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# Border wars and asylum crimes

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by Frances Webber



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## Introduction

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One of Britain's most senior military strategists has warned that the threat posed by migration to western civilisation is on a par with the barbarian invasions that destroyed the Roman empire. Rear Admiral Chris Parry, likened modern immigration to the Goths and Vandals, saying that Europe could be subjected to 'reverse colonisation' over the next twelve years.<sup>1</sup> Not since the days of Enoch Powell has such apocalyptic language been so acceptable, and its message so widely accepted. There is no recognition of responsibility for the refugees from the wars and anti-Muslim crusades of the middle east, the resource wars of Africa, the fall-out wars born of the perverse boundaries of colonialism and the proxy wars against communism, those displaced by economic wars on the poor or by death squads. They, not the western policies and actions creating or contributing to their displacement, are seen by western European politicians and popular media as 'the problem'. To the image of locusts seeking to descend on the continent to strip it bare is superadded the label of criminal, justified by the necessary illegality of their travel, and now, after the twin towers, after Madrid and after 7/7 in London, they are potential terrorists too.

When the pamphlet 'Crimes of Arrival' was written, in 1995, the title was a metaphor for the way the British government, in common with other European governments, treated migrants and especially, asylum seekers. Now, a decade on, that title describes a literal truth. The first experience of many new arrivals – if they are from the 'wrong' countries, the refugee-producing countries, the 'failed states' – is arrest, the inside of a police cell and then conviction by a court and a prison sentence. In January 2005 E, an Eritrean Pentecostalist Christian arrived in Britain fleeing from religious persecution in her own country and from forced marriage in Sudan, where she had sought refuge. She could not produce any travel documents, having returned to the agent, on demand, the false passport he gave her to pass immigration officers at Khartoum. She was arrested, charged and convicted of not being in possession of a valid passport at an asylum interview. She served a four-month prison sentence before being recognised as a refugee. Her imprisonment breached Refugee Convention provisions banning penalties on refugees' irregular entry to countries of refuge. But her appeal was roundly dismissed by the Court of Appeal, and the judicial committee of the House of Lords – which in 1993 had laughed at the idea that arrival without a passport could be a criminal offence<sup>2</sup> – refused to entertain a further appeal.<sup>3</sup> In just twelve years, the unthinkable had become commonplace.

The criminalisation of asylum claimants who arrive with no documentation is the latest salvo in a 'war on asylum' which employs every possible method to keep the world's unwanted masses, the displaced, the desperate and the destitute, away from the shores of Europe – from legal obstacles such as the common visa list,<sup>4</sup> imposing impossible visa requirements on nationals of all refugee-producing countries, to British immigration officers stopping Roma passengers boarding aircraft at Prague airport,<sup>5</sup> gunboats and

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<sup>1</sup> 'Beware, the new Goths are coming', Sunday Times 11 June 2006.

<sup>2</sup> In the hearing of the case of *Naillie*, reported at [1993] AC 574.

<sup>3</sup> *R v Navabi, R v Embaye* [2005] EWCA Crim 2865.

<sup>4</sup> Regulation 539/2001 on third countries whose nationals are or are not to be subject to visa requirements 'visa list' (OJ 2001 L 81/1), amended by Regulation 453/2003 (OJ 2003 L 69/10).

<sup>5</sup> A practice declared unlawful because of race discrimination by the House of Lords in *European Roma Rights Centre v Immigration Officer Prague* [2004] UKHL 55.

military aircraft patrolling the Mediterranean and the coast of west Africa,<sup>6</sup> landmines on the Greek border with Turkey<sup>7</sup> and the shooting of people attempting to scale the barbed wire fences surrounding the Spanish enclaves of Ceuta and Melilla in Morocco.<sup>8</sup> Anything goes, so long as the goal of keeping out poor asylum seekers and migrants is achieved.

Visa policies, border controls, and military operations have meant that the journey to safety or economic survival in Europe is more and more fraught with danger. Yet those who manage to arrive are frequently sent to prison, as the criminal law is pressed into service to control all aspects of arrival, sojourn and departure of migrants and refugees. A system which makes lawful, documented arrival impossible for refugees now criminalises arriving with no documents, in the UK at least. Seeking to enter on false documents or by means of other forms of deception results in prosecution and frequently prison in many countries. With exclusion from all support affecting more and more asylum claimants, many are driven by destitution to illegal working, exposing themselves to the risk of prosecution. In Britain, a myriad of further criminal charges can be deployed against those who fail to comply with administrative requirements imposed on them, from not reporting to a medical officer of health on demand,<sup>9</sup> to a failure to provide specified information.<sup>10</sup> Failed asylum seekers who do not cooperate with their own expulsion can be prosecuted,<sup>11</sup> and those who, with no documents of their own, use false documents to seek asylum elsewhere are liable to be charged with obtaining air services by deception.

Criminalisation involves not just the bringing of criminal prosecutions but the treatment of whole groups of people as inherently suspect and criminal. To no group does this description apply to such an extent in present-day Europe than asylum claimants. To the wholesale fingerprinting of asylum claimants introduced via the Eurodac regulation<sup>12</sup> has now been added a system of control entailing large-scale detention or, as a non-custodial alternative in the UK at least, electronic tagging, to which all adult asylum seekers lodging applications in-country are to be subjected.<sup>13</sup> In non-detained cases, the functions of subsistence support and control have been married in the system of compulsory residence at dispersal addresses and regular reporting to the authorities. And the treatment of failed asylum seekers ranges from a simple denial of all means of support to which adults are entitled – including social services assistance for the vulnerable, and in some cases even denial of medical treatment – to resort to illegal detention and degrading treatment in ‘removal’ centres reminiscent of totalitarian states.

Then there is the additional burden of suspicion of terrorism. The powers and proscriptions contained in the anti-terrorism legislation, from stop and search to the

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<sup>6</sup> Nearly 5,000 people were intercepted en route to the Canary Isles in May 2006: see *Migration News Sheet* July 2006. See ‘The Mediterranean Solution’, *European Race Bulletin* 56, July 2006; ‘EU patrols off Africa due within a few weeks’, *International Herald Tribune* 25 July 2006.

<sup>7</sup> ‘How can I leave? I have no legs’, IRR online news 20 January 2005; ‘Migrants risking Greek minefields’, BBC online 4 May 2005.

<sup>8</sup> Thirteen migrants, including a 17-year-old youth, were shot dead in the autumn of 2005 trying to scale the fence at Melilla: ‘The Mediterranean Solution’, *European Race Bulletin* 56 (2006).

<sup>9</sup> Immigration Act 1971 s 24(1)(d).

<sup>10</sup> Immigration Act 1971 s 26(1)(b). For offences of failure to provide information committed by third parties, see below.

<sup>11</sup> Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s 35.

<sup>12</sup> Regulation 2725/2000 EC.

<sup>13</sup> Under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s 36. All those claiming at Croydon, London and Liverpool asylum centres were due to be tagged from March 2006. See ‘Electronic tagging for asylum seekers’, *Guardian* 14 March 2006.

range of criminal offences relating to support for banned organisations and the ‘glorification’ of terrorism, the dilution of appeal rights and the use of detention make it clear that rights to privacy, freedom of expression and assembly, liberty, fair trial, psychological integrity, even freedom from inhuman or degrading treatment, and from removal to the near-certainty of torture, are considered disposable in their application to suspect individuals – and individuals from suspect communities. It is against the migrant communities and the asylum seekers that the punitive and draconian anti-terror legislation and practices have bitten most deeply, and in the process, the universality of fundamental rights has been called into question.

As the imperatives of exclusion and criminalisation invade every aspect of life, more and more people in different sectors of society are recruited willy-nilly as agents of immigration control. There are carriers’ liability penalties for carrying undocumented or clandestine migrants, for failing to supply full passenger information or failing to prevent unauthorised disembarkation. Assisting someone to breach the immigration laws of any EU member state is a crime which carries the same maximum sentence as trafficking for sexual or other exploitation. The offence may be committed simply by providing assistance, in the form of housing or humanitarian aid, to those not entitled to be in the country, thus enabling them to stay illegally. There are employer sanctions (for employers who hire people unauthorised by their immigration status to work), and criminal penalties for failing to provide information on employees, irregular migrants or failed asylum claimants. As humanitarian assistance itself is criminalised, growing numbers of people acting in solidarity with failed asylum claimants and irregular migrants, or who fail or refuse to provide information enabling failed asylum claimants to be pursued and arrested for deportation, have found themselves facing prosecution. And as conditions for asylum claimants become grimmer, particularly those who are detained on arrival or for deportation, those who attempt to investigate and publicise abuses have also found themselves facing prosecution or other sanction. Third parties who try to prevent expulsions may also be charged.

While the main focus of what follows is on the United Kingdom, there are also some examples of European practice, which is increasingly convergent as a result of EU legislation on illegal entry and expulsion, as well as through operational cooperation between member states.

## **Preventing arrival**

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The extent of EU border controls has been described elsewhere.<sup>14</sup> The UK has pushed its borders back to France and Belgium, where passengers bound for Britain are examined in a system of ‘juxtaposed controls’<sup>15</sup> at eight locations in France and Belgium.<sup>16</sup> Migrants can be refused leave to enter, detained and removed at any of these points, and no one knows how many asylum claimants are unlawfully turned back at these control points.<sup>17</sup> The UK is pioneering the use of biometrics to prevent asylum seekers getting to the UK

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<sup>14</sup> See eg Webber, ‘The war on migration’, in Hillyard et al, *Beyond Criminology* (2004); ERB passim.

<sup>15</sup> Under the Sangatte Protocol 1991 and 2000 Additional Protocol, given domestic effect in the UK by the Channel Tunnel (International Arrangements) Order 1993 as amended, and the Le Touquet Treaty, given effect in the UK by the Nationality, Immigration and Asylum Act 2002 (Juxtaposed controls) Order 2003.

<sup>16</sup> These are the Eurotunnel site at Coquelles; the Eurostar stations at Paris Nord, Lille Europe and Calais Fréthun, and at Calais, Dunkirk and Boulogne sea ports; and at the Brussels Gare du Midi. Powers to take fingerprints and to search vehicles are being extended to the control zones.

<sup>17</sup> For the Prague operation designed specifically to prevent Roma travellers from coming to the UK see fn 5 above.

on forged visas, and now requires fingerprints from visa applicants from 20 countries in Africa and Asia.<sup>18</sup> At the EU level, too, there is increasing reliance on biometric controls such as fingerprints, which are to be included in all EU passports,<sup>19</sup> and soon in visas too.<sup>20</sup> The UK government is piloting a hugely ambitious 'e-borders' project, with participation by British Airways on nine routes so far, based on biometrics and electronically transmitted passenger information, which prompts a 'board/no board' response before passengers embark.<sup>21</sup> The US and Australia are also piloting their own versions of authority-to-carry schemes, in a movement towards a world where all air and sea passengers are vetted in advance of travel by the immigration, police and security authorities of their intended destinations.

