramount importance. Nationality, for instance, appears to be an important consideration in the decision on whether to pursue a criminal action. A senior official at UKBA's Crime Directorate told me that there is a great difference between a case of false document involving a Brazilian and one against a Zimbabwean: in the first one, the outcome will probably be removal whereas a prosecution will be a most likely result for the second case. So he recognised that the same offence might be treated differently according to the country of origin of the defendant and whether or not he is readily removable (Respondent 20, 28/04/2011).<sup>248</sup> While this practice might amount to discrimination and be in breach of Race Relations legislation, it seems to be fairly generalised. In fact, those who are more frequently prosecuted for immigration offences come from countries with which Britain has no bilateral agreements to return people without documents, such as Somalia, Iran and Sri Lanka.<sup>249</sup>

Other more mundane reasons, such as the availability of resources, may also influence the outcome of a case. The official at the Crime Directorate recognised that the resources available –particularly trained staff- to carry out an enforcement operation may define how to approach it. Two similar cases of sham marriage may end up in a criminal investigation or in a removal procedure depending on the number of free officers in the Immigration Crime Team

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<sup>248</sup> The nationality of the person not only affects the chances of her being prosecuted or administratively removed, it also impacts on the length of post-conviction detention. Nationals of certain countries –such as Zimbabwe, Algeria, Iraq, Somalia and Iran- with a criminal conviction are less likely to obtain bail and more likely to remain in administrative detention for longer periods because of the impossibility to deport them (LDSG 2009, 12).

<sup>249</sup> Data on the nationality of the offender is not systematically compiled by the courts. However, from information in the court-files it was possible to determine the nationality of the defendant (eg, photocopy of passport, his or her statement, references by immigration or police officers, etc). The search of court-files shows that nationals from certain countries were overrepresented in the sample. At the magistrates' court, most of those accused of immigration offences claimed to come from China, Somalia, Iran, and Sri Lanka. At the crown court, most immigration-related defendants claimed to be Somalis, Iranian, Sri Lankan, and Kuwaiti. Some of the defendants, though, are naturalised British citizens, particularly, in the cases before the crown court.

(ICT) at a particular time. Even if pursuing sham marriages is a priority for the agency, he told me that they cannot take on some of these cases because of shortage in personnel. So they call the LIT to deal with them when the ICT is overstretched. Because immigration officials at LITs are not ‘prosecution-trained,’ they can only carry out executive actions. In other cases, they will just deploy a uniformed immigration officer standing outside the registry to persuade the parties and thus prevent the marriage from taking place. He stated that ‘people are dealt differently because of lack of resources’ (Ibid).

An example of the impact of enforcement capability on this decision can be found in the practice of prosecuting non-cooperation under section 35(3) of AI(TC)A 2004. It seems that the decision to prosecute this offence varies according to jurisdiction. While nationally the number of prosecutions for this offence is quite low,<sup>250</sup> it tends to be higher in certain areas. Two practitioners told me that this crime is prosecuted in Dover, Kent, because Dover Police has the resources and is willing to pursue these cases. One of them mentioned that in Kent ‘there is what appears to be a sort of understanding’ between immigration officials, the Kent Constabulary and the CPS, to prosecute them.<sup>251</sup> This was confirmed by a UKBA official who told me that the Canterbury prison is a ‘hub’ with a number of immigration officials deployed there to check those who are liable to deportation and/or removal and he suggested that the existence of these arrangements may explain the higher rates of prosecutions for this offence in that jurisdiction (Respondent 20, 28/04/2011).

The identity of the decision-maker may also influence the way in which a particular case is handled. A UKBA’s in-country enforcement official referred to different practices by different immigration teams: ‘what actually ends up being prosecuted will depend on who is

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<sup>250</sup> See ch III.

<sup>251</sup> Barrister at Doughty Street Chambers and Director of an organisation supporting immigration detainees. Respondents 15 and 9, interviews held on 28/04 and 16/07/2010, respectively.

there to do it on the ground.’ He referred to the immigration team in Gatwick airport and its approach to document offences:

I know Gatwick [airport] in terms of people using false documents. [The immigration team] very much focus on –or they had a period when they very much focused on- people who were leaving Britain rather than people who were coming into Britain. So if somebody was discovered with false documents trying to enter Britain it was made it more likely that they just be removed and not prosecuted (Respondent 3, 18/05/2010).

The existence of ‘cycles’ or ‘periods’ in which particular offences are more likely to be prosecuted because of certain policy priorities was also referred to by other interviewees. The Head of Law of a non-governmental organisation that provides legal support to asylum seekers mentioned that ‘there do seem to be some sorts of offences which do tend to go through periods of prosecutions,’ for example, document offences where the person is in transit in the UK to seek asylum elsewhere (Respondent 13, 14/06/2010). The supervising solicitor at RMJ also talked about ‘cycles’ in which certain offences seem to be particularly targeted as an ‘influencing factor’ in the decision to pursue a criminal case. She further explained how difficult it is to predict the outcome in a particular case: ‘I don’t [know] whether it varies regionally [...]. It’s really hard to say because I have clients from all different countries who’ve been prosecuted and clients from all different countries who haven’t been prosecuted in very similar circumstances’ (Respondent 10, 8/06/2010).

This variation in prosecution patterns once again reveals the pragmatic and arbitrary use of criminal powers for immigration enforcement. What ends up being prosecuted very much depends on the UKBA’s priorities at a particular moment and whether or not criminal law is useful or effective in achieving them. The lack of clear guidelines and the availability of different mechanisms result in inconsistencies and lack of coherence in the treatment of immigration offenders. A snapshot of cases published on UKBA’s website shows this variation in decision-making. For example, a Ukrainian man who arrived at Bristol airport and attempted to use a forged Estonian passport was arrested and removed without being

prosecuted;<sup>252</sup> however, a number of cases of forged or false passports do routinely reach the criminal courts. In a case involving four people caught working illegally, two of them were put in immigration detention, one was released on immigration bail and the fourth was detained on suspicion of 'ID card offences.' Presumably, this last person was caught using a forged identity document for securing employment. In another case, six workers were found working illegally; one of them was caught using a fake British passport. All the six were considered for removal, including the person using a false document who was not prosecuted.<sup>253</sup> Inconsistency is one of the main reasons mentioned in the SAC for adopting guidance on cases for investigation. It is also a motive for the creation of a Crime Directorate within UKBA whose aim is 'to provide a more cohesive, consistent and effective approach to tackling organised criminal networks.'<sup>254</sup>

### **c. Criminalisation as a policy goal?**

The examination of decision-making in cases involving immigration offenders reveals the contingency of crime and of immigration crimes in particular. A similar conduct may be treated as an administrative or criminal matter depending on the nationality of the offender, the identity and training of the intervening officer or team, the availability of resources, the policy directions at a particular time, etc. These are factors that have little or no relation to the criminal charge but are important in the decision on whether or not to proceed against a

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<sup>252</sup> 'Forged passport attempt foiled at Bristol Airport' (19 May 2010). Available at <http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2010/may/06-forged-passport-bristol> (Last accessed: 10 March 2011).

<sup>253</sup> See UKBA, respectively, 'Christchurch takeaway facing possible fine' (2 July 2010) and 'Illegally working in Loughborough' (5 July 2010). Available at <http://www.ukba.homeoffice.gov.uk/news-and-updates/?page=42&area=Enforcingthelaw&filterMonth=&filterYear=&filterDateSubmit=GO> (Last accessed: 10 March 2011).

<sup>254</sup> Home Office/UKBA, Crime Directorate, p 7 (unpublished document).

crime. This is an example of how social practices and its 'actors' play a major role in the definition of the 'frontiers of criminalisation' (Lacey 1995).

The use of discretion in practice reveals a very unpredictable and unplanned use of the criminal justice route. Just as there are no clear guidelines about who and when to prosecute, equally there is no specific goal of subjecting more immigrants to criminal punishment. Rather than a planned, strategically designed policy of criminalisation, the practice of prosecution of immigration crimes against non-nationals reveals a more mundane, erratic and inconsistent exercise of (criminal) powers. The use of criminal law against immigration offenders is not only subject to prosecutorial discretion –namely, the application of the 'public interest' threshold. It largely depends on its suitability for the purpose of immigration controls for a particular team or jurisdiction. This in turn explains the disparity and lack of patterns noticed in the practice of prosecuting immigration offenders.

These inconsistencies seem to be the result of an unsystematic and haphazard use of power as much as a reflection of a system designed to ensure the maximum flexibility and wider range of alternatives to deal with non-citizens. It is hard to think of a similar regime applicable to nationals whereby they can be subject to parallel systems of (coercive or punitive) state intervention (criminal, civil, administrative) on the basis of the same conduct and with no certainty about which system of sanctions will be triggered in a particular case.<sup>255</sup> The differential legal regimes applicable to foreigners and nationals ultimately reveal the importance of the citizenship status *vis-a-vis* the universality of human rights (Aas 2011). In fact, the lack of legal limits and the broad margin of discretion and flexibility in the exercise of

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<sup>255</sup> Within immigration law, it is possible to think in the dual system of civil penalties and prosecution for illegal employment which applies to citizens and non-citizens alike. However, under this regime, criminal charges can only be pressed against those who 'knowingly' employ a person without entitlement to work. The rest of the cases of illegal employment are dealt with through civil penalties. As such there is no overlapping between the two regimes.

state powers have been –and still are- features of immigration law (Schuck 1984).<sup>256</sup> Rather than placing non-citizens on a par with citizens, the use of criminal law to regulate immigration has increased the possibilities of state interventions against (non-national) immigration wrongdoers. Even though citizens may be proceeded against for immigration offences, only one system is activated to deal with them. Most importantly, they are not subject to deportation and removal.

## V. Immigration offenders: rhetoric and practices of punishment

*There is a mismatch between those against whom the Government intend to take enforcement action –those regarded as the most nefarious- and those against whom action is actually taken. I can understand why action is taken against them.*

*They are the easiest to pick up and deal with.*<sup>257</sup>

Until this point, I have analysed the prosecution of low-level immigration offences. However, in recent policy documents the government has emphasised that criminal law should be used against the most serious offences, particularly those involving organised criminality. As discussed in chapter III, the government has prioritised offences that cause most harm, particularly, terrorism, drug and human trafficking, organised criminality, facilitation and knowingly employing illegal workers (Home Office 2007a; 2008b; 2010c). People involved in these serious offences are likely candidates for prosecution (Home Office 2007a, 23). The categorisation of immigration crimes according to the harm they cause is based on the ‘harm matrix’ which breaks down offences into three main categories: Category A (high) includes serious criminal offences such as terrorist activity, murder, rape, people and drug trafficking,

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<sup>256</sup> An early example of the broad executive powers over non-citizens in Britain is the extension of emergency legislation from 1919 until 1971 on the entry and residence of ‘aliens.’ The then Under-Secretary of State for the Home Department argued against the introduction of permanent legislation on the premise that the emergency regime provided more flexibility and that new legislation would entail that ‘the powers of the Home Secretary should be more precisely defined than they are today’ (Hansard, HC Deb 26/11/1953, col 560). See ch II.

<sup>257</sup> Keith Best, then Chief Executive of the Immigration Advisory Service (IAS). Hansard, HC Deb 27/02/2007, col 65.

violent crime and child abuse; Category B (medium) includes offences such as illegal working, dishonest claim for asylum support and identity fraud; and Category C (low) groups minor immigration offences, such as those resulting in a drain on public funds and anti-social behaviour (Home Office 2010c, 46; 2006b, 14). According to the harm matrix prosecutions should be reserved for serious offences, while low level offences are supposed to be dealt with by caution and removal (Home Office 2010c).

The concept of ‘harm’ in immigration enforcement has been institutionalised by its inclusion in the immigration agency’s Public Service Agreement (PSA) which makes as one of its four strategic objectives ‘ensuring and enforcing compliance with UK immigration laws, removing the most harmful people first and denying the privileges of the UK to those here illegally’ (HM Government 2009, 3; also Home Office 2006b, 23; Home Office 2007c, 7). It has been also introduced as a parameter to measure the impact of the agency’s work, particularly in relation to immigration offences and the work of the recently created Crime Directorate (Home Office 2010a). The concept of ‘harm’ gained currency following the FNP scandal in April 2006 which prompted the institutional overhaul of the IND. One of the repercussions of this crisis was the melding of penal and immigration policies.<sup>258</sup> At the time of the IND review, the language of risk and harm was already prevalent in crime control policies. The use of actuarial instruments to predict risk and to manage offenders is common in sentencing, bail and post-conviction decisions. Risk assessments are undertaken on all offenders entering the criminal justice system based on their background and offences, and the risk they pose to society when (and if) released. These assessments have consequences on the length of the sentence, the conditions while in prison, and decisions on parole and post-sentence treatment (Home Office 2006c, 12).

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<sup>258</sup> See ch III.

These criteria have infiltrated immigration decision-making on how to effectively manage FNPs after their criminal sentences expire, and spilled over to the other phases of immigration enforcement. Harm is defined as ‘all the potential negative consequences of illegal migration’ (Home Office 2007a, 10). By tackling those who cause the most harm, a number of public protection objectives are achieved, including removing the incentives for illegal immigration; protecting public services and private businesses from immigration fraud; and protecting the immigrant herself. In fact, as it is articulated in policy papers, the crack down on organised immigration crimes is aimed at protecting, among others, the ‘victim’ of it from being exploited by smugglers, traffickers and unscrupulous employers (see eg, Home Office 2002, 76; Home Office 2007a, 12; also Goodey 2003).

The emphasis on preventing harm attempts to reconcile the task of enforcing the law -ie keeping people out or expelling them- with the goal of protecting and doing good (Black 2003, 39). Doing ‘good’ is an appealing goal particularly in the context of immigration controls. Unlike crime control, which has its ‘positive side,’ protecting the public and individuals from crime, immigration enforcement lacks this aspect and is seen by many as illegitimate and ethically problematic. The prerogatives of the state to limit the access of certain people to its territory and to exercise its controls over them by imposing conditions on their residence, detaining and excluding is subject to contestation not only from academics and activists<sup>259</sup> but also from those who are in charge of enforcing these measures (Gibney 1988; Hayter 2003; Carens 2003). When she interviewed immigration staff working in removal centres, Bosworth (2011a) reported a certain ambivalence of such personnel about their job. Some of them were not sure if they were doing the ‘right’ thing.<sup>260</sup> Probably because of the

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<sup>259</sup> See for example the campaigns by ‘No One is Illegal’ and the ‘London NoBorders’ (respectively, <http://www.noii.org.uk/> and <http://www.london.noborders.org.uk>) (Last accessed: 22 October 2011).

<sup>260</sup> In an interview with BBC Radio 4, a senior official in the Immigration Service Union puts it this way: ‘I think there is certainly a feeling amongst senior civil servants in the Home Office that immigration is not an area you want to work in. You don’t want to go to a dinner party and when people say, “Oh what are you working on?”, you don’t want to say, “Oh I work in immigration.”’ He explains that this is so because immigration is ‘not

controversial nature of its work, in recent years the agency has made some efforts to publicise it and adopt ‘customer friendly’ strategies.<sup>261</sup> The criminalisation of immigration breaches is also a contentious matter.<sup>262</sup> Because immigration offences are generally trivial and victimless crimes, creating a ‘counterpart’ to it, a victim, is politically and rhetorically persuasive.

In this regard, the recent appeal to the concept of harm in British immigration policy strives to legitimise this policy. As such, the idea of harm is used for the validation of this policy rather than as a limiting principle for state’s coercion, as first envisaged by political philosophers and liberal theorists such as John Stuart Mill and HLA Hart. In his famous treatise *On Liberty*, Mill (1859 [1978], 9) puts it simply: ‘the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.’ According to Bernard Harcourt (1999), in the last two decades states have increasingly appealed to the rhetoric of harm to frame and legitimate their policies on prostitution, pornography, drugs, public drinking, loitering, homosexuality, etc. The state regulations of these conducts have been justified not on moral grounds but on the potential harm that they pose to individuals. Harcourt argues that the pervasiveness of harm has made it meaningless as a means to set limits on the use of criminal law (Harcourt 1999, 113; also Ramsay 2010).

In turn, Bridget Anderson (2011) observes that the appeal to harm within immigration policy was originally taken from the context of trafficking and then slipped into mainstream immigration enforcement. She notes that

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liberal. It’s not seen as a nice thing to do. You’re not helping people. You are actually enforcing the law and not allowing people into the country’ (BBC4, ‘Current Affairs,’ 8/02/2010, transcripts available at [http://news.bbc.co.uk/nol/shared/spl/hi/programmes/analysis/transcripts/08\\_02\\_10.txt](http://news.bbc.co.uk/nol/shared/spl/hi/programmes/analysis/transcripts/08_02_10.txt)) (Last accessed: 6 March 2011).

<sup>261</sup> Such as the TV programme ‘UK Border Force,’ and the coverage of its operation in the agency’s website and in the press. References like ‘customer satisfaction,’ ‘customer approach’ and ‘customer service’ are also very much present in recent policy papers (Home Office 2006b, 4; Home Office 2009c; Home Office 2010d; Home Office 2011b).

<sup>262</sup> Even within the EU, the Commissioner for Human Rights has repeatedly verbalised his opposition to the criminalisation of immigration breaches (eg Council of Europe 2010).

It was the arrival on the scene of the [victim of trafficking] that marked the emergence of the prevention of 'harm' as a concern of immigration policy. Harm is associated with the body, with shared human physical (and related mental) fragility, with suffering bodies, and in policy terms, with public health, drugs, commercial sex and other activities that are deemed risky (Anderson 2011, 4).

Enhanced immigration controls are justified in terms of public protection and particularly the protection of the individual subject to them. However, Anderson points to a problematic aspect of the 'harm reduction agenda' which is the role that the state has in producing and reproducing harm by imposing barriers for legal migration and creating the grounds for illegality and thus exploitation.<sup>263</sup> The state is then captured in a contradictory position when charged with the task of protecting those whom it aims to exclude (Weber and Grewcock 2011).

This tension is reflected in the practice of prosecuting illegal immigrants and the criminalisation of immigration offences. The former are generally not seen as victims to be protected, but as perpetrators to be punished and expelled. This conflict is particularly evident in the enforcement of immigration control in workplaces. As I argued in chapter III, these controls are primarily aimed at catching and punishing the worker rather than punishing the employer. A consultation paper on illegal employment makes such rationale clear. It first focuses on the employer:

Employers who employ illegal migrant workers may do so because they want to avoid providing minimum standards, such as the National Minimum Wage and paid holidays. This is harmful to the workers involved and enables unscrupulous employers to gain an unfair advantage over legitimate competitors (Home Office 2008c, 4).

It then goes on to discuss the main aim of enforcement visits:

The Agency adapts resources where appropriate to carry out specific operations that will yield the greatest results, with the aim of removing the most harmful people from the UK first. Any person found to be working illegally is liable to prosecution and/or removal from the UK (Home Office 2008c, 11).

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<sup>263</sup> As any other legal enterprise, organised criminal gangs adopt various strategies to exploit the demand for their services by offering 'package deals,' thus increasing their gains and serving their 'customers:' they take advantages of the weaknesses of border controls, exploit humanitarian crises and develop new technologies to match governments' efforts to enhance document security (Ruggiero 1997; Salt and Stein 1997; Koslowski 2000, 212).

In this context, the immigrant is the target of immigration enforcement, not those who take advantage of her illegality –or ‘victimise’ her. The apparent tension between, on the one hand, enforcing immigration controls by not allowing people in and pushing them out of the country and, on the other hand, protecting them from their traffickers and smugglers is also present in the actual practice of immigration enforcement. The latter seems to contradict UKBA’s priorities.<sup>264</sup> In the following two subsections I analyse the gap between UKBA’s policy and priorities and the actual prosecution of trafficking in human beings and facilitation of unlawful immigration.

#### **a. Trafficking in human beings**

While British legislation has criminalised trafficking for sexual and labour exploitation<sup>265</sup> and has made it a policy priority to disrupt trafficking networks, the rate of successful prosecutions for this offence is still extremely low. There were only two convictions for trafficking for forced labour in 2009 and three convictions for conspiracy to traffic for forced labour in 2010.<sup>266</sup> Low prosecution rates can be partly explained by the fact that trafficking –as organised crime in general- requires a great deal of intelligence work and is very resource-intensive. Trafficking networks are highly sophisticated, well-resourced and resilient, with

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<sup>264</sup> Katja Franko Aas finds a similar contradiction between the rationale behind the construction of the mass surveillance architecture within the EU (allegedly created to disrupt immigration organised criminality) and the targets of such systems in practice (the undocumented migrant) (Aas 2011, 137).

<sup>265</sup> Cfr trafficking in prostitution (s 145, NIAA 2002); trafficking into the UK, within the UK, and out of the UK for sexual exploitation (respectively, ss 57, 58 and 59, Sexual Offences Act 2003); and trafficking people for exploitation (s 4, AI(TC)A 2004).

<sup>266</sup> In addition, 41 cases from arrests in 2009 and 2010 were pending a decision (cfr Hansard, HC Deb 13/09/2010, c882W, data up until 31/07/2010). In 2007, there were 25 prosecutions for trafficking for sexual exploitation (Barnardos 2009, 6). The government claims that between 2010 and 2011 there have been 116 prosecutions for offences involving sexual and labour exploitation and other kinds of exploitation, but it is not clear from this data if all of them are under trafficking charges (Home Office 2011a, 6).

great capacity to avoid detection. In addition, there are evidentiary difficulties (Gallagher and Karlebach 2011, 3). The required intention is apparently difficult to prove and so, as the senior official of UKBA's Policy and Strategy Group told me, traffickers are usually charged with facilitation 'because it is just more likely to secure a conviction.' Especially if it is detected at the port of entry, trafficking –he told me- is 'almost impossible to prove' (Respondent 14, 12/08/2010). On the other hand, trafficking victims often retain some level of control or agency, so they do not quite fit in the narrow definition of 'ideal victim' which is often applied by social workers and the police (Hoyle et al. 2011). Further, they are difficult to identify and usually reluctant to cooperate in the procedures against their traffickers. All these factors raise important practical and legal difficulties for the successful prosecution of these crimes. Still, some authors have argued that the goal of penalising human trade organisations, which are often heavily involved in different sectors of the informal economy –particularly, the business of bringing cheap labour to central countries- and are therefore important economic actors, clashes against economic interests to reduce costs and wages of services and manufacturing (eg, Ruggiero 1997; Salt and Stein 1997; also Anderson and O'Connell Davidson 2003; Anderson 2007).

In many instances, the balance is struck on the 'weak end' of this process, so individuals trafficked or smuggled into the UK are caught and in some instances criminalised for immigration offences. Even though there are no statistics, recent research on victims of trafficking suggests that they are sometimes proceeded against for document fraud when caught trying to exit the country escaping from her traffickers or working illegally (Hales and Gelsthorpe 2011; also Gonzalez 2002; Stephen-Smith 2008; Hoyle et al. 2011, 325).<sup>267</sup> Precisely because of these cases, in 2007 the CPS issued two sets of guidance to prevent the

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<sup>267</sup> It is difficult to ascertain with confidence the number of people charged with document offences who are actually trafficking victims because of the difficulties involved in their identification (Nelken 2010).

prosecution of victims of trafficking for immigration offences.<sup>268</sup> One such case was uncovered by the Appeal Court. The defendant pleaded guilty to the charge of possession of false document with intent and was sentenced to eight months imprisonment. This decision was appealed on the grounds that Ms O's lawyer failed to object to the prosecution of his client on the ground that she had been trafficked for sexual exploitation. While the defendant had disclosed the fact that she was a trafficking victim, her solicitor disregarded this information and advised her to plead guilty. Neither did the prosecutor withdraw or discontinue the case against Ms O. After quashing the conviction, Laws LJ emphatically stated:

There was no fair trial. We hope that such a shameful set of circumstances never occurs again. Prosecutors must be aware of the protocols which, although not in the text books are enshrined in their Code. Defence lawyers must respond by making enquiries, if there is before them credible material showing that they have a client who might have been the victim of trafficking (*R v O* [2008] EWCA Crim 2835 [at 26]).

Similarly, in a recent judgment by the High Court, it was revealed that a Moldovan woman who was victim of trafficking was arrested and accused of possessing a false passport in 2003. She was convicted, sentenced to three months in prison and was sent back to Moldova where she was caught once again by her trafficker and was re-trafficked into the UK. In 2007, she was arrested again and detained in an immigration removal centre. After being identified as a trafficking victim by the Poppy Project, she was granted refugee status. She sued the Home Office and was awarded damages for the failure of the department to protect her and for

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<sup>268</sup> These are two protocols that are part of the Code for Crown Prosecutors: on Prosecution of Defendants charged with offences who might be Trafficked Victims, and on Prosecution of Young Defendants charged with offences who might be Trafficked Victims. According to them, prosecutors are under a duty to be proactive in establishing if a person subject to a criminal prosecution is a potential victim of trafficking. The principle of non-prosecution of victims of trafficking for immigration crimes or other offences is also contained in the UN Trafficking Principles and Guidelines, guideline 5; and in the European Trafficking Directive, art 8.

sending her back to Moldova despite evidence that she was at risk of being found by her trafficker, who has still not been caught.<sup>269</sup>

The small number of prosecutions against traffickers and the criminalisation of their victims suggest there may be a mismatch between the official rhetoric and the actual practice of prosecuting trafficking offences. Such divergence calls into question recent anti-trafficking policies aimed at targeting traffickers and protecting the rights of those who are trafficked. In this regard, the document ‘Human Trafficking: The Government’s Strategy’ (Home Office 2011a, ch 5) makes clear that immigration powers (denial of visas, identification of forged passports, refusal of entry, etc) are to be deployed to prevent the entry to the country not only of traffickers but also of their victims. The idea behind this enforcement strategy is that traffickers bring their victims through illegal means and thus the same controls deployed against illegal immigration should be effective in disrupting trafficking organisations. This assumption is however not based on evidence. Research shows that many trafficking victims enter the country legally (Ruggiero 1997, 236; Buckland 2008, 45). Most importantly, making immigration controls one of the main enforcement tools to deal with human trafficking may increase –and not decrease– the vulnerability of victims to abuse and exploitation (Lee 2005; Anderson 2010b).

Stringent enforcement of immigration laws, contributes to blurring the distinction between trafficking victims, smuggled people, refugees and undocumented, economic migrants because immigration restrictions force people to turn to smugglers and traffickers to escape poverty, imprisonment or death. Tougher border controls induce enforcement officers and decision-makers to adopt a narrow view about those who deserve to be protected. By making such controls central in the crusade against traffickers, the government ‘meets [its] goals of restricting immigration while failing in its mandate to protect’ (Buckland 2008, 79).

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<sup>269</sup> The settlement reached by the parties of the case on 11 April 2011 and approved by Mrs Justice Cox remains confidential. This case is registered in the High Court as *ELS v The Home Office*, claim HQ09X01333. See press coverage of the case: Daily Mail 2011; BBC News 2011; Travis 2011.

As in the case of asylum seekers, the government is fearful that the allegation of being trafficked can be used ‘as a source of abuse’ (Home Office 2007a, 23). Thus, people who have been trafficked or smuggled run the risk of being treated as immigration transgressors as ‘questions of “victimhood” merge with questions of legality’ (Goodey 2003, 420; also Anderson 2010b, 70). Catherine Dauvergne (2008, 79) observes that the recent crack-down on trafficking in many western liberal democratic states is driven by immigration controls rather than human rights (also Kostakopoulou 2006).<sup>270</sup> Within this context, immigration controls –and the punitive powers attached to it- are more likely to be deployed against the immigrant rather than on those who ‘service’ or do commerce with them.

#### **b. Facilitation of unlawful immigration**

The official rhetoric which announced tougher actions against the most harmful offenders is also contradicted by the practice of detection and prosecution of smuggling organisations – one of the main UKBA’s targets. Surprisingly, this gap is apparent in the same policy papers and media reports which publicise enforcement operations against organised criminal groups. For example, one of these documents announces actions against facilitators; however, it only reported the detection of 18 people in a tanker who were later on handed to French authorities (Home Office 2010c, 11). Nothing is said about their smugglers and whether they were identified and prosecuted for this operation. In a snapshot of UKBA’s enforcement operations based on information in the agency’s website,<sup>271</sup> I identified fifteen cases: eleven

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<sup>270</sup> As Marie Segrave observes, the discussions over the regulation of trafficking at the international level have been dominated from the outset by a concern with transnational organised crime, border surveillance and the sexual exploitation of innocent women. While human rights approaches were put forward, they have been less successful (Segrave 2009, 74).