Just as with the 'sister' war, the 'war on terror', as the invisible war on asylum intensifies, more and more states – the new EU member states of Cyprus and Malta, Hungary and Poland, candidate states such as Turkey, Ukraine and Belarus, and states of north and west Africa, Tunisia, Morocco, Algeria, Libya and Mauritania – are coopted or pressed into cooperation, to police Europe's outer borders, to prevent migrants in transit to western Europe from going any further, holding them in detention centres, and agreeing the readmission of those (nationals or not) who are removed from European countries.<sup>22</sup> In the Mediterranean, a network of detention centres is being created, in Malta, Cyprus, Lampedusa, the Canary Isles, Libya, Tunisia, Morocco and Mauritania, where those caught en route to northern Europe can be held pending removal to their countries of origin. The International Organisation for Migration (IOM) has been funded by the EU to develop a programme for the 'enhancement of transit and irregular migration management' (TRIM) in Libya, a programme from which the UNHCR, the body with global responsibility for refugees, has been wholly marginalised. There is no reference to the refugee issue at all in this and other EU initiatives on repatriation and readmission. The EU is drafting a Joint Action Plan with Libya and readmission agreements with Libya and Mauritania. Spain has a bilateral agreement with Mauritania, where it is financing and constructing detention centres, and Italy entered into an agreement with Libya in 2004, following which it has secretly financed the construction of three detention centres there.<sup>23</sup> Between August 2003 and the end of 2004 the EC financed the repatriation of nearly 6,000 migrants from Libya to their countries of origin, under a technical programme on illegal immigration.<sup>24</sup>

Meanwhile, boat people from Africa are not admitted to the asylum process in Italy and are denied access to UNHCR. Huge programmes involve the expulsion of up to a

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<sup>18</sup> The visa will not be issued until the fingerprints have been checked against a databank including the prints of people who have previously sought asylum. UKVisas to ILPA 14 October 2005.

<sup>19</sup> Regulation 2252/2004 on biometric features in EU passports (OJ 2004 L 385/1).

<sup>20</sup> This is envisaged in Council Decision of 8 June 2004 establishing a visa information system, 2004/532/EC (OJ 2004 L 213/5).

<sup>21</sup> See Select Committee for Home Affairs, Fifth Report 2005/6, 'Immigration Control', 13.7.06 (HC 775), written evidence from Board of Airline Representatives in UK; British Air Transport Association; British Airways.

<sup>22</sup> See ERB 56 (above). See also 'Migrants brave Sahara desert to reach Europe', Reuters Alertnet 16 August 2006. 'Readmission' can mean being dumped in the desert: in March 2006 the Moroccan authorities dumped 80 sub-Saharan migrants in the no man's land between Morocco and Mauritania, without food or water. See also *Migration News Sheet* August 2006.

<sup>23</sup> EU/Libya: Full steam ahead, without pausing to think: Statewatch News Online, June 2005 and Statewatch analysis: EU-Africa: Carnage continues as EU border moves south: <http://www.statewatch.org/news/2006/sep/Immigration-analysis.pdf>

<sup>24</sup> All information from ERA Bulletin 56, 'The Mediterranean solution'. Lampedusa - a test case for the subcontracting of EU border controls, Lorenzo Trucco: <http://www.ecln.org/essays/essay-13.pdf>

thousand people at a time from the island of Lampedusa. The Italian authorities say these are not expulsions but refusal of entry. In the Canary Isles, African would-be asylum claimants were denied access to asylum procedures and removed. The EU Network of Independent Experts complained of a similar lack of access to the asylum process in Cyprus.<sup>25</sup>

European governments have followed the lead of the US and Australia in physically intercepting ships suspected of carrying illegal migrants. The French navy has intercepted a merchant ship alleged to be carrying hundreds of illegal migrants,<sup>26</sup> while the Italian government has taken powers to intercept boats in international waters, and a senior minister has advocated the use of lethal force against 'boat people'.<sup>27</sup> In June 2003 a RAF Nimrod intercepted two boats carrying illegal immigrants from Morocco to Lanzarote in a joint operation run by the Spanish Guardia Civil and supported by the Portuguese Navy and the British and French air forces. The exercise was part of Operation Ulysses, a joint military venture between Spain, the UK, Italy, Portugal and France, which began patrolling the Mediterranean in February 2003 and later extended its operations to the sea between the African coast and the Canary Islands. With observers from Greece, Norway, Holland, Germany, Poland and Austria, it is a pilot for an EU-wide interception force.<sup>28</sup> There are joint patrols by Spanish and Moroccan navies,<sup>29</sup> and cooperation between Italy and Greece<sup>30</sup> and Tunisia.

The number of deaths at sea ought to have reduced dramatically as a result of such intensive surveillance of sea traffic by the EU border patrols, the armed forces of Europe and of the southern Mediterranean. But the numbers drowned, or listed as 'missing', continue to rise, despite – or in some cases because of – surveillance and interception. Several interceptions have resulted in the deaths of large numbers of passengers as boats have capsized. In April 2004, 32 passengers were missing presumed drowned when the boat they were travelling on was intercepted in the Canaries.<sup>31</sup> Thirty-seven passengers drowned 200 metres from the Spanish coast, next to a major US-Spanish naval base, when distress signals from the boat were not responded to for nearly an hour.<sup>32</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> *Guardian* 18 March 2002.

<sup>27</sup> Umberto Bossi told *Corriere della Sera* on 16 June 2003 that force should be used: 'After the second or third warning, boom .... the cannon roars, the cannon that blows everyone out of the water.' Cited in 'Return at the frontier, interception at sea' in *European Race Bulletin* 44, IRR, July 2003.

<sup>28</sup> See: [www.andalucia.com/news](http://www.andalucia.com/news). Ulysses is one of 17 joint border-policing operations; others include Triton, Orca, Deniz and Rio IV: see *Road map for follow-up to conclusions of European Council Seville*, 6023/4/03, Brussels, May 2003. See also, on interception, Select Committee on Home Affairs Fifth Report 2005/6, 'Immigration Control', 13.7.06, HC 775, written evidence: joint memo from Refugee Council and Oxfam.

<sup>29</sup> *Migration News Sheet* February 2004.

<sup>30</sup> In an operation between the Italian CIO and the Greek merchant marine, 612 migrants were stopped and five boats confiscated in ten days in October 2005 off the coasts of Libya, Crete and Egypt: ERB 56; *Migration News Sheet* November 2005.

<sup>31</sup> *Statewatch* vol 14 no 5. The Andalusian human rights association APDHA reported 71 deaths in 2004 during interception operations on the open sea: *Statewatch* Vol 15 no 1. See also Athwal, *The human cost of the war on asylum*, IRR, 2004.

<sup>32</sup> *Migration News Sheet* June 2004. The Royal Fleet Auxiliary ship Diligence called the Spanish search and rescue vessel to the rescue of 23 migrants drifting in a tiny overcrowded boat 50 miles off Lanzarote in November 2006: [portsmouth.co.uk](http://portsmouth.co.uk), 7.11.06.

## Penalising rescue

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Carriers' liability, adopted by some member states including Germany, Denmark and the UK in the eighties, became compulsory in all EU member states in 2001 as a result of a directive<sup>33</sup> which requires member states to impose financial penalties on air and sea carriers for each undocumented or falsely documented passenger. In the UK, the regime extends to trains and to lorries carrying undocumented migrants.<sup>34</sup> The per-passenger fines, currently £2,000, can be enforced by seizure of relevant vehicles or craft and their sale. The regime forces carriers to reject undocumented passengers. Airline staff finding passengers who intend to present asylum claims have prevented them from leaving the aircraft at their destination. The Spanish Committee for Aid to Refugees, CEAR, accused the Spanish state airline Iberia of preventing would-be asylum seekers from disembarking.<sup>35</sup> Ships' captains finding stowaways have on occasion taken even more drastic action to prevent fines and confiscation of vessels, by casting them adrift on makeshift rafts, or simply throwing them overboard – dead or alive.<sup>36</sup>

The carrier sanctions regime means that captains who go to the rescue of shipwrecked, drowning and desperate passengers are putting themselves at risk of penalty. The captain of the Norwegian vessel the MV Tampa, which answered a distress signal on 26 August 2001 at the request of Australian search and rescue officials and picked up 438 asylum seekers from a sinking Indonesian fishing boat, was forbidden on pain of fines from landing his passengers on Australian territory, until a judge granted an order requiring the authorities to allow him to land them on 11 September 2001.<sup>37</sup> In July 2004, the Italian authorities went one step further and arrested three aid workers, Elias Bierdel, director of the refugee aid group Cap Anamur, the ship's captain Stefan Schmidt and crew member Vladimir Achkevich, who rescued a group of 37 shipwrecked Africans and landed them on Sicily. The ship came across the men adrift in a dinghy 100 miles from Lampedusa, but was prevented from landing for 11 days, and only got permission after the captain issued an emergency call, reporting that those aboard were ready to throw themselves overboard if they were not allowed to land. The three were arrested immediately for aiding illegal immigration. A judge ordered the men's release after several days, but their ship remained impounded.<sup>38</sup> The Cap Anamur committee was set up in 1979 to assist Vietnamese boat people, and was hailed for its humanitarian work, bringing ten thousand to Germany in the 1980s in an old freighter of the same name and providing assistance to another 30,000. But in 2004, the German interior ministry denounced as irresponsible Bierdel's declaration that the ship would go back to the Mediterranean to continue its humanitarian mission of rescuing shipwrecked and drifting refugees on the high seas, and warned the men that they could be prosecuted in Germany for doing so.<sup>39</sup>

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<sup>33</sup> Council Directive (EC) of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L187, 10.7.91.

<sup>34</sup> Under s 32 Immigration and Asylum Act 1999, amended by Schedule 8 of the Nationality, Immigration and Asylum Act 2002.

<sup>35</sup> *Migration News Sheet* July 2004.

<sup>36</sup> Lawyers for crew members who denounced their captain for murdering stowaways and throwing their bodies overboard and were then granted protection in Canada against threatened reprisals said it was 'open season' for killing stowaways when the Canadian court ruled it had no jurisdiction because the crime was committed in international waters. *Migration News Sheet* June 2004.

<sup>37</sup> Willheim, Ernst: 'MV Tampa: The Australian Response', *Int J Refugee Law* 2003 vol 15 p159.

<sup>38</sup> *Guardian* 14, 17 July 2004.

<sup>39</sup> See 'European governments make an example of Cap Anamur refugees' on [wsws.org](http://wsws.org).

Although the crew of what was then the world's largest container ship, the *Clementine Maersk*, were not arrested, they were roundly condemned by local MPs and by the tabloid press for bringing 27 refugees whom they had rescued in the Mediterranean to their next port of call in Felixstowe. UNHCR praised the crew for following international maritime law and custom and their moral instincts, after other ships had apparently ignored the migrants and left them to their fate.<sup>40</sup> UNHCR also praised the captain and crew of a Spanish trawler who rescued 51 migrants in Libyan waters on 14 July 2006 – but when they attempted to land the migrants in Malta, the Maltese authorities refused to allow the disembarkation. A stand-off ensued which lasted for eight days, during which the trawler lost around €50,000 as the governments of Malta, Libya, Spain, Italy and Andorra argued over who should take the migrants.<sup>41</sup> The Maltese government's reaction appeared to breach the 1974 International Convention for the Safety at Life at Sea, amended only two weeks before the stand-off to strengthen states' responsibilities, as well as those of captains, in the rescue of those in distress at sea.<sup>42</sup>

### **Criminalising humanitarian smuggling**

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In early 2004, a Swiss parliamentary commission declared null and void the conviction of Aimee Stauffer-Stitelmann, who was convicted in 1945 and imprisoned for 15 days for helping to smuggle fifteen Jewish children from France into Switzerland to save them from the Nazis.<sup>43</sup> A humanitarian smuggler operating in Switzerland today would be liable not to 15 days' but to six months imprisonment – and between 1998 and 2001, 3,500 people were prosecuted and convicted of helping people to enter the country illegally, where there was no evidence of personal gain.<sup>44</sup>

In November 2002, the European Union adopted a Directive and a Framework Decision on 'Strengthening the Penal Framework to prevent the Facilitation of Unauthorised Entry, Transit and Residence'.<sup>45</sup> The Directive requires member states to create offences of directly or indirectly aiding the unauthorised entry, movement or residence of nationals of third countries, or participation as an accomplice or an instigator. The offences must be punished by 'effective, proportionate and dissuasive penalties', although (in a hard-fought concession to humanity) family members of a person smuggled in may be exempted from penalty. The directive had to be implemented in all member states by December 2004. It permits (but does not require) states to refrain from prosecuting those helping people enter or remain in breach of immigration laws for humanitarian motives.

A UK parliamentary committee expressed concern that, in negotiating the EU Directive, the British government had indicated that it did not wish to give immunity to 'humanitarian smugglers', but this concern was allayed by a Home Office assurance that UK law did not criminalise persons or organisations bringing asylum claimants to the UK 'otherwise than for gain'.<sup>46</sup> What the Home Office did not tell the committee however, was

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<sup>40</sup> 'Captain criticised for bringing refugees to Felixstowe', 16 June 2005, irr.org.uk.

<sup>41</sup> *Migration News Sheet* August 2006.

<sup>42</sup> Ibid.

<sup>43</sup> *Swissinfo* 3.3.04

<sup>44</sup> Swiss Coordination Unit against the Trafficking in Persons and Smuggling of Migrants, Factsheet, November 2003

<sup>45</sup> Council Directive of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [Official Journal L 328 of 05.12.2002]; Council Framework Decision 2002/629/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of authorised entry, transit and residence [Official Journal L 328 of 05.12.2002]

<sup>46</sup> House of Commons Select Committee on European Scrutiny, 25<sup>th</sup> and 26<sup>th</sup> Report, para 11.9ff.

that this 'humanitarian immunity' does not apply to humanitarian smuggling, or to providing false documents with which asylum claimants enter the country – in other words, it does not apply to those helping people enter or remain in breach of immigration laws, but only to those who bring people to ports to enable them to claim asylum without coming in illegally.

In 2001, while the draft Directive was being negotiated in the European Council, the English Court of Appeal dismissed an appeal by Rudolph Alps, who was charged with assisting illegal entry for bringing in his nephew, a Kurd who needed to escape persecution in Turkey, on the passport of another (British) nephew. His argument that the Geneva Convention's protection of *bona fide* refugees from penalties for illegal entry should apply to those helping them was roundly rejected.<sup>47</sup> The UK authorities' attitude to humanitarian smuggling is clear: whether or not financial gain is involved, the courts have consistently held that smugglers must go to prison, and the motive is relevant only to the length of the sentence. In 1998, in what became known as 'guideline cases', Le Van Binh's sentence of 3½ years for bringing in a fellow Vietnamese was reduced to 2½ years because of the lack of evidence of financial gain, and Rudi Stark's sentence of five years' imprisonment for smuggling nine Kosovans in his camper van was reduced to 3½ years.<sup>48</sup> This punitive level of sentencing continues: in 2003, sentences of 2½ years were upheld on brothers who used one of their (British) passports to bring in another brother from Pakistan.<sup>49</sup>

In the UK, the maximum sentence for assisting people to breach immigration law has doubled to fourteen years (from seven when the offence was first created in the Immigration Act 1971).<sup>50</sup> The offence of bringing asylum claimants to the UK for gain, to enable them to claim asylum, which was added in 1999, carries the same sentence. It is exactly the same as the maximum sentence for human trafficking, although there is the world of difference between the two activities. Trafficking always involves either force or deception (the trafficked person is either conned into believing he or she is going to a better life, or is forcibly taken). It always involves exploitation – the trafficker is importing a commodity, whether for sexual exploitation, for work in conditions of slavery, or for removal of organs.<sup>51</sup> It can never be for humanitarian purposes. Smuggling, on the other hand, may be for commercial or humanitarian purposes, but in either case, it is essentially the provision of travel services to people who cannot get where they want to go legally. Those who are smuggled are willing (frequently desperate) to avail themselves of it. The distinction is reflected in the UN's Protocol to Prevent, Suppress and Punish the Crime of Trafficking, and its Protocol Against the Smuggling of Migrants by Land, Sea and Air, which were both adopted by the UN General Assembly in November 2000.<sup>52</sup>

By treating both activities as identical, or as involving the same degree of criminality, European states endanger the long and vital tradition of 'underground railway' humanitarian smuggling which has historically been the expression of human solidarity

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<sup>47</sup> *R v Rudolph Alps* [2001] EWCA Crim 218.

<sup>48</sup> *R v Le van Binh, R v Stark* [1999] 1 Cr App R (S) 422.

<sup>49</sup> *R v Toor* [2003] EWCA Crim 185.

<sup>50</sup> Immigration Act 1971 ss 25, 25A.

<sup>51</sup> For the legal definition of trafficking in UK law see Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s 4 (trafficking for exploitation), Sexual Offences Act 2003 s 139 (trafficking for sexual exploitation).

<sup>52</sup> UN Doc A/55/383, adopted by Resolution A/RES/55/25, 15 November 2000. The Trafficking Protocol, which came into force on 25 December 2003, has 117 signatory states and 95 States parties (ie States which have ratified the Protocol as well as signing it). The Smuggling Protocol, which came into force on 28 January 2004, has 112 signatory states and 84 States parties.

in response to persecution of others, whether to spirit away escaped slaves in the US in the nineteenth century, or to smuggle victims of persecution to safety in the twentieth. That is not to deny the role which criminal gangs play in smuggling, and the extreme callousness with which some smugglers allow their charges to suffocate in sealed container lorries, or abandon them in leaky boats, or even deliberately sink them, to avoid capture. But the footballer Desiré M'Bonabucya did not deserve the label of 'trafficker' when he was accused of bringing in his fellow Rwandans to Belgium by claiming them as family members.<sup>53</sup> And Amir Heidari, known as the 'Robin Hood' of smuggling, an Iranian refugee based in Sweden who boasts that he has helped over 200,000 of his persecuted countrymen to flee to Sweden, has been compared with Oskar Schindler (who saved 1200 Jews from the death camps during the second world war) or Raoul Wallenberg (who saved between twenty and thirty thousand). Yet Heidari has been convicted twelve times since 1984 and was due to be expelled from Sweden on account of his crimes, until in June 2004 the UN Committee Against Torture requested a stay on his expulsion pending his complaint that he would face torture in Iran.<sup>54</sup>

Another side effect of equating smuggling and trafficking is that it allows European states to ignore the urgent humanitarian needs of victims of trafficking. In November 2004 the special representative on action against trafficking of the Organisation for Security and Cooperation in Europe, Helga Konrad, complained that member states often treated victims of trafficking 'as the guilty parties, placed in detention centres and deported instead of finding refuge', placing too much emphasis on border controls and internal security.<sup>55</sup> An EU directive, agreed in 2004 and to be implemented by member states by August 2006, now requires member states to provide temporary residence permits to victims prepared to cooperate with investigations against traffickers – but only for the duration of judicial proceedings.<sup>56</sup> The UK has opted out of even these minimal obligations, and trafficking victims are given no special rights unless police specifically seek their stay in order to testify.<sup>57</sup>

## Prosecution of refugees

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In 1999, a case brought by three asylum seekers against the Crown Prosecution Service, the Home Office and Uxbridge magistrates revealed a scandalous situation.<sup>58</sup> The three had fled from Algeria, Iraq and Albania and had sought to enter the UK using false passports. All were genuinely in fear, and seeking asylum. All should have benefited from Article 31 of the Refugee Convention of 1951, which states that refugees entering countries of refuge illegally should not be penalised. All had been convicted of using false documents to enter the country, and had been sentenced to between three and six months' imprisonment. Their case revealed that hundreds of asylum seekers had been sent to prison, in breach of Britain's international obligations under the Refugee

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<sup>53</sup> *Migration News Sheet* April 2004.

<sup>54</sup> *Migration News Sheet* July 2004. His complaint (CAT/250/2004) was held inadmissible at the Committee's session of November 2005.

<sup>55</sup> *Migration News Sheet* November 2004.

<sup>56</sup> Directive 2004/81 on residence permits for victims of trafficking or facilitation of irregular migration, OJ 2004 L 261/19. As its name indicates, the Directive allows (but does not require) member states to grant temporary permits on similar terms to smugglers' 'customers'. Residence permits are to be withdrawn if the subject stops cooperating or is in contact with the trafficker or smuggler.

<sup>57</sup> Victims of trafficking may seek protection under the Refugee or Human Rights Convention if there is a real likelihood of re-trafficking on return, but the immigration authorities and Tribunal have demanded very strong proofs.

<sup>58</sup> *R v Uxbridge Magistrates Court ex p Adimi; R v Crown Prosecution Service, Secretary of State for the Home Department ex p Sorani; R v Secretary of State for the Home Department ex p Kazuu* [2001] QB.

Convention. The government, chastened by the rebuke of the Divisional Court, created a statutory defence for refugees presenting false documents (albeit in much stricter terms than those of the Convention itself),<sup>59</sup> and many wrongly convicted asylum seekers had their convictions quashed and obtained compensation.

Five years later, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 created a new criminal offence of failing to produce a valid passport on arrival in the UK.<sup>60</sup> Once again, hundreds of genuine asylum claimants, including children, are being arrested, convicted and imprisoned, when the Refugee Convention says that they shouldn't be. The government's rationale for the new offence is that criminalising the passengers will deter the agents who provide asylum claimants with false documents (which they need to board aircraft to get to Europe). What this logic misses out completely is the lack of any alternative for the desperate people who frequently pay the agent their or their family's life savings to reach safety, or simply to find somewhere where they can make a living. Sending the customers to prison won't stop the alternative transport trade. The maximum sentence is two years' imprisonment,<sup>61</sup> and sentences of up to five months have been upheld by the Court of Appeal,<sup>62</sup> which unconcernedly accepts the systematic violation of international refugee law which this entails – since this is what Parliament apparently intended. A glimmer of hope came in October 2006, when the Lord Chief Justice held that disposal of a false passport used to leave the country of persecution was not a criminal offence under the statute, provided the defendant had a reasonable excuse for not having a genuine passport (such as never having had one). The judgment is likely to put an end to prosecutions under the 2004 Act, since the documents which asylum seekers destroy are almost always false ones provided by agents.<sup>63</sup>

Charging refugees with criminal offences relating to documentation is not unique to the UK. In the Netherlands, the public prosecutor announced the resumption in July 2005 of prosecutions of passengers with forged passports, who have not been prosecuted since 2003. The suspension of prosecutions was not in order to comply with the Refugee Convention but because of court overload.<sup>64</sup> In Switzerland, the home of the Refugee Convention, in December 2005, the highest administrative court upheld the conviction of a Russian asylum seeker who entered the country illegally, although he claimed asylum promptly.<sup>65</sup> And a new Asylum Bill adopted in the same month goes even further, in

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<sup>59</sup> Immigration and Asylum Act 1999 s 31. See Macdonald and Webber, eds: *Immigration Law and Practice* (6<sup>th</sup> ed, 2005) Ch 14.