<sup>271</sup> Review carried out on 7 June 2010 based on the UKBA’s website: ‘Latest News: Enforcing the Law’ (<http://www.ukba.homeoffice.gov.uk/news-and-updates/?area=Enforcingthelaw>) (Last accessed: 8 March 2011).

cases of illegal working, two of passport fraud and two of sham marriage. In only two of them (sham marriage cases), there is evidence of criminal prosecution for facilitation against those directly involved in the marriage. The rest of the cases were dealt with through removal or prosecution for document fraud. This data shows that while official rhetoric about immigration offenders generally addresses those who commit the most serious offences, it is the petty crime of illegal immigrants –and not of those who profit from them- on which legislative activity and enforcement operations concentrate.

When prosecutions are brought against smugglers, the small, family-based smuggling organisation is caught. Facilitation (or technically, assisting unlawful immigration to a Member state<sup>272</sup>) is one of the most frequent immigration offence before the magistrates' court and the most important one at the crown court.<sup>273</sup> According to the review of court-files performed for this study, 16 percent of immigration-offence cases that reached Uxbridge Magistrates' Court between January 2008 and December 2009 were 'facilitation' cases. This is an offence which is sanctioned with a maximum of fourteen years imprisonment. So these cases are generally not suitable for a summary trial and are committed to the crown court. In all but one of the cases reviewed, the decisions were not available because they were decided by the crown court. In the only case decided at the magistrates' court, the defendant pleaded guilty and was sentenced to six months imprisonment. The magistrates stated in their decision that 'Credit [for the guilty plea] is not sending [the] matter to the Crown Court' (UMC, Court-file, Case 40). At Isleworth Crown Court –where these cases are committed- the rate is even higher: 55 percent of those accused of immigration offences were charged with assisting unlawful immigration.

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<sup>272</sup> S 25, IA 1971.

<sup>273</sup> See Home Office 2010b, Table 3.11a and b. The most frequent offences at magistrates' courts are entering the UK without a passport and deception. This coincides with the findings of the review of court cases for this study.

Unlike other immigration-crime cases, facilitation ones generally require some measure of investigative work, so case-files are rich in information about the accused and the circumstance of the offence, as well as the procedures followed and the decision taken by enforcement agencies. Most of the accused had residence in the UK<sup>274</sup> and thus were granted bail. Many of them were naturalised British citizens. In the cases before Isleworth Crown Court, at least 17 out of 58 defendants were naturalised British nationals, one was British-born and one had indefinite leave to remain. 19 percent of those charged with this offence had been granted refugee status in the past.

The cases that I reviewed were small-scale facilitation. From the information in court-files, I could not find any evidence of large-scale organised criminality connected to the accused. Organised networks are generally characterised by the involvement of a large number of people who are part of a hierarchical structure, with a clear division of labour and which provide different ‘services’ to its ‘clients’ –such as entry, accommodation, employment, etc. None of these characteristics were found in the cases reviewed. Generally, the defendant assisted the person with travel arrangements before and during the journey, such as providing documents, booking the ticket, contacting the travel agent and airline –especially when the person assisted does not speak English, and assisting the passenger during flight connections. At the magistrates’ court, in only two cases there was evidence that a second person was involved in the crime (in both they were husband and wife); in the rest of them only one person was charged with the offence. At the crown court, in five cases there was more than one person charged with this offence: in three of them the alleged facilitators were family members assisting another member.

In many of these cases, the defendant was charged with assisting a family member (brother, mother, wife, children and other relatives). At the magistrates’ court, in 25 percent of

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<sup>274</sup> At Uxbridge, only three out of 40 defendants had no address in the UK; at Isleworth, seven out of 58 had no address in the country.

facilitation cases the accused and the person assisted were members of the same family; this rate was even higher at the crown court where 45 percent of defendants were accused of assisting family members. In one of the cases reviewed, the defendant, a man from Somalia who had been granted refugee status in the UK, was charged with facilitating the unlawful entry of his wife and his two children. Previously, he had applied for visas on their behalf on family reunification grounds which were refused. His family never had passports, arrived at the airport without documents and claimed asylum. He was found not guilty of this offence (ICC, Court-file, Case 70). In another case involving two friends who assisted the sister of one of them to enter the UK and to claim asylum, the lawyer asked the judge for a mitigated sentence because the offence was ‘done for humanitarian reasons. This case is about humanitarian issues, not criminal. This case does not fit in the structure. This was about saving one’s life.’ The person assisted was granted refugee status. Her brother is a naturalised British citizen originally from Somalia. Both defendants were convicted for the offence of facilitation and sentenced to fifteen and nine months in prison, respectively (ICC, Court-file, Case 77).

The fact that the selected courts for this study have jurisdiction over a major port of entry (Heathrow airport) may explain that the cases analysed involve individual or small-scale facilitation. Crimes spotted at ports of entry tend to share these characteristics as detection is the product of reactive policing rather than proactive, intelligence work. A pattern identified in the cases reviewed is that people accused of facilitation are caught by police or immigration officers because the person whom they helped was detected as well –using a false document or without one. One of the main sources of evidence against these people is the testimony of their ‘clients’ who describe them (their clothes, their physical appearance, etc)<sup>275</sup> and so can be later identified through CCTV footage inside the airport. Enquiries about their flight booking

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<sup>275</sup> In many cases, people accused of document offences are interviewed by officers at the Human Smuggling Unit at Heathrow police station. Most questions are related to the ‘agent,’ his identity, the itinerary, who paid for the trip and how much, etc.

are also usually made to link smugglers with their clients or victims. In other cases, people are identified during the boarding process abroad by airline staff and overseas immigration officers. People caught at the port can be part of a criminal chain but this is not uncovered unless further investigative work is carried out. In the files that I reviewed, though, there was no evidence of the involvement of larger smuggling organisations.

These findings resonate with work by Sarah Webb and John Burrows (2009) on prisoners convicted of smuggling and trafficking offences. In relation to smuggling organisations, the authors report that most of the interviewees refer to medium to small scale organisations such as businesses formed by a particular ethnic community based in the UK to engage in facilitating the entry of further members of that community: ‘The common requirements for [these community-based organisations] would be to have a facilitator (or range of facilitators) based in the originating country who would be responsible for the commencement of the process’ (Webb and Burrows 2009, 21). In other cases, facilitation is organised from outside the country with little foundation in the UK:

Smaller smuggling organisations would focus on bringing in (extended) family members and close associates. Directed via a contact in Europe, the UK contact would be required to collect the immigrant(s) at the point of entry and provide temporary accommodation’ (Webb and Burrows 2009, 21).

A similar pattern is described by Leanne Weber and Michael Grewcock (2011) in their analysis of the actions recently taken by the Australian government to tackle the smuggling of asylum seekers into the country. They point to the fact that, contrary to the official policy, many of those prosecuted are fishermen or farmers, and not international criminal organisations.

## **VI. Making sense of prosecutorial practices in immigration-related cases**

While the ‘harm matrix’ mandates the use of criminal powers against those who cause most harm, low-level offences continue to be the most common matters reaching the criminal

courts.<sup>276</sup> Over 60 percent of immigration offenders at Uxbridge Magistrates' Court are charged with the offence of arriving without documents. Many more are charged with the offences of possession of a false identity document with intent or without reasonable excuse under the IDCA 2006.<sup>277</sup> Moreover, while facilitation cases are one of the most important categories of immigration crimes in the courts, most of them involve individual criminality with low levels of organisation. According to sentencing guidelines and the characteristics of the cases reviewed, those accused of this offence are unlikely to be at the higher end of the sentencing range because of the absence of aggravating features.<sup>278</sup>

How can this apparent contradiction between policy and practice be explained? One obvious reason is that governments are not monolithic entities and in many instances the policy design is contradicted by its implementation (Ruhs and Anderson 2010, 199). While general policies mandate the use of criminal powers against serious offenders, other rules encourage different outcomes. The establishment of prosecution targets is an example in point. It is practically simpler and easier for enforcement staff to identify individual offenders without proper documentation and to charge them with a criminal offence, than to investigate criminal networks. It is also easier to obtain a conviction in these cases. As such prosecution targets promote this policy outcome. Similarly, a senior official at the Crime Directorate told me that due to scarce resources some ICTs end up prosecuting document offences instead of pursuing more complex cases. Because the number of staff in some ICTs is so low –in some cases, only up to three officers- they cannot pursue organised crime cases: ‘they can spend

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<sup>276</sup> See ch V.

<sup>277</sup> S 25(1) and (5), respectively. However, I did not examine court-files on these offences as they are not technically considered immigration offences.

<sup>278</sup> According to the leading case *R v Le and Stark* cit [at 3], aggravating features include: repeat offending; committed for financial gain; involving strangers rather than family members; a high degree of planning/sophistication; the number of immigrants involved; and the level of involvement of the offender. See also CPS Guidance, ‘Human Trafficking and Smuggling.’ Available at: [http://www.cps.gov.uk/legal/h to k/human\\_trafficking\\_and\\_smuggling/#a05](http://www.cps.gov.uk/legal/h to k/human_trafficking_and_smuggling/#a05) (Last accessed: 10 December 2010).

their whole career in one of these cases' so 'they just do low level crime' such as fraud-based offences (Respondent 20, 28/04/2011).

There are also contradictions between different policies and regulations. The SAC mention the 'entry to the UK without document' as one of the UKBA's strategic priorities. Therefore, no document cases 'should be referred to and adopted by the UKBA crime team.' The same document, though, states that low-level offences should be dealt with administratively 'wherever possible.'<sup>279</sup> On the other hand, the official at the Crime Directorate described the prosecution of undocumented migrants or those using forged documents as an undesirable enforcement outcome. He referred to this work as 'old stuff' and explained to me that many immigration and police officers have been trained to pursue these offences in the past. There still are units at Manchester, Gatwick and Heathrow airports to deal with cases of passport fraud. He highlighted the need to relocate and train these officers in the UKBA's new national intelligence model and 'crime control strategy' to tackle organised criminality (Ibid).

Another UKBA official at the Policy and Strategy Group explained the prosecution of low-level offences –particularly, the possession of a false document- because of the cumulative impact that several prosecutions may have in the prevention of these offences, even though they are not considered serious ones. He indicated that after the entry into force of the IDCA 2006, the number of undocumented arrivals 'plummeted:' 'So, yes, you are prosecuting people for offences that [aren't] very serious. But the wider impact was reduction in this sort of behaviour so there was a valid reason for doing that' (Respondent 14, 12/08/2010). In this regard, he said that while there are enforcement priorities, the 'reactive element' of policing takes precedence:

We have clear priorities that we want to address first and it is the role of senior officers to ensure that those priorities are fulfilled through which particular operations we do [...]. But there is still a sort of reactive element [...], you still have to respond to it. So you can prioritise

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<sup>279</sup> SAC. Version 1.0 28 April 2009, p 3 (unpublished document).

particular sort of activities. Those are the areas that you will be proactive in investigating or building your intelligence around. But that doesn't necessarily mean that ultimately [that is] where the majority of your efforts end up because you [are] still going to do something else (Ibid).

The introduction of the concept of 'harm' and the 'harm matrix' sought to make decision-making more coherent by establishing priorities and providing an 'indicator' or 'benchmark' against which the agency's performance can be evaluated. So too did 'harm' imprint the idea of protection of the individual and the general public in immigration enforcement and thus is intended as a source of legitimacy. The problem with this conceptual framework is that not only does the practice seem to contradict the agency's manifest goals of tackling serious immigration crimes, but these goals are also themselves contradictory. It is difficult to tackle illegal immigration and protect illegal immigrants at the same time.

The main purpose of the UKBA is to control irregular flows and eject those without leave, rather than controlling criminality and punishing offenders. Criminal law is one of the means available to achieve such goal. This is clearly articulated by UKBA officials. After stating that prosecutions should be reserved for serious criminality, high-ranking officials at UKBA justify the use of it for low-level offences when there is a 'value' in it because either it 'buys' time for operating expulsion or several prosecutions decrease the number of arrivals of undocumented immigrants. While the official at the Crime Directorate thought that the prosecution of document fraud did not fit the 'new model' and was 'old stuff,' the reason he gave for not criminally pursuing document offences 'as a policy' was because 'we realised that it was not having any impact on driving down illegal immigration' (Respondent 20, 28/04/2011). Targeting the 'big fishes' with criminal prosecutions is thought to have a greater effect on the reduction of illegal immigration.<sup>280</sup> But the criminal law is still kept for low-level crimes to tackle particular problems of removability.

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<sup>280</sup> This is also the logic behind the recent crusade against illegal employment. See ch III.

## VII. Conclusion

The examination of immigration-offence cases demonstrates how contingent the concepts of ‘crime’ and ‘criminality’ are (Lacey 1995; Naffine 2009). The idea of ‘crime’ in general is not immutable as it is subject to a continuous definitional process. Formal criminalisation is but one part of it. Enforcement agencies, the judiciary and the public all contribute to the definition of something as ‘criminal.’ This is particularly acute in the case of immigration crimes. From the outset, the label of these offences as ‘true’ crimes is contentious. Likewise their disparate and inconsistent enforcement raises questions about the precise contours of crime. The consideration of a particular conduct as an immigration offence largely depends on policing practices; the actors involved in the decision; the circumstances of the case; the value or utility of a criminal ‘intervention;’ the availability of resources; and the identity of the ‘wrongdoer.’ Consequently, similar conducts may be dealt with in completely different ways.

While policy papers and the embrace of a pseudo-scientific category of harm and the instrument to measure it (the harm matrix) give an idea of a perfectly articulated, measured and calculated control programme, the practice of immigration enforcement –and particularly the use of criminal law powers- looks messier and contradicts policy objectives. Even though the government aims to use criminal powers against organised criminality, empirical evidence shows that low-level immigration offenders end up being prosecuted and convicted by the courts. In many cases, they are victims of the ‘big fishes’ whom the official programmes aim to target. This contradiction between goals and outcomes is not just a problem in the implementation of the former. Most importantly, it reveals how problematic it is to reconcile retribution and punishment with immigration imperatives. Ultimately, what is at stake in the substantial criminalisation of immigration violations is not so much punishing wrongdoing – by immigrants or those who aid, commerce with or exploit them- but deterring and expelling

unauthorised migrants. Criminal law expands the frontiers of immigration controls where the latter trips over with its own limits.

**CHAPTER V: PRACTICES OF PUNISHMENT: IMMIGRATION OFFENDERS  
BEFORE THE CRIMINAL COURTS**

This chapter examines cases that reach the criminal justice system. It is mainly based on data extracted from case-files at Uxbridge Magistrates' Court and Isleworth Crown Court, and from attending hearings on immigration-offence cases at both venues. As I explained in chapter IV, the lack of documents is one of the most frequently prosecuted immigration offences. Thus, a large part of immigration-related cases handled by criminal courts involve this offence. Once prosecutorial authorities decide to pursue a case involving immigration crimes, the normal criminal proceeding follows. In principle, there is no distinction between an immigration case and other cases. However, because immigration-related offences bring together two different legal branches –immigration law and criminal law- during the criminal process some aspects of immigration law and the immigration case of the defendant may emerge in the criminal case.

A clear example of this 'legal overlapping' occurs when the person accused claims asylum. In that case certain international and domestic norms of refugee law –particularly, the prohibition to impose penalties<sup>281</sup>- ought to be considered during the criminal process against this person. Many of the defendants charged with immigration offences are asylum claimants. Because they cannot be removed while their claims are being assessed, they are generally prosecuted.<sup>282</sup> Likewise, the immigration status of the accused may influence other aspects of the criminal process. It is usually taken into account in the decision to grant bail and in the selection of the sanction on those convicted. In cases where the penalty is below the twelve-month threshold for automatic deportation, the judiciary is expected to decide on whether to issue a recommendation for deportation against the person convicted.

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<sup>281</sup> Under art 31, Refugee Convention, and s 31, IAA 1999. See ch III.

<sup>282</sup> However, some asylum applications are decided through the 'fast-track' procedure. So if the claimant is 'fast tracked,' she will be administratively detained until a decision is made. This process usually takes two weeks. Often the decision to fast-track a claim is based on the country of origin of the applicant. Applications by nationals of certain listed countries are in principle considered as unfounded. See <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/detention/guidance/dftanddntakeselection?view=Binary> (Last accessed: 25 November 2011).

In this chapter I concentrate on foreign national defendants who are charged with immigration offences for breaching their immigration status –particularly, the offence of no document. First, I review the general features of the proceedings in these cases and assess them in the light of the everyday dynamics and practices of the criminal justice system more generally. I then analyse how lawyers and prosecutors handle these criminal cases. I focus specifically on whether and how the immigration case is considered when mounting a criminal prosecution and a defence. In the third section, I describe the prevalent practice of pleading guilty to immigration-offence charges and explain the factors that might influence this outcome. Finally, I examine judicial decisions in these cases. I look at the weight that the immigration status of the defendant has in the likelihood of being remanded in custody during criminal proceedings and punished with imprisonment for these offences.

## **I. The makeup of the criminal process**

There are a number of common features in the court cases involving immigration defendants. Prosecutors briefly summarise the facts of the case. In their statements, they usually employ similar stock phrases, arguments and words for different cases. These are the same prosecutors involved in other cases which do not relate to immigration offences.<sup>283</sup> Defence lawyers make few remarks usually limited to explaining the circumstances in which the person arrived in the country. They often urge the court to ‘sentence today’ and ask it to ‘take credit’ of the defendant’s ‘early guilty plea’ and her ‘cooperation with the authorities.’ When immigration matters are mentioned, they are generally presented as mitigating factors. After the lawyers’ interventions, the magistrates or judges pass sentence. They barely ask questions

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<sup>283</sup> In some cases involving drug trafficking and smuggling of goods –such as cigarettes- that I heard at the magistrates’ court I noticed that specific UKBA prosecutors were intervening, instead of the designated prosecutor of the court. However, the latter rather than the former intervened in the prosecution of immigration offences. When I asked UKBA officials why special UKBA-designated prosecutors were dealing with the above specific cases, they said that they did not know.

and usually use ready-made, formatted phrases which they repeat in cases with similar characteristics. The particular circumstances of the cases and its mitigating or aggravating factors are used to fix the tariff. Probably because judicial decisions look so similar clerks transcribe them in court-files using abbreviations. For example, one of the expressions used by the magistrates with some frequency to justify a custodial sentence is that ‘no other method is appropriate.’ This phrase is recorded by clerks with the acronym ‘NOMA.’ Another of these expressions which appears very often in decisions refusing bail is ‘no fixed address,’ transcribed as ‘NFA.’

These procedures take place in a short period of time, usually no more than ten minutes. Court-files are generally very thin. Particularly, files at the magistrates’ court involving people charged with the offence of no document have no more than a couple of pages, if any. These cases do not require intelligence work and are dealt with by the court generally in the same day. So the defendant is caught in the airport, questioned by immigration authorities and the police, and charged with the offence. The same day or the day after, the case is sent to the court and decided straightaway if the accused pleads guilty. Within a couple of days of arriving in the UK, the person can be serving her sentence in a prison. The cases are taken through the various stages of the criminal process speedily. The decision to criminalise these offences is never discussed and these cases are by and large considered as unproblematic. To some extent, a legalistic approach that dominates the everyday work of the lower courts contributes to the mechanical and uncritical application of the law: if a particular conduct constitutes a crime, then it should be punished. As a manifestation of this reasoning, a lawyer representing a person who was charged with the offence of arriving to the country without a passport whom I approached after the hearing bluntly described these cases: ‘It is straightforward: you don’t have a passport, you destroyed it; that in this country is a crime.’

It can be argued that the features described above can apply to the vast majority of cases reaching the criminal courts, particularly the lower courts. In this regard, research done

on criminal courts has uncovered the gap between legal theory and the everyday work of these courts. Criminal law theory is predominantly built on core or paradigmatic crimes, such as murder and rape (Naffine 2009; Dubber 2010b, 199). So too, academic debates usually depart from the assumption that the ordinary form of criminal adjudication is through a criminal trial (Ashworth and Zedner 2008). In practice though, the usual clients of the criminal courts are accused of less serious offences and are subject to a minimalist procedure. Criminal proceedings are more often than not characterised by the following features: ‘there is no contest, no testing of evidence, no calling for witnesses, and no open court trial. At the hearing itself, the prosecution’s evidence tends to be dealt with perfunctorily, and [...] cases are disposed of in a matter of minutes’ (Baldwin 2007, 246).

In this version, justice is made through repetition and is the result of a superficial enquiry about the facts and the law. Malcom Feeley (1979) has vividly depicted the work of the lower courts where judges are bored about the routine of passing format-like sentences, prosecutors become dulled by their monotonous work and defence lawyers are disaffected and depressed by the fact that in many cases their work resembles more that of a social worker than of a legal professional. This leads them to treat their clients carelessly. Defendants rely on their lawyers and in so doing are excluded from the decision-making process. In most instances, decisions are made prior to a public hearing. So the courts are not deliberative bodies. Instead, ‘the courtroom encounter [is] a ritual in which the judge *ratifie[s]* a decision made earlier’ (Feeley 1979, 11, italics in original; also Ashworth 1988, 112). In contrast to the grandiose and intellectually stimulating popular images of criminal trials, the routine work of the courts seems more ‘dull, commonplace, ordinary and after a while downright tedious’ (Bottoms and McClean 1976, 226). While sophisticated legal arguments are thoroughly debated on appeal, the cases that reach that stage are the minority. Instead, administrative needs to manage case loads and solve cases swiftly drive the daily work of

lower criminal courts (Feeley 1979, 5; Baldwin 2007, 246). The result is the mass-production of judicial decisions in an assembly-like fashion.

The ‘administrativisation’ of the criminal process and the concomitant actuarial approach to the administration of justice which prevails within lower courts are also present in cases involving immigration offenders. These are generally cases in which an application of asylum is pending in which complex issues about facts and laws arise. Even if there is no asylum application at stake, in many of them the person accused may have defences available and so she may be immune to punishment. However, in the vast majority of cases these defences remain unexamined. When they are, examination of these matters is generally superficial.

## **II. Offences and defences: the decision about impunity**

Immigration officers are in charge of the initial decision on whether any defence applies to people accused of immigration offences at the port of entry. When at this stage immigration staff consider that no defence is available, the case is referred for examination to the police and the CPS. Generally though this initial decision has great weight on subsequent assessments and thus is very important. The prosecution is required to undertake an examination based on the evidentiary test and the public interest test. Once the prosecutor determines that both conditions are fulfilled, a criminal case is opened.

### **a. The pre-criminal process stage**

When a person is encountered without documents or with false ones and claims asylum, immigration authorities are the first to make a decision on whether or not an offence has been committed. This is a pre-screening process where an immigration officer makes an assessment

on the credibility of the person. A prosecutor at Uxbridge Magistrates' Court told me that immigration officials test the credibility of the applicant in the first interview and, based on her responses, decide whether to refer the case to the CPS.<sup>284</sup> In practical terms, questions of credibility lead to a series of factual questions. If, for instance, a Chinese national claims that she was persecuted in her own country because she is Catholic, the immigration officer will question her about the Catholic religion, the name of the Pope, etc. In many cases, though, the defence under section 31 is disregarded when the applicant has travelled via another 'safe' country.<sup>285</sup> For instance, in one of the cases reviewed, the failure to make an application for asylum in one of the countries through which the defendant travelled before arriving to the UK was considered by the Crown as damaging to his credibility and hindered the application of the defence under section 31:

It is considered that you failed to take advantage of a reasonable opportunity to make an asylum or human rights claim while in safe country [Turkey or Italy]. Your failure to do so has damaged your credibility under section 8 of the asylum and immigration (TC) act 2004 (ICC, Court-file, Case 30).<sup>286</sup>

People accused of the offence of no documents under section 2 of the AI(TC)A 2004 are not covered by section 31 even if they claim asylum. So in order to be immune from sanctions

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<sup>284</sup> This first interview is designed to determine eligibility for benefits. It involves questions on personal details of the applicant, health, employment, journey, education, and immigration history. No questions are asked about the substantive claim for asylum. Those questions are asked in the Statement of Evidence Form which is handed to the applicant in the first interview and should be filled within ten working days of the claim. A second interview happens shortly after (Bohmer and Shuman 2008, 47).

<sup>285</sup> In this regard, the Dublin Convention determines the Member state responsible for assessing an asylum claim thus restricting the choice by asylum seekers on the country of application (Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Official Journal L 050 of 25.02.2003). This is an example of how European harmonisation on immigration and asylum policies has limited local access to international protection. Other bilateral agreements authorise the rejection of asylum applicants if they have passed through a 'safe country.' The Home Office deems certain countries as 'safe' and asylum applicants who had travelled through them may be returned there. See Hailbronner 2004; Achermann and Gattiker 1995.

<sup>286</sup> The accused was later discharged. He claimed he was tortured in Iran and was diagnosed with Post-Traumatic Stress Disorder (PTSD).

they must prove that any of the exemptions in section 2(4) apply to them.<sup>287</sup> According to IND guidance, once immigration authorities encounter a person without a document they are required to ask brief questions to establish whether an offence under section 2 has been committed and if it is ‘considered likely that the person does not have a defence.’ This is called ‘initial designated administrative procedure’ which precedes the usual screening process. If the immigration officer does not consider that the person has a defence, he should refer the case to the chief immigration officer who will discuss it with the police and the prosecutor.<sup>288</sup> As a justification for his decision in one of the case-files reviewed, the chief immigration officer argued that:

[The accused] had stated to [the] IO [immigration officer] [...] that he had his own national passport and that the agent used his original Sri Lankan passport and a forged Sri Lankan passport to travel to the UK. [The defendant] stated that he handed his original passport to the agent in Sri Lanka about two months ago and was told by [the] agent that everything would be arranged. He did not at any point state that he had been threatened by the agent or that he was under duress. After considering all of the information provided I am of the opinion that this was not a reasonable defence and that [this person] had therefore committed an offence under section (2) of the [AI(TC)A 2004] (UMC, Court-file, Case 80).

The interview as reproduced in the file, though, showed the existence of threats that may have given rise to the statutory defence.<sup>289</sup> When the immigration officer questioned the accused about ‘what would have happened if you did not follow his [the agent’s] instructions?’ he replied: ‘He would have dropped me in a known place.’ The officer went on to ask: ‘Why did you listen to [the] agent?’ This person said: ‘I was frightened, if I didn’t listen to him he would have left me somewhere else’ (UMC, Court-file, Case 80). Such responses were not investigated further, the defence under section 2 was disregarded and a prosecution was initiated against this person.

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<sup>287</sup> See ch III.

<sup>288</sup> See IND Guidance issued to immigration officers on s 2 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, quoted in ILPA, ‘Information on new immigration offences for criminal practitioners.’ Available at: <http://www.ilpa.org.uk/s2infocrimpractsamend.htm> (Last accessed: 3 May 2011).

<sup>289</sup> See s 2 (7)(b)(iii), AI(TC)A 2004.

The assessment by immigration officers is deemed as preliminary and so it is to be reviewed by the police and the CPS. Generally, though, this initial decision is subsequently ratified. Once the case reaches the court, the availability of these defences often goes unexamined as criminal lawyers seldom raise them and frequently advise their clients to plead guilty.

**b. Criminal lawyers and prosecutors handling immigration offenders: uncertainty, negligence and inconsistencies**

*A lot of people have gone through the system and they don't even know they don't know and they are meant to know [...]. You've got a lawyer expecting to do to the job properly, and if they don't you suffer.<sup>290</sup>*

Even though the offence of no document is one of the most frequent immigration offences in the criminal courts and despite the fact that many of those accused of immigration crimes claim asylum, defences such as those in section 31, IAA 1999 and section 2, AI(TC)A 2004 are barely raised. Of 232 defendants charged with immigration offences at the magistrates' court, 159 were charged with section 2 –as principal offence- (that is 68 percent of the defendants). In 41 out of 159 cases, it was mentioned that the defendant claimed or intended to claim asylum.<sup>291</sup> The overwhelming majority pleaded guilty to the charge based on this offence and were convicted for their illegal entry before their claims were examined: 155<sup>292</sup> out of 159 defendants were convicted for this offence. Likewise, the vast majority of the defendants charged with this offence at the crown court claimed or intended to claim asylum: 14 defendants out of 16 filed an asylum petition. Among them, however, the rate of guilty

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<sup>290</sup> Criminal law and immigration solicitor. Respondent 4, 16/07/2010.

<sup>291</sup> In many other cases, such intention might not have been recorded in the file.

<sup>292</sup> 154 defendants pleaded guilty; one pleaded not guilty and was found guilty by the court.

plea was much lower: only seven defendants pleaded guilty to the charge; the rest of them (nine) pleaded not guilty: four of them were found guilty while five were found not guilty.