<sup>60</sup> Section 2. It is a defence for the defendant to show that he or she had no travel document for the whole journey, or that there is a reasonable excuse for not having a document, but destroying or disposing of the document on the instructions of an agent is not a reasonable excuse unless the defendant shows that there was realistically no alternative.

<sup>61</sup> Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s 2(9).

<sup>62</sup> *R v Lu Zhu Ai* [2005] EWCA Crim 936 (sentence of 9 months reduced to 5 months). A heavily pregnant Iranian woman and her husband were sent to prison for nine months in *Safari and Zanganeh* [2005] EWCA Crim 830. The Court of Appeal, while accepting that the couple appeared to have a genuine asylum claim and had probably not known that they were committing an offence in disposing of their passports when the agent told them to, still held that a prison sentence was 'inevitable', although they reduced it to three months.

<sup>63</sup> *Soe Thet* [2006] EWHC 2701 (Admin).

<sup>64</sup> *Migration News Sheet* April 2005.

<sup>65</sup> *Migration News Sheet* January 2006.

providing that undocumented asylum seekers will no longer be entitled in principle to have their refugee claim examined, a measure in flagrant breach of the Convention.<sup>66</sup>

## Disincentives to claiming asylum

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Refugees seeking asylum at the ports and airports of Europe have other hazards to fear apart from the risk of being prosecuted. The unremitting racist hostility to which they are subjected by the popular press and politicians carries through into the treatment of asylum claimants throughout the process from arrival on,<sup>67</sup> and has resulted in more and more 'tightening' of the refugee determination process to prevent 'abuse'. Asylum seekers are in effect treated as cheats, scroungers and fraudsters, and the burden of proving their claim, and of surviving the attendant indignities and humiliations, has never been higher. The accelerated procedures which European governments were starting to adopt in the 1990s have now become institutionalised. Due process rights are curtailed. Asylum claimants may be dealt with in speedy procedures or they may be waiting for years for a decision on their claim, but the conditions of their stay have been made as unpleasant as possible, to deter more arrivals.

### *Legal rights curtailed*

An increasing proportion of asylum claimants have their applications declared inadmissible, and are shuttled to another EU member state under the provisions of the Dublin II regulation<sup>68</sup> (which replaced the 1990 Dublin Convention). Others are dealt with in accelerated procedures, on the basis that they come from 'safe countries' or that their claims are 'clearly unfounded'. The accelerated procedures give no adequate time or opportunity for evidence to be collected, thus ensuring that claims are rejected and appeals dismissed in short order – giving politicians ammunition to justify the accelerated procedures as preventing 'abuse of asylum'.

At EU level, the draft Directive on asylum procedures,<sup>69</sup> agreed in principle by the Council in November 2004 but not yet formally adopted or published, was strongly condemned by a large group of European NGOs including Amnesty International as violating due process rights.<sup>70</sup> The Directive provides for accelerated procedures, including the removal of an asylum interview, for those who immigration officers believed were making 'implausible' claims, thus effectively making the immigration officers judge, jury and executioner for many asylum claimants.

In the UK, rights of appeal for immigrants and asylum seekers were reduced in 1999,<sup>71</sup> 2002,<sup>72</sup> 2004<sup>73</sup> and 2006.<sup>74</sup> An accelerated procedure adopted in the UK in 2002 removes

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<sup>66</sup> *Migration News Sheet* January 2006. In deference to critics, some exceptions are provided, but these will operate at the discretion of border guards, with no safeguards to ensure compliance with the Convention.

<sup>67</sup> Thus, for example, ANAFÉ (the Association Nationale d'Assistance aux Frontières pour les Étrangers) reported on 24 July 2006 on the harassment, humiliation and threats suffered by five Cameroonian nationals refused entry to France. See: <http://www.anafe.org>.

<sup>68</sup> Council Regulation (EC) No 353/2003 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, OJ L 50, 25 February 2003, p1.

<sup>69</sup> Draft Asylum Procedures Directive, 14203/04, see SEMDOC legislative observatory

<sup>70</sup> Amnesty (EU), Medecins sans Frontieres and Save the Children were among the groups signing a letter expressing their grave concern about an earlier draft of the Directive.

<sup>71</sup> The Immigration and Asylum Act 1999 introduced human rights appeals (s65), but also introduced a 'one-stop' appeal system to prevent second and subsequent appeals (ss73ff), and (ss11ff) introduced presumptions of safety and removed appeal rights from those being removed to EU states under the Dublin Convention.

the right of appeal before removal from those whose claims are deemed 'clearly unfounded'. This procedure is based on the notorious 'white list' of so-called safe countries of origin,<sup>75</sup> which the Labour government got rid of in 1999, but reinstated in 2002.<sup>76</sup> Cases deemed 'clearly unfounded' include those where claimants have clearly fled from genuine and serious risks to life. Thus, claims by women who have been raped by police have been rejected as 'clearly unfounded', with no right of appeal before removal,<sup>77</sup> as was a claim by a west African asylum seeker, accepted as true, that he risks being made the subject of human sacrifice.<sup>78</sup> In another accelerated procedure, citizens of around 60 countries deemed suitable for 'fast-track' claims, including Zimbabwe, Cameroon, Sri Lanka, Turkey and Afghanistan,<sup>79</sup> are detained for their claims to be processed within a week or so – including appeals. Lawyers complain they have no time to prepare cases adequately, to obtain medical reports verifying allegations of torture, or to apply for bail for the detained claimants.<sup>80</sup>

### *Funding slashed*

Public funding for asylum and immigration casework and appeals was dramatically curtailed in 2004, and this, together with legal restrictions on providing advice or assistance in the field, resulted in the departure of hundreds of lawyers from legally aided immigration practice. Since 2004, there has been no funding for lawyers to attend asylum interviews (except where the asylum seeker is a child, or can otherwise show particular vulnerability), and thousands go unrepresented in their appeals against refusal of asylum, for lack of funds to pay for a lawyer.<sup>81</sup> Even in the accelerated

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<sup>72</sup> The Nationality, Immigration and Asylum Act 2002 removed in-country appeal rights from asylum seekers whose claims were certified 'clearly unfounded'. It also removed appeal rights by defining 'immigration decisions' in s 82 so as to exclude certain decisions about the length or type of leave granted, restricted the Tribunal's jurisdiction to errors of law, and removed the right to an oral hearing in judicial review of immigration appeal decisions (s 101).

<sup>73</sup> The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 merged two tiers of appeal into one, but the government was defeated in an attempt to exclude immigrants and asylum seekers from all access to the courts save first-instance Tribunal appeals, following a vigorous campaign by refugee groups, lawyers and senior judges. It also created presumptions of safety in respect of many 'third countries', ie transit countries to which asylum seekers might be returned, and curtailed rights of appeal against removal to these countries.

<sup>74</sup> The Immigration, Asylum and Nationality Act 2006 further curtailed appeal rights, particularly against refusal of visas to the UK.

<sup>75</sup> The 'white list' was contained in the Asylum and Immigration Act 1996. Nationals of the listed countries were given a first-instance appeal only against refusal of asylum, but could remain in the UK while the appeal was pending.

<sup>76</sup> See the Nationality, Immigration and Asylum Act 2002 s 94, which now lists fourteen 'safe' states including Jamaica, Sri Lanka and India. Bangladesh was removed from the list following a legal challenge (Pakistan was not included, having been successfully challenged during the currency of the old 1996 white list). For details see Macdonald's *Immigration Law and Practice* (6<sup>th</sup> ed, 2005) 12.161

<sup>77</sup> See *L v Secretary of State for the Home Department* [2003] 1 All ER 1062.

<sup>78</sup> Author's case files.

<sup>79</sup> Home Office to ILPA September 2005; Macdonald and Webber, eds: *Immigration Law and Practice* 2005, Ch 12.

<sup>80</sup> 'Working against the clock', inadequacy and injustice in the fast track system', BID, July 2006, at [www.biduk.org](http://www.biduk.org)

<sup>81</sup> For the impact of the legal aid cuts on representation of asylum claimants see Asylum Aid and Bail for Immigration Detainees: *Justice Denied: Asylum and Immigration Legal Aid – A System In Crisis* (April 2005).

procedures, where the protection of a lawyer is arguably the most needed, only half of the claimants in a recent study were represented on appeal.<sup>82</sup>

### *Detention*

Malta has adopted the Australian policy of detaining all asylum claimants who arrive undocumented – a breach of the spirit of the Refugee Convention, if not its letter.<sup>83</sup> Many other European governments detain asylum claimants about whom they have suspicions, or simply detain claimants for administrative convenience. The European Human Rights convention allows detention of immigrants only for deportation and to prevent illegal entry, but the European Court has recently upheld as lawful the short-term detention of asylum claimants (for up to a week) while their claims are processed, even where there are no concerns that the detained claimants will abscond if released.<sup>84</sup>

The UK 'detention estate' has tripled since 1997, according to the immigration minister,<sup>85</sup> and well over 2,000 asylum seekers and migrants are detained at any one time.<sup>86</sup> Amnesty International estimated that 25,000 asylum seekers had been detained during 2004, including many vulnerable people.<sup>87</sup> The Council of Europe Human Rights Commissioner, Alvaro Gil-Robles, expressed concern about detention under fast track procedures for the duration of the asylum process, and the lack of real opportunities to challenge detention.<sup>88</sup> Although generally the asylum determination procedure, including the appeal process, takes only a few days, a case study by Save the Children revealed that families with children were detained for up to 162 days.<sup>89</sup> Fast-track procedures were extended to women in May 2005, and protests and hunger strikes have taken place in Yarl's Wood, where they are held.<sup>90</sup> Although Home Office policy is not to detain children, a coalition of children's and refugee organisations, *No Place for a Child*, found that over 2,000 migrant or asylum seeking children are detained annually.<sup>91</sup> The Home Office admitted that it detained children who immigration officers believed were adult, often in the face of social services assessment that the claimant is in fact a child.<sup>92</sup>

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<sup>82</sup> See 'Working against the clock', fn 80 above

<sup>83</sup> Meanwhile, Australia has abandoned the practice of automatic detention of undocumented asylum claimants in the face of broad international condemnation; see eg Amnesty International (UK), *Australia: The impact of indefinite detention - the case to change Australia's mandatory detention regime*, June 2005.

<sup>84</sup> *Saadi v UK* (Appn 13229/03), upholding the House of Lords decision in *Saadi v Secretary of State for the Home Department* [2002] 1 WLR 3131.

<sup>85</sup> House of Commons Official Report, 17 March 2006, col 2599W.

<sup>86</sup> Evidence of BID (Bail for Immigration Detainees) to Select Committee on Home Affairs, see 5<sup>th</sup> report 2005-6, HC 775, 13 July 2006, memorandum of written evidence.

<sup>87</sup> Amnesty International: 'Seeking asylum is not a crime: detention of people who have sought asylum', June 2005.

<sup>88</sup> Report on visit to the United Kingdom, 4-12 November 2004, Office of the Commissioner for Human Rights, Council of Europe, 8 June 2005.

<sup>89</sup> *No place for a child – Children in UK immigration detention*, February 2005; see also memorandum submitted by Save the Children to Select Committee on Home Affairs, 6 December 2005.

<sup>90</sup> 'A Bleak House for our times', Legal Action for Women, December 2005.

<sup>91</sup> See [www.noplaceforachild.org](http://www.noplaceforachild.org) In Belgium, a petition signed by 18,000 people against the detention of asylum seeking children was handed in to the minister, Patrick Dewael, in June 2006: MNS July 2006.

<sup>92</sup> Home Office policy on the detention of age-disputed minors has changed following a series of successful court challenges; see eg *R (I) v SSHD* [2005] EWHC 1025 (Admin); Operational Enforcement Manual and API on age-disputed minors, on the Home Office website.

Torture victims are detained, in breach of Home Office policy, and rules providing for medical screening of those alleging torture are routinely disregarded.<sup>93</sup>

It is now well established that detention of already vulnerable people can lead to mental illness, self-harm and attempted suicide, and that detained children also suffer failure to thrive, associated with unwillingness to eat and associated weight loss.<sup>94</sup> Statistics produced by the UK immigration minister showed that in the nine months from 1 April 2005, an incredible 1,467 detainees had been formally assessed as at risk of self-harm, and there had been 185 incidents of self-harm requiring medical treatment.<sup>95</sup> The Institute of Race Relations calculates the number of deaths of asylum seekers in detention during the last five years at 14: eight in immigration detention, and six in prisons.<sup>96</sup>

Asylum claimants are frequently housed in detention, accommodation or reception centres which fail to meet basic standards of health and safety. In Malta, a delegation of MEPs found detention conditions for migrants ‘intolerable’ and ‘frightening’, observing that there was no access for journalists or NGOs, and even UNHCR found access difficult. The Council of Europe Committee for the Prevention of Torture found hunger strikes, self-mutilation, suicide attempts and violence among detainees common.<sup>97</sup> There were frequent protests and hunger strikes about conditions in the basement cells in France (whose closure was recently announced following condemnation from the Council of Europe),<sup>98</sup> at Le Petit Chateau in Belgium and elsewhere. In Denmark, MPs have expressed indignation at ‘indecent’ conditions in reception centres where over 2000 asylum seekers, including 400 children, stay for up to three years or more,<sup>99</sup> Immigration detainees at Heathrow and in UK-operated control zones in France are ‘treated like parcels, not people’, according to the prison inspector’s report of April 2006.<sup>100</sup> The prison inspector found detention facilities at Luton and Stansted airports not fit for holding children or for overnight stays, although used for both,<sup>101</sup> and Yarl’s Wood and Harmondsworth holding centres were ‘not fit for purpose’ according to the prisons ombudsman Stephen Shaw.<sup>102</sup> At Yarl’s Wood, a ‘flagship’ detention centre opened in the UK in November 2001 to hold 900 detainees, no expense was spared in the security arrangements, including dozens of fixed and moving cameras, numerous microwave detection units to foil escapes, and chain-link fence two and a half metres high topped by three lines of barbed wire; but fire destroyed an entire wing three months later in February 2002, because of the failure to install sprinklers.<sup>103</sup>

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<sup>93</sup> See *R (D, R) v SSHD* [2006] EWHC 980 (Admin).

<sup>94</sup> See ‘Fit to be detained? Challenging the detention of asylum seekers and migrants with health needs’, Médecins sans Frontières and BID, May 2005, ‘Doctors question their role in human rights violation of asylum seekers’, IRR news, 2 August 2005.

<sup>95</sup> House of Commons Official Report, 17 March 2006, col 2599W.

<sup>96</sup> IRR website.

<sup>97</sup> ‘The Mediterranean solution’, European Race Audit Bulletin 56, IRR, 2006.

<sup>98</sup> Migration News Sheet March 2006.

<sup>99</sup> Migration News Sheet May 2006.

<sup>100</sup> Report of unannounced inspections of three non-residential short-term holding facilities at Heathrow, Calais and Coquelles, HM Inspector of Prisons, April 2006.

<sup>101</sup> Report on four non-residential short-term holding facilities at Luton, Leeds, Portsmouth and Stansted, HM Inspector of Prisons, June 2006.

<sup>102</sup> Report of the inquiry into the disturbance and fire at Yarl’s Wood Removal Centre’, Stephen Shaw, November 2004.

<sup>103</sup> See Fekete, ‘Huge fire at Yarl’s Wood’, IRR news 20.4.02, irr.org.uk.

Abuse is rife in immigration detention centres. There have been allegations of intimidation, abuse including spitting in food and assault in such centres in Ireland,<sup>104</sup> and in Austria, allegations of assault, threats, torture including burning with cigarette butts and demands for sexual favours have been made against a German private security firm, European Homecare, which was awarded the contract for running the refugee camp at Traiskirchen instead of a consortium of humanitarian agencies because its tender was the lowest - at €1.10 per day per resident.<sup>105</sup> In Spain, sexual abuse has been alleged at a Malaga detention centre where irregular migrants can be held for up to forty days pending expulsion.<sup>106</sup> Allegations of systematic abuse in UK detention centres, received by asylum claimants' representatives,<sup>107</sup> were given credence by an undercover film, 'Asylum Undercover',<sup>108</sup> depicting abuse, violence and degrading treatment towards detainees at Oakington reception centre, run by Global Solutions Ltd.<sup>109</sup>

Italy's network of migration detention centres has been a national scandal for years. Governors and representatives of 14 out of Italy's 20 regions came out in opposition to the centres, and the Italian interior minister, Giuseppe Pisanu, accepted that conditions were 'inhuman' and fell below acceptable standards of civilisation, after a series of scandals including the death of six migrants in a fire in Trapani, Sicily in December 1999, for which no one has ever been convicted (in April 2005, the appeal court upheld the acquittal of the former police chief). The scandals culminated in the conviction in July 2005 of fifteen senior staff members of a centre in Lecce, Apulia, including its director and a priest, doctors and volunteers on charges of violence, abuse and failure to prevent ill-treatment towards detainees in their care.<sup>110</sup> But while that trial was still going on, in May 2005, five anarchists were arrested under anti-terror legislation, accused of inciting revolts by detainees at the centre and seeking to 'subvert the democratic order'.<sup>111</sup>

#### *Journalist prosecuted after exposé*

These appalling, inhuman conditions are only possible because centres are normally closed, and the public do not know what goes on there. That is perhaps why European governments have often been very reluctant to allow NGOs or journalists in to these centres, and on occasion have even subjected those who get inside them to prosecution. In Malta, the Home Minister refused access to immigration detention centres, despite a petition signed by 100 journalists, and a White Paper proposed access to the centres only in exceptional circumstances.<sup>112</sup>

In Spain, NGOs and journalists were denied access to detention centres in Andalucia to investigate conditions at centres in Algeciras, Málaga and Tarifa.<sup>113</sup> In France, a draft

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<sup>104</sup> IRR *European Race Bulletin* 50.

<sup>105</sup> *Migration News Sheet* Feb, March 2004.

<sup>106</sup> *Migration News Sheet* August 2006.

<sup>107</sup> *Observer* 23.4.04, citing allegations from Birnberg Peirce solicitors.

<sup>108</sup> The film, broadcast by the BBC in March 2005, won the Royal Television Society award for the 'best current affairs' programme in February 2006: see Athwal, 'Award for *Asylum Undercover*', IRR news 21 March 2006, irr.org.uk.

<sup>109</sup> See Hansard House of Commons 7 March 2005, col 1275. Global Solutions Ltd also runs all of Australia's asylum detention centres.

<sup>110</sup> *Statewatch* vol 15 nos 3-4.

<sup>111</sup> *Statewatch* vol 15 nos 3-4, July 2005.

<sup>112</sup> *MaltaMedia* 16.2.05.

<sup>113</sup> *Infoapdha* 12.8.04.

decree under the Sarkozy law aimed to get the human rights organisation CIMADE out of the detention centres, following its reports condemning extreme overcrowding, lack of hygiene, violence, frustration and lack of morale in the centres, all exacerbated by the law increasing the legal maximum period of detention from 12 to 32 days.<sup>114</sup> And in Italy, Fabrizio Gatti, a journalist who went undercover, posing as a Romanian asylum seeker in January 2000 to investigate conditions at the notorious via Corelli detention centre in Milan (because access to journalists was denied), was convicted in May 2004 of giving false identity details to police and given a suspended sentence of 20 days' imprisonment.<sup>115</sup> He won a prize for his reports on conditions in the centre, where abuses were rife, and it was closed following his reports. But in July 2004, staff of Médecins sans Frontières were denied access to immigration detention and reception centres following publication of a damning report on conditions in the centres, which called forth an accusation of 'disloyalty' by the responsible minister.<sup>116</sup> As for Gatti, in October 2005 he published another inside exposé, this time of filthy and degrading conditions in a closed centre on the island of Lampedusa, revealing beating, robbing, insults and humiliation of inmates. As a result of his second exposé, UNHCR, the International Committee of the Red Cross and the IOM were granted access to the centres, although the allegations of violence were denied by the minister.<sup>117</sup>

Gatti's prosecution was for assuming a false identity. In Germany, the attempt to censor information about the conditions of asylum seekers has been more blatant. Criminal charges of defamation have been brought against asylum claimants who complain about their conditions. In November 2004, two asylum seekers, Abdel Amine and Mohammed Mahmud, were acquitted of charges of defamation brought against them following their publication of an open letter in summer 2002 denouncing the conditions in which they lived in the asylum hostel at Rathenow. They accused the management of massive and constant intrusions on privacy – by filming, opening letters and entering residents' rooms at will – and of employing known neo-Nazis. The organisation responsible for running the hostel lodged proceedings, which were taken up by the state prosecutor. At the trial, over two dozen witnesses confirmed all the allegations in the open letter, and the defendants were acquitted.<sup>118</sup>

Allegations by asylum seekers about abuse suffered in centres frequently goes unheard because witnesses are removed from the country. This kind of 'censorship by deportation' seems to have happened to Dédé Mutombo Kazadi of the Belgian sans-papiers group UDEP, who was deported the day before a scheduled press conference at which, as the spokesman for residents at the Petit Chateau, he was to have denounced police raids at open asylum centres. He and his wife and three-month old baby were removed when they went to report, with no opportunity to collect clothes and belongings. In the UK, witnesses to the conditions and events at Yarl's Wood precipitating the disorder and fire of 14 February 2002, had been deported before they were able to testify at the trial of eleven detainees on charges of violent disorder.<sup>119</sup>

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<sup>114</sup> *Migration News Sheet* June 2004.

<sup>115</sup> *Statewatch* news online 23 June 2004.

<sup>116</sup> *Statewatch* vol 14 no 2.

<sup>117</sup> *Migration News Sheet* November, December 2005.

<sup>118</sup> *Junge Welt* 2.11.04.