The small numbers of contested cases are surprising given the low evidentiary burden on the defendant. In cases where the defence under section 31 is at stake, the accused bears the burden of adducing 'sufficient evidence' in support of her refugee claim. For this, she merely needs to show the real or serious possibility of being persecuted if she is sent back to her country. In turn, the prosecution bears the burden of proving 'to the usual standard' that the defendant is not a refugee.<sup>293</sup> In only three cases that I reviewed was this defence interposed. In two of them, though, it was probably wrongly raised as the defendants were charged with the no document offence. One reason that may influence this outcome is that my sample was dominated by cases involving the offence of no document for which the defence under section 31 does not apply.

Still, vague allegations about 'human right issues' or 'being a genuine refugee' were raised in very few cases. In the court-files that I reviewed at Isleworth Crown Court, various defences were mentioned in ten out of 99 cases. Eight of them were cases of entering without a passport, and the remaining two were cases of assisting unlawful immigration and deception, respectively. In five of them the defendants were acquitted, in four the defendants were found guilty and the remaining one was sent back to the magistrates' court. At Uxbridge Magistrates' Court, defences were mentioned only in seven out of 229 cases. In all of them the defendants were charged with the offence of no document. In two of them the defendants were acquitted, in three the defendants were found guilty and in two others the cases were committed to the crown court. Three of these cases were connected as they involved a brother and two sisters from Uganda. Apparently they had applied for a visa to visit their

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<sup>293</sup> Cfr *R v Makunwa (Liliane)*[2006] EWCA Crim 175 [at 3] in which Moore-Bick LJ stated that 'Provided the defendant adduced sufficient evidence in support of her claim to refugee status to raise the issue, the prosecution bore the burden of proving to the usual standard that she was not in fact a refugee.' For a comment see Fitzpatrick 2006.

mother in the UK but their applications were rejected. The 'agent' they used to travel to the UK suggested that they claim asylum but they decided not to. Their lawyer argued that the two sisters had been compelled to destroy their passports and that, during the journey, they were under absolute control of the 'agent' and their brother. The cases of the two sisters went to trial and they were acquitted, whereas the brother pleaded guilty and was convicted to 16 weeks imprisonment (UMC, Court-file, Cases 4, 5 and 6).

In the rare instances in which defences were raised, defendants still often ended up pleading guilty. Unfortunately, however, the files did not provide information on the reasons for not pursuing these defences. For example, in one of these cases the lawyer said that the defendant, a Sri-Lankan Tamil woman, 'had a reasonable defence' but still she pleaded guilty and was convicted to three months in prison (UMC, Court-file, Case 93). In another case, the lawyer of the defendant, a Sri Lankan Tamil man, stated in court that article 31 of the Refugee Convention was applicable to him. The defendant had travelled to UK via Argentina and claimed asylum upon arrival. He then changed his plea from not guilty to guilty and was convicted to four months imprisonment (ICC, Court-file, Case 84). Presumably, the fact that this person made a stopover in a 'safe country' and was accused of arriving without a passport had disqualified him for this defence.

In some other cases, the legal representatives expressed doubts that they can successfully run a defence and so advised their clients to plead guilty. This is for instance the case involving an Iranian woman who claimed asylum in the UK. All her family claimed asylum as well. The main ground for her claim was that she had had an affair with another man while married. She divorced her husband and since then she had suffered persecution in Iran. Her lawyer told the court that her circumstances 'might not amount to reasonable excuse' and requested a post-sentence report which supported the community disposal of the defendant. However, she pleaded guilty and was sentenced to eight weeks imprisonment (UMC, Court-file, Case 69). In another case, the defence lawyer asked the court for

adjournment because he was not sure if he should advise the defendant to plead guilty or not; he told the court that he 'need[ed] to investigate case law.' Later on, the defendant pleaded guilty and was sentenced to twelve weeks imprisonment. The accused, an Iranian man, travelled through Turkey and other countries. He was helped in his journey by an 'agent' who asked him to destroy his passport once he arrived in the UK where he claimed asylum (UMC, Court-file, Case 27).

In a few cases lawyers did pursue these defences. For those cases before the magistrates' court, some requested the committal to the crown court. The lawyer of a Sri Lankan Tamil woman argued in court that she was a 'genuine asylum seeker,' but she was not believed, and that article 31 applied to her. Therefore, he requested that the case be sent to Isleworth Crown Court (UMC, Court-file, Case 65). A similar strategy was followed in the case of an Iranian woman who claimed asylum. Her lawyer argued that she had a defence and asked for a committal to the crown court (UMC, Court-file, Case 223). In another case at the crown court which was committed from the magistrates' court for sentence, the lawyer asked for the guilty plea to be vacated. The counsel realised that the defendant had a defence to the charge and argued that he was wrongly advised at the magistrates' court. He also said that 'problems with the interpreter on the last occasion made it difficult to deal with it then.' The defendant, an Iranian whose first asylum claim was refused, was charged with deception for allegedly giving details of another person when he made a fresh asylum application. He claimed that he never had a passport and he used a false one (ICC, Court-file, Case 7). In one further case the solicitor announced his intention to request that the plea be reopened because there were 'human rights issues' in the case which may question the correctness of the 'very high tariff' of the sanction imposed. His client, a Middle-Eastern man, had been convicted for the lack of a passport to a six-month prison sentence. In this instance, the solicitor's argument was not about impunity but about mitigation (UMC, Court-file, Case 227). Because these

cases could not be subsequently followed up, it is difficult to assess how successful these strategies had been.

These cases demonstrate the negligibly low rates in which defences are pursued in favour of people accused of immigration offences. Among legal practitioners there seem to be doubts about the scope of these provisions and uncertainty on their applicability to the particular defendant. For many, running them is just too risky. In a number of files that I reviewed, people charged with the offence of no document said that they never held a passport; some of them offered other identification which may confirm their identity and nationality. For instance, a Zimbabwean woman alleged that she has never had a passport and used a false one to check-in on the flight to the UK. Apparently, she followed her 'agent's' directions and she disposed of the false document before arriving to the UK. She produced her national identity document and birth certificate to immigration authorities. This situation may have fall under the defence of section 2(4)(e) as interpreted by the British courts.<sup>294</sup> Yet, the chief immigration officer charged her with the no document offence because she disposed the passport that she had used to travel. When examining the case for prosecution, the intervening prosecutor concluded that 'the fact that she never held a passport is not a reasonable excuse' (UMC, Court-file, Case 142). In court, she pleaded guilty and was sentenced to a period of two months in prison. In contrast, in a case involving a Kuwaiti Bedouin the barrister raised the defence under section 2 because the defendant has never had a passport. The prosecution agreed that she had a reasonable excuse because she was stateless and nomadic, and thus cannot return to her country because of internal problems. She was found not guilty for the offence of no document (ICC, Court-file, Case 54). Similar apparently conflicting decisions were noticed in relation to Somalis charged with the offence of no document. Although in one case the prosecutor said that Somalis are not 'normally'

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<sup>294</sup> See for example, *Thet v DPP* cit.

prosecuted for this offence before withdrawing the charges against the defendant (UMC, Court-file, Case 7), in another case involving a Somali woman the prosecution under section 2 was initiated. This person pleaded guilty and was convicted to an eight-month prison sentence (UMC, Court-file, 134). These inconsistencies in prosecution practices may also influence the decision by the defence not to run the risk of pursuing a defence. Further, section 2 is ill-drafted, confusing and allows multiple interpretations. Hence a defence based on it may be difficult to put forward.

Other lawyers do not even know the existence of such defences. Criminal law practitioners frequently ignore immigration law and the many communicating vessels between the two disciplines.<sup>295</sup> Despite the increased convergence of immigration and criminal laws through legislative changes and in practice, there are still rigid disciplinary divisions between the two. The training of criminal lawyers seldom includes immigration as a subject. Neither do criminal law textbooks incorporate it as a separate section.<sup>296</sup> As a result, asylum claimants are still being prosecuted and convicted for entering the country illegally.<sup>297</sup> When I asked a criminal solicitor, defending a person who arrived at Heathrow without travel documents and subsequently claimed asylum (Mr Hussain) before Uxbridge Magistrates' Court, whether he was planning to interpose the defence based on article 31 of the Refugee Convention, he replied that 'that is an immigration issue related to the asylum claim. It's not a criminal defence. I'm a criminal lawyer; I don't know anything about immigration.'

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<sup>295</sup> This legal intertwining also raises difficulties for those serving a prison sentence. In fact, the lack of knowledge and training on immigration matters has been identified as one of the main problems in dealing with FNPs by prison staff and by the prisoners themselves (HMIP 2006, 23, 28; also Bosworth 2011c). A research on foreigners in prison commissioned by the Prison Inspectorate states that '[p]risoners were generally given little information during criminal proceedings about the potential immigration consequences' (HMIP 2006, 34).

<sup>296</sup> Until recently, the main textbooks for criminal law practitioners made no reference to the protocols on trafficking victims prosecuted for immigration crimes, incorporated into the Code for Crown Prosecutors.

<sup>297</sup> Cfr 'Adimi' cit [at 526]. See also ch III.

In most of these cases the lack of knowledge goes unnoticed, unless it is detected on appeal. In one such instance it was uncovered that the defendant had a defence for the charge of entering the country without a passport which he disclosed in the written document in which he pleaded guilty. The Appeal Court stated that such defence was apparent in the written document. Therefore, the plea should not have been accepted and the defendant should not have been convicted.<sup>298</sup> However, the cases that reach higher courts are a small minority. Most of the people who are prosecuted for immigration offences are offered a quick and superficial examination of their cases in a criminal procedure which looks more like a bureaucratic and repetitive administrative proceeding rather than a genuine exercise of justice. In other words, criminal proceedings in these cases seem to be more about administration than about justice.

**c. When the immigration case does have an impact on the criminal case:  
exceptions and mitigations**

In some instances, the immigration or asylum case is important for the criminal case. First, when the defendant is granted refugee status or humanitarian protection before the latter is decided, the person is more likely to be acquitted. Second, the immigration or asylum case is usually mentioned for mitigation purposes and so it might have some weight on the reduction of the penalty. An asylum claim does not prevent the opening of a criminal proceeding against the applicant. More often than not magistrates and judges pass their sentence before the asylum claim is decided. Therefore, in many cases people are prosecuted and convicted for immigration crimes, and after serving their sentences they are granted refugee status. A

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<sup>298</sup> Cfr *R v El Hudarey* [2008] EWCA Crim 1761 [at 9].

barrister specialised in immigration offences explained that the criminal judgement generally precedes the asylum determination:

[W]hat we do see is that someone is arrested with a passport, false passport, they plead guilty. Afterwards they say 'look, I am a refugee.' By the time they say they are refugees they weren't properly represented, they served time in prison, they came out, they made an application for asylum and a deportation order is issued. And they have to defend that on asylum grounds and their asylum application becomes the resistant to the deportation order and at the end of it, the court says 'well, we are not going to deport him because he is a refugee' (Respondent 15, 28/04/2010).

In some rare cases, however, the determination on the asylum claim is made before the criminal case is settled. In some files at the crown court, when the claimant is granted refugee status before a decision in the criminal case is made, the prosecution is frequently discontinued and the accused is declared not guilty and exonerated. This is the case of an Iranian man who was charged with arriving without a passport. The Crown stated that because the defendant was granted refugee status, it was decided not to proceed with the case (ICC, Court-file, Case 56). In another case, a Palestinian man claimed that he had been captured and tortured by the Israelis. His asylum application was successful and so the prosecutor stated that there was 'no realistic prospect of conviction and no public interest [in the prosecution]' (ICC, Court-file, Case 63). In both cases, the defendants were acquitted.

In a recent decision by the Court of Appeal it is implicitly admitted that the asylum determination is of great importance in the criminal case. In the case of 'M and Others'<sup>299</sup> the applicants challenged their convictions following their unconditional guilty plea to the offence under section 25(1) of the IDCA 2006 (possession of a false identity document with intention). They submitted that their guilty plea was a nullity –and should be so declared– because their legal representatives failed to advise them about the availability of the defence under section 31 of the IAA 1999. In three of the cases,<sup>300</sup> the solicitors recognised that they

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<sup>299</sup> *Mohamed & Ors v R* [2010] EWCA Crim 2400. These were four separate appeals which were considered jointly because of the identity of the facts at stake.

<sup>300</sup> Cases of MV, Rahma Abukar Mohamed and Mohsen Nofallah.

did not mention to their clients the availability of this defence, either because of negligence or because they thought it was unavailable to the defendant. In two of the cases,<sup>301</sup> they considered that the defence was unavailable or ‘difficult to run’ due to the defendants not ‘coming directly’ to the UK. The Court of Appeal granted the appeal in three cases and quashed the convictions of three of the four appellants because they were wrongly advised to plead guilty. Because the defendants had a good prospect of successful defence under section 31 and they were not advised about it, these three convictions were declared ‘unsafe.’ In order to decide whether the convictions were unsafe, the court analysed the prospect of a successful defence under section 31 for each of the cases. The court not only examined the requirements in section 31; it also gave significant weight to the decision by immigration authorities. In fact, the only appeal that was dismissed related to an asylum claimant whose application was refused.<sup>302</sup>

A conclusion that can be drawn from these cases is that, if the decision on the criminal case relies on the determination of the asylum claim, the former can only be decided when the latter is solved. Even though this reasoning may benefit those who are granted refugee status or other kind of international protection before the final criminal judgement, the most likely outcome is that the criminal case is decided prior to the asylum one because the asylum adjudication process is usually longer than a criminal proceeding for immigration offences and because few of those convicted for these offences file an appeal. This decision pattern reflects a system of immigration and criminal sanctions primarily aimed at deterring those who seek to abuse the asylum route. Within this system, the criminalisation of successful asylum applicants is conceived as a necessary or ‘collateral effect.’ Further, it shows

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<sup>301</sup> Cases of Abdalla Mohamed and MV.

<sup>302</sup> Case of Abdalla Mohamed.

that the fate of the prosecution and the criminal proceeding largely rests on decisions made elsewhere.

A second, more subtle avenue through which immigration considerations filtrate into the criminal process is in the defence's plea for mitigation. Criminal judges insist that the immigration and the criminal cases should be dealt with separately.<sup>303</sup> For instance, in one of the cases heard after passing sentence the judge referred to the defendant's asylum application as the 'background' of the case which is 'for the immigration authorities to consider when the moment comes' (ICC, Hearing, Case 10).<sup>304</sup> Yet, in practice the matters related to the asylum claim are sometimes brought into the criminal proceeding. As I show, immigration-offences cases are overwhelmingly settled through guilty pleas and, in some of them, the defence lawyer 'uses' the asylum claim to beg for a mitigated sentence.

In a case involving an Iranian national who was charged with the no document offence and who claimed asylum upon arrival, his solicitor argued for a mitigated sentence on his behalf. While the defence was clearly based on the circumstances in which Mr Babakhani escaped from Iran due to political persecution by the government, his solicitor stated that the asylum application 'will be considered in due course. This is a criminal matter.' He did not raise any defence, even though he recognised that the defendant had escaped because he risked being killed. The lawyer explained to the court that the accused had been involved in demonstrations against the results of the last elections and the Iranian authorities had beaten him and wanted him for arrest. He hid in the houses of family members and friends, and his family paid a facilitator to get him out of the country. When he arrived at Heathrow, he

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<sup>303</sup> Cfr eg *R v Kishientine* [2004] EWCA Crim 3352, where Pill LJ noted that the assessment of the asylum claim is 'a question for the Home Office and the appellate system provided in relation to decisions of the Secretary of State. In our judgment, it is not appropriate that the Court should routinely assess the genuineness and strength of asylum claims' [at 10].

<sup>304</sup> This is the case of Mr Elmi from Somalia who, when he filed an asylum application, was caught in possession of a Norwegian passport that related to someone else and was charged for this offence. He pleaded guilty and was convicted to twelve-month imprisonment and automatic deportation.

destroyed his passport. The solicitor explained his client's conduct in the following terms: '[The defendant] knows it is a difficult road but the alternative was the loss of his life.' He apologetically said 'the mistake was to destroy the document.' In this case, the magistrates evidently took into consideration the 'asylum background' in fixing the length of the prison sentence. After stating that the case presented 'very difficult circumstances' and that 'we are dealing with the criminal side of this,' the magistrates considered in their decision the guilty plea and 'the circumstances of the case,' and sentenced him to a 'minimum custodial sentence' of two months (UMC, Hearing, Case 15).

While in the files reviewed there is little information about the arguments put forward by the defence and the motivation for the judges' decision, the appeals to these mitigating factors may explain the variation in sentencing tariffs.<sup>305</sup> In the magistrates' court, the penalties imposed on those accused of the offence of no document ranged from 8 weeks to six months imprisonment. Another important consideration in the decision on the length of imprisonment is whether and at what stage of the process the accused pleads guilty to the charges.

### **III. Admitting one's guilt or relinquishing rights? Immigration status and the incentives to plead guilty**

In the English and Welsh criminal justice system, the rate of cases that are settled through plea bargains and guilty pleas is very high and has increased in recent years, largely due to cost-effectiveness considerations (Ashworth and Zedner 2008, 34). In 2009, 67.6 percent of the cases examined in magistrates' courts ended up with a guilty plea by the defendant.<sup>306</sup> At

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<sup>305</sup> See *R v Wang* cit [at 12] in which the Appeal Court reduced the sentence imposed by the lower court from ten months to two months due to mitigating circumstances, including an extant asylum claim.

<sup>306</sup> In 2006, it was 65.4 percent; in 2007, 67.5 percent; and in 2008, 68.6 percent (cfr Crown Prosecution Service 2009, Annex B, Chart 3; Crown Prosecution Service 2010, Annex C, Table 3).

the crown courts the rate was even higher: 71 percent.<sup>307</sup> These high rates can be explained by the large discounts in penalties of up to one third if the guilty plea is entered at the ‘first reasonable opportunity.’ These incentives are aimed at encouraging defendants to plead guilty because it ‘avoids the need for a trial [...], shortens the gap between charge and sentence, saves considerable cost, and, in the case of an early plea, saves victims and witnesses from the concern about having to give evidence’ (Sentencing Guidelines Council 2007, 4).<sup>308</sup> While criminal justice system data do not distinguish immigration-related crimes from recorded offences, from the examination of court-files for this research I found a considerably higher number of people charged with immigration offences who pleaded guilty at the court hearing. In fact, 95 percent of defendants in immigration-offence cases decided in Uxbridge Magistrates’ Court between 2008 and 2009 pleaded guilty.

This rate is significantly lower in Isleworth Crown Court, where there are more contested cases. Of the 90 defendants accused of immigration offences who were sent to trial, only 48 percent of them pleaded guilty. In these latter cases, the defendant made the decision to plead guilty at a later stage in the process, once the case was ‘trial ready’ and before the case was heard in trial. This rate does not take into account the cases committed for sentence (16), where the defendant pleaded guilty in all of them.<sup>309</sup> The lower rate of cases settled through guilty pleas may be explained in part by the fact that the cases that reach the crown court are fairly different from those usually decided in the magistrates’ court. In the former, most of the immigration-offence cases involved those who aid undocumented migrants, and defendants are generally British nationals or foreigners with strong ties to the country and with good

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<sup>307</sup> In 2008, it was 70 percent (Ministry of Justice 2010a, 55). It should be borne in mind that CPS and MoJ statistics present a number of differences because they use two separate information systems which have different counting rules. Mainly, the CPS ones do not include non-police prosecutions whereas the MoJ ones do (ibid., 51).

<sup>308</sup> On the English system of sentencing guidelines, see Ashworth 2006.

<sup>309</sup> In one case, the plea was vacated and the case was sent back to the Uxbridge Magistrates’ Court (ICC, Court-file, Case 7).

knowledge of English –inferred from the fact that interpreters are used in few of these cases. On the other hand, the cases that are settled at the magistrates’ court are those involving undocumented migrants who are caught when trying to enter the country. As I will explain, they are more vulnerable and less prepared to battle a criminal case.

Criminal law scholars have pointed out the risks of an extensive use of plea bargaining. One of the main problems is the ‘possibly coercive effects of increased incentives’ that could affect the defendant’s rights to a fair trial and the presumption of innocence (Ashworth and Zedner 2008, 35). Even in the absence of these incentives, defendants may not make an informed decision. The police, prosecutors, judges and magistrates are increasingly pressured to clear up cases and manage them in a speedy, cost-effective way. An illustration of the pressure by some judges on defendants to plead guilty is provided in the following extract from a case-file involving an Iranian man accused of failing to cooperate with his removal. This person had no lawyer representing him, pleaded not guilty and was convicted to a six-month prison sentence:

[Judge:] ‘Are you going to plead guilty?’ [Defendant:] He says h[e is] not guilty. [Judge:] ‘Were you interviewed by an officer to sign some papers?’ [Defendant] says yes. [Judge:] ‘Did you say you are not going to co-operate?’ [Defendant:] ‘Yes’. [Judge:] ‘Given the fact that you were interviewed and you didn’t co-operate that would mean that you are guilty and you have no defence to it [...]. If the clerk puts the indictment to you will you say you are guilty?’ [Defendant:] ‘I have not committed a crime’ [..] [Judge:] ‘If you plead guilty –I would give you a lesser sentence and [I will] sentence you to 4months which you have already served. If you fight the case and are found guilty by the jury I would sentence you to 6months imprisonment. Now taken all that into account do you wish to say you are guilty of this offence or go on fighting it [?]’ (ICC, Court-file, Case 52).

In another case, at the end of a trial in which the defendant was found guilty of passport fraud, the judge addressed him and said: ‘you didn’t plead guilty, which is your right, so I can give you no credit for that.’<sup>310</sup> He was convicted to twelve months in prison.

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<sup>310</sup> This case is not part of my sample as I did not hear the whole trial and only sat in the hearing when the judgement was read by chance –because I was waiting for one of the cases I was following up. This hearing was held at Isleworth Crown Court against Mr Ahmed on the 13 September 2010. Similarly, in *R v Kalonga* [2004] EWCA Crim 1250 the Court of Appeal referred to the decision by the lower court in which the judge said he gave the defendant full credit for ‘being honest enough to plead guilty’ [at 4].

So too defence lawyers often make a pragmatic decision or ‘strategic bargain’ based on the costs and benefits involved in ‘fighting’ the case for both their clients and themselves in order to avoid the difficult and time-consuming task of mounting a defence. Few defendants are able to make a decision on their plea by themselves because they ignore the law and the consequences involved (Duff et al. 2007, 11). Then their choice is usually influenced by the purposes of her lawyer and other actors of the criminal justice system. Additionally, those who cannot afford the financial costs of a trial and do not have enough legal knowledge are more likely to accept a plea under pressure (Scott and Stuntz 1992, 1928; Stuntz 2008, 1978).

**a. Foreignness, immigration status and the ability to resist a charge**

As the high rates of immigration-related cases that end up with guilty pleas testify, increased incentives and pressures to plead guilty are even more acute in the case of non-citizens charged with immigration offences. Because of language barriers and the lack of knowledge about rituals and legal formalities of the criminal process, they are particularly ill-suited to ‘fight back.’ Most of the defendants, particularly in the magistrates’ court, needed an interpreter during the hearing and to communicate with their lawyers. The presence of interpreters, however, does not guarantee that the matters discussed are fully understood by the accused (Dery 1996; Cole and Maslow-Armand 1997; Messier 1999, 1402). Even when access to interpreters is granted, the task of translating formal and legal terms from one language into another is full of difficulties.

There is an obvious link between the vulnerability of the people predominantly caught in these types of cases and the high rate of guilty pleas. They are not only foreigners unfamiliar with the vernacular language and culture, they frequently lack financial resources and are traumatised (Brennan 2006, 156; Bosworth 2011c). In the case-files I examined, these people have just arrived in the country. According to what they claim, many have been forced

to emigrate because of political persecution in their own country. Others are seeking to be reunited with their family and had applied for visas which had been rejected. Still others are looking for better social and economic conditions. The very fact of being involved in these offences implies an element of 'duress' or 'involuntary mobility' (Carling 2002). As De Giorgi (2010, 158) puts it, many are 'crimes of desperation' or 'crimes of survival.' People involved in these offences are not tourists or businessmen. They are badly informed; many do not even know that their conducts are imprisonable offences in Britain. Some though will still try 'their luck' again as they prefer to remain in a British prison than to be deported back to their country. Once caught, they are more likely to be in pre-trial detention than nationals and thus at greater risk of conviction because of the limitations in fighting their cases from prison. They have few possibilities for resisting a criminal charge and even less a removal (Ellermann 2010). It is difficult to think of a more vulnerable situation to be in. The fact that a large proportion of defendants accused of immigration crimes 'waive' their right to trial, to be 'called into account' and held responsible for their actions tells a great deal about their stance *vis-a-vis* the state.

The high rate of guilty pleas among defendants in immigration-offence cases sharply contrast with the lower rate of cases involving ethnic minorities in England and Wales settled in this way. Roger Hood (1992, 123) found that defendants with ethnic minority backgrounds are less likely to plead guilty than white defendants. When they do so, they plead guilty later in the process than do their white counterparts. This pattern of guilty plea among non-white defendants has been explained by their alienation and lack of trust in the criminal justice system, and the perception among ethnic minorities that the criminal justice system and the police are biased against them (Tonry 1997, 17; also John 2003, 13).<sup>311</sup> Even though

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<sup>311</sup> The role that ethnicity and race play in the criminal justice system is well-documented. See eg, Mair 1986; Walker 1989; Phillips and Bowling 2007.

defendants of immigration crimes are overwhelmingly non-white,<sup>312</sup> other factors not necessarily related to their ethnic background explain their inclination to plead guilty and to waive their right to trial. As explained above, these factors are related to the condition of foreigners and the situation surrounding the offence. They are often too vulnerable to challenge a criminal charge. Hence, foreignness plays a crucial role in the decision to plead guilty (Messier 1999, 1404).

Hearings in these cases are characterised by the lack of participation of the accused. They generally remained silent throughout in the cases that I witnessed. Their physical presence contrasts sharply with their absence and exclusion from the proceedings. They are spectators in their own case. As with other defendants in custody, they were escorted by security staff, brought to the court and placed in a glass custody box. In the beginning they were asked a few questions by the clerk –such as their names and addresses in the UK- but remained silent during most of the hearing. While criminal defendants in general rely on their legal representatives and do not actively participate during court proceedings, I observed that in cases involving non-immigration defendants there were some interactions with court staff in order to clarify certain aspects of the case, for example. In immigration-related cases, such exchanges were less common. When questions were asked they were generally directed to the lawyer and not to the defendant. Magistrates and judges addressed them directly only to communicate their decision. For many of them trying to understand what is going on was itself such a big effort requiring deep concentration that they made no attempts to intervene.

In one occasion, after the magistrates declined their jurisdiction and decided to send the case to the crown court, the accused (Mr Joseph) wanted to talk to his lawyer but he was told by the judge that the decision had been made. Mr Joseph, a Nigerian national, was accused of trying to exit the country with a false Nigerian passport. No efforts were made by

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<sup>312</sup> In the sample, only one out of 232 defendants before the magistrates' court was white; only three out of 106 defendants before the crown court were white.

his lawyer to hear and transmit what he had to say. The hearing was abruptly ended and the defendant was sent back to custody (UMC, Hearing, Case 4). In the hearing at the crown court, he just intervened when he was asked his name and address. He also was asked about his plea, to which he replied 'guilty.' His barrister told the judge that Mr Joseph had been living in the UK for 16 years. He entered the country illegally and had never regularised his condition. He was trying to embark to Nigeria to meet his British partner, marry her and enter the country legally. The judge imposed a twelve-month prison sentence and automatic deportation. There was no reaction from him and he quietly left the room (ICC, Hearing, Case 4). In this context, the silence of the defendants in the courtroom may hide their confusion, uncertainty, impotence, and subjugation (Johnson 2011).