<sup>119</sup> Athwal, 'Yarl's Wood trial: a miscarriage of justice?' IRR news online 3.9.03.

## Stigma, segregation, destitution

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Asylum claimants who are not detained on arrival are denied access to work, generally for a year,<sup>120</sup> and are forced to accept humiliating and degrading conditions as a prerequisite to obtaining basic subsistence. One effect of the removal of asylum seekers from 'mainstream' social security benefits and the creation (in the UK) of NASS (the National Asylum Support Service) as a department of the Home Office in 1999<sup>121</sup> to provide their support has been to reinforce the segregation of asylum seekers, fostering the idea that they neither need nor deserve the same rights – to a decent standard of living and health care, to a livelihood – as everyone else, and that social provision can legitimately be based not on need but on status. The UK followed Germany's system of compulsory residence, generally in slum accommodation run at huge profit by rapacious private companies under partnership agreements with the Home Office – where claimants are dispersed without regard to family or community connections, educational or welfare needs, on pain of exclusion from all support if they leave the accommodation.<sup>122</sup>

While urban myths abound that asylum claimants are given brand new homes and cars on arrival, the reality is that more and more have been denied all support – those who don't claim asylum 'as soon as reasonably practicable' following their arrival in the country, rejected asylum claimants who don't cooperate with arrangements for their removal, or take steps to leave the country voluntarily, as well as sponsored immigrants, are barred from all forms of social assistance except (in some cases) workhouse-type board.<sup>123</sup> A clampdown on free NHS treatment restricts non-emergency hospital treatment, including anti-retroviral treatment for AIDS, to specified categories of immigrants, and excludes failed asylum seekers.<sup>124</sup> Examples collected by Medact, a coalition of medical and refugee groups, include a failed asylum seeker who was denied cancer treatment; another faced with an £18,000 bill for renal treatment; and a Vietnamese failed asylum seeker who was turned away from ante-natal treatment at a hospital in Bromley, Kent despite being seven months pregnant, for non-payment of a £2,750 bill for a 24-week scan.<sup>125</sup> Although there are no legal restrictions on access to primary health care, evidence suggests that many vulnerable and traumatised asylum seekers are refused registration with GPs.<sup>126</sup>

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<sup>120</sup> The EC Reception Directive, 2003/9 (OJ 2003 L31/18), provides that asylum claimants whose claims have been outstanding for over a year without a first decision should be allowed access to the labour market.

<sup>121</sup> Immigration and Asylum Act 1999 ss 94-116.

<sup>122</sup> See eg Audit Commission: 'Another country: implementing dispersal under the IAA 1999' (June 2000); 'The dispersal of xenophobia', ERB August 2000, IRR; Webber, 'From deterrence to destitution', *Race & Class* 45:3.

<sup>123</sup> Under ss 54, 55 and Sch 3 to the Nationality, Immigration and Asylum Act 2002. The House of Lords upheld the right of destitute and street-homeless asylum claimants to subsistence in *R (Adam, Limbuela, Tesema) v Secretary of State for the Home Department* [2005] UKHL 66. 'Hard cases' support is provided under s 4 Immigration and Asylum Act 1999. Two recent reports described rejected asylum claimants in abject poverty, some forced to sleep in parks, phone boxes and public toilets and to eat out of bins: Amnesty International *Down and Out in London*, and Refugee Action *The destitution trap*, both published on 7 November 2006.

<sup>124</sup> NHS (Treatment of Overseas Visitors) (Amendment) Regulations 2004, SI 2004/614. See also Lucy Carter, 'Failed asylum seekers and primary care', *Student BMJ* 14:309-352, September 2006; Terrence Higgins Trust 'Note on access to HIV treatment for undocumented migrants and those refused leave to remain', February 2006.

<sup>125</sup> 'Failed asylum seekers forced to go it alone', *Guardian* 14.12.05; see also 'Forced to go it alone', medact.org.

<sup>126</sup> 'The doctor won't see you now', *Observer* 24.6.01.

The combination of punitive welfare provision and the ban on work, the likelihood of speedy refusal and removal, and the risk of detention as a (declared) asylum seeker in many EU states, has removed any shred of incentive to claiming asylum – so people fleeing war, persecution, rape and torture are reduced to a precarious, illegal existence, frequently super-exploited by rapacious gangmasters and living on the margins to avoid the industrialised refusal and removal machine which is the asylum determination process. There, they are vulnerable not just to the dangers of the jobs they have to do to survive,<sup>127</sup> but also to immigration raids and to criminal prosecution for the false documents they must produce to obtain minimum-wage work.<sup>128</sup> Raids on workplaces are common, and employees who have produced false documents to obtain work are sentenced to nine months or more.<sup>129</sup> An Algerian facing an 18-month sentence said, 'I am not here to beg on the streets. I will not steal to feed myself. My only crime is to find work.'<sup>130</sup>

Pushing desperate migrants out of the asylum process into the invisible undocumented underclass suits the politicians, who can show their populations that the statistics show a decrease in asylum claimants. But it also justifies the vastly increased range of powers available to immigration officers, including powers of arrest for non-immigration offences such as obtaining property by deception, bigamy and fraud; powers of search and seizure, and powers to demand ever more information about non-EU users of services from an ever wider range of people, who are effectively forced into cooperation.

#### *Immigration police*

The 1999, 2002 and 2004 immigration acts extended immigration officers' powers of arrest, search, entry and seizure so as to make them equivalent to police. Immigration officers can search premises, arrest and detain occupants reasonably suspected of illegality, seize vehicles and confiscate them for sale, search business premises and seize records, take fingerprints and other biometric identifiers, subject immigrants to electronic tagging, and can use reasonable force in any of these functions. Obstruction of an immigration officer in the exercise of his functions is a criminal offence. But unlike police, immigration officers are not subject to statutory controls. There are no committees overseeing immigration officers, no independent complaints commission, and PACE codes<sup>131</sup> are voluntary. Private-sector 'detention custody officers', employed as deportation escorts and at all immigration 'removal centres', are also empowered to use reasonable force and have even less accountability. Following the collapse of the Campsfield detainees' riot trial owing to the contradictory evidence of the camp guards, an attempt to sue the Home Office for the treatment of the detainees failed on the ground that the Home Office was not responsible for the conduct of the private sector guards. Documented brutality at Yarl's Wood removal centre<sup>132</sup> and in escort facilities is not penalised or

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<sup>127</sup> In February 2004, between 19 and 24 Chinese cockle pickers were drowned by rising tides on Morecambe sands. See [bbc.co.uk](http://bbc.co.uk) 6 February 2004.

<sup>128</sup> See 'Raids break up ring of illegal workers', *Observer* 26.10.03; 'Rise of the gangmasters', *Observer* 15.2.04; 'Protest against clampdown on working asylum seekers' [irr news online](http://irr.news) 27.7.06.

<sup>129</sup> 'Court of Appeal reduces 15 months to 9 months for using false passport', *Leicester Mercury* 24.12.04. Sixty pier workers were questioned after a raid on Brighton Palace pier in August 2005; 50 employees questioned at a Walkers crisp factory in Coventry, and 14 arrests at a Bernard Matthews poultry processing plant: [bbc.co.uk](http://bbc.co.uk) 24.8.05; [iccoventry.co.uk](http://iccoventry.co.uk) 14.9.05; *EDP Business* 4.5.05.

<sup>130</sup> *This is Lincolnshire* 23.5.05.

<sup>131</sup> Codes of conduct for searches, questioning of suspects etc made under the Police and Criminal Evidence Act 1984.

<sup>132</sup> Such as 'A culture of abuse, racism and violence', *Daily Mirror*, 8.12.03.

sanctioned, despite a number of prison service investigations and reports.<sup>133</sup> The prison service inquiry into the disturbance and fire at Yarl's Wood recommended vetting of guards, one at least of whom was a member of the extreme-right British National Party and a number of whom wore union jack badges.

### Network of informers

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Home Office powers extend to coercive information gathering from a range of agencies, companies, organisations and individuals who might hold information on migrants. Historically, it was just hotels which had to keep records of the addresses and nationalities of all their guests. Now, in a number of countries, including the UK, the Netherlands and Germany, employers are required to check would-be employees' immigration status and can be fined and in some cases imprisoned for employing irregular migrants and those without permission to work. In the Netherlands, fines for employing people without work permits rose from 900 to 3,500 euros in 2004,<sup>134</sup> and in Britain, a new Bill proposes penalties of £2,000 per worker, matching the penalties for carriers.<sup>135</sup> Jobcentre staff must report any suspected fraudulent use of national insurance numbers to the Home Office, from June 2006.<sup>136</sup> The EU is to explore an employers' liability directive, to punish businessmen who accept, encourage or actively support illegal working.<sup>137</sup> Penalties for employing undocumented migrants can reach SFr 1m and five years' imprisonment in Switzerland, and serious or repeated offences can lead to exclusion from the market and cuts in state subsidies. Cantons may use surveillance methods to catch employers.<sup>138</sup>

Housing, health and education providers are also being roped in to the surveillance and control of immigrants. In the UK, local authority housing departments are obliged by statute to inform the Home Office of any irregular migrants seeking housing or social services support.<sup>139</sup> In the Netherlands, where the Linking Act has kept undocumented migrants out of public housing since 1998, the government in 2004 announced that it was taking measures against landlords who rented accommodation to illegal immigrants, whereby rental contracts could be declared void and tenants illegally subletting could lose their home.<sup>140</sup> A 'Memo on Illegal Migrants' dated April 2005, presented to parliament, said that those providing shelter to undocumented migrants had to inform police.<sup>141</sup> In Spain, local councils in Catalonia and the Basque country refused to hand over information on immigrant registration to police, saying it put the immigrants concerned at risk. The Socialists supported a Popular party law requiring foreigners to register, but the main unions, CCOO and the UGT, support immigrants who say that police access to the register could in practice strip undocumented migrants of their rights to health and education, by deterring them from registering.<sup>142</sup> In Germany, property owners are

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<sup>133</sup> 'Investigation into allegations of racism, abuse and violence at Yarl's Wood Removal Centre', Stephen Shaw (Prisons and Probation Ombudsman), April 2004; Report of the inquiry into the disturbance and fire at Yarl's Wood Removal Centre', Stephen Shaw, November 2004

<sup>134</sup> *Migration News Sheet* May 2004.

<sup>135</sup> Immigration, Asylum and Nationality Bill, going through parliament December 2005.

<sup>136</sup> *Migration News Sheet*, July 2006.

<sup>137</sup> *Migration News Sheet*, August 2006.

<sup>138</sup> *SwissInfo* 7.6.05.

<sup>139</sup> Nationality, Immigration and Asylum Act 2002 Sch 2 para 14.

<sup>140</sup> *Migration News Sheet* May 2004.

<sup>141</sup> *PICUM Newsletter* Sept 2005.

<sup>142</sup> *European Race Audit* 50.

obliged by law to ensure that tenants subject to the obligatory residence laws register at the local registration office, and the Aliens' Act requires all public offices to report to the Foreigners' Office not only undocumented migrants but also infringements by asylum seekers of residence obligations.<sup>143</sup> In Finland, the interior minister has proposed that reception centre staff pass on confidential information about asylum applicants to immigration, police and border police, to deal with 'the abuse of asylum'.<sup>144</sup> And in France, three NGOs – GISTI, the League of Human Rights and IRIS – have applied to the supreme administrative court, the Conseil d'Etat, seeking annulment of a decree of August 2005 which authorises mayors to set up a database recording the personal data of those offering hospitality to foreigners on visit visas. The decree authorises the storage of information, including the financial situation of the host, the size of the homes, number of rooms and details of other occupants, for up to five years.<sup>145</sup>

In Britain, even marriage registrars have been co-opted; since 1999 they been required to report any suspected 'sham' marriage between an EU and a non-EU national,<sup>146</sup> and since 2004 may not perform a marriage between such a couple unless the non-EU partner has a fiancé(e) visa or has written permission to marry from the Home Office.<sup>147</sup> The same rules apply to civil partnerships between same-sex couples, introduced into UK law in December 2005.

In Germany, the Bonn public prosecutor's office was said in June 2005 to be investigating kindergarten teachers in the city on suspicion of aiding and abetting illegal residence, because of the teachers' failure to report children without valid residence documents to the authorities. The local authority issued a letter to kindergarten heads in April urgently recommending that schools demand to see passports or registration certificates before enrolling children, to determine their residence status.<sup>148</sup> The information clearly goes direct to the Aliens' Office; in Berlin, children were reportedly taken straight from their school classroom to an expulsion detention centre in Berlin-Köpenik in December 2004.<sup>149</sup>

While there is (as yet) no duty on health workers or teachers in the UK to provide information on undocumented migrants seeking medical treatment or education, ministers have admitted that biometric identity cards, due to be introduced in about 2008, will be used as entitlement cards for immigrants, thus creating an immediate underclass of those ineligible for them.<sup>150</sup>

In Sweden, there is no legal obligation on health workers to inform on patients, but the hostility against asylum seekers is such that in April 2004, two hospitals reported failed asylum seekers who sought treatment to police and the migration board, with the result that a woman and two children were detained for expulsion.<sup>151</sup>

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<sup>143</sup> Residence Act s 87; *PICUM* Book of Solidarity 2003.

<sup>144</sup> *Sanomat* 8.11.05.

<sup>145</sup> *Migration News Sheet* November 2005.

<sup>146</sup> Immigration and Asylum Act 1999 ss 24-25.

<sup>147</sup> A High Court judge ruled the requirement for permission to marry unlawful in *R (Baiai) v Secretary of State for the Home Department* [2006] EWHC 823 (Admin) (10 April 2006) but held it lawful in relation to undocumented migrants in *R (Baiai) (No 2)* [2006] EWHC 1454 (Admin) (16 June 2006).

<sup>148</sup> *Junge Welt* 1.6.05.

<sup>149</sup> *Junge Welt* 15.12.04.

<sup>150</sup> No2ID campaign website. The Application Registration Card (ARC) issued to all asylum claimants after screening serves as an entitlement card; see Macdonald and Webber, *op cit*, 12.114.

<sup>151</sup> *Migration News Sheet* May 2004.

## Forced out

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In most EU countries, failed asylum seekers can't work, and can't get benefits unless they agree to return home. When their country of origin is a war zone like Iraq, DRC, Afghanistan or Somalia, or a byword for repression like Iran or Zimbabwe, the dilemma of such failed asylum seekers is clear. In the UK, continuing support for failed asylum seekers is generally contingent on their agreement to be removed as soon as this becomes possible. In November 2005, around 200 Iraqi Kurds were evicted from their accommodation in Sheffield by order of the Home Office, prior to their attempted forcible removal by the Home Office.<sup>152</sup> Some local authorities in Britain were refusing to evict failed asylum seekers with families under new provisions in November 2005, and 33 authorities said the eviction policy was incompatible with their responsibilities to children.<sup>153</sup> In the Netherlands, some local authorities held out for years against the government demand that they evict failed asylum seekers, but in January 2004 the authorities of Amsterdam, Rotterdam, the Hague and Utrecht finally agreed to carry out evictions following a promise by immigration minister Rita Verdonk that the migrants would not be on the streets but housed in special centres.<sup>154</sup> In Denmark, a third of those in homeless shelters were found to be immigrants or refugees, up from 5 percent five years before,<sup>155</sup> and in Norway, the country's largest municipalities are protesting that the government's asylum policies are creating a homeless population, turned out on to the streets with no rights.<sup>156</sup>

The point of all these deterrent measures is to force out failed asylum seekers and irregular migrants, by making them destitute, with no rights to work, to shelter or to basic livelihood. And the inhuman, perverse logic driving these policies of 'deterrence' also demands that those who, through religious vocation or human solidarity, seek to provide the means of subsistence refused by the State may themselves be criminalised. Compassion is thus criminal, and politicians who show signs of sympathy may be guilty of 'incitement'.

## Criminalising solidarity

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In March 2004, the Dutch immigration minister accused the leader of the opposition Labour party, Ruud Koole, of 'inciting' party mayors to civil disobedience by calling on them to defy the government's demand that they evict failed asylum seekers from council accommodation.<sup>157</sup> In Belgium, in September 2003 Red Cross workers at an asylum reception centre were fired following an accusation that they had allowed asylum seekers to work at the centre, which could have incurred heavy penal sentences.<sup>158</sup>

In the United Kingdom, the little-used offence of harbouring an illegal entrant or overstayer, which carried a maximum penalty of six months' imprisonment, was abolished in 2002 – but instead, someone providing support or accommodation to an

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<sup>152</sup> Fifteen Iraqis were actually removed: 'Iraqis forcibly removed on overnight flights', *Guardian* 21.11.05.

<sup>153</sup> 'Asylum measure inhuman and disastrous, says report', *Guardian* 7.11.05; Barnardos, *The End of the Road*, November 2005.

<sup>154</sup> *Migration News Sheet* February 2004.

<sup>155</sup> *European Race Audit* no 49, 50.

<sup>156</sup> *European Race Audit* no 49.

<sup>157</sup> *Migration News Sheet* March 2004.

<sup>158</sup> *Expatica News* 16.9.04.

immigration offender could be convicted of the 'generic' offence of assisting someone to enter or remain in the country illegally, which carries a maximum penalty of 14 years' imprisonment.<sup>159</sup> Bucking the trend, the Spanish Supreme Court reversed an attempt by the Spanish authorities to criminalise those accommodating failed asylum seekers. In November 2005, the Court quashed sentences of four years for aiding and abetting illegal immigration, imposed by the Cadiz court on three people who had rented rooms out to undocumented migrants. The judges commented that the purpose of the law was to deter people smuggling, and merely providing reasonable accommodation at a non-exploitative rent could not amount to an offence.<sup>160</sup>

The imperative of reducing asylum claims and removing claimants has led governments to bulldoze any humanitarian effort which appears to obstruct that aim. In September 2003, Spanish police evicted Médecins sans Frontières workers and closed down a camp they had set up to look after asylum applicants and undocumented migrants who could not find space in the government's temporary holding centre in its north African enclave of Ceuta.<sup>161</sup> In France, the Red Cross camp of Sangatte, opened to provide basic shelter to undocumented migrants and asylum claimants in Calais, was closed at the behest of the British authorities in November 2002, and solidarity activists Charles Frammezelles and Jean-Claude Lenoir, of the collective C'Sur, were convicted under Article 21 of the 1945 Foreigners' Law, designed to penalise smuggling of immigrants, for their humanitarian work with the migrants following Sangatte's closure.<sup>162</sup> When the law was amended in 2003 to prohibit direct or indirect assistance to illegal entry, movement or stay in France, interior minister Nicholas Sarkozy (who became notorious in 2005 for calling Arab-French rioters 'scum'), reassured humanitarian organisations that the changes would not penalise humanitarian organisations providing genuine support and care for foreigners. The purpose of the law, he said, was to target 'criminal networks which exploit immigrants and put their lives at risk'. At the time, the migrants' aid organisation GISTI said that if that was the government's intention, it should clarify the law accordingly.<sup>163</sup> The criminalisation of Frammezelles and Lenoir called forth a torrent of support for the pair, with a solidarity petition signed by 354 organisations and 20,000 individuals.<sup>164</sup> Abbot Jean-Pierre Bouteille, who had earlier called for the prosecution of the state for its failure to assist those suffering from exclusion, accused the authorities of using the men to set an example to deter other humanitarian networks.<sup>165</sup>

Those whose job is to provide assistance have found themselves investigated or charged for doing their job. In March, the director of a hostel in Vaucluse was arrested on suspicion of housing undocumented migrants, and a few months later, the director of the Sonacotra hostel in Ajaccio, Corsica, was arrested on a similar charge, although neither was proceeded with.<sup>166</sup> In Austria, FPÖ justice spokesman Dieter Böhmdorfer has called for penalties for relief organisations that 'knowingly assist in the abuse of asylum', which some commentators suggest could even penalise those helping asylum claimants prepare their asylum claim,<sup>167</sup> while ÖVP interior minister Strasser ordered investigations into

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<sup>159</sup> See text and fn 50 above.

<sup>160</sup> *El País* 24.11.05.

<sup>161</sup> *Statewatch* vol 13 no 5, Aug-Oct 2003.

<sup>162</sup> *Migration News Sheet* September 2004.

<sup>163</sup> GISTI 26.6.03.

<sup>164</sup> As at March 2004. See 'Délit de solidarité', *Plein Droit* 59-50, March 2004, [www.gisti.org](http://www.gisti.org). Over 6,000 signatures were obtained in the first fortnight of the campaign.

<sup>165</sup> *Libération* 5.11.02.

<sup>166</sup> *Libération* 6.9.03.

<sup>167</sup> *der Standard* 14.9.05.

two asylum lawyers after they criticised the law in a parliamentary hearing. Georg Bürstmayr, who offered legal representation to Chechen asylum seekers, was accused of assisting illegal entry, while Nadja Lorenz was under investigation for disobedience to laws following her assertion, as spokesperson for SOS Mitmensch, that assistance for traumatised refugees threatened with deportation was justified. Amnesty International described the investigation of the lawyers as containing ‘all the elements of political persecution’, and shortly afterwards they were halted by the public prosecutor’s office.<sup>168</sup>

In Belgium, two social workers Myriam Vastmans and Jaffar Nasser Gharaee, who had assisted migrants and asylum seekers for fifteen years, were arrested in June 2002, while working for refugee welfare organisation, *Soziale Dienst van de Sozialistische Solidaritat* (SDSS), and charged with human trafficking and association with criminal gangs. Four years later, in January 2006, they were acquitted.<sup>169</sup> Their case highlighted the lack of clarity in Belgian law as to whether assistance provided to failed asylum seekers is legal<sup>170</sup> – a lack of clarity exacerbated by interior minister Patrick Dewael, who in January 2006 told a newspaper that members of the public had a duty to report to the police anyone assisting migrants to remain illegally, only to correct his statement the following day, to confine the ‘duty’ to public officials.<sup>171</sup>

In France, police searched the home of radio journalist Bleuette Dupin, who reported on the case of a failed asylum seeker in August 2005, after the woman’s two children went missing, preventing the family from being deported. The children, aged 14 and 15, were said to be ‘terrorised’ by the idea of deportation to DRC, where their father had disappeared and their mother suffered serious abuse and was hunted. Journalists’ unions protested the police action, which police sought to justify by the fact that the journalist’s telephone number was in the deportee’s address book, as ‘totally contrary to freedom of the press’.<sup>172</sup>

Churchmen and women have not escaped the long arm of the anti-solidarity law, either. In February 2003, a member of the Emmaus community was held for refusing to surrender an Algerian failed asylum seeker housed by the community to border police for expulsion. In Switzerland, members of religious orders who have taken in rejected asylum seekers have been arrested and convicted. In 2005, the head of the Daughters of Charity of St Vincent de Paul, sister Marguerite Joye, was convicted of providing shelter to two Kosovans for a month in March 2002 and fined SFr 100, and ordered to pay SFr 70 in costs at the Freiburg police court.<sup>173</sup> Sister H el ene Donzalez, known as ‘Sister Emmanuelle’, 61, was found guilty of aiding and abetting illegal immigration in November 2003 in respect of the same incident, and was fined SFr -100.<sup>174</sup> Former priest and Socialist cantonal MP Bernard Bavaud was convicted in 2003, and teacher Madeleine Passat in 2004, of aiding illegal stay without financial reward, for offering hospitality to homeless Kurds. Both had their convictions upheld on appeal, and the fine imposed on the MP was tripled.<sup>175</sup> They say that they would rather go to prison than pay the fine.