#### **b. The role of the defence lawyer**

Defendants in immigration-offence cases are generally assisted by legal aid lawyers at magistrates' and crown courts. Because of the lack of financial resources, most of the people accused of immigration offences fulfil the 'means test' and are eligible for legal aid. While in the files at magistrates' court this information was generally not available, the ones at crown court did contain a separate folder on legal representation. Almost all of the accused were represented by legal aid lawyers. In England and Wales, a person accused of a criminal offence needs to appoint a private or public-funded lawyer so she can be represented before the courts.<sup>313</sup> In the latter case, she does not have to pay legal costs. In order to be eligible for legal aid, the person must meet certain financial conditions. People who are receiving welfare benefits or are under 18 years old are automatically eligible. The defendant is required to apply for a representation order to get legal aid representation by a solicitor and, if necessary, a

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<sup>313</sup> Free legal advice is provided from duty solicitors for people in police stations, regardless of their financial situation.

barrister. If legal aid is granted, she needs to appoint a lawyer who does legal aid work. Legal aid is run by the Law Services Commission and is formed by solicitors' firms and non-profit organisations. Lawyers have to meet a number of conditions in order to qualify as legal aid solicitors or barristers –such as obtaining a law degree and completing a training contract. Many firms do both legal aid work and private work.<sup>314</sup>

Legal aid lawyers are paid fixed and standard fees regardless of the time spent in each case. A recent reform on legal aid provisions fixed fees for legal aid work at £515 if the client enters a guilty plea at the first appearance; however, these fees are not increased if the case continues (Legal Services Commission 2006, 18; Davidson 2010). These new measures have substantially enlarged the proportion of summary cases settled in this way. Even though fixed fees for attending the police station at Heathrow airport are twice as high as those for attending the police station at Blackpool (respectively, £340.43 and £138.72), many lawyers are unenthusiastic about taking immigration-crime cases. A criminal and immigration solicitor observed that because some private lawyers consider these rates to be very low they turn down cases of immigration offences which required expertise on both criminal and immigration law (Respondent 4, 16/07/2010).<sup>315</sup>

Other lawyers take these cases without devoting much time to them. The defence counsel of Mr Hussain, accused of arriving to the country without a passport, told me that this was a case of a friend and he did the 'favour' of taking it because his friend was unavailable. He saw his client once, a couple of minutes before the hearing at the magistrates' court and advised him to plead guilty. He did not intervene in the hearing (UMC, Hearing, Case 1). I followed this case through to the crown court. The attitude of the barrister was no

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<sup>314</sup> Cfr the Law Services Commission website: [http://www.legalservices.gov.uk/about\\_legal\\_aid.asp](http://www.legalservices.gov.uk/about_legal_aid.asp) and the Citizens Advice Bureau website: [http://www.adviceguide.org.uk/index/your\\_rights/legal\\_system/help\\_with\\_legal\\_costs.htm](http://www.adviceguide.org.uk/index/your_rights/legal_system/help_with_legal_costs.htm) (Last accessed: 29 October 2011).

<sup>315</sup> More generally, the view that legal aid fees are low compared to other legal work is the main reason for the withdrawal of solicitor firms from criminal legal aid contracts (NAO 2009b, 16).

different. Before the hearing started, the usher warned the participants that ‘the court was running late’ to which Mr Hussain’s barrister responded: ‘[This is] quite short, it is this document case. It should be short.’ His intervention in the hearing seemed to be more directed at clarifying certain circumstances of the case for the court –particularly via which countries Mr Hussain travelled- than at defending his client. He succinctly explained to the judge: ‘I met [the defendant for the] first time in video conference. I don’t understand why he is coming from Hong Kong. He is from Iraq and he is not willing to go back.’

In this hearing it was revealed that Mr Hussain was found wandering around Heathrow without his passport. When he was interviewed by immigration staff, he said he was coming from Taiwan via Thailand. He also claimed that he disposed the passport off in the toilet. Records obtained by the police seemed to show though that he had come from New Zealand via Hong Kong. In fact, the main object of the hearing was to find out through which countries the defendant had travelled. The judge asked the lawyer whether the defendant had applied for asylum to which the lawyer replied ‘yes.’ The determination of the itinerary was important not only to assess whether he could have claimed asylum in another ‘safe country’ and thus to decide if the claim was admissible, but also to determine if he was lying. Before passing sentence, the judge stated that ‘the circumstances around you remained a mystery and your acts prevented the authorities in dealing with you [as you] provided a false account of the facts. You know you were doing something wrong.’ These were considered aggravating factors and so Mr Hussain was convicted to twelve months in prison. Details about the asylum claim were not discussed at all during the hearing and the hearing lasted for only ten minutes (ICC, Hearing, Case 1).

Another factor which may explain the high rates of guilty plea among immigration defendants is the lack of adequate defence lawyers who know immigration law. The supervising solicitor at RMJ explained to me:

[P]eople who are prosecuted at that stage almost always haven't had an opportunity to obtain legal advice in respect of their immigration matters. They are referred to a duty solicitor who advises them in relation to the criminal prosecution and huge numbers of people are advised to plead guilty, so that they will receive a shorter sentence. And so they plead guilty without even knowing that they have a defence to that offence (Respondent 10, 8/06/2010).

A senior criminal and immigration barrister agreed with her in the way people accused of immigration offences are generally treated once they are caught by the police and brought to court:

[T]hese are people who aren't in the system. I think that people are incredibly vulnerable when they aren't in the system. And they don't have access to lawyers [...] [They are] taken down to the police station, get the local solicitor doing the police station duty. And they don't know anything about immigration law on the whole. So they are advising these people to plead guilty (Respondent 8, 17/05/2010).

In some of the cases reviewed the defendants/clients expressed unease with their legal representatives. A Sri Lankan Tamil accused of assisting unlawful immigration complained to the court about his lawyer's careless handling of the case and that he or she was not Tamil speaker, and requested a change in his representation. The notes in the file state: 'No representative came to prison to visit him. He wants to change representation because lawyers don't speak Tamil' (ICC, Court-file, Case 3). In another case, the defendant complained to the court and asked for another lawyer because 'the first one advised him to plead not guilty and [did] not give [him] proper advice.' The defendant complained that his lawyer 'doesn't care' about his case 'as [he] didn't go to prison to see him' and mentioned that in one of the hearings there was no interpreter. Even though the defendant did not understand what was discussed, his lawyer did not ask the court for one. Finally, he expressed his preference for a lawyer who 'knows [his] language and knows Afghanistan.' This person was accused of using deception to enter the country by giving details of someone else when he claimed asylum (ICC, Court-file, Case 83).

Although tensions between clients and legal representatives are not unique to immigration-crime cases, the fact that legal representatives frequently do not speak the

language of the defendants and rely on interpreters constitutes a serious barrier for communication and may exacerbate frictions. Often these cases involve political and social issues about other countries. While these issues are not strictly related to the criminal charge, they are important to understand the motives and circumstances of the defendant to engage in the behaviours in question. The lack of minimum knowledge about them by the defence counsel may represent a weakness for the defence strategy (Brennan 2006, 154).

### **c. Strategic reasons for pleading guilty**

While some lawyers are unaware of the availability of defences in favour of their clients, many defence counsels advise clients to plead guilty for strategic reasons, because the likely sentence would be reduced. Factors such as the likelihood of a conviction, the length of the potential sentence, the time spent in pre-trial detention and the legal work involved (especially at public defender fees) are often considered. A critic of plea bargaining powerfully argued that the guilty-plea system 'leads even able, conscientious, and highly motivated attorneys to make decisions that are not really in their clients' interests' (Alschuler 1975, 1180). The President of the Middlesex Law Society explains the practice of plea bargain in the case of passport offences. He argues that in order to avoid a lengthier sentence,

[M]ost practitioners would advise pleading in the magistrates' court at the earliest opportunity on the purely pragmatic grounds that the court would probably accept jurisdiction, and so the sentence served would only be three months. Whereas it would take at least three months, and probably more, to list a trial in the crown court during which time the defendant would almost certainly be in custody, and would end up serving more time even if found not guilty (Darlington 2006).

Such strategic decision-making was apparently used in one of the cases I followed for this study. The defendants were an Afghan couple who claimed to have received death threats from the Taliban. One day, the Taliban met Mr Khawas when he was leaving the university where he was studying. They said that his wife should stop her activities as a women's rights

activist. Otherwise, they will cut off his head and send it to his wife before raping and killing her. Palwasha Zarifi Khawas is an internationally renowned leader who has been vocal in denouncing human rights abuses against women in her country. Faced with such imminent danger, they decided to leave the country immediately. They could not apply for a visa and thus paid an 'agent' to take them out of the country. They travelled through Pakistan, Turkey, and Italy. When they reached the UK, they claimed asylum. Upon arrival, they were asked for their passports. They maintained that they had not used their original passports but false ones to leave Afghanistan because they did not want to alert the authorities. They also stated that they handed the false passports back to the 'agent' before passing immigration controls. Afterwards, they were charged with the section 2 offence.

Even though the magistrates accepted jurisdiction, their lawyer requested the bench to send the case to the crown court. Apparently, some lawyers consider that the crown court is a better forum to discuss these cases. In fact, after the hearing, the usher of the court commented on the case to the couple's solicitor. He crudely said: 'entering without passport? Rubbish!' to which the lawyer replied: 'That's the reason we are going to the crown court.' The solicitor told me that he believed the defendants had a number of defences available and he intended to raise them at Isleworth. Predicting their prosecution, before leaving Afghanistan the defendants made scanned copies of their original passports so they can prove their identity and nationality. The solicitor told me that this proof may exempt them from penalties. From his presentation during two hearings and the short conversation I had with him afterwards, I had the impression that he was very committed to this case and had thorough knowledge about the defendants' asylum claims.

The defendants twice applied for bail, yet on both occasions were refused. In the committal hearing, Mrs and Mr Khawas changed their pleas from not guilty to guilty. No reasons were given in court for this change. The lawyer told the court that 'It is with great pain that they plead guilty.' He then requested a mitigated sentence based on the

circumstances of the case –mainly, their asylum claim- (UMC, Hearing, Case 5). The decision on the change of plea may have been motivated by the refusal to grant bail. In order to save them time in custody, the lawyer might have advised his clients to plead guilty as they had to spend the process behind bars and there was no certainty that they would have been acquitted at the crown court and a risk that they would have received a longer sentence for not pleading guilty.

While this instrumental strategy is thought to benefit the clients, it has a number of negative consequences in cases involving foreigners. Particularly in the case of asylum seekers, a criminal conviction will certainly affect their credibility and have an adverse impact on their asylum claim. It can even disqualify them for international protection (Weber 2003). The supervising solicitor at RMJ told me that criminal convictions against asylum seekers for document offences ‘later affects the credibility in the consideration of their immigration case and quite often affixes their ability to get immigration bail if they are detained. It affixes the case quite significantly all the way through’ (Respondent 10, 8/06/2010). In fact, a letter from the Home Office accompanying IND guidance to immigration officers of 21 September 2004 states:

If a person found guilty of an offence under section 2 were sentenced to the maximum 2 years’ imprisonment, he could, for the purposes of Article 33(2) of the Refugee Convention, be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the UK by virtue of section 72 of the Nationality, Immigration and Asylum Act 2002. However, a presumption that a person constitutes a danger to the community is rebuttable.<sup>316</sup>

Immigration bail is restricted for those detainees with a criminal conviction since immigration courts assess them as posing a high risk of absconding and re-offending (LDSG 2009, 10). A

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<sup>316</sup> Quoted in ILPA, ‘Information on new immigration offences for criminal practitioners’ available at: <http://www.ilpa.org.uk/s2infocrimpractsamend.htm> (Last accessed: 3 May 2011). The letter refers to art 33(1) of the Refugee Convention which prescribes the prohibition of expulsion or return (*non-refoulement*) of a refugee to a place where ‘his life and freedom would be threatened.’ Paragraph (2) excludes from this protection a refugee ‘whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.’

criminal conviction of more than twelve months triggers automatic deportation and will affect a future application for a visa, permanent residence and citizenship (Zedner 2010, 384). As Bosworth puts it, ‘a criminal conviction for non-citizens has a far greater and more deleterious ramification for non-nationals than ever before, creating a kind of double jeopardy, wherein purely on the basis of citizenship, punishment will effectively vary’ (Bosworth 2011b, 592). These detrimental effects are even more damaging when a conviction might well have been avoided.

#### **IV. Judging who and how to punish**

Judicial decisions on the cases I examined gave significant weight to the immigration status of the defendant and the immigration imperatives which the courts are called to sanction. The defendant’s immigration status is particularly important for assessing whether to grant bail. It is also relevant for the determination of the sanction imposed. Criminal courts usually punish defendants who are non-nationals and have no or weak ties to the country with confinement. So too imprisonment is generally justified by deterrence and the need to reduce unlawful immigration. What is at stake then is not so much individual wrongdoing but the identity of the defendant and the cumulative effects that similar conducts may have on broader policy goals.

While immigration-crime defendants are dealt with according to the same ordinary criminal procedures, these principles have an adverse impact on some defenders. Because they do not have legal residence and are due to be expelled, they are more likely to be remanded in custody and punished with imprisonment.

##### **a. Negotiating freedom: the decision to grant bail**

Foreigners in general –and those with ‘no right of abode’ in particular- are often refused bail. Some lawyers do not even apply for it because of the low probability of success. Magistrates and judges consider that defendants who lack or have weak community ties and who are without residence in the country are likely to abscond and consequently pose a procedural risk. If the defendant absconds, the criminal proceeding and the imposition of a penalty in case of conviction may be frustrated. Therefore, people ‘without legal status’ –undocumented migrants- charged with immigration offences are very likely to be subject to pre-trial detention. An illustration of the weight nationality has on the decision on bail is the case of Ms Samuels, a woman who pretended to be French and was caught trying to exit the UK with a Spanish passport which related to someone else. Her lawyer did not apply for bail and so the district judge asked her: ‘Why are you not applying for bail? [Your client] is a French citizen...’ After some enquiries, the defendant turned out to be a Cameroonian national with a different name. The judge refused the application for bail in part due to her immigration status: ‘there are substantial grounds to believe that, if released, the defendant will fail to surrender because of the seriousness of the offence, the fact that she has other convictions, *her immigration status* and the lack of community ties’ (UMC, Hearing, Case 9).

In other cases, bail applications are not submitted to the court because the defendant is under immigration detention. The decision on bail during a criminal process is independent from that taken by immigration authorities under immigration powers. Technically criminal judges can bail the defendant even though he is subject to administrative detention. Even though the distinction between bail in criminal and immigration procedures seems clear, it is however not fully understood in practice. In fact, in one court-file that I reviewed, the lawyer did not apply for bail because he said that the defendant was subject to immigration controls (UMC, Court-file, Case 148). In another case, when the clerk asked for representations regarding bail, the prosecutor said that ‘bail is not an issue here. He is going to be deported anyway.’ The accused, Mr Johnson, was charged of assaulting a fellow detainee in a removal

centre. He was detained under immigration powers (UMC, Hearing, Case 13). This confusion may be in part due to the use of an identical term –bail- in criminal and immigration proceedings to refer to the release of the person subject to them. Further, while criminal justice and immigration authorities have different criteria to determine whether to grant bail, they are increasingly dovetailing as public protection and security considerations are becoming paramount for immigration staff and judges (LDSG 2009). For this reason, it is unfortunate that the criminal justice system’s jargon and terms have permeated the immigration ones (Bosworth 2011c).

Some of the reasons given by the magistrates and district judges for denying bail were:

- the defendant is not a citizen or has no legal status;
- the offence charged shows ability to move from one country to another, to access and use false documents, and to use sophisticated means of travel;
- the lack of travel documents;
- the defendant is likely to be deported or has been served with a deportation order;
- the defendant is a failed asylum seeker;
- the lack of community ties;
- the seriousness of the offence and the likelihood of a prison sentence; and
- the history of failing to comply with instructions.

These circumstances are considered ‘substantial grounds to believe’ that the defendant will fail to surrender and commit further offences on bail. While these circumstances may be deemed as proxy for assessing risk factors, they are assumed without subjecting them to an objective scrutiny. Further, in two of the cases reviewed, the reasons given were very loosely linked to the risk of absconding. In the case of Mrs and Mr Khawas referred to above, the district judge considered as one of the grounds for refusal the fact that the defendants ‘clearly claim asylum in the UK and not in the first safe port [Italy]’ (UMC, Hearing, Case 5). In another case, one

of the grounds for refusing bail by the magistrates was that the defendant ‘travelled without passport and [upon arrival to the UK] gave up [the] passport to a 3rd party’ (UMC, Court-file, Case 80). These are examples of how substantive considerations –for example, about the availability of a defence- are taken as justification for denying bail which should be based on procedural considerations.

In some instances, certain facts –such as the use of interpreters- are presented as indicators of lack of community ties and thus argued as grounds for refusing bail. In a hearing at Uxbridge Magistrates’ Court in the case against Mr Alensi, charged with facilitating the entry to the country of a group of Kuwaiti nationals, the prosecutor argued against his release in the following terms:

Facilitation is a very serious offence and should be sent to the crown court. [The people assisted] destroyed their documents in the toilet. *The defendant has links outside the UK and no links in the country. This is evidenced by the fact that he is using an interpreter.* Perhaps he is not even working (UMC, Hearing, Case 2).

Although Mr Alensi was a UK resident, the prosecutor inferred the lack of ties from the need to use an interpreter. This argument was however rejected and the accused was granted bail by the magistrates.

While the policy of restricting bail to those who pose a procedural risk may be considered as ‘facially neutral,’ it has a disproportionately adverse impact on a certain group: those without legal residence, settlement or a permanent job (Tonry 1997, 17). The practice of restricting bail to foreigners without links to the country explains the high rates of pre-trial confinement among them and has an impact on the composition of the prison population, particularly in London. While non-nationals represented 12.9 percent of prison population in England and Wales in April 2011, in London this rate was between 25 and 48 percent – depending on the prison- (International Centre for Prison Studies 2011). Nicolas Hammond (2007, 815) observes that the overrepresentation of foreigners in London prisons can be explained in part by the fact that they cover the courts of Heathrow airport which has a large

volume of cases involving foreigners accused of drugs and immigration offences. Because of their immigration status, they are more likely to be remanded in custody during the criminal process.<sup>317</sup>

Particularly in the case of immigration offences, certain features –such as the possibility to move from one country to another and the access to false documents- are interpreted by the courts as justifying the need for precautionary measures during the criminal process. In general, defendants behind bars are less likely to successfully battle their cases and more likely to be convicted than defendants who are free (Hagan and Palloni 1998, 376). So the decision on bail may also impact the outcome of the case.

#### **b. Protecting the borders: immigration imperatives and the decision to punish**

When cases are settled through guilty pleas, as Feeley puts it, the role of the judge is reduced to ‘ratifying’ the decision which was made earlier by the parties. Still, magistrates and judges decide on the type and tariff of the sanction. This judgement is often justified by immigration imperatives and a preventive rationale. For the offence of possession of a false passport, the leading case, *R v Kolawole*, refers to the need to pass ‘deterrent sentences’ in order to prevent the occurrence of this crime: ‘Due to international events in recent years and the resulting increase in public concern, deterrent sentences at a higher level [...] are justified.’<sup>318</sup> For facilitation, the leading case is *R v Le and Stark* which prescribes prison sentence in all but

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<sup>317</sup> For analysis on the impact of ‘foreignness’ on the rates of imprisonment among non-citizens in Europe, see Albrecht 1997, 73; Albrecht 2000; Melossi 2003; Guillén and Vallès 2003; Wacquant 2006; Silveira Gorski 2009; De Giorgi 2010.

<sup>318</sup> *R v Kolawole*, [2004] EWCA Crim 3047 [at 6]. According to this judgement, the appropriate range for this offence should be between twelve to 18 months imprisonment. This ruling superseded *R v Daljit Singh* [1999] 1 CrAppR (S) which fixed the penalty tariff at six to nine months’ imprisonment [at 490]. See also *R v Kishbentine* cit, where Pill LJ states that in case of document fraud, deterrent sentences are needed: ‘There is clearly a public interest in the maintenance of immigration control’ [at par 10].

minor offences and states that this ‘offence is one which generally calls for deterrent sentences.’<sup>319</sup>

Decision-makers in the court cases that I reviewed also referred to deterrence as the main aim of punishment. Before passing sentence, a judge at Isleworth Crown Court asked the prosecutor which sentencing principle was to be considered in the case, to which the prosecutor replied ‘deterrence’<sup>320</sup> (ICC, Hearing, Case 1). In many of the court-files the justification was that a ‘deterrent sentence [is] necessary to protect the integrity of the country’s border controls,’<sup>321</sup> that the ‘prevalence [of the offence] need deterrent sentences’<sup>322</sup> and that the sentence was necessary ‘to deter you and others.’<sup>323</sup> In another decision, the magistrates stated that ‘the abuse of the travel document system damages border controls of this country. We have a duty to pass a sentence to reflect this and deter others’ (UMC, Court-file, Case 35). In a case involving a person who failed to cooperate with the re-documentation process, the magistracy convicted him to eight weeks imprisonment and emphasised that ‘no other sentence [would be possible] to protect the immigration system which you tried to undermine. *Any other sentence would send out the wrong message*’ (UMC, Court-file, Case 165, italics added).<sup>324</sup> Both the conviction and the tariff imposed are generally justified by a (negative) preventive purpose: to impede the commission of the same act in the future by the accused or

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<sup>319</sup> *R v Le and Stark* cit [at 3]. See also Sentencing Guidelines Council 2005, 101. Similarly, for the offence of no document, the Court of Appeal in *R v Wang* cit stated: ‘These offences are prevalent and usually the sentence imposed should be intended to have a deterrent effect on others who may be minded to commit an offence of this kind as part of an attempt to enter the United Kingdom’ [at 10].

<sup>320</sup> He was probably referring to s 142(1), Criminal Justice Act 2003, which lists the purposes of sentencing: ‘(a) the punishment of offenders; (b) the reduction of crime (*including its reduction by deterrence*); (c) the reform and rehabilitation of offenders; (d) the protection of the public; (e) the making of reparation by offenders to persons affected by their offence’ (italics added).

<sup>321</sup> For example, in UMC, Court-file, Cases 124, 128, 129, 135, and 146.

<sup>322</sup> For example, in UMC, Court-file, Cases 118, 125, 133, 134 and 150.

<sup>323</sup> For example, in UMC, Court-file, Cases 151, 155 and 198.

<sup>324</sup> The motives given by crown court judges in their decisions were not available in files. There was only information about the sanction imposed in case of conviction.

by others. In this regard, deterrence means not only the threat of punishment, but its actual imposition.

While general prevention has historically featured as one of the aims of punishment and is, under current law, one of the purposes of sentencing, its deployment as a primary reason for the imposition of punishment is contested. The justification of a sentence on an individual case by broader policy objectives such as the reduction of crime and the protection of the borders is not only questionable on grounds of principle because of the violation of the principle of proportionality and commensurate desert that may result from it (von Hirsch and Roberts 2004, 643). It is also mistaken on empirical grounds due to the lack of evidence on the impact that judicial decisions have on the levels of offending. Research done in the field of sentencing and deterrence does not provide conclusive evidence linking severity of sanctions to reduction of future offending. Because of the highly selective process of substantive criminalisation and the very small portion of offences that reach the courts, the impact that one decision can have on the achievement of broader public policy goals is –if any- minimal (von Hirsch 1976, 61, 71; Ashworth 1989, 342; Ashworth and Player 2005, 826). There is little evidence on whether these deterrent measures have been successful so far to slow down immigration flows. Because the likely candidates for criminal punishment are generally unaware of these regulations and even if they are, many are prepared to take the risks, the impact may be minimal.

Generally, judges and magistrates argue in their decisions that these immigration offences have the effect of undermining the system of immigration and border controls and the integrity of travel documents.<sup>325</sup> That is, punishment is not justified because the prohibited conduct is harmful per se but because of its broader repercussions on the country's border controls. These criminal offences are victimless because they do not aim to directly protect

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<sup>325</sup> For example, UMC, Court-file, Cases 170 and 178. In relation to the offence of failure to cooperate, magistrates referred to the fact that this offence 'challenges the deportation system and repatriation of failed asylum seekers' (UMC, Court-file, Case 146).

individual human beings, but an impersonal entity. Therefore, their normative justification in terms of the harm principle, based on the requirement of concrete harm to human beings, remains weak (Ferrajoli 1989, 478; also Husak 2008, 159). In this regard, in a pre-sentence report in a court-file the probation officer justified these offences in the following way: ‘While there are no direct victims of the offence, illegal immigration has an impact on the whole of society and the community at large’ (ICC, Court-file, Case 24). Even though in recent policy documents the government has attempted to ‘personalise’ these offences through the introduction of the notion of ‘harm’ to the public and to the immigrant herself,<sup>326</sup> this aspect is not mentioned by the judiciary.<sup>327</sup> In a manifestation of what Eugene Kamenka and Alice Tay (1975, 138) call ‘bureaucratic administrative regulation,’ what is at stake in the imposition of punishment against immigration offenders is not a particular individual or community and the harm that the conduct of the former pose on the rights of the latter. Rather, the main aim pursued is the efficient running of immigration border controls and the efficient execution of these controls by enforcement officials. According to Anthony Bottoms (1995, 26) this is one of the features of ‘systematic managerialism’ in the criminal justice system.

Moreover, these offences presume that the prohibited conduct entails a danger which is not concrete, but remote, not actual but potential, and as such cannot be empirically verified. As an ultimate example of this, a sentence by a magistrate mentions that the offence of entering without a passport ‘puts the safety of the State in danger’ and thus is considered very serious (UMC, Court-file, Case 130). In many other decisions, the threat to national security –ie, terrorism- appears as recurrent justification for reprimanding these offences. Immigration crimes punish the mere disobedience to the law –a breach to an administrative

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<sup>326</sup> See ch IV.

<sup>327</sup> However, judicial decisions mention words such as ‘protection,’ ‘preservation,’ and ‘damage’ in a way that can be interpreted as an attempt to personalise or personify the non-personal object to be protected by these offences.

rule- which is linked by the criminal law to the potential for or risk of harm, not actual harm (Ericson 2007, ch 5; Zedner 2009). Appeals to a remote harm license the criminalisation of acts and omissions which are otherwise innocuous and harmless, and at most candidates for less intrusive measures.<sup>328</sup>

In all of the court-files that I reviewed, the decision mentioned the ‘seriousness’ of the offence: the offence is ‘so serious,’ the magistrates argue, that ‘no other method is appropriate,’<sup>329</sup> a ‘custodial sentence is inevitable’<sup>330</sup> and ‘no community order would be practicable.’<sup>331</sup> According to magistrates’ and judges’ arguments, this seriousness mainly lies on the ‘prevalence’ of these offences, their potential to undermine Britain’s system of border controls and thus the need for sentences that ‘deter’ potential offenders (that is, imprisonment). Section 152(2) of the Criminal Justice Act 2003 (CJA 2003) has limited the use of imprisonment to ‘serious’ offences that cannot be dealt with through a fine or a community sentence. Since the act was passed, however, the category of serious offences has been expanded by the courts in order to justify the imposition of custodial sentences (von Hirsch and Roberts 2004, 645). According to guidelines by the Sentencing Council, ‘The seriousness of an individual case should be judged on its own dimensions of harm and culpability rather than as part of a collective social harm.’ However –they state- in ‘exceptional local circumstances’ a higher sentence may be justified when ‘a particular crime is prevalent in [that] area and [the judges] are satisfied that there is a compelling need to treat the offence more seriously than elsewhere’ (Sentencing Guidelines Council 2004, 9). The courts interpret this to be applicable to them because Uxbridge Magistrates’ Court and Isleworth Crown Court, both

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<sup>328</sup> This is connected to the introduction of the logic of prevention or pre-emption in the criminal justice system, much discussed in recent criminology and criminal law literature. See among others, Steiker 1998; Zedner 2005; Zedner 2007; Harcourt 2007a; Ashworth 2009; McCulloch and Pickering 2009; O’Malley 2011.

<sup>329</sup> For example, UMC, Court-file, Cases 52, 136 and 182.

<sup>330</sup> For example, UMC, Court-file, Cases 2 and 126.

<sup>331</sup> For example, UMC, Court-file, Case 229.

with jurisdiction over Heathrow airport, receive a disproportionate number of these types of cases. The prevalence, and thus the seriousness, of the offence justify a custodial sentence.<sup>332</sup> The consideration of immigration crimes –particularly, the arrival to the country without a passport- as ‘serious’ and grave offences by the judiciary sharply contrasts with the assessment by enforcement and prosecution authorities. As I showed in chapter IV, these offences are largely deemed as minor offences and therefore the bulk of them are dealt with through executive removal.

The choice of sanction is also determined by the immigration status of the convicted defendant as those without ‘community ties’ are not candidates for non-custodial sentences. A pre-sentence report is ordered only for those defendants with residence and legal immigration status in the UK. In this report alternatives to imprisonment are considered and, based on it, the court should decide the most appropriate sanction. Because rehabilitation does not come into play in relation to people who are due to be deported,<sup>333</sup> non-custodial penalties are not contemplated for them. Pre-sentence reports were not ordered by the court for the defendants who appeared and were convicted by the magistrates’ courts and imprisonment was imposed on all of them.

The judges at the crown court ordered such a report more frequently, for 27 defendants. Most of them (23 defendants) were charged with the offence of assisting unlawful immigration. Of the 106 defendants charged with immigration offences before the crown court, though, only ten of them were given a suspended sentence with other conditions (such

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<sup>332</sup> The ‘custodial threshold’ is reached when the offence is ‘so serious that neither a fine alone nor a community sentence can be justified for the offence’ (s 152(2), CJA 2003). The notion of ‘serious offence’ and the offences falling in this category though is not unequivocal. There is no fixed criteria to rank ‘seriousness’ in the legislation and sentencing data (Francis, et al. 2001).

<sup>333</sup> While magistrates should decide whether to recommend deportation for convicted non-citizens, many are uncertain about these powers and usually they do not make such recommendation (Ashford 1993, 22). In one of the cases heard at Uxbridge Magistrates’ Court, the magistrates asked their legal adviser about this aspect and the chair noted: ‘I’ve never heard that before’ (UMC, Hearing, Case 5). The fact that they do not make this recommendation in many cases involving foreigners was one of the reasons for introducing the automatic deportation against certain convicted non-nationals in 2007.

as performing unpaid work or be subject to electronic monitoring). In one other case, the defendant was discharged. In all of these cases, the defendant had legal status in the UK – three of them were naturalised British citizens and another had indefinite leave to remain. In one of these cases, a Somali woman was accused of assisting the unlawful entry to the country of her mother, who applied for asylum and was given indefinite leave. The defendant pleaded guilty and her sentence was suspended for twelve months as recommended by the pre-sentence report. When passing sentence, the judge made clear that the offence was serious: ‘Usually this is an immediate custodial sentence.’ Subsequently he referred to the ‘exceptional circumstances in this case:’ ‘There was no commercial gain. [You experienced] pressure from your mother and your family. Second, you have made a credible effort to work hard here in the UK. The Court is not going soft, but there are here unusual circumstances in this case’ (ICC, Court-file, Case 15). Similarly, in a hearing against a Romanian man who in 2006 entered the country by deception –he claimed asylum under a false identity- the judge at the crown court considered in his decision the date of the offence, the fact that he is an EU national entitled to live in Britain and his ties to the country (he had a family and a work permit). He suspended the prison sentence and imposed a number of hours of unpaid work against Mr Dobrin after clearly stating: ‘Immigration laws are strict and anyone who breaks them faces [a] custodial sentence’ (ICC, Hearing, Case 11).

The judicial decisions reviewed above are difficult to defend from a normative perspective. In the first place, deterrence alone is a weak justification for punishment, particularly in the absence of empirical evidence which can prove the effectiveness of criminalisation in reducing the incidence of immigration crimes (Ashworth 2007, 998). Second, the principles of harm and last resort are compromised by the penalisation of conducts that have no direct victims and can be dealt with through less intensive and harmful interventions. Finally, the deprivation of liberty that results almost automatically from convictions for these offences is not substantiated by the protection of rights with equal rank.

These offences allegedly protect a risk of undermining immigration controls. While in the public interest, the maintenance of immigration controls –and even more a remote harm to them- is an insufficient justification for criminal punishment, especially if the sanction imposed is imprisonment (Ferrajoli 1989, 477). As a result, the sanctions are disproportionate because they bear no relationship to the blameworthiness of these offences (Husak 2005).

The resort to general and individual prevention as justification to penalise cases involving immigration offenders –both foreigners and citizens- should be considered against a background of increased social hostility towards illegal immigration and, in particular, ‘criminal aliens.’ ‘Immigration crimes’ bring together two of the most politicised topics in recent public discourse and policy-making: illegal immigration and crime (Tonry 1997, 2). In the context of high unemployment, depreciation of wages and budget cuts, an ‘exemplary’ punishment for those who appeal to deception and fraud to secure entry to the country and employment for themselves and for others is considered as appropriate and deserved.

## **V. Conclusion**

Formally immigration crimes are treated in the same way as any other case reaching the criminal justice system. This formal equality may be by itself a cause for concern. Bottoms and McClean (1976, 226) describe the usual business of a magistrates’ court as dealing with ‘unexciting offences handled in the ordinary routine way by court personnel who had seen it all before many, many times.’ Likewise, the practices of punishment in immigration-related cases are made of routines, rituals, repetitions and almost mechanical imposition of custodial sentences. In this regard, the dealing of immigration-offence cases by the criminal justice system looks like a bureaucratic, administrative-like exercise which contributes to standardising them, erasing the differences between them and the suffering of those accused. Defences based on the immigration status of the accused are seldom raised. Lawyers advise

their clients to plead guilty because of ignorance or negligence or for strategic reasons without considering the broader impact of a criminal conviction on their clients' ability to win their immigration cases. Magistrates and judges clearly differentiate the immigration from the criminal case and expeditiously 'administer' punishment by repeating similar formulas over and over, and calibrating the length of the sentence according to the particularities of the case.

Separating the criminal case from the immigration case makes decision-making less complex and easier as criminal justice actors need to only discuss whether or not a particular statute has been infringed. Likewise, putting aside or obscuring this broader context hinders the possibilities for 'mercy.' Prosecutors and judges make decisions in a social and political climate which favours harsher punishment. Thus, judicial inertia and an uncritical application of criminal powers result in the imposition of tough and exemplary sanctions. At the same time, the mechanical application of the law forecloses the possibilities to resist this 'punitive systemic tendency' in the form of moderating or even forgoing of sanctions (Steiker 2010, 41; also Lacey 2008; Bosworth and Guild 2008, 709).

In the same vein, no one questions the legality of immigration offences. Decision-makers explicitly endorse immigration policy goals and the use of criminal law to attain them. Individual wrongdoing is then considered in the light of the negative repercussions the aggregate of similar conducts might have on government policies to reduce illegal immigration. In practice the embracing of these policies by judges and magistrates has the effect of extending the exercise of immigration controls onto them. In relation to asylum adjudication by administrative courts, Robert Thomas observes: 'The decision-making context is [...] informed by a strongly authority based relationship between government and foreign nationals' (Thomas 2011, 16). This feature very much resonates with judicial decisions in immigration-crime cases. Some of the judgements quoted above emphasised the duty of the judiciary to harshly censure any attempt to undermine the state's powers to police its territory. For instance, in the case of Mr Hussain, the judge made clear that 'High courts consider these

offences very seriously. 'To protect the borders is important in this country' (ICC, Hearing Case 1). Criminal courts enforce immigration norms and to some extent judge who should be let in and who should not. These expressions and the position adopted by the judiciary are constant reminders of the extensive powers of the state over non-citizens and the latter's subordinate position. The mere fact of bringing unauthorised foreigners before a criminal court re-enacts and upholds the state's powers to grant or deny entry.

Bringing immigration issues to the criminal justice venue carries other difficulties. Contrary to the assumption that the criminalisation of immigration breaches results in more safeguards for immigrants who otherwise would be subject to less protective administrative proceedings, the practice shows that immigration offenders are not offered the full-fledged criminal procedure but a simplified version of it. Further, the formal equality between foreigners and citizens that governs the criminal justice process has disproportionately negative effects on the former who are rarely granted bail, more likely to be convicted for these offences and given custodial sentences.<sup>334</sup> In this sense, the observations by Steven Legomsky (2007) about the US are valid for Britain as well. He points to the asymmetric nature of the convergence of immigration and criminal law, in which only some aspects of the latter are imported (those related to criminal enforcement) but not others (procedural rights). Most importantly, criminal punishment does not substitute expulsion (Stumpf 2009, 1691). In many of these cases, after serving their sentence people convicted for immigration offences may be detained under immigration powers waiting for their deportation.

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<sup>334</sup> David Nelken explains the high rates of illegal immigrants accused of minor offences in Italian prisons by factors similar to those reviewed in this chapter: the lack of legal competence and assistance, and the reluctance by the judiciary to apply procedural possibilities for leniency in their favour –particularly the suspension of a prison sentence or alternatives to prison- (Nelken 2009, 308).

**CHAPTER VI: EXPLAINING THE ROLE OF CRIMINAL LAW IN THE CONTROL OF  
IMMIGRATION**

Soon after starting this project two central aspects became apparent. First, immigration-related offences –such as illegal entry, overstaying, deception, etc- are barely considered in parliamentary debates and scholarly discussions about the criminalisation of immigration. Second, despite their expansion in recent years, these offences are seldom used by authorities. Immigration crimes are considered as necessary corollaries of the immigration control system. Criminal sanctions for immigration breaches have been historically deemed as an enforcement mechanism which may be triggered when other sanctions are not effective, and as a deterrent. This may explain why there have not been any attempts to justify the enactment of immigration-related offences. The reasons for criminalising certain conducts, the terms in which offences are drafted, the consequences of making these conducts subject to criminal punishment, and possible alternatives are rarely examined in parliamentary debates. While policy papers have discussed the strategic use of criminal powers against immigration offenders following the introduction of the ‘harm matrix,’ such accounts have been chiefly motivated by cost and efficiency considerations. So a critical scrutiny of the role of criminal law in immigration enforcement still needs to be done.

Likewise, in academic circles the category of ‘immigration crimes’ is seldom considered. While the criminalisation of immigration has attracted a significant degree of scholarly attention (Calavita 2003; Melossi 2003; Wacquant 2006; Bosworth and Guild 2008; De Giorgi 2010; Cecchi 2011), the rise of immigration offences at the core of immigration laws has inspired much less reflection, particularly in Britain.<sup>335</sup> Criminal law literature has not considered immigration law as a branch in which ‘over-criminalisation’ takes place, despite the recent concern of criminal law scholars with this phenomenon.

In this chapter I will use the recent scholarship on (over)criminalisation (Lacey 2004; 2008; 2009; Ashworth 2008b; Ashworth and Zedner 2008; Husak 2008; Duff 2010a) to

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<sup>335</sup> See however, Zedner 2010.

account for the increased reliance on the criminal law to enforce immigration statutes. I begin by explaining the historical roots of a legal system like the British that has relied on criminal law for regulatory purposes. I go on to look at the main factors that have reinforced the criminalisation trend in the immigration field. Many countries have started to introduce so called 'immigration offences' to their legislation. Further, the criminalisation of certain immigration violations has been mandated by international and regional bodies –such as the UN and the EU. These global trends have reinforced the use of criminal law at home –and foreclosed the search for alternative options- in the context of increasing pressures on the Labour administration to bring down the number of immigrants coming to the country and, particularly, to prevent economic migrants from abusing the asylum system.

I argue that it is also important to look at the dynamics of immigration enforcement and the processing of immigration-related cases by the criminal justice system. From this perspective, the criminalisation of migration appears to be a mundane, bureaucratic and repetitive exercise of criminal powers geared by convenience and efficiency in delivering outcomes rather than to reflect a punitive rationale to sanction morally wrong conducts. Criminal law is one of various enforcement tools to achieve the effective regulation of border and inland controls. I finally reflect on the role of criminal law and punishment against immigration wrongdoers. Because the goal is to eject them from the country once they serve their sentence, criminal sanctions against immigrants are emptied of any normative function and are unjustified.

## **I. Criminalisation the British way**

As this dissertation has demonstrated, the inclusion of criminal offences in immigration statutes is not a new phenomenon. Legislation regulating the entry and residence of foreigners in nineteenth century Britain contained many criminal law provisions. Similarly, criminal

offences can be found in contemporary non-criminal legislation, such as competition, corporate, health and safety, and consumer laws. In fact, the trend to criminalise an ever expanding range of conducts is neither new nor confined to immigration legislation. Particularly in countries like Britain and the US, criminal law has historically served functions seemingly extraneous to its core task of censuring wrongdoing (Lacey 2004; Husak 2008). More recently, the use of criminal law to ensure compliance with societal goals and roles has been identified by some authors as a main factor behind the expansion of criminal law and the redefinition of its boundaries (Ashworth 2000; McSherry et al. 2009; Duff et al. 2010).

In this regard, Markus Dubber's (2005) *The Police Power* traces the origins of the power of the state to punish in contemporary societies –particularly the US. Dubber identifies a particular form of state power which derived from that exercised by a householder over the members of a household in feudal societies. Unlike the political or legal power which is premised on the idea of equality of rights among the members of a political community and heteronomy, police power bestowed wide prerogatives upon the head of the household over its members, who were inferior by definition. Because this authority was directed to maximise the welfare of the household, it was not constrained by principles of justice. The goal of protecting the household against internal and external threats justified almost any means, including the use of force against rebellious members. Following the consolidation of monarchical regimes in Europe, the king exercised the police power. Considered 'the father of his people,' the king wielded wide disciplinary powers over the macro-household, the kingdom, in order to maximise its welfare and wellbeing.

Dubber argues that this unconstrained, patriarchal, disciplinary power did not disappear but rather was entrenched in pre-modern criminal law statutes, particularly in so called 'police' or 'welfare' offences. These offences were considered necessary for the due regulation and domestic order of the kingdom (also Foucault 1991; Farmer 1996). The quintessential examples of them were the vagrancy laws which appeared in the criminal laws

of many countries in Europe –including Britain- (also Baratta 2002; Melossi 2002). They sanctioned a large range of vaguely defined conducts and minor breaches to the public ‘peace’ such as begging and vagrancy. Because the aim was to benefit the macro-household, the scope of the police power was infinite: anything and anyone could be policed. Coercion in this context was important to impose obedience which was in turn vital to ensure the smooth operation of the household (Dubber 2005, 73). According to Dubber,

[Police or welfare offences] have the same object: threats. They are measured by the same standard: efficiency. They take the same form: regulation. And they protect the same cluster of interests: public welfare (or ‘social betterment’) and social order, and the authority of the state to maintain them (2005, 151; also Dubber 2010b, 208).

Following Dubber’s description, it can be argued that immigration law is *par excellence* a site of police power which remains relatively untouched by legal and constitutional constraints. As Simon (1998, 585) claims, the imprisonment of refugees and ‘criminal aliens’ under immigration provisions reflects the vestige of a monarchical, unlimited power over non-citizens (also Schuck 1984). Similarly, some immigration offences –particularly those penalising non-compliance- share certain characteristics of the police or welfare offences, as spelled out by Dubber: their main object is to deter people from breaching immigration rules in order to ensure the smooth and effective operation of the immigration control system. In other words, the criminal law is a means for the regulation of immigration flows.

Dubber identifies ‘a residual, slippery, elusive, oppressively amorphous power [of the state] to manage people and things in order to maximise the welfare of a community’ (Loader and Zedner 2007, 143). Such power is manifested in the wide and unconstrained scope to criminalise conducts for regulatory purposes which puts criminal law ‘on the muddy border between political/legal and police power’ (Lacey 2008, 99). When comparing different criminal justice systems, Nicola Lacey (2008, 101) maintains that in countries, such as Britain and the US, where this unrestrained, disciplinary power has been absorbed by or undifferentiated from the legal power, criminalisation drives are less restricted than in

continental Europe, where this differentiation is clearer (also Hildebrandt 2009).<sup>336</sup> Moreover, Anglo-American legal systems contain few constitutional constraints on state's criminalisation powers (Lacey 2009, 940; also Whitman 2003). Unlike continental civil law countries which deploy criminal law only to reprimand the most serious wrongs, Anglo-Saxon, common law countries, she argues, commonly resort to the criminal law to regulate social life. Under such conditions, criminal law easily becomes a means to implement particular policies. In other words, non-moral, regulatory objectives are imprinted into criminal law, thus blurring the line dividing civil and criminal law (Lacey 2004; also Steiker 1997; Klein 1999; Sarat et al. 2011).

The existence of so called 'regulatory' or 'welfare offences' (Ramsay 2006) in British legislation is one of the expressions of the wide, regulatory scope of the criminal law (Dubber 2010b, 200; 2011b, 22). Many of them were introduced in legislation passed during the nineteenth century when arguably, without the threat of criminal sanctions, regulation would not have been possible to enforce (Leigh 1982, 12; Farmer 1996). In the context of industrialisation and faced with the need to regulate a new set of economic activities –and their repercussions on society, legislation was enacted imposing public duties which were backed-up by formal, criminal sanctions to ensure compliance. As LH Leigh (1982) explains, regulatory offences were not regarded as 'real' criminal offences and the courts considered them 'less than crimes,' regulatory offences or 'quasi-criminal' offences. The main purpose of these offences was to minimise danger to others by dissuading people and businesses from engaging in lawful activities in an unlawful way. The creation of a risk to others from the violation of this regulatory scheme triggered criminal liability. These offences did not require

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<sup>336</sup> Hildebrandt argues that in Medieval Europe –and Germany in particular- a clear line was drawn between 'police' and 'justice,' each subject to different regimes and limitations. Criminal law belonged to the domain of 'justice' where a number of legal rules applied. The domain of 'police,' instead, was 'based on the authority of the sovereign to command his subjects and seemed to be situated outside the realm of law' (Hildebrandt 2009, 53). Regulatory offences were part of the police ambit or the administration: they were not aimed at protecting public goods, but the integrity of the administrative order.

intention and strict liability applied (also Ramsay 2006). Leigh finds the origins of these offences in the law of torts because of their emphasis on prevention rather than censure.

## **II. Hyper-criminalisation revamped and the politics of immigration**

The last two decades have witnessed a resurgence in reliance on the criminal law as the government has sought to fix any social problem with ‘reactive, populist criminal legislation’ (Lacey 2004, 163; also Duff 2010a). This expansion of the ‘frontiers of criminalisation’ has been linked by criminal law scholars to the use of criminal law for regulatory, instrumental purposes. In particular, Ely Aharonson and Peter Ramsay (2010, 182) argue that the dominance of neoliberalism in social and economic policies has fostered the ‘role of criminalization as a mechanism of social ordering.’ Criminal law scholars have branded this phenomenon as ‘over-criminalisation’ (Husak 2008) and ‘over-punishment’ (Stuntz 2001; Steiker 2010). In the UK, the ‘legal tradition’ of overusing or misusing the criminal law to regulate social life in recent years prompted Andrew Ashworth (2000) to qualify English criminal law as a ‘lost cause.’ From 1997 to 2006, the New Labour government created more than 3,000 criminal offences. Put another way, during nine years in office Labour created twice as many offences as its Tory predecessor created in 18 years. Moreover, this has been an upward trend: while in 1998, 160 new offences were created, the number rose to 346 in 2000 and 527 in 2005 (Morris 2006; also Pantazis 2008). Most of these offences have been created to ensure compliance with public duties and to support the work of agencies in charge of enforcing such duties (Sparks and Spencer 2002, ch 1).

There is evidence, however, that many of the offences created by the Labour government are rarely, if ever, used. A recent consultation paper by the Law Commission

(2010)<sup>337</sup> found that most ‘regulatory’ offences are seldom used. Only 10 percent of those before magistrates’ courts are charged with regulatory offences, while the numbers are much smaller in crown courts where only between 1.5 and 2 percent of defendants are charged with these crimes.<sup>338</sup> Such under-enforcement means that an increasing number of people subject to these provisions are under ‘illusory or empty threats of criminal prosecution’ (Law Commission 2010, 8). In fact, it may imply that the creation of new offences conveys little more than a symbolic message that the government is taking care of a particular problem.

The recent increase in criminal offences in immigration legislation is a clear example of regulation through punishment –or the threat of it. While there has been a longstanding practice of criminalising immigration breaches in British legislation, in the last fifteen years there has been a noticeable change in the intensity of this criminalisation. Faced with pressure from the public, the media and the Opposition to bring immigration under control (Welch and Schuster 2005a, 408), the government introduced more legislation. As a retired Labour MP interviewed for this research mentioned, legislative hyperactivity has been a trend across government: ‘I think it’s a tendency in government, if there is a problem think about legislation [...]: to look for a legislative answer to what is not essentially a legislative problem’ (Respondent 12, 28/05/2010). A number of MPs<sup>339</sup> attacked the government for adding more legislation to an increasingly crowded and complex field, instead of solving administrative problems at the heart of the system’s backlog. These critiques were largely ignored as administrative solutions were more difficult and expensive to implement, and they were less glamorous in the eyes of the electorate.

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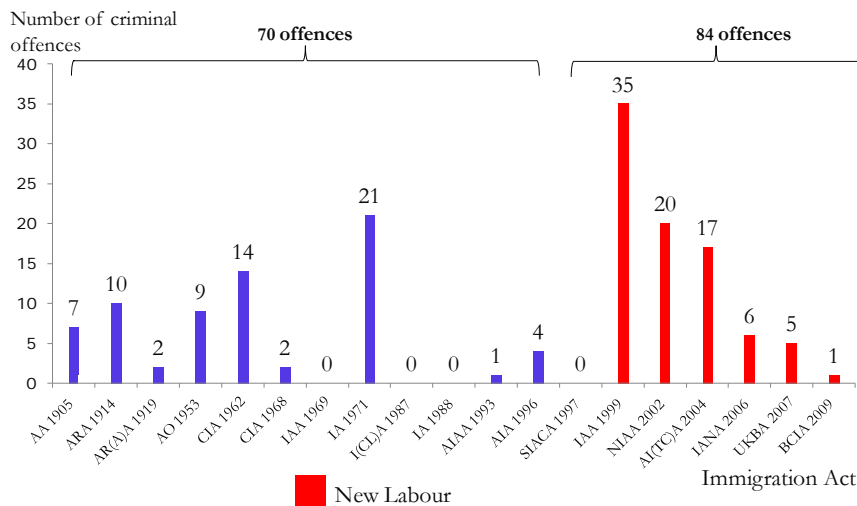
<sup>337</sup> This consultation paper was primarily aimed at reviewing the system of sanctions –and particularly the role of the criminal justice- in regulatory contexts. It follows the report prepared by Richard Macrory in which he calls for a limitation of the role of criminal justice in dealing with regulatory non-compliance and the creation of a more diversified penalty system (Macrory 2006).

<sup>338</sup> Excluding motoring offences.

<sup>339</sup> Eg, interventions by Neil Gerard (Hansard, HC Deb 24/04/2002, cols 387-8; 17/12/2003, col 1636) and Damian Green (Hansard, HC Deb 05/02/2007, col 601).

Parliament passed a piece of immigration and asylum legislation, on average, every two years. This legislative ‘productivity’ also impacted the number of offences being enacted. Labour passed six acts which created a total of 84 immigration offences. The preceding Conservative administrations introduced five immigration and asylum bills which created only five offences.<sup>340</sup> The period between 1997 and 2009 witnessed the fastest and largest expansion of the catalogue of immigration crimes since 1905, as illustrated by Graph 8 below.

**Graph 8: Criminal offences introduced in immigration acts**



In immigration –as in other fields- one of the ways to look tough is to create new offences. David Garland (1996, 459; 2001, 131) describes this reaction as ‘acting out:’ a form of denial or evasion by the state that, conscious about the impossibility of or difficulties in solving a particular problem –such as reducing crime, adopts more criminal legislation. Similarly, in his work on excess and incarceration, Ian Loader (2009; 2010b; a) draws on what he calls ‘contemporary forms of penal excess’ and states that responses to crime and insecurity in the US and Europe are characterised by a seemingly insatiable appetite for ‘a semblance of

<sup>340</sup> One of them being a partial amendment to s 25(1), IA 1971.

security' (Loader 2009, 245, 246). In response to people's demand for order, governments in the western world assume

[A] punitive, hyperactive and consumer-appeasing political posture which typically glosses over the complexities of lay sensibilities towards crime in favour of simplistic, risk-averse and electorally satisfying readings of 'public opinion'[...]. Government acts, in other words, as a consumer watchdog and champion, eliciting and giving effect to the demands for punishment and security of its always potentially disloyal customers (Loader 2009, 250).

In doing so, instead of seeking to temper those demands, Loader posits that these governments 're-enact' excess. This hyperactivity, he argues, is at the heart of the 'permanent state of crisis' of the English penal system and one of the causes of the sharp increase in the prison population in recent years (Loader 2010b, 351).

In this context, the government's appeal to criminal sanctions to enforce immigration rules had a 'presentational aspect:' to be seen as doing something about immigration law-breaking. The Legal Officer at the Immigration Law Practitioners' Association (ILPA) explained that:

[There was] a belief [in the government] that criminalising in certain areas, introducing offences and greater powers was going to make it more effective in terms of tackling abuse. I think there is also a degree [...] of thinking that [...] it is not just about tackling abuse, it is even more important to be seen to be tackling abuse. So creating immigration offences appeals to a certain body either of the political establishment or the electorate in that it looks at you as getting tougher and the rhetoric around this period has increasingly been about toughness (Respondent 17, 29/04/2010).

In the same vein, an academic involved in immigration policy-making during this period explains:

The imperatives to have immigration under control were so strong [...] that even had the criminal justice system been reformed to be decriminalised, I'm not sure if [it] necessarily would have affected IND [...]. The politics of immigration control is somewhat separate from the politics elsewhere. But clearly in immigration by creating new criminal offences, they won't go against the flow of what the rest of the government were doing. They were creating criminal offences everywhere (Respondent 16, 1/07/2010).

The government's response needs to be read in a context of increasing social anxieties about the steady dismantling of the welfare state, the erosion of social security protections and the restructuring of the labour market. The working class was particularly affected by these

changes. First, since the late 1970s they had been severely affected by the diminishing bargaining power of trade unions and their undermined capacity to protect workers. Second, many low-skilled jobs either disappeared as they started to be done by machines or were ‘shipped abroad,’ or were considerably downgraded by the depreciation of wages –in part as a consequence of the influx of economic migrants, particularly from eastern Europe in the mid-1990s- (Ruggiero 1997, 233; Garland 2001, 82; Reiner 2007, 151; De Giorgi 2011).<sup>341</sup> Faced with structural limitations to implement inclusionary social policies, the Blair administration sought to appease an important fraction of its electorate by promising a halt on immigration and by resorting to draconian measures to tackle the ‘unauthorized mobility of this ever more globalized proletariat’ (De Giorgi 2010, 151).

Further, the Legal Officer at ILPA explained the expansion of immigration offences in part because of the impossibility to move in a different direction: ‘What happened is that by starting on that road [...] the government has opened itself up to be [...] pushed further and further in that direction, and in a sense it can’t really stop because that looks weak’ (Respondent 17, 29/04/2010). The legal tradition to rely on the criminal law to enforce immigration legislation –mainly established in the IA 1971 but inherited from much older legislation- shaped later reforms and made it harder for politicians to justify any attempt to change the system in place by, for instance, decriminalising some offences (Spencer 2011, 165). Such a proposal was perceived as deadly for any government. This was even more so for the Labour administration, expected to be ‘soft’ on immigration. Even though the government has not decriminalised immigration-related offences, in recent policy papers it has announced a *de facto* decriminalisation of minor immigration offences (Home Office 2007a; 2010c). The statement in a policy document that ‘low level’ offences will not be criminally

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<sup>341</sup> Public opinion surveys show that UK-born, white Britons with lower levels of education and income are more likely to strongly prefer restrictive immigration policies (eg McLaren and Johnson 2007; Blinder 2011).

pursued is less controversial than passing a law which ‘downgrades’ certain breaches as administrative rather than criminal (Spencer 2011, 165).

This criminalisation drive is also apparent in other countries which have introduced similar offences in their legislation. The fact that this trend has been barely questioned and in some instances has been instructed by regional and international bodies have reinforced the criminalisation option in Britain and precluded alternative courses. Particularly in Europe, the criminalisation of many immigration infractions has been either directly mandated by EU norms or supported by EU institutions.

### **III. Globalising the criminalisation of immigration breaches?**

The ‘crimmigration’ trend is not unique to Britain (Stumpf 2007). Other countries with similar legal traditions have introduced immigration offences in their legislation. In the US, immigration offences preceded deportation. Criminal sanctions, including incarceration, fines and hard labour, were the first mechanisms to enforce immigration laws in the late 1800s (Stumpf 2009, 1711). From then on, the US Congress has incorporated many immigration offences into federal laws. Since 1929, unlawful entry is a misdemeanour and unlawful re-entry a felony.<sup>342</sup> Re-entering the US after being removed, deported or denied admission without authorisation by the government is an offence<sup>343</sup> as is the failure to depart from the country when this had been ordered<sup>344</sup> (Medina 2011, 95). Illegal employment and sham marriage were made criminal offences in 1986 and 1990, respectively (Medina 1997). Other offences related to immigration status were created in 1996 (such as driving above the speed

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<sup>342</sup> 8 USC Sec 1325(a), US Code.

<sup>343</sup> 8 USC Sec 1326, Ibid.

<sup>344</sup> 8 USC Sec 1253, Ibid.

limit to avoid an immigration checkpoint<sup>345</sup> and failing to cooperate in one's removal<sup>346</sup>). Assisting unlawful immigration and different document fraud offences also formed part of this catalogue (Legomsky 2007, 477; Medina 2011, 100). Many of these crimes were barely enforced until the mid-1980s when prosecutions started to go up. Between 1994 and 2000, there was a 34 percent increase in prosecutions for these offences and in 2000 they represented 14.5 percent of all the criminal cases commenced in that year (Demleitner and Sands 2002, 247). This rise is most noticeable in the cases of unlawful employment and document fraud against asylum seekers. Nowadays immigration offences account for 32 percent of total federal prosecutions (Legomsky 2007, 480; also Coutin 2005, 13).

Likewise, Canada and Australia have incorporated a number of immigration offences into their legislation. Besides the criminalisation of smuggling and trafficking (Grewcock 2009; Weber and Grewcock 2011), Australia punishes hiring illegal workers with imprisonment and fines. It also criminalises the harbouring of illegal entrants, the use of false documents and visas, and sham marriage.<sup>347</sup> Similarly, Canadian legislation contains a number of criminal offences, including offences related to document fraud, a general clause which punishes contraventions to any provision of the Immigration and Refugee Protection Act (IRPA), employing an illegal worker and escaping or attempting to escape from immigration detention.<sup>348</sup>

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<sup>345</sup> 18 USC Sec 758, *Ibid.*

<sup>346</sup> 8 USC Sec 1253, *Ibid.*

<sup>347</sup> Division 12, Migration Act 1958. A similar criminalisation trend is observed in some countries in the Asia-Pacific region: Schloenhardt 2008.

<sup>348</sup> Part 3, IRPA (2001). See Pratt 2005.

Even though countries with different legal traditions have not yet witnessed a great extension in the criminalisation of immigration laws, there is a certain ‘legal convergence’<sup>349</sup> in this field particularly in continental Europe (Lahav 1998; Albrecht 2000; van Kalmthout et al. 2007; D’Appollonia and Reich 2008), a development which has been explained as ‘part of the spreading of Anglo-American (legal) culture’ (Nelken 2010, 30). In Germany, irregular entry and residence is an offence under criminal law, albeit seldom used, with imprisonment of up to one year or a fine (Broeders 2010). The German penal code also criminalises smuggling. Since 2005, Greek legislation imposes criminal sanctions on irregular entry and exit with up to three months imprisonment and fines.<sup>350</sup> This offence is however not generally prosecuted unless the accused is a trafficker or uses false documents (Amnesty International 2010, 18). In 2008, Italy passed legislation criminalising illegal entry and aiding such entry. Illegal entry is punished with six months to four years imprisonment.<sup>351</sup> Being illegally in the country is also an aggravating circumstance for those convicted of an ordinary crime.<sup>352</sup> The Italian reform punishes with imprisonment of up to three years those who ‘let out an accommodation to a foreign citizen illegally residing in the Italian territory’<sup>353</sup> (Merlino 2009). In France, both illegal entry and residence are criminal offences, as is assisting an unlawful immigrant (Council of Europe 2010, 16). Illegal residence is also a crime in Finland and Cyprus. In the Netherlands, failure to comply with an order to leave the country after being declared ‘undesirable’ is a crime.<sup>354</sup> This is punished by a prison sentence of up to six months or a fine. Other European

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<sup>349</sup> There are signs of convergence in other aspects of immigration policies. Welch and Schuster noticed a ‘conservative shift’ in the treatment of asylum seekers and an increase in detention rates in US, UK, France, Germany and Italy (Welch and Schuster 2005b).

<sup>350</sup> Art 83, Law 3386/2005 (Immigration Act).

<sup>351</sup> Art 10*bis*, Law No. 94/2009.

<sup>352</sup> Art 1(f), Law Decree No. 92/2008.

<sup>353</sup> Art 5(1), *Ibid* (non-official translation).

countries, such as Germany, France and the Netherlands have introduced criminal sanctions for illegal employment (Martin and Miller 2000; Junkert and Kreienbrink 2008). Spain, on the other hand, has maintained a system of administrative sanctions for immigration violations and only imposes criminal sanctions in cases of human trafficking and facilitation (Monclús Maso 2009; also Calavita 2005).<sup>355</sup>

While recent examples in some European countries –such as the abolition of the death penalty and the embracing of human rights- point to a moderation in penal policy and a ‘resistance to punitiveness’ (Snacken 2010), the expansion of offences penalising immigration wrongdoing reveals a trend in the opposite direction. This trend to criminalise immigration infractions in many European countries is the outcome of domestic dynamics as well as regional and global developments. As unwanted flows of migrants have been portrayed as security, social and economic challenges for rich, western countries, the artillery to ‘pre-empt’ movements from poorer regions of the globe and fortify Europe’s borders has been expanded (Bigo 2005; Weber 2007; Aas 2011). Criminal punishment and ejection are the most stringent manifestations of state coercion in liberal democracies (Garland 1996; Bosworth 2008). It is not surprising then that in an era of ‘social panics’ about immigration (De Giorgi 2010, 154), the governments of these countries appeal to criminal law to deter potential migrants and punish those who risk their fate (Melossi 2003). By criminalising illegal status, nation-states send a powerful symbolic message to both would-be immigrants and citizens that they are increasing their grip on immigration flows.

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<sup>354</sup> Art 197, Dutch Penal Code. There is currently a proposal to criminalise illegal residence. See: <http://www.commissie-meijers.nl/commissiemeijers/pagina.asp?pagkey=144998&mode=read> (Last accessed: 15 November 2010).

<sup>355</sup> Art 318 bis, Criminal Code. While the scope of criminal law against migrants is limited in Spain, Spanish courts have interpreted this provision broadly, thus imposing sanctions on those who help family members and in other cases of ‘humanitarian smuggling’ (Martínez Escamilla 2009 *Derechos Humanos y Política Criminal: ¿Hasta dónde estamos dispuestos a llegar?*, 9).

This criminalisation trend is also largely influenced by external actors (Green and Grewcock 2002, 95). International organisations, such as the UN, have endorsed and even prescribed the use of criminal sanctions against people smugglers ‘when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit’<sup>356</sup> and against trafficking in human beings.<sup>357</sup> In Europe this trend is connected to the process of European integration and the consequent ‘Europeanisation’ of immigration regulation. In fact, the EU has been pushing for penal sanctions in many policy areas (Guild 2003; Guild and Geyer 2008). Early on in 1985, the Schengen Convention prescribed the introduction of ‘penalties’ against unauthorised crossing of external frontiers of the Schengen zone, carriers who transport undocumented migrants and ‘any persons who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the contracting parties.’<sup>358</sup> According to the Carrier Liability Directive which supplements such provisions, penalties should be ‘dissuasive, effective and proportionate.’<sup>359</sup>

However, it was not until the 2000s that the EU explicitly mandated criminal sanctions to deal with immigration breaches. This was first stated in 2002 in the Directive on Unauthorised Entry, Transit and Residence which prescribed that Member states should adopt appropriate sanctions against those who facilitate unauthorised entry, transit and residence of ‘aliens.’ Its Framework Decision further established that these sanctions should be ‘punishable by effective, proportionate and dissuasive criminal penalties.’<sup>360</sup> Later on in

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<sup>356</sup> Art 6(1), UN Protocol against Smuggling which prescribes the criminalisation of smuggling without subjecting that imperative to any exception. See Nelken 2010, for a comment.

<sup>357</sup> Art 5, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (‘UN Protocol against Trafficking’).

<sup>358</sup> Cfr arts 3(2), 26(2) and 27(1), respectively.

<sup>359</sup> Art 4.

<sup>360</sup> See, respectively, art 1(1), Directive on unauthorised entry, transit and residence and art 1(1), Framework Decision on unauthorised entry, transit and residence.

2009, the Directive on Illegal Employment established that, along with imposing financial penalties, Member states shall ensure that ‘knowingly’ hiring an illegal worker is a criminal offence when other aggravating features are present.<sup>361</sup>

The European Convention on Action against Trafficking in Human Beings prescribed criminal sanctions for a number of conducts concerning trafficking,<sup>362</sup> as did the Framework Decision 2002/629.<sup>363</sup> The criminalisation of trafficking though is distinct in some respects from other immigration offences. First, unlike offences such as illegal entry or passport fraud which are victimless, trafficking offences entail the infliction of harm on individual human beings. The offence aims to protect individuals rather than a collective or abstract entity, like the ‘immigration system’ or the ‘security of the state.’ As such the use of coercion, abduction, fraud, deception or abuse against someone for the purpose of exploitation are constitutive elements of the offence as defined by European Convention and the UN Protocol against Trafficking<sup>364</sup> (Hoyle et al. 2011, 316). Second, the use of criminal law in trafficking cases is directed at punishing serious moral wrongs (particularly, egregious forms of exploitation and abuse). In contrast, most immigration offences aid immigration enforcement when other sanctions are insufficient to achieve particular policy or regulatory goals. Trafficking is exempt from some of the principled critiques on immigration-related offences put forward in this thesis. In fact, the label of trafficking as an immigration offence remains contested (Moss 2011). In this regard, the distinctive features of trafficking offences show the difficulties in

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<sup>361</sup> Such as when the infringement is continued or is persistently repeated; involves a significant number of workers; involves exploitative conditions; relates to a victim of trafficking or involves a minor. Cfr art 9(1), Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, Official Journal L 168/24 of 30.6.2009.

<sup>362</sup> See arts 18 to 21.

<sup>363</sup> Art 1(1), Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, Official Journal L 203 of 1.8.2002.

<sup>364</sup> Cfr art 4(a) and art 3(a), respectively.

grouping together different ‘immigration crimes’ and analysing them as a homogeneous category.

A number of human rights international organisations have criticised this criminalisation trend. The UN Working Group on Arbitrary Detention has stated that ‘the criminalization of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows’ (Human Rights Council 2010, par 58). Likewise, the High Commissioner for Human Rights raised objections against the criminalisation of immigration violations (OHCHR 2009, 31). The Council of Europe Commissioner for Human Rights, Thomas Hammarberg, has recently launched a report in which he questions the compatibility of the use of criminal law to manage immigration with human rights norms (Council of Europe 2010, 38) and insisted that ‘immigration offences should remain *administrative* in nature’ (Hammarberg 2008, italics in original). Elsewhere international human right bodies have scrutinised domestic norms criminalising immigration status. In a recent judgement, the Inter-American Court of Human Rights stated that a provision in Panamanian legislation which punished the breach of a deportation order with two-year imprisonment was illegitimate and disproportionate, and hence the sanction imposed on the applicant violated his right to liberty.<sup>365</sup> The European Court of Human Rights (ECHR) has not yet examined the compatibility of criminal law sanctions to control immigration with human rights norms. The closest it came to considering this matter was in a case recently brought before the Court against Greece. In this case, the applicant, a Turkish asylum seeker, claimed that he was prosecuted for entering Greece illegally and using false documents. This person was ultimately acquitted for these offences. Therefore, the Court decided not to examine this aspect of the case.<sup>366</sup>

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<sup>365</sup> IACHR, *Vélez Loor v Panama*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of 23 November 2010. Serie C No. 218, par 172.

<sup>366</sup> See ECHR, *SD v Greece*, judgment of 11 June 2009, Application 53541/07.

In a context where the use of the criminal law has been expanded or globalised, scrutiny over the ‘frontiers of criminalisation’ of immigration seems vital (Lacey 2009). Unfortunately, the impact of human rights norms in state practices in this field –as in others- has been limited (Dauvergne 2008; Husak 2008; Bosworth 2011c).<sup>367</sup> Even if human rights legislation have narrowed sovereign powers towards citizens, very few of these rules can be imposed on states’ prerogatives over non-citizens.<sup>368</sup> In particular, the scope for human rights assessment of a state’s prerogatives to extend the domain of criminal law against non-nationals for violating their immigration status has been limited. According to the European Court, this is part of the ‘undeniable sovereign right to control aliens’ entry into and residence in their territory.<sup>369</sup> The Court has insistently established that states cannot label a particular act or omission as civil or administrative, rather than penal, in order to evade the procedural protections of the criminal law.<sup>370</sup> Further, in an *obiter dictum* the Court favoured the creation of criminal offences in the context of anti-terrorism as an alternative to the indefinite detention of terrorist suspects.<sup>371</sup> However, it has said nothing about the scope of state’s powers to turn certain wrongs into criminal offences. As such, this power remains weakly constrained and poorly regulated.

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<sup>367</sup> Some authors have criticised the punitive inclination of international human rights bodies which prescribe penal sanctions on virtually any human rights violation without considering principles of substantive criminal law and criminal responsibility (see eg, Pastor 2005; Aliverti 2007; also Sebba 2009).

<sup>368</sup> See however a recent landmark decision in which the Court recognised the right of third-country parents without legal residence to reside and work in the country of citizenship of their dependent children (ECHR, *Ruiž Zambrano v Belgium*, judgement of 8 March 2011, Case C-34/09, pars 42-4).

<sup>369</sup> ECHR, *Amuur v France*, judgement of 25 June of 1996, Application 19776/92, par 41; *Saadi v the United Kingdom*, judgement of 29 January 2008, Application 13229/03, par 64.

<sup>370</sup> See eg, ECHR, *Engel et al v the Netherlands*, judgement of 23 November 1976, Applications 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, par 81; and *Öztürk v Germany*, judgement of 21 February 1984, Application 8544/79, par 53. For a comment on *Öztürk v Germany*, see Duff 2007.

<sup>371</sup> In a leading case involving non-nationals suspected of terrorism who were indefinitely detained under the UK’s Anti-terrorism, Crime and Security Act 2001, the ECHR supported ‘less intrusive’ measures to address the terrorist threat that led to the detention of the petitioners, including the recourse to the criminal justice system through the creation of specific offences. Cfr ECHR, *A and Others v the United Kingdom*, cit, par 145.

#### **IV. The other side of criminalisation: the banality of everyday criminal law practices**

The extent of the global trend towards the criminalisation of immigration status and the symbolic appeal to criminal law in the fight on illegal immigration in domestic politics reveal a highly politicised, emotionally-charged exclusionary discourse. In this context, the criminalisation of immigration breaches is but one facet of what some authors have referred to as the criminalisation or securitisation of immigration (Welch 2003; Muller 2004; Malloch and Stanley 2005; Huysmans 2006; Brandariz García and Fernández Bessa 2009). There is however another side of this phenomenon which is far from the world of high politics and powerful rhetoric, and made up of the everyday practices of criminalisation. These are less glamorous and more ordinary exercises of power where decisions are shaped by convenience, pragmatism and efficiency.

In this version of criminalisation, immigration offences are merely introduced to provide enforcement officers additional ‘tools’ to facilitate their everyday job. In this context, these offences are brought in as ‘backups’ or ‘levers’ to enforce compliance, as part of a ‘presentational pack’ to enhance the role of immigration officers or simply to tackle evidentiary problems. These more mundane reasons behind criminalisation were articulated by UKBA policy and enforcement officials. A senior official at the Policy and Strategy Group explained that more offences meant more choices of intervention: ‘you can tailor your response to a particular case and you have a great range of deterrent [...]. It just helps us to do the job.’ He argued that the addition of new offences is inoffensive, even when they are barely, if ever, used: ‘Is it harmful to have offences that you either never use or don’t use very much? Once you have done the effort of creating, of putting them in the statute book they are not actively harmful even if they are not objectively, desperately useful’ (Respondent 14,

12/08/2010). In fact, enacting legislation in general, and criminal laws in particular, is relatively easy. It is fairly cheap and does not entail high political costs for the actors involved. Removing them is much more difficult for practical and political reasons (Husak 2008, 10). In the absence of constitutional limits to the production of criminal legislation, policy-makers are inclined to criminalise for pragmatic reasons, even though such a choice has slight chance of achieving any successful outcome. As Husak (2008, 34) nicely puts it, this easiness to create criminal offence has turned legislatures into ‘offense factories.’

Immigration offences created during the Labour government were of two types. The first group comprises offences which penalise the failure to comply with a specific duty, which can be termed ‘offences of disobedience’ (Dubber 2010b, 200). An example in point is the provision of section 35(3) of the AI(FC)A 2004, considered in chapter III, which enumerates a number of requirements which may be imposed by the Secretary of State in order to operate the removal of a person and impose a criminal sanction in response to non-compliance with them. Other examples are offences that punish the failure to attend and give evidence or produce documents before an immigration judge,<sup>372</sup> the failure to submit to medical examination by a detainee,<sup>373</sup> and the failure to supply information requested by the authorities by employers or financial institutions,<sup>374</sup> and by transportation companies.<sup>375</sup>

The second group is constituted of offences that have specific application in the immigration field and replicate existing offences. This is the case with deception and document fraud. While a number of deception offences were introduced in the Theft Act 1968 and the Theft Act 1978, and later on in the Fraud Act 2006,<sup>376</sup> the IAA 1999 includes a

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<sup>372</sup> Sch 4, par 8, IAA 1999.

<sup>373</sup> Sch 12, par 3, IAA 1999.

<sup>374</sup> S 137(1), NIAA 2002.

<sup>375</sup> S 34(1), IANA 2006.

<sup>376</sup> Ss 15, 15A, 16 and 20(2), Theft Act 1968; ss 1 and 2, Theft Act 1978; and ss 2, 3 and 4, Fraud Act 2006.

specific offence of deception to deal with asylum applicants.<sup>377</sup> Similarly, even though the FCA 1981 already punished the use of a false instrument,<sup>378</sup> the offences in the Identity Cards Act 2006 (IDCA 2006) were introduced to specifically address the possession of false identity documents.<sup>379</sup> The IA 1971 already included the offence of possession of false passport<sup>380</sup> as a summary offence punishable with up to six months imprisonment. However, this is barely used as illustrated by the low rate of prosecutions.<sup>381</sup>

While the IDCA 2006 is not an immigration act, the offences contained in it are frequently used against non-citizens using forged or improperly obtained documents, or documents that belong to someone else (Macdonald 2010, ch 14.77).<sup>382</sup> The preference for the offences<sup>383</sup> under the IDCA 2006 over those under the IA 1971 and under FCO 1981 in cases of document fraud is due to two reasons. First, the penalties of the offences under the IDCA 2006 are much higher (maximum of ten years imprisonment) than those under the IA 1971. Second, the offences<sup>384</sup> in the IDCA 2006 are indictable only, whereas the offence in the FCA 1981 is triable either way.<sup>385</sup> Hence, defendants charged with the former are sent straight to

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<sup>377</sup> S 24A, IA 1971 (s 28, IAA 1999). The reproduction of fraud-based offences in regulatory contexts has been identified as one of the causes of the expansion of criminal law in recent years (Law Commission 2010, 11).

<sup>378</sup> S 3, FCA 1981.

<sup>379</sup> S 25(1), (3) and (5) IDCA 2006.

<sup>380</sup> S 26(1)(d), IA 1971.

<sup>381</sup> Cfr Home Office 2001, Table 7.5; Home Office 2006a, Table 6.7; Home Office 2010b, Tables 3.11a and 3.11b.

<sup>382</sup> Before then, s 3, FCA 1981 was preferred (see ch III).

<sup>383</sup> Particularly, the offences of possession with intent under s 25(1) and (3).

<sup>384</sup> Excluding the offence of simple possession of a false, an improperly obtained or another's identity document without reasonable excuse which is triable either way. Cfr s 25(5) and (7), IDCA 2006.

<sup>385</sup> In English criminal law, offences can be summary only (that is triable only before magistrates' court), indictable only (triable only before crown courts) or hybrid (triable either way).

the crown court, less likely to get bail and more likely to attract harsher penalties (Wadham et al. 2006, 139).

Other immigration offences in this second group, such as assaulting a detainee custody officer,<sup>386</sup> and assaulting and obstructing an immigration officer,<sup>387</sup> reproduce those related to constables<sup>388</sup> and prison officers.<sup>389</sup> The creation of these offences is connected to the expansion of police-like powers to immigration officers and they were aimed to backup those powers. Even if they are rarely used, they provide immigration officers with leverage to enforce compliance. In fact, they were requested by operational officers who find it ‘helpful’ to have their authority backed up with a criminal sanction. As a UKBA official at the Policy and Strategy Group told me, they are also part of a ‘presentational pack’ which demonstrates that they are being ‘looked after in the same ways as their police colleagues’ (Respondent 14, 12/08/2010).

In this sense it is relevant to remember that, unlike other government agencies, the UKBA has retained its policy-making power and is therefore responsible for proposing, shaping and taking a bill through Parliament. Its role in the design of immigration policy is influenced by the agency’s enforcement capacity. New legislation and new offences are frequently motivated and shaped by its enforcement work. Hence, the agency is an important actor in –and factor of– ‘pragmatic criminalisation’ (Lacey 2009, 940; also Stuntz 2001). New categories of offences are proposed to facilitate the exercise of the agency’s work. A high-ranking official at the UKBA’s Criminality and Detention Group told me that many of the recently created immigration offences are the product of loopholes and evidentiary difficulties that UKBA staff encounter in the exercise of immigration controls: ‘we sometimes find

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<sup>386</sup> Sch 11, par 4, IAA 1999.

<sup>387</sup> S 3(1)(b) and (c) and s 22(1), respectively, UKBA 2007.

<sup>388</sup> S 89(1), Police Act 1996.

<sup>389</sup> S 8, Prison Act 1952.

through experience a gap in processes or a gap in law, and so we legislate and fix that. It's just through experience and through changes really' (Respondent 5, 16/09/2010). He told me that this was the case with the offence of document fraud. The general offence of fraud under the FCA 1981 was difficult to use in the context of immigration because of its narrow scope and the requirement to prove the double intention by the defendant<sup>390</sup> (Wadham et al. 2006, 141). Therefore, the agency was involved in the enactment of the IDCA 2006 because this act was considered important for immigration enforcement.

Behind the cold and pragmatic language of the policy officials who emphasise the role of immigration offences in the effective and smooth regulation of immigration lies a more retributive and punitive rationale for the criminalisation of these offences, particularly those involving fraud. An immigration barrister at Garden Court North Chambers articulated it in this way:

[The government has made] an absolutely fundamental statement that you [...] have to get people to tell the truth. And if they are not going to tell the truth, you are going to punish them. So I think they are trying very hard to engender an understanding that dishonesty does not pay in immigration terms. And I think that is partly because they have a problem here, as in many places, in just knowing who is here, you know, how many illegal entrants they have, where they are, you know, what is their true identity (Respondent 11, 29/04/2010).

More generally, making immigration breaches criminal offences has a broader symbolic function of drawing the moral boundaries of a political community. They function 'as a sort of "purifying filter" protecting the local and the national from threatening foreign elements' (Aas 2007, 288). This symbolic role is articulated in the image of the immigrant as abuser and cheat imprinted in recent policy documents. The targets are foreigners who, by appealing to fraud, 'abuse the hospitality' of the UK and 'cause harm' by 'living and working here illegally,' 'abusing our public services or private businesses,' or 'taking advantage of our free health services' (Home Office 2006b, 15; 2007a, 12; 2010c; d, 32). The criminal law is elicited, at least

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<sup>390</sup> Evidentiary difficulties were mentioned as one of the motives for introducing a civil penalty regime on carriers responsible for clandestine entrants and people without proper documentation. See ch III.

at a rhetorical level, to enforce an implicit contract that immigrants sign with the ‘people of the UK’ (Home Office 2008b, 3). A trivial breach of immigration law is then conceived as a more serious wrong.

In this context, ‘[t]he enduring exclusionary bent of the criminal law is exacerbated by the demands for public protection and rebalancing in favor of the “lawabiding majority” that are the hallmark of populist penal politics’ (Zedner 2010, 390). Because of their weak status as residents, as opposed to citizens, those who are let in owe the receiving society the privilege of being hosted; they are in debt and in ‘eternal probation’ (Kanstroom 2000, 1907).<sup>391</sup> They are, in Matthew Gibney’s (2009) term, ‘precarious residents.’ For that matter, breaches to their duties as good guests –epitomised by the violation of a civic contract- are sanctioned more harshly. The use of criminal law against immigration offenders for not living up to their obligations as guests –and their subsequent deportation- is a reminder of the line separating citizens from non-citizens and recreates the boundaries of membership (Anderson et al. 2011). Therefore, immigration offences are not merely regulatory. They are not only aimed at ensuring the good running of the immigration control system and to prevent the undermining of the immigration control system. They convey a punitive rationale and an element of blame against those who, by violating the boundaries of their status, engage in a breach of trust.

The motives reviewed above illustrate a less flamboyant, more pragmatic use of criminal law lying behind the expansion of formal criminalisation in recent years. Such an expansion in the law on the books, though, is not reflected in the actual enforcement of these offences. In fact, the everyday practice of dealing with immigration offenders is bound by strategic decisions and a discretionary exercise of powers which casts doubts about a one-dimensional trend towards increased (substantive) criminalisation.

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<sup>391</sup> In a similar line, Daniel Kanstroom argues that deportation is based on a contractual model in US legislation and case-law. It is a social control device on non-citizens who are conceived as ‘eternal guests,’ with limited rights and subject to expulsion. The consequence (deportation) bears no link or proportion to the cause (breach to the entry conditions). Its main goal is to return the individual to the *status quo ante* (Kanstroom 2000, 1907).

## V. On regulation and prevention: using criminal powers for immigration management

Criminal sanctions against immigration offenders are used primarily as threats, as the preferred choice to deal with them is through executive removal (Weber and Bowling 2004, 204). This is even more compelling in a moment of tight budgets and squeezing public services. In terms of the ‘benchmarks’ of the agency’s performance, removal numbers matter more than prosecution and conviction rates. A UKBA senior policy official explained to me that

[A criminal proceeding] is expensive, is time consuming, and if there is an alternative such as administrative removal, that is still very clearly our first preference. We do not want to fill the UK’s criminal justice system and prisons with foreign nationals whose offences are not very serious or very harmful (Respondent 14, 12/08/2010).

Another high-ranking member of the force at the Criminality and Detention Group articulated the preference of the agency for removals over criminal prosecutions for minor offences because such choice serves better ‘the interest of justice:’

If we embark in a prosecution route we’ve have to wait for the prosecution to be over before we can remove the person and the motives of the person is only about staying in the country anyway [...]. You know if the offence is not serious –these are victimless offences so there’s no victim- and we have to have this person out of the country immediately, well normally we will take that course because it serves the interest of justice better, probably. [...] [It] doesn’t serve the interest of justice particularly to take it through the criminal justice system where they may or may not get a serious penalty. We are not talking about the most serious offences (Respondent 5, 16/09/2010).

Expulsion should be the primary form of intervention against immigration offenders because the ultimate goal of the agency in these cases is to remove those with no legal status, rather than sanctioning their wrongdoing. The punishment attached to an immigration breach works chiefly as a backup to the administrative sanction. In this context, criminal sanctions have a secondary role to that of civil or administrative sanctions. According to Carol Steiker (1997,

784), the recast of the nature of civil and criminal sanctions as preventive reflects the dominance of consequentialist or utilitarian approaches in legal theory which ‘portrays them as related parts of a unitary scheme of state control of private behaviour.’ She argues that in this scheme criminal punishment is relegated to perform a secondary or reinforcement role of civil sanctions:

Just as economic analysis helped to shift conceptions of civil justice from compensation toward deterrence, so, too, it has begun to shift conceptions of criminal justice from retribution toward deterrence. [...] [Law and economics advocates give] the criminal sanction a role secondary to that of the civil sanction; criminal law works as a ‘backup’ to civil law to induce deterrence in situations in which civil sanctions are likely to prove ineffective (Steiker 1997, 785).

This observation holds true for regulatory offences in which criminal punishment reinforces the preventive role of the regimes underpinning these offences (Ashworth and Zedner 2011, 282). Likewise, the everyday practice of immigration offences reveals that criminal law is often used against foreigners in breach of immigration rules when immigration measures (the primary response) are ineffective or impracticable, in the same way that immigration measures such as removal or deportation are sometimes used against foreigners where the criminal law finds its limits.<sup>392</sup> The nature of the criminal sanction in the immigration arena does not only have a regulatory, preventive purpose. The rationale for the actual punishment of immigration wrongdoers is, as the magistrates and judges repeatedly emphasise in their decisions, deterrence.

While prevention of harm to others is a legitimate goal –and a duty– of the state and hence of the criminal law, prevention alone is a weak justification of criminal intervention on

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<sup>392</sup> This is evident in cases involving national security issues where the person subject to investigation cannot be criminally prosecuted and instead he is removed from the country for alleged breaches to immigration rules. For example, in April 2009 twelve Pakistani men were arrested following an anti-terrorist operation in Manchester. They were not charged with criminal offences but deported to Pakistan (see media coverage in O’Neill, et al. 2009). Other similar examples of how removal has been used against terrorist suspects in the US are described in Chacón 2008, 1861. Equally, one of my interviewees working on FNP policy at UKBA told me that they usually ‘get an immigration solution to a criminal problem.’ This happens when ‘the police is looking for us to prioritise a particular case or [someone] who doesn’t have any leave because that individual is known to be an offender or a low level offender in the community [...]. The police might ask us to shift that up in our priorities’ (Respondent 2, 18/05/2010). On the use of immigration enforcement for crime control, see also Quassoli 2004.

people's rights (Ashworth and Zedner 2011, 282). One of the purposes of any legal prohibition is to dissuade people from engaging in socially undesirable conducts and, thus, to orient their behaviour. While this is a pragmatic function of any social norm, by itself it is an unsatisfactory justification of criminal law (Ferrajoli 1989, 277; Duff 2011, 129). In the absence of strict limits –such as the requirement that the conduct being punished is a serious wrong, the proof of the agent's intention and knowledge, and the proportionality of the sanction or retribution- the person subject to punishment risks being treated as a means to achieve particular social goals rather than as a rational and autonomous agent. The use of criminal law and punishment on purely preventive grounds is contested even by consequentialist theorists who proscribe punishments which are not necessary or represent a misuse of the criminal law (Kadish 1967, 169). When the preventive aim can be attained through other less intrusive means, such alternatives should be favoured. Criminal regulation should be left for the most serious wrongs and be used as a last resort when other non-criminal measures have proven unsuccessful (Ashworth 2008b, 417).

While the aim of preserving the integrity of immigration controls can be achieved through other, less intrusive and punitive interventions, the resort to criminal law either as a threat to force compliance or as an alternative sanction when practical reasons frustrate removal represents a disruption of criminal law principles such as last resort, harm to others and proportionality (Husak 2004; 2008; Stumpf 2009; Duff et al. 2010; Duff 2010b). Criminal sanctions are not used to punish serious wrongs nor as last resort. In fact, the conducts that are being criminalised –and punished- are not considered serious offences; they are made crimes in pursuit of other means. What is at stake is preventing the arrival of irremovable migrants. A similar rationale is behind the criminalisation of aiders, facilitators, transportation companies and employers whose punishment is justified for the impact that their conduct has on the system of controls over immigration. By displacing criminal law principles for immigration enforcement imperatives, '[t]he movement of states to make people themselves

illegal shifts understandings of criminality' (Dauvergne 2008, 8). The main problem in using criminal punishment for immigration management is that the imperatives of the enforcement agency infiltrates the aims and purposes of the criminal justice system: it is not the crime in itself which is considered but the impact that the conduct at stake may have on the whole immigration system (Cancio Meliá 2006).

## **VI. Immigrants as criminal offenders: rhetoric, practices and symbolisms of criminalisation**

*To prohibit a number of indifferent actions is not to prevent the crimes which they may produce,  
but to create new ones.<sup>393</sup>*

While foreigners caught and removed by the state in breach of immigration laws are a small portion of the irregular resident population in the country, the proportion of those who are actually prosecuted and convicted for breaches to immigration laws is even smaller.<sup>394</sup> On the face of it, then, the criminalisation of immigration is not a generalised phenomenon as it is sometimes claimed. Enforcement is inconsistent and random, and thus highly unpredictable for those who are potentially accused of immigration offences. Even when these offences are not enforced, criminalisation carries a number of consequences.

At the rhetorical level, the re-shaping of immigration law under the banner of crime has the consequence of demonising migrants (Pratt and Valverde 2002). They are increasingly seen as criminals (Bosworth 2007, 208; Bosworth and Guild 2008; Dauvergne 2008). This is not only because of the borrowing of criminal justice jargon, methods and strategies for

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<sup>393</sup> Beccaria 1963 [1764], ch 41.

<sup>394</sup> A recent estimation of the UK irregular resident population for 2007 was 618,000 of whom 442,000 were calculated to be based in London (Gordon, et al. 2009, 8). In 2009, 67,215 people were subject to removal and voluntary departure while only 549 people were proceeded against and 433 were convicted of immigration offences (Home Office 2010b, Tables 3.1, 3.11a and 3.11b).

immigration enforcement. It is the potential use of criminal law –the prosecution, conviction and imprisonment- which has the most powerful effect in the representation of foreigners as cheats and abusers. Immigrants who violate immigration statutes are not only represented as criminal, dangerous and risky, but are also strictly speaking –in legal and institutional terms- criminal offenders. Making people criminal has the effect of increasing the pull of offenders, forcing people to resort to illegal means and making them more vulnerable to exploitation (Dauvergne 2008; Weber and Grewcock 2011). At a practical level, the fact that the criminal route is not followed does not mean that the person goes scot-free –as it may happen with minor, ‘ordinary’ criminal offences. Because of the juxtaposed immigration controls, the label of ‘immigration offender’ justifies other measures –generally, detention and removal. The criminal label in this sense reinforces and legitimises the need for administrative action and controls (Coutin 2005, 14).

When immigration-based offences are enforced, there is a further, symbolic implication of the criminalisation of immigration status (Valverde 2010, 228). They enable the representation of the immigration drama in the public stage of a criminal hearing –even when it is a silent drama since most of these cases are settled by guilty pleas. The very fact of being called, held into account and punished for entering the country by prohibited means uncovers the perils that those ‘begging’ for access are prepared to face to be in Britain. In doing so, these proceedings make possible the exposé of the receiving country as desirable, powerful and prosperous; and give the state the opportunity to display the last bastion of sovereign powers –the power to grant entry, and to punish and expel those who are not allowed in. As Bosworth (2011b, 592) argues in relation to the power to detain and deport, the power to punish so too poses ‘a virile, absolutist State, wielding great power over non-citizens’ (also Bosworth 2011c; Dauvergne 2004). The criminalisation of immigration status makes apparent the importance of entitlement to enter and remain in certain nations. In the context of increased criminalisation, the ‘accident’ of being born in the global south is reasserted as a

moral, political and legal handicap which precludes those unfortunate ones from enjoying the rights reserved to the citizens of prosperous countries (Dauvergne 2008, 17) and licenses the use of state coercion against those who challenge the boundaries of their status.

While descriptions of criminalisation practices generally take as their point of departure appeal court cases (eg Bye 1999; Webber 2008), the enquiry into everyday practices of prosecution and conviction of immigration defendants, though, shows a much more mundane, bureaucratised, dull and far less glamorous exercise of state powers. Those who are detained, charged and brought to a criminal court for violating their immigration status are more often than not subject to an uncontested criminal process in which it seems that there is nothing to discuss, evidenced by the speed of the hearings and the concise volume of the court-files. In this regard, the role of the judges and the criminal justice more generally is to literally 'administrate' punishment. These cases often go unnoticed. While some of them do reach the courts of appeal and set case-law, they are a minority.

The managerial or administrative approach underlying the immigration cases reviewed looks like the actuarial model theorised by Feeley and Simon (Feeley and Simon 1994; 1992; Feeley 2004; 2006) or the 'new mode of bureaucratic management of crime' diagnosed by Harcourt (2003, 106). As a consequence of the 'administrativisation' of the criminal procedure, immigration-based cases are predominantly handled through a downgraded criminal process in which some of the procedural guarantees germane to a criminal trial are diminished or slashed off (Greenspan 1991, 49; Duff et al. 2007; Ashworth and Zedner 2008). As Ashworth and Zedner (2008, 39) explain, '[t]his managerialist tendency is particularly dominant at the lower end of the tariff where the claim to normality is most plausible. Here, censure and hard treatment become less appropriate than the manipulation of costs or disincentives.' This model that has transformed the criminal courts, paraphrasing Husak, into 'sentences factories' is squarely fitted to 'process' the irrelevant, petty illegality of outsiders.

## VII. Conclusion

As Michel Foucault (1977) famously argued, criminal law has not always been the outcome of principles elaborated by Enlightenment thinkers. The dark side or authoritarian aspect of criminal law has been a constitutive part of it, rather than its perversion (Ericson 2007; Norrie 2009). An element of unaccountability and ‘unlawless’ has been inherent to the formation of modern criminal law conceived as both a control device and source of protection for those affected by state coercion. This ‘dark side’ is exemplified by the extensive and unconstrained power that British lawmakers have historically had to criminalise an extensive range of conducts. In turn, this is reflected in the deployment of criminal punishment –or the threat of it- for purposes other than retribution or moral condemnation. While the goals of criminal punishment have never been absolutely ‘pure’ (Garland 1990; O'Malley 1999), a quick glance at the history of criminalisation in Britain shows how utilitarian aims –particularly deterrence- were behind the broad use of criminal law for regulatory purposes.

These early developments are linked to more recent trends of excessive enactment of penal legislation. One of the consequences is the enlargement of criminal provisions to police the compliance with immigration norms. I want to draw attention to two fundamental problems in using criminal law to regulate immigration. Firstly, the great gap between formal criminalisation (the expansion of criminal offences) and substantial criminalisation (their actual enforcement) reveals the recurrent appeal to criminal legislation for symbolic and deterrence purposes. It can be argued that with the criminalisation of immigration violations there is an ‘upgrade’ of such breaches (formal condemnation). Their under-enforcement however suggests the opposite. For most immigration offenders, criminal punishment is more than anything a threat unlikely to be realised.

Further, ever increasing criminalisation with limited resources (police, prosecutors, judges, defence counsels, etc) means that those caught in breach are subject to substandard

proceedings: access to poor legal defence, lack of knowledge about immigration and asylum law by police and practitioners, high incentives to plead guilty or to accept a caution, and subsequent removal. The government has recently launched a pilot to divert cases of document fraud from the criminal justice system through ‘simple caution.’<sup>395</sup> This proposal was not motivated by concerns about the pernicious effects of criminalisation. Rather its primary objective has been to reduce the burden on the criminal justice system and prison estate and facilitate removals. Both the ‘administrativisation’ of the criminal process in immigration-related cases and the diversion of some of them from the criminal system seek to manage an increasing number of cases in a swift, effective way.

Secondly, in the cases in which these offences are used and the defendant is convicted, the purpose of punishment remains unclear. It is certainly not to reintegrate the offender, since she is usually due to be expelled. Neither is the aim to incapacitate or discipline her. The society that punishes a foreigner for violating the boundaries of her status does not expect her to become a good member of it, but rather the opposite. The purpose is to expel this person from the community (Bosworth 2011b). Criminal punishment is then redundant and unfit to deal with immigration offenders. In the case of refugees, it is also against international and domestic law. The actual role of criminal punishment in relation to the individual offender is emptied of content. It can only play a more general function of (re)establishing the normative force of the violated norm (in positive terms) or as a deterrent for others (in negative terms). But are they enough justification for imposing criminal sanctions?

The problems outlined above suggest that immigration crimes are not simply ancillary powers, nor are they inoffensive, harmless tools that only serve symbolic and political purposes. Even if they are not used, they ‘create’ crime and thus a pull of potential offenders liable to administrative or criminal sanctions. They license the use of coercive force with

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<sup>395</sup> In order to be eligible, the individual has to admit the charge and accept voluntary removal. The offence forms part of the person’s criminal records. Cautions are being extensively used in recent years as a means to unclog the criminal justice system (Duff, et al. 2007; Ashworth and Zedner 2008).

limited procedural safeguards, they are disproportionate to the 'wrong,' and their normative justification remains weak. In fact, in the case of people subject to removal or deportation imposing punishment does not serve retributive, incapacitating, or rehabilitative aims.

## CONCLUSION

In this thesis I have analysed the role of the criminal law in the immigration field and the different ways in which the two regimes converge. The banner of ‘immigration crime’ is certainly broad and therefore presents a number of challenges for researchers. It encompasses many offences with different features which are difficult to group together for analytic purposes. Further, foreigners using fraudulent documents are sometimes criminalised under offences that are part of non-immigration acts –such as the IDCA 2006. Even though these crimes are not strictly speaking ‘immigration offences,’ because they criminalise identity fraud they may be regarded as immigration offences. The purpose of this work has been to find common grounds for understanding the function (or functions) that the ‘hybrid system’ of administrative and criminal sanctions has served historically and in present conditions. In doing so, I have addressed immigration offences both as a general category and in relation to particular crimes.

As the literature on the criminalisation of immigration shows, states from the economically developed west are increasingly deploying punitive measures against the ‘hordes’ coming from the global south. Low-skilled, poor, non-white immigrants are portrayed as security threats to the country’s culture, identity and welfare. Yet, this ‘macro’ or ‘grand’ analysis or theory needs to be grounded in the concrete and specific setting in which this phenomenon is taking place. The criminalisation trend is rooted in legal, social and historical factors. In Britain, the shape of today’s immigration system is the product of a long struggle to define its identity as a society *vis-a-vis* the outside. The post-war years are particularly key to understand the mechanisms put in place to enforce such a boundary –including the appeal to criminal law.

At the same time, the criminalisation of immigration is not a straightforward phenomenon. It is neither new nor generalised. While there is not much information about the actual use of criminal sanctions against immigration law-breakers in the pre-1900 period, evidence tend to suggest that these have been very rarely used until the 1980s, with the

exception of overstaying and the failure to observe the conditions of a leave (Home Office 1985, Table 21; also Porter 1979, 4; Dummett and Nicol 1990, 161; Bloch and Schuster 2005, 494). Only since then, have the enforcement of both administrative and criminal provisions started to rise, particularly against people seeking asylum. However, it was not until New Labour came to office in 1997 that the powers to prosecute, detain, remove and deport immigration wrongdoers were more systematically used.

### **I. Immigration offences as the punitive regulation of the poor**

Criminal law provisions have traditionally been inserted into immigration laws as backup sanctions. In this vein, immigration offences have historically served deterrent and regulatory purposes. Immigration crimes are part of what Ramsay has termed ‘regulatory public welfare offences’ for which punishment does not serve a retributive function but acts as a deterrent for causing harm or creating a risk of harm to abstract or collective entities –as opposed to individual victims- (Ramsay 2006, 50). They resemble in many respects the ‘police’ or ‘welfare’ offences described by Dubber as an early manifestation of what he calls the ‘police power’ (Dubber 2011b, 22). Even though in recent years the catalogue of immigration crimes has incorporated many offences that may not fit the regulatory model of criminal law –such as the assault of an immigration officer or trafficking-related offences- the role of criminal law in immigration enforcement remains primarily regulatory in nature.

The category of regulatory offences is controversial as these offences have not been clearly defined (Ashworth 2000, fn 12; Dubber 2005, 129). Still, a number of criminal law scholars have identified certain characteristics that may distinguish them from ‘true,’ ‘core’ or ‘paradigmatic’ crimes. In his work on over-criminalisation, Husak (2008, ch 1) divides the criminal law into a core and a periphery. The core is formed by crimes against the person and property, and the periphery is populated by an array of vaguely defined offences which he

classified for analytical purpose into three groups: overlapping offences, crimes of risk prevention and ancillary offences. According to him, some of these ‘peripheral’ offences compromise various principles of liberal criminal law, because they criminalise trivial harms, they lack the *mens rea* requirement, and they shift the burden of proof. Many regulatory offences fall in the ‘periphery’ of the criminal law as outlined by Husak (Ashworth 2000, 228). Victor Tadros (2007, 16) excludes regulatory offences from his general theory of criminal responsibility because they ‘do not carry with them any strong stigma, or often any great punishment’ (also Tadros 2010, 164). Similarly, Ashworth and Zedner (2011, 282) differentiate regulatory offences from other parts of the criminal law based on the function that each serves: ‘[in the former] it is not the seriousness of the wrongdoing that bolsters the case for criminalization but rather that of coordination and regulation of activities.’

I agree with these authors that the use of criminal law to regulate certain spheres, such as health and safety, environment, industry and finance, differs from the function of criminal law, for example, in punishing inter-personal violence. In the former domain, ‘what is regulated could be described as performing a legitimate activity in an illegitimate way’ in order to minimise danger and ensure fair practices (Ashworth 2008b, 420; also Ashworth and Zedner 2011, 282); while in the latter, the conducts subject to condemnation are in themselves morally wrong and the purpose of punishment is censure. In this regard, I have argued that the function of criminal law in the context of immigration is *predominantly* regulatory. Its main function is to make possible the smooth and effective enforcement of border controls and immigration regulations.

I have also argued that immigration offences play a distinct function in the reassertion of membership boundaries through punitive state coercion. Underlying the criminalisation of immigration breaches is the idea of a breach of the social contract. Criminal law is deployed to enforce that contract by punishing the foreigner for not abiding by the rules and failing in her obligations to the host society. This appeal to the criminal law represents ‘a reversion to

traditional visions of the social as unified, consensual and authoritative, and to traditional sovereign state strategies to reinforcing them' (O'Malley 2001, 94). The idea of the existence of a unified 'community of shared values' which should be guarded and protected against outsiders –be they the under-classes within or the aliens from outside- has been historically used to legitimise the exercise of state powers to punish and exclude (Aas 2007; 2011; Anderson et al. 2011, 554; Bosworth 2011b). This contractual conception has dominated recent government attempts to justify punitive measures such as deportation and punishment.

Hence, the role of punishment in immigration enforcement cannot be completely assimilated to its function in regulatory law. Criminal provisions in the latter are broadly speaking introduced to force private businesses or individuals to comply with (public) standards and regulations for safety or other public interest reasons. Instead, immigration regulations are entirely part of the public sphere. Criminalisation in the immigration regulatory framework is not merely regulatory, but is embedded in the exercise of sovereign state power to punish and exclude. Thus, the crucial function of punishment is to '(ex)capacitate' non-members, as opposed to incapacitating or reintegrating. Locating these concepts in the regulatory state framework elaborated by Braithwaite (2003), immigration offences seem to be closer to the regulation of the poor, through mainly punishment or punitive measures, than to the regulation of businesses. Within the business regulatory enforcement, criminal prosecutions are barely pursued and the crimes of the powerful are usually dealt with through various 'soft' control devices, such as mediation, restitution, revocation of licenses and other forms of regulatory strategies. The hybrid system of immigration and criminal sanctions shares features of both regulatory regimes but it is ultimately aimed at (punitively) exclude foreigners.

## **II. Contingency, discretion and the importance of membership in the interface between immigration and criminal laws**

The appeal to criminal law by enforcement agencies is mainly justified by immigration imperatives as criminal prosecutions are initiated only in certain specific cases. Actual immigration offenders –those who end up being prosecuted and eventually convicted- have done nothing different from those who are removed straightaway. The first group is not constituted by particularly serious offenders: what they did and for what they are being sanctioned is essentially the same prohibited act as the one committed by those dealt with by the administrative route. They are double-punished simply because they are harder to remove. Further, the first group is much smaller than the second one. Substantive criminalisation is therefore a relatively infrequent and selective phenomenon, triggered by pragmatic and disparate considerations rather than by a politically orchestrated decision to put more immigrants behind bars. In other words, the prosecution of immigration offenders – particularly those accused of document fraud- is an opportunistic use of the criminal law, and does not seek to castigate wrongdoing.

The decision-making process in cases involving immigration offences and its outcome are clear examples of the contingency of crime and criminalisation: what is in fact a crime and who are the offenders largely depends on the process of definition and the actors involved in the labelling. In this respect, Lacey (1995, 21) writes that ‘No unified set of principles constrains the range of discretionary powers which determine the course of a defendant’s progress through this ideologically central path of criminal procedure.’ In the case of immigration, the choice of criminalisation is made even more ‘artificial’ by its unpredictability and highly discretionary nature.

While the analysis of the practices of punishment shows that they have as main targets foreigners without legal status, immigration laws are also used against legal residents and citizens –particularly, naturalised British citizens aiding their relatives. As documented by the cases that reach the criminal courts, many of those nationals who are caught have been

immigrants themselves. They are blamed for undermining immigration imperatives and so the ultimate goal of their prosecution and punishment is to bring down illegal immigration. As in the case of undocumented immigrants, what is at stake is not the criminal wrong as such but the impact that their conduct –facilitation- has on the overall system of immigration controls.

An important difference between the (foreigner) undocumented immigrant and the (citizen) facilitator is, however, that the former is subject to the dual system of criminal and administrative sanctions whereas the latter is not. This parallel system of sanctions makes it impossible to predict which regime will be activated in a particular case. Such uncertainty is further accentuated by the wide margin of discretion held by enforcement officers and the instrumental use of the criminal law to pursue immigration enforcement objectives. In this sense, even though the institution of citizenship has been progressively eroded of its capacity to sort those who belong from those who do not (Soysal 1994; Dauvergne 2008, 101; Aas 2011, 339), it remains important to differentiate the intensity and scope of sovereign state powers exercised over non-nationals versus nationals.

### **III. The problems of criminalisation: are immigration offences different?**

Formal criminalisation of immigration breaches has a number of troubling consequences. Most importantly, it represents a departure from liberal criminal law principles, particularly last resort, harm, and proportionality of sanctions. Criminal law is used against non-serious, victimless conducts and the sanction of imprisonment on most immigration defendants is disproportionate to the wrong. Many of these offences do not require proof of fault and so the principle of culpability is compromised as well. More generally, the great expansion of these offences in recent years has contributed to the phenomenon of over-criminalisation described by some authors with all its worrisome consequences for the criminal law and those subject to it (Ashworth 2000; 2008b; Husak 2008; Duff 2010a). The main function of criminal

regulation in immigration is to dissuade people from ‘wrongdoing,’ that is, as a threat. When the threat is materialised and people are charged with and convicted of immigration offences, the judiciary generally justifies their decision by the need to impose exemplary punishments against those who challenge immigration rules so others do not follow the same track. The importance given to deterrence in the criminalisation of immigration offences and offenders reveal an unbalanced emphasis on an utilitarian rationale which in turn risks leading to an unprincipled exercise of state power (Ashworth and Zedner 2011, 303). More generally, as this study has shown, the justification of criminal punishment for purely preventive reasons tends to expand the frontiers of criminalisation and is therefore a reason behind recent immigration over-criminalisation both on formal and substantive grounds (Steiker 1998; Zedner 2009; Ashworth and Zedner 2010).

Even if formally criminalised conducts are not punished the expansion of the criminal law licenses punitive interventions against a whole population of so defined ‘immigration offenders.’ As such, ‘making people criminal’ has not only a symbolic effect. Most importantly, it has legal and institutional consequences for those so labelled as they are candidates for expulsion. When immigration offences are used, people deserving protection such as refugees and trafficking victims are at risk of being prosecuted and convicted for these offences. The cases analysed in this study reveal that these are not isolated ‘mistakes,’ but the product of a system geared towards controlling the mobility of undesirable migrants (Dauvergne 2008) or the ‘*illegalized* global underclass’ (Aas 2011, 137 italics in original). While according to the government the criminal law should be used against organised immigration criminality, and only those who cause the most harm –to society and to the foreigner herself– should be prosecuted, the cases that still crowd the criminal justice system’s dockets are what the immigration agency classifies as ‘low-level.’ As such, those who end up being prosecuted and, eventually punished, are largely immigrants and their relatives. Further, they are less likely

to successfully battle their cases and are equally more likely to be remained in custody and get a custodial sentence as a sanction.

It could be argued that the problems of the criminalisation of immigration breaches identified in this thesis are no different from those that affect the criminal law and its practice more generally. Over-criminalisation and the use of criminal law for regulatory purposes, the expansion of strict liability offences and the emphasis on prevention, the high percentage of cases settled through guilty plea and the erosion of criminal safeguards in the criminal process, and the disproportionate use of criminal law and imprisonment against the poor and the socially excluded are features that have been denounced by criminal lawyers and criminologists for many years. Some legal scholars have explained them as a departure from or a perversion of liberal law principles (Duff et al. 2007; Duff 2010b; Steiker 2010; Ashworth and Zedner 2011); others, as manifestations of the residual of an authoritarian, disciplinary power which constitutes the dark or illiberal side of the criminal law (Dubber 2005; 2011a; Ericson 2007; Norrie 2009).

Seen as part of this perversion or authoritarian side of the criminal law, immigration offences are one tool among many to enforce exclusionary policies against unwelcome foreigners –the outcast or under-class coming from outside. Immigration offences are though a small part of the artillery of (immigration) controls and they are deployed when the other devices find their own limits. As such, they increase the flexibility and scope of immigration law, a field which remains relatively unconstrained by legal norms and which authorises broad discretionary power over those subject to it (Simon 1998; Kanstroom 2004, 641). Peter Schuck (1984, 1) defines in stark terms this feature of US immigration law: ‘Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.’ Criminal (immigration) offences are part of immigration law and as such they contribute to exacerbate its pernicious features.

Because of the distinctive nature of immigration offences –they are part of both criminal and immigration law- they cannot be completely assimilated within other offences. The analysis of these offences thus should consider the regulatory scheme underpinning them and the specific function that criminal punishment is called to perform.

#### **IV. Managerialism and the administrativisation of immigration regulation**

While the use of criminal law for immigration enforcement is not new, how criminal punishment –or the threat of it- is deployed and administered is novel. The ‘administration of punishment’ against immigration offenders is governed by a managerial approach which embraces risk and harm as measurements of the seriousness of certain conducts and proxy for state action. As in the ‘new penology’ described by Feeley and Simon (1992; 1994), immigration offenders are divided up into low, medium and high risk categories in order to rationalise the use of the criminal law for immigration enforcement. The use of actuarial devices to identify the most harmful immigration offenders, such as the harm matrix, aim at achieving a certain political programme –the reduction of illegal immigration- (O'Malley 2002). Even though the practice of immigration enforcement is messier and more ambiguous than its depiction in policy papers, the appeal to these clear-cut actuarial categories gives the idea of a perfectly designed system of controls and legitimises enforcement actions.

Instead of being in stark opposition, the language and methods of actuarialism and managerialism are linked to the rise of penal populism in crime and immigration policies and debates. At the centre of the government’s immigration plans are a narrow policy objective (bringing down illegal immigration) and the proposal of practical enforcement strategies to achieve it. This effectively forecloses any discussion about the various other approaches to the same issue such as tackling the social and economic causes of irregular migration. As Harcourt (2011, 18, italics in original) explains, this cost-benefit type analysis offers a ‘common sense’

approach to politically controversial issues, thus, a ‘narrow objective [...] displace[s] political contestation, wrangling, logrolling, and debate, and it [...] impose[s], under the veil of neutral, objective, positivistic science, a *political outcome*.’ By representing immigration enforcement as a technical issue and emptying it from any political and moral considerations, the ‘bureaucratic management’ of immigration and crime (Harcourt 2007a, 16; also O'Malley 2004) hides the highly political and contested nature of immigration and its control. Thus it rules out alternative strategies that decouple immigration from control and enforcement.

The ‘instrumentally rational, morally neutral, knowledge-based, pragmatic solutions’ that characterise the managerial approach to control crime (Garland, 2001, 182) is embedded in an anti-modern rhetoric: a populist discourse which represents immigrants as the source of a range of social ills –from unemployment to crime- that in turn justify a ‘tough on immigration’ approach. In this context, the two trends are not contradictory, but intrinsically connected (O'Malley 1999; Zedner 2002). From this perspective, it is not difficult to link the cold, pragmatic language of the Home Office’s position papers and the bureaucratic processing of immigration-crime cases by the criminal justice system with the heated debates on immigration in the Commons and the tabloid media (Huysmans and Buonfino 2008). While they seem distant from each other, they ultimately pursue similar goals.

Further, actuarial terminology and strategies provide a ‘dispassionate management of population groups’ (Bosworth and Guild 2008, 712) and an ‘impersonal style of regulation’ (Matthews 2005, 187) which effectively neutralise the concern about individual suffering and placate resistance (Simon 1988). Bosworth and Guild (2008, 709) argue that this managerial discourse in immigration ‘effectively neutralizes the moral ambiguities of migration control. Rather than being treated as individuals with specific needs and experiences, foreigners are instead grouped together and managed collectively as a matter of administrative expediency.’ This approach precludes the consideration of the ‘individual wrong’ in itself with all its complexities and nuances. By judging immigration-crime cases as part of an aggregate, judicial

decisions assess them for their effects on broader policy purposes. Because these are considered as easy, unproblematic cases, they are dealt with through an impoverished criminal process which offers fewer constraints on punitive interventions (Pratt 2006, 134; Ashworth and Zedner 2008, 39; Zedner 2009, 43).

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In this thesis I sought to contribute to the body of literature on which I based my study: first, to the literature on the criminalisation of immigration by looking at one specific manifestation of this phenomenon from a socio-legal perspective; and second, to the criminal law literature on actuarial justice and over-criminalisation by analysing the challenges that the criminalisation of immigration poses to criminal law theory and by emphasising the parallels and intertwining in the two fields. One of the problems that has contributed to an almost total indifference to the use of criminal laws against non-citizens –specifically, through immigration offences- in academic circles is the seemingly disciplinary dominance of social scientists (sociologists, political scientists, and criminologists) in immigration studies and the retreat from this field of criminal law scholars.<sup>396</sup>

This epistemological division has been unhelpful for understanding the criminalisation of immigration as part of a broader phenomenon of criminal law expansion and for developing limiting principles in the use of criminal powers against immigration wrongdoers. The criminal law remains circumscribed by state boundaries and criminal law scholars have been focused on state criminal laws and its institutions (Valverde 2010; Farmer 2010b). Criminal law theory has been predominantly built on the idea of the ‘citizen’ as the main recipient of state protection through its criminal laws and the subject of punishment (eg Duff

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<sup>396</sup> See, however, the special issue of the *New Criminal Law Review* on ‘Citizenship and Criminalisation’ (2010, vol 13, issue 2) as a promising starting point.

2010a; 2011; Ramsay 2010).<sup>397</sup> Social changes brought by globalisation and the mechanisms put forth to police state boundaries should force a re-focus of the criminal law as a discipline.

In this dissertation, I attempted to breach these disciplinary boundaries by critically examining the use of criminal law in the enforcement of immigration laws from a socio-legal and normative perspective. I have argued that the criminal law has no role to play in the regulation of immigration. The use of punishment against those who breach the boundaries of their immigration status is moot in practice because the ultimate sanction against them is expulsion.<sup>398</sup> The goal of punishment is not to expiate a past guilt (through retribution); nor is it to prevent future wrongs (through incapacitation and rehabilitation). While deterrence appears to be an important consideration for policy-makers and judges, I have showed that there is no evidence that criminal sanctions serve preventive purposes in the cases most usually prosecuted. Indeed, the threat of punishment is unlikely to act as a deterrent for undocumented migrants either because many of them are unaware of these sanctions or because, even if they are, they will often choose to spend some time in a British prison to immediate return. Therefore, prevention remains a weak justification for punishment in these cases. Hence, the use of criminal law and punishment in immigration-related cases is unjustified in the light of the main theories of punishment. The chief purpose of punishment in immigration-related cases is ancillary and pragmatic: to facilitate the return of the accused.

Different from the system of criminal sanctions in the 1800s in which the foreigner in breach was penalised but allowed to stay and be part of the hosting community once she served her sentence, contemporary sanctions for immigration wrongdoers have a totally

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<sup>397</sup> See however Dubber 2010a.

<sup>398</sup> Interestingly, the Carlisle Committee –appointed to analyse the British parole system and to suggest changes– recommended the exclusion of foreign nationals liable to deportation from this system because their punishment has no rehabilitative purposes (Carlisle 1988, par 470). More recently, in a parliamentary debate about foreign prisoners in the UK, Conservative MP Philip Hollobone made the point that the number of foreigners in British prisons contributes to their overcrowding and thus undermines the rehabilitative aims of punishment for ‘British prisoners, who are likely to stay in this country for a long time.’ The government representative, MP Crispin Blunt added that rehabilitation of foreigners is ‘not a duty owed by the United Kingdom taxpayer to foreigners in the same way as it is owed to our own citizens’ (Hansard, HC Deb 22/06/2010, cols 55WH and 56 WH).

different aim. The hybrid system of immigration and criminal sanctions should then be modified accordingly in order to reflect the purpose it chiefly serves. Punishment is not only ineffective and fruitless to address immigration wrongdoing, it is also highly damaging to those caught by this dual system of sanctions. Echoing the EU Commissioner for Human Rights, Thomas Hammarberg, immigration breaches should remain administrative and immigration management should largely be regulated through other, non-penal means.

**APPENDIX: BRIEF ACCOUNTS OF THE RESEARCH PROCESS**

Since I started this research project, I have been interested in looking at the mixed, hybrid or dual nature of immigration offences. Even though the shape and focus of the project has changed considerably since I started, the very existence of these offences sparked my attention from the outset. Being educated in law in Argentina, a country with a strong continental European legal tradition, where immigration regulations are a branch of administrative law and therefore are completely separate from penal law, I found the notion of ‘immigration offences’ a curious legal specimen worth investigating. My legal interest was complemented by my personal experience of being an immigrant myself and my interest in immigration and citizens matters at a personal level. Even though, rightly or wrongly, I have barely felt any practical effects from these immigration provisions –perhaps due to my status as EU citizen and my educational and socio-economic background- I always felt attracted and morally obliged to be engaged in debates touching on immigration issues. My condition as a foreigner and my legal background certainly influenced the approach to the research project, its design and outcomes.

## **I. Evolving design of the research project**

From the beginning, the fieldwork stage was aimed at supplementing and enriching with empirical material the written text of policy documents and the understanding of the rationale behind the law. By looking at the concrete, practical reasons that guide and shape decision-making of the people that make and enforce the laws, I sought to critically scrutinise contemporary appeals to criminal law and the actual practices of punishment against immigrants. So besides looking at documental data (legislation, policy papers, official statistics, parliamentary debates, case-law, etc), I analysed court cases (both hearings and court-files) on immigration-related offences and conducted semi-structured interviews with government and non-government actors. Court data and interviews are important sources of information

beyond the written texts of official documents. Research based on 'near data' contributes to understanding the way the immigration enforcement system works in practice by contextualising and bringing closer 'distant data' or 'mute evidence' 'manufactured' elsewhere –secondary data- (Hodder 2003, 155; Daly 2011). Thus it serves the function of enriching the analysis of immigration legislation, policies and practices. Such qualitative data is also particularly important in this field where quantitative data is scarce and unreliable, as I explain below.

The design of the fieldwork phase was reviewed and modified according to the changing focus and emphasis of the research project. As such, it was not a 'one off' decision but an evolving process, as the project itself. While at the beginning the collection of empirical evidence was limited to conducting interviews with key actors, soon after finishing this stage it was apparent that such data was insufficient and that it did not provide a comprehensible account of the decision-making process in cases involving immigration offences. Critically assessing the function of these offences and how they are being used against individuals became essential. This was the main reason for extending this stage by looking at the criminal justice system and the processing of cases involving immigration defendants. In this sense, the interviewing process not only provided data rich in detail on the experience and perceptions of my interviewees, it also made me re-think, redirect and focus the project and its design.

My enthusiasm for undertaking an enquiry over immigration offences often stumbled upon sceptical reactions. A member of the UKBA finished an interview with his sincere doubts about where I would find evidence to draw any conclusions: '[This is a] difficult research because it's not entirely tangible in ways. It's quite difficult too, because where are you going to get data from, really?' (Respondent 5, 16/09/2010). A barrister with expertise in immigration offences crudely put it: 'there's no such thing as an immigration crime. It's a crime. Immigration crime is a sort of handy tag, but it is not different than any other offence' (Respondent 15, 28/04/2010). Likewise, a senior member of the CPS told me that there is

nothing different between the prosecution of immigration crimes and any other crimes: all are 'treated' in the same way and according to the same rules (Respondent 19, 14/06/2010). Many research participants and court staff did not appear to understand my interest on the subject, telling me there was little value in pursuing it. Such 'feedback' was discouraging at moments. But their reactions also challenged me to research and disentangle the troubling functions of criminal punishment to regulate immigration and to expose the perceived and seemingly unproblematic nature of immigration offences.

## **II. Interviewing the immigration elite**

I started the interviewing process in April 2010. I endeavoured to interview both practitioners and legal advocates and high- to mid-ranked officials at the UKBA in order to have accounts from both sides of the immigration/criminal law practice. Participants were invited through a letter which explained the research project and the purpose of the interview. Before starting the interviews, a brief explanation of the research was given. The questionnaire was tailored to each particular group of interviewees. Participants were selected through purposeful sampling (Maxwell 2005, 88) and snowballing (Bachman and Schutt 2007, 126).

The first stage consisted of identifying people who are qualified to provide information about immigration reforms and enforcement through purposeful sampling. I selected the first sample of interviewees from secondary data (such as parliamentary debates, immigration websites, newspapers, scholarly articles). I singled out from these sources those actors who have been closely involved in the debates about immigration and, particularly, immigration enforcement in recent years. Some of the participants were also suggested by my supervisor. For example, I contacted a criminal law barrister specialising in immigration crimes who presented expert evidence to the Parliament's Standing Committee on the UK Borders Bill 2007. I also ranked MPs according to their interventions during parliamentary

debates on immigration and asylum bills. The more they participated, the higher their rank. From this list, I selected a number of MPs from the mainstream parties (Conservative, Labour and Liberal Democrat). While I invited seven MPs and followed up my request by email and post, only one of them replied to my request and agreed to be interviewed.<sup>399</sup> The resulting sample was formed by criminal law and immigration practitioners and an MP. Most of the interviewees selected for the first round were practitioners (barristers and solicitors) and members of refugee and immigration organisations.

The second stage consisted of speaking to those people suggested by my initial interviewees from the first round of interviews. This technique of ‘chain referral’ or ‘snowballing’ not only facilitated the identification of key actors in a field where there are few people with knowledge or experience on immigration offences. It was also useful because it provided a degree of trust necessary to initiate contact, particularly important for accessing ‘elite subjects’ (Atkinson and Flint 2001; Harvey 2010). However, the value of these interviews was limited as those referred were likely to share the views of the ‘referee’ and have similar professional and ideological backgrounds. Most of the people who were contacted in the second and third round of interviews were academics and practitioners generally critical of the government’s approach to immigration. The homogeneity of the initial sample was a result of the method used to select participants –snowballing. People tend to suggest colleagues or people with similar professional backgrounds and likeminded. This is one of the weaknesses of snowballing:

Because elements are not randomly drawn, but are dependent on the subjective choices of the respondents first accessed, most snowball samples are biased and do not therefore allow researchers to make claims to generality from a particular sample’ (Atkinson and Flint 2001).

Given this selection bias and in order to make the sample of informants more diverse, participants from the immigration agency were sought. I was particularly interested in

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<sup>399</sup> Low level of responses is a common feature of research relying on interviews with MPs: Williams 1984.

speaking to people from the UKBA at different ranks and with different responsibilities (enforcement, policy design, etc) in order to have a variety of experiences and views. I initiated the contact with UKBA staff through a number of means. For example, my supervisor suggested a number of officials and put me in contact with them. I also directly got in touch with other officials using the agency's 'organigram.' I then initiated a chain referral within the agency as well. The UKBA officials interviewed for this study ranged from junior staff (in the Criminality Policy Team and Immigration Policy) to senior members of the force with management positions in the Policy and Strategy Group, the Crime Directorate and the Criminality and Detention Group; and an official in an operational position (the head of a Local Immigration Team). I also sought to interview caseworkers in charge of making decisions on immigration offenders. The head of the LIT passed on such request but it was refused. He explained to me that caseworkers are generally not enthusiastic about talking to 'outsiders' because immigration is 'a very sensitive area' and there is concern that information will be made public and trigger a scandal (Respondent 18, 10/06/2010).

In fact, contacting people inside the force was considerably more difficult than getting in touch with practitioners and academics. The access to officials in government bodies is in general more restrictive than to people with non-governmental affiliations. This is particularly so in the case of the police and similar law enforcement entities, such as the UKBA (Loftus 2009, 201). In gaining access to government officials, it was necessary to negotiate with gatekeepers (ie, personal assistants, administrators, etc). Even if they did not required any special procedure and an invitation with a brief description of the project sufficed, it was necessary to follow up the request closely. Reaching people inside the UKBA was also a long process because of the existence of many intermediaries who mediate and manage the contact with the official. For example, I sent my first request for interview to the Director of Immigration Policy in April 2010. I followed this request up insistently and had various negative responses. Three months later I was finally put in contact with an official responsible

for Policy and Strategy, who was not the person I originally wrote to. Fortunately, he was very cooperative, open and frank in his responses, and kindly helped me to contact other high-ranking personnel. Without his help I would have been unlikely to reach the managerial levels. These difficulties in access that I encountered might explain the little research done so far on the immigration force.

Once access is granted, researchers need to gain the trust of interviewees. Often people working in these enforcement agencies are suspicious and wary about research work, and how the outcomes will be used. They are also fearful of public exposure. The fact that I was a foreigner researching immigration policies might have been an additional reason for distrust. A member of the UKBA checked with me whether the data collected would be used only for my research and not 'for the media or anything like that' before allowing me to record the interview (Respondent 5, 16/09/2010). Another official requested my ID and took some information from my driving license before starting the interview. He did not allow me to record it and also asked me if I was from the press: 'If you are, I'll have to arrest you' (He did not laugh and neither did I) (Respondent 20, 28/04/2011). During the interview, he also implicitly suggested that he knew I was coming from Argentina, which showed that he had done some background research on me before accepting my request.

In total, I interviewed 20 people: UKBA officials (six); practitioners (solicitors and barristers, and/or members of asylum and immigration organisations) (ten); academics (two); an MP; and a legal adviser at the CPS. Additionally, I had some informal conversations with criminal law practitioners when attending court hearings –ie, prosecutors and solicitors. Except for two interviewees, everyone allowed me to digitally record the interviews. All interviews were conducted face-to-face except for one that was done through the telephone. Thereafter, I transcribed and coded them manually according to themes.

In order to gain access to and support from participants, they were promised confidentiality and anonymity. Because of the highly politicised and controversial nature of

immigration in recent years, many of my interviewees asked me for confidentiality. Even though many of them are well-known advocates, academics or public officials whose names are in the public domain, without an assurance of confidentiality and that their names will remain anonymised, their participation would have been hindered. For example, the Head of Law of a charity working with asylum seekers asked me not to reveal his name to avoid any adverse impact on his work as an advocate before the UKBA. So interview notes and transcriptions were anonymised and research data was edited in order to remove all identifying information and, thus, ensure confidentiality. This is the reason why, when the data was incorporated into the thesis, some attributes of the interviewees –such as their professional background and institutional position- are mentioned, but not their names (Israel 2004, 719; Noaks and Wincup 2004, 48). Instead, when directly quoting them I name them as Respondent 1, 2, 3 and so on, for internal identification, and provide the date of the interview.

The process of data collection was simultaneous to its analysis. In fact, conducting interviews with key actors allowed me not only to have a better knowledge about the subject, but also helped me to narrow down my research, find themes and structure my thesis (Noaks and Wincup 2004, 129). Interviews with senior criminal and immigration practitioners also allowed me to understand the origin and practice of immigration crimes in the past because they retain rich ‘institutional memory’ that cannot be captured through other methods (Tansey 2007).

### **III. Meeting ‘real’ immigration offenders**

Until I attended hearing at criminal courts, I had only second-hand knowledge about how these offences are enforced and against whom. So I had very limited knowledge about whether and where I would find these cases. Thus, before starting the fieldwork it was necessary to identify criminal courts dealing with immigration-related cases. I consulted the

Oxford and Reading magistrates' courts; however, court staff did not seem to understand which cases I was after and in one of them the administrator told me that 'they don't have a lot of cases of document fraud.' Finally, I chose Uxbridge Magistrates' Court and Isleworth Crown Court because they have jurisdiction over Heathrow airport and, thus, they were likely to deal with immigration-offences cases. The limited geographic scope of the review is a shortcoming of my research. The jurisdiction of the selected courts over a major port of entry certainly influenced the type of immigration-related cases that form part of the sample and makes claims of generalisation questionable. However, because the number of cases involving immigration offences is so small nationally, a random selection of courts would have provided a much smaller sample of cases for analysis.

I attended Uxbridge Magistrates' Court during August and September 2010 three to four days per week. I heard fifteen cases on immigration-related offences in which 16 people were charged with these offences. The period of observation was relatively short because after two months I realised that few cases of interest were heard and the information disclosed in court was limited. So I subsequently decided to supplement the data obtained during the hearings with records in court-files.

Ten of the cases which I heard at Uxbridge were sent to Isleworth Crown Court either because the jurisdiction of the magistrates was insufficient or because the defendants chose to be judged by the crown court. I followed these cases up through to the crown court as well. Six of the defendants were charged with possession of false identity document with intent; five were charged with entering the country without a passport; two defendants with facilitation; two with assaulting an employee in a removal centre; and one with deception. Ten of the defendants pleaded guilty to these charges. While the Identity Cards Act 2006 –IDCA 2006- is not an immigration act, I decided to consider cases of possession of false document for my study given their characteristics: the defendants were foreigners trying either to enter or leave Britain without proper documents. In fact, the offence of possession of forged

passport is frequently used in practice against undocumented migrants. Even though statistics for this offence do not show the nationality of the defendants, foreigners serving prison sentences are generally overrepresented in the category of fraud and forgery offences (Hammond 2007, 821).<sup>400</sup>

In my fieldwork notes, I captured the details of the case I observed (such as the name of the defendant, criminal charges, and a brief description of the prosecution case and the response by the defence lawyer). I also wrote down my impressions and perceptions about the interactions between the parties, the interventions by the judges and magistrates, and the role of the defendant during the hearings. On occasions, I had some difficulties in understanding oral interactions between the parties because they did not speak loud enough, they spoke very quickly or they used technical language which I was not familiar with. The focus of my observation was on the case overall and I did not have a set of specific questions to answer. Therefore, the aim of the observation was broad: to develop themes that may arise from it and to try to make sense of the criminal process in these cases.

As fieldwork sites courts have the advantage of being open to the public and so it is easy to get access (Baldwin 2007, 237). I arrived in court without prior notice and did not have any difficulties in getting access to courtrooms. Attending hearings provided rich data about how these cases are dealt with by the courts, the way in which the different actors behave and interact, and the dynamics of the criminal process. Pieces of information –such verbal and corporal expressions- that are not recorded in the court-files may be captured during the hearings.

While hearings are public, in practice they usually proceed without members of the public. Family members of the defendant are sometimes present but they leave when the

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<sup>400</sup> Criminal justice data are disaggregated by groups of crimes, one of them being ‘fraud and forgery.’ While FNPs are not significantly represented in other offence categories, compared to British prisoners, they are overrepresented in drug, and fraud and forgery offences. In 2005, FNPs comprised 51 percent of all prisoners for fraud and forgery. Moreover, the largest increase in convicted FNPs between 2000 and 2005 were for drug offences (from 1,736 to 2,538) followed by fraud and forgery (from 139 to 611) (Hammond 2007, 821).

hearing is over. So there is huge variation in the people that sit in the public gallery each day. This is the reason why my presence throughout the day was noticed by court personnel, and by some practitioners, judges and magistrates. In the magistrates' court I sat in only one room all the time as this was the court which decides cases that arrive daily to Uxbridge. While in the magistrates' court different courtrooms deal with different type of cases (juvenile cases, daily arrivals, trials, etc), there is no such division of work at Isleworth where there are thirteen courtrooms and cases are randomly distributed. The magistrates' court is a more informal environment, than the crown court. It is smaller too. There is less variation of ushers, defence lawyers and prosecutors attending the court compared to the crown court where the parties and the staff fluctuate much more.

Because I sat everyday in the same court at Uxbridge, the usher and lawyers were used to seeing me there and at some points asked me what I was doing. One of the magistrates asked the usher: 'Who is that lady at the back?' to what the usher replied: 'She's here to look at mainly passport cases, as the ones we saw this morning.' Another magistrate called me after a hearing. He asked me what I was doing in the court and talked to me about his experience as non-stipendiary magistrate. Such questions were less common in the crown court. In one opportunity, while I was sitting and taking notes in one of the courtrooms at Isleworth, the usher asked me who I was, what I was writing and if I had any interest on the case. She also suggested announcing me to the usher before entering the courtroom as 'many judges want to know what people are writing about.' Even though my presence was noticed by court participants, the probability that it had an effect on how they behave and conduct their roles during proceedings is fairly low because they follow standardised rituals which are relatively impermeable to 'external' factors.

Because of listing practices, there is no way to know in advance whether and when cases on immigration offences would be heard by the court on a particular day as the public lists only provide limited information of the cases. They contain the name of the accused, the

intervening authority, and a rough time in which the hearing will take place (morning or afternoon). The lists of cases in the crown court also contain the purpose of the hearing: trial, plea and case management, committal for sentence, etc. However, they do not provide information on the criminal charge. Also, these are daily public lists which are published by the court on the same day of the hearing. They are done the afternoon before the hearing. Some cases are taken off the list by the court without being publicly announced; other cases which are heard by the court are not on the list because the defendant was caught after the list was made.

This uncertainty was frustrating because in most of the days I attended the courts none of these cases were heard. In fact, most of the cases I ended up watching were not related to my research. However, it forced me to sit in the court and look at the everyday work, the routines and the type of cases generally reaching the criminal justice system. Most of the matters before the criminal courts –particularly the magistrates’ court- are motoring offences, breaches to bail conditions, theft, assault, possession of drugs and, in smaller numbers, immigration crimes. Hearings are brief, defence arguments are about ‘mercy’ rather than complex elucidations about factual or legal aspects of the cases, and generally matters are solved the same day through plea bargains. These features were more evident in immigration-related cases as hearings were particularly short and dull.

Those immigration-offence cases I observed were largely dealt with in a few minutes without much examination of the circumstances and motives of the defendant. Occasionally, though, there were instances when the defence lawyer provided details of the circumstances in which the defendant left his country and his journey to the UK which usually entail persecution and abuses. In one occasion, the family member of a defendant in another non-immigration case, after hearing that the defendants received death threats by the Taliban, pronounced a loud ‘Oh God!’ Even so, it did not seem that the courts were in some sort of unease or difficult position when dealing with these cases. By and large, court staff considers

them as straightforward, easy cases. When I told one of the ushers I was interested in looking at this type of cases, he explained that ‘they are straightforward: cases of no-document are decided here and those involving false documents are sent to the crown court.’

One limitation of attending court hearings for data collection purposes is that some cases may be decided outside the courtroom without any public announcement –for example, a committal to the crown court- so I needed to rely on other sources –such as the court usher, clerk and administrators- to find out the outcome of a particular case. Moreover, only those issues discussed in open court can be accessed. A number of important aspects of a case are neither disclosed nor debated during the public hearing –such as the identity and background of the defendant or written statements by the parties and police and immigration files- and so are kept out from the researcher. This aspect of the court routines poses an important challenge to court-based research: ‘[r]esearchers are seriously handicapped when they are excluded from the significant action, and court procedures can be as baffling to them as to anyone else as a result’ (Baldwin 2007, 245). A further weakness is that the attendance at court hearings provides only a snapshot of the cases that are actually dealt with by the designated courts and so observations can hardly be generalised (Payne and Williams 2005).

#### **IV. Looking inside the files: what do court cases reveal and obscure?**

In order to tackle these difficulties, at a later stage, I requested access to review files on immigration-related cases at the designated courts. In order to gain access to case-files at Uxbridge Magistrates’ Court and Isleworth Crown Court it was necessary to submit an application to the Ministry of Justice through Data Collections & Research Requests to Her Majesty’s Courts Service (HMCS) Data Access Panel and Performance Board. These requests were granted in November 2010 and May 2011, respectively. The search on court-files provided quantitative and qualitative data about the number and types of cases heard in those

courts during a longer time-period, and the decisions made in such cases. I conducted this search over files initiated during the period from 1 January 2008 to 31 December 2009 at both courts. In England and Wales, criminal court-files have been computerised since January 2001 in an electronic database held by the Office for Criminal Justice Reform and so it was relatively easy to identify cases of interest. I requested access to files in which the defendants were charged with offences under immigration acts and were subject to immigration control (that is, persons who do not have right of abode in the UK).<sup>401</sup> I requested full files but was particularly interested on certain parts of them, such as statements of the case, written records of public examinations, reports by the official receiver and judgments. Due to the small number of cases that the search threw up, I decided to consider them all rather than to draw a sample out of them. Files were reviewed manually and data was stored in Excel files. The data recorded was: the offence, the ethnic background and gender of the defendant, whether she or he had residence in the UK and needed an interpreter, a brief description of the facts, whether the defence raised defences, the defendant's plea, the bail decision and the final judgement.

At the magistrates' court I reviewed 229 cases in which 232 defendants were charged with immigration offences. When a single person was accused of more than one offence, I considered the principal offence. People were charged with the following offences: entering without a passport (159 defendants); assisting unlawful immigration (40); failing to comply with requirement of the Secretary of State (20); deception (eight); helping an asylum seeker to enter the country (three); and entering the UK without a leave (two). 61 defendants in these cases were committed to Isleworth Crown Court, while 171 defendants were dealt with in the magistrates' court. Of the latter, 163 of them (95 percent) pleaded guilty to those charges. In the rest of the cases, the defendant pleaded not guilty (three). In four further cases the

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<sup>401</sup> However, this 'filter' had apparently not been considered for the search as I found that some of those charged with these offences –particularly 'facilitation' offences- were British nationals.

prosecution was withdrawn or discontinued and in two other cases there was no information. The rate of guilty pleas is particularly high among those who were charged with entering without a passport: 149 defendants out of 154 pleaded guilty at the magistrates' court (97 percent).

At Isleworth Crown Court, I reviewed 99 court-files with 106 people charged with various immigration offences. 16 of them were committed for sentence from Uxbridge Magistrates' Court, while 90 defendants were sent for trial. Defendants were accused of the following offences: assisting unlawful immigration (58 defendants); entering without a passport (17); failing to comply with requirement of the Secretary of State (fourteen); deception (thirteen); and helping an asylum seeker to enter the country (four). 48 percent of those defendants who were sent to trial pleaded guilty to the charges; whereas 50 percent pleaded not guilty. Of those who pleaded not guilty, 56 percent of them were found not guilty, while 44 percent were found guilty.

According to recent policy papers (Home Office 2007a; 2008b; 2010c), criminal law should be used against serious immigration crimes –such as smuggling, trafficking or illegal employment. However, none of the cases reviewed involved organised immigration crimes. In my sample, none of the defendants were charged with offences like trafficking in human beings or illegal employment. In a large proportion of immigration-offences cases, undocumented immigrants were prosecuted and punished, particularly those arriving to the country without a passport. In the vast majority of cases of assisting unlawful immigration, only one person was accused and in some of them, the defendant was charged with assisting a family member.

The permission to access court-files was subject to a number of conditions. One of them was the prohibition to reveal any personal information about the parties involved. The reference numbers of the files are considered personal data and as such covered by data protection rules. Because of this limitation, I did not include this information when quoting

the files reviewed. Instead, when I refer to them throughout the thesis I provide the following information: name of the court, whether the reference is about a court-file or a public hearing,<sup>402</sup> and a number. This number is for internal identification purposes but does not correspond to the real reference number given by the court.<sup>403</sup>

The search over court-files was not as ethnographically rich as the hearing stage because it was very solitary work without much contact with the court environment. In both courts I was given a room where I spent the whole day examining files. However, from my brief contacts with court staff –particularly administrative personnel working in the ‘backyard’ of the courts- I perceived the perplexity that my research topic caused. One of the administrative staff at Isleworth Crown Court directly asked me why I was doing this research and what was interesting about immigration offences.

## **V. The quantification of criminalisation: undeserving numbers and undeserving words**

One of the most important obstacles I encountered throughout this project concerned the difficulty of accurately quantifying the criminalisation phenomenon. While successive governments have been enthusiastic in including criminal law provisions in immigration legislation, apparently they were less interested in learning whether and how such provisions were enforced evidenced by the scarce statistical data on these offences. Because of this, it has been difficult to trace the ‘enforcement side’ of the history of immigration crimes. These are

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<sup>402</sup> When referring to court hearings I mention the name of the defendant as this is information that has been revealed during the hearings and thus made public.

<sup>403</sup> Cases before Uxbridge Magistrates’ Court are referred to as: UMC, Court-file/Hearing, Case X. Cases before Isleworth Crown Court are referred to as: ICC, Court-file/Hearing, Case X.

numbers that evidently were undeserving to be collected, crimes unworthy to be counted.<sup>404</sup> In fact, while immigration controls statistics have been systematically compiled since the early 1960s, until 1984 data on people proceeded against for these offences was not included in the annual volume on the 'Control of Immigration Statistics.' So I relied on personal experiences of practitioners doing immigration law prior to the 1980s to learn how the enforcement of these offences looked like at that time.

While immigration statistics now include a table on people proceeded against and convicted for offences in immigration acts both at magistrates' and crown courts, because of counting practices there have been some inconsistencies and under-recording. For example, in the sample of court-files reviewed, I counted 20 cases of non-cooperation with removal proceedings in the magistrates' court and fourteen such cases in the crown court. In total, 34 defendants were proceeded against for this offence between 2008 and 2009 in only two courts of justice. National statistics for 2008 and 2009 throw up an even smaller rate of prosecutions: in 2008, there were 46 defendants proceeded against for this offence; and in 2009, only fifteen. These numbers make one suspicious about the reliability of statistics on immigration crimes. Unfortunately, though, they are the only source of quantitative data on the enforcement of these offences. Another problem is that while many immigrants are proceeded against for document fraud under non-immigration legislation (particularly, the IDCA 2006), statistics about prosecutions and convictions is not disaggregated by nationality of the defendant. And so it is not possible to quantify the criminalisation of immigration through non-immigration, 'mainstream' criminal laws. There is also no statistics about the number of foreign national prisoners who have been convicted for immigration-related offences and those who have been victims of trafficking or are asylum seekers.

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<sup>404</sup> I borrow this expression from Katja Franko Aas which so nicely captures the lack of interest on these offences. I also thank her for making me aware of this aspect of my research.

The lack of quantitative data and the weakness of the available data is an important obstacle to understanding the dimension and extent of the criminalisation phenomenon. In the absence of it, I have been forced to rely on testimonies by practitioners and qualitative data about particular cases. The mere absence of this data though is a 'rich' piece of information. Interpreted together with other evidence, it reinforces the view put forward in this thesis that immigration offences have been historically considered as a non-issue, which do not deserve scrutiny or debate. The problems raised in this work however cast doubts over such indifference and apathy on the subject.

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