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<sup>168</sup> *B ses  sterreich* Oct-Nov 2004.

<sup>169</sup> See infoshop; Amnesty International Belgium.

<sup>170</sup> The law penalises knowing assistance in illegal residence, but exempts from penalty actions ‘mainly humanitarian in motivation’. See *PICUM Book of Solidarity* 2003.

<sup>171</sup> *Migration News Sheet* Jan, Feb 2006, *PICUM* Jan 2006.

<sup>172</sup> [www.listes.rezo.net](http://www.listes.rezo.net) 24.8.05.

<sup>173</sup> *Migration News Sheet* May 2005.

<sup>174</sup> *Migration News Sheet* January 2005.

<sup>175</sup> *Migration News Sheet* Feb 2004, 2005.

Their defiance has inspired hundreds of people in the town to denounce themselves to the public prosecutor, declaring that they had provided hospitality to illegal immigrants.<sup>176</sup>

The Spanish authorities have also penalised members of religious orders for solidarity actions. In Ceuta, the Carmelite order of Bedruna was under investigation in 2002 for its aid to asylum claimants. The nuns were alleged to have over twenty immigrants staying on one floor of their property.<sup>177</sup> In the same year, a Catholic priest was sentenced to six months' imprisonment for assisting illegal entry, after admitting to try to bring a Moroccan immigrant to mainland Spain hidden in his vehicle.<sup>178</sup> The churches have had an important solidarity role in Spain, where lock-ins have been organised by immigrants in Barcelona churches in support of regularisation campaigns. The success of the action in 2001, when 14,000 ended up receiving papers, led to a repeat in 2004, but on that occasion the immigrants were violently evicted, and many were arrested and deported.<sup>179</sup>

Those penalised are not always Christians, either. An imam was arrested in Ceuta in January 2004, on an allegation of harbouring two Moroccan immigrants. It was the first arrest of an imam in the enclave, and the man was highly respected in the Muslim community.<sup>180</sup>

## Forced removal

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Removals of failed asylum seekers and other irregular migrants are carried out according to targets set by ministers responding to anti-immigrant propaganda, without regard for the human needs and concerns of those being removed. Liz Fekete has described the 'creation of a conveyor belt system to meet government targets' as 'opportunistic political campaigning' which puts the lives of asylum seekers at risk:

*'The actions of ministers, politicians, the press and the extreme Right all constrain civil servants, immigration officers, police officers who have to enforce the targets to act with greater zeal ... the most vulnerable are targeted because they are the easiest to remove: torture victims, those severely traumatised by war, psychiatric patients, the terminally ill and vulnerable children ...'*<sup>181</sup>

The prisons ombudsman Stephen Shaw was highly critical of the setting of the 'unachievable' target of removal of 30,000 rejected asylum seekers and irregular migrants a year, set in 2001, which led to the disastrous speed-building of Yarl's Wood in the same year.<sup>182</sup> In 2006, the Asylum Fact Sheet on the Home Office website boasts that the Home Office removed 15,000 failed asylum seekers in 2005, and the numbers removed in the first quarter of 2006 were 43% up on those for the first quarter of the previous year. Soon, it predicts, more failed claimants will be removed than fresh asylum seekers arriving – the holy grail of UK asylum policy.

Under the pressure to meet targets, removals are conducted by force, by guile and by lawbreaking. Alistair Burt, Bedfordshire MP whose constituency includes Yarl's Wood

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<sup>176</sup> *Migration News Sheet* Feb 2005.

<sup>177</sup> *Europa Sur* 23.1.03.

<sup>178</sup> *El Pais* 8.6.02.

<sup>179</sup> *Statewatch* vol 14 nos 3-4.

<sup>180</sup> *Migration News Sheet* Feb 2004.

<sup>181</sup> 'The deportation machine: Europe, asylum and human rights', IRR, April 2005.

<sup>182</sup> Report of the inquiry into the disturbance and fire at Yarl's Wood Removal Centre', Stephen Shaw, November 2004.

Removal Centre, and who has campaigned for better conditions and for safeguards against brutality and disrespectful treatment, pointed out that:

*'Most women who I come across in Yarl's Wood have not committed offences in this country or failed to comply with any regulations relating to their status ... What happened to them was that one day, when they went to sign on and report, they were lifted by the security services, dispatched to a detention centre, and sometimes given very early decisions on their removal. In some cases, they were not allowed to return home, to collect clothes, or even to speak to friends ...'*<sup>183</sup>

In April 2006, a senior High Court judge condemned the way the Home Office sought to remove a Croatian family, ruling that the detention of the family at 8.40pm for removal to Croatia the following day at 7.40am, three years after an application in November 2001 to which there had been no response, was deliberately planned to minimise the chance of being able to contact a solicitor or apply to a judge to stop removal. 'This was improper and oppressive interference by the executive,' the judge said.<sup>184</sup> In August 2006, another judge condemned the Home Office for removing a Turkish family in the face of a court injunction.<sup>185</sup>

Home Office policy of non-removal to particularly dangerous countries has been abolished, purely because (according to the then home secretary David Blunkett) 'a blanket suspension of all removals to any country can only encourage those who seek to get around our controls for reasons nothing whatsoever to do with their political activities or fear of persecution'<sup>186</sup> Thus, a moratorium on removals to Zimbabwe was lifted in 2004, and a number of Zimbabweans were removed before the High Court stepped in; a group of Kurds were removed to northern Iraq in 2005 and another group removed by charter flight in September 2006 despite UNHCR warnings – in the latter case, home secretary John Reid publicly warned judges not to interfere.<sup>187</sup> In August 2006, the Home Office reversed a decades-long policy not to remove unaccompanied asylum seeking children whose claims were rejected, even where removal was against their best interests. They announced their intention to remove 500 children to Vietnam, including girls in their early teens trafficked to the UK for prostitution, who in some cases would be returned to the families who sold them. They plan to remove unaccompanied children to Angola and to the DRC, seen as among the most dangerous places in the world.<sup>188</sup>

A similar picture obtains in other European countries. In France, a coalition of refugee and migrant support groups, human rights groups, judges and lawyers has brought a legal challenge in the Supreme Court to a ministerial circular to prefects and public prosecutors which encourages the 'ambushing' of irregular migrants by detaining and removing those who respond to a request to report. The coalition argues that the circular jeopardises the right to asylum and requires officials to abuse procedures.<sup>189</sup>

In Spain, 189 Senegalese were repatriated in one week in June 2006, on seven secret night flights.<sup>190</sup> The Spanish authorities have also been accused of flouting children's

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<sup>183</sup> Hansard HC 20.7.05, col 439WH.

<sup>184</sup> *R (Karas) v Secretary of State for the Home Department* [2006] EWHC 747 (Admin).

<sup>185</sup> 'Turkish family deported despite court injunction', *Guardian* 16.8.06.

<sup>186</sup> Hansard HC 27.6.05, vol 435 col 1023.

<sup>187</sup> *Guardian* 5 September 2006.

<sup>188</sup> *Guardian* 18 August 2006.

<sup>189</sup> Migration News Sheet May 2006.

<sup>190</sup> Migration News Sheet July 2006.

rights by repatriating them, mainly to Morocco, without warning, without legal process and without ensuring adequate arrangements for their reception and care, in breach of legal and human rights obligations. Children in reception centres have organised an ad hoc vigilance system to alert them to attempts at removal and enable them to escape.<sup>191</sup> The Spanish authorities organised the first EU joint expulsion, removing 75 Romanians on a chartered aircraft which picked up a further 50 from France and Italy in September 2005.<sup>192</sup> Since then, a chartered aircraft has collected deportees from Switzerland, Germany, Holland, the UK and Malta.<sup>193</sup>

In Germany, the pressure to remove failed asylum seekers has led to collaboration with the smugglers who brought them in. The head of a smuggling ring was paid thousands of euros to identify his smuggled compatriots, to enable them to be deported. The head of Dortmund's immigration services in Germany confirmed that documentation on 250 out of a group of 321 Africans had been gathered through information obtained by the smuggling gang leader, who was paid a fee for each rejected asylum seeker to be repatriated.<sup>194</sup>

Following deaths in 1999 and 2001 during deportation, the Swiss legislature has finally approved legislation regulating the manner of removal, which approves the use of restraints to hands and feet, and fails to rule out the use of dogs, while drawing the line at the use of gags and other obstructions to breathing, and of medication.<sup>195</sup> In Austria, half of all aborted expulsion attempts since January 2005 have resulted in injuries severe enough to require hospital treatment.<sup>196</sup>

## **Violation of sanctuary**

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In the pursuit of failed asylum seekers for their expulsion, the German and British authorities in particular have no scruples about breaking down the doors of churches and mosques, destroying the sanctity of such places along with the age-old tradition (formerly part of medieval law) that they are inviolable and that not even desperate criminals can be pursued there. The first breach of sanctuary in the UK occurred in 1989, when Viraj Mendis was arrested in the Church of the Ascension, Hulme, in Manchester, after two years there, and deported to Germany. The bishop of Barking condemned the breach of the sanctuary of a mosque by police in riot gear in July 2002, when Farid and Feriba Ahmadi were arrested in the Ghausia Jamia mosque in Lye, west Midlands, where they had taken sanctuary four weeks earlier.

In January 2003, police forced their way into the rectory of Oranienburg parish priest Johannes Kölbel in Schwante, Brandenburg, looking for a Vietnamese man, Xuan Khang Ha, and his five-year-old German-born son. In response to the invasion of sanctuary, the parish lodged charges of coercion and trespass against the police, but the public prosecutor halted the legal action within a week, and instead launched proceedings against the priest, and his colleague Christoph Vogel, who were charged under section 92a of the Foreigners' Law with assisting the illegal entry or stay of foreigners. Although the proceedings were eventually dropped, the state prosecutor's office threatened to act

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<sup>191</sup> Migration News Sheet May 2006.

<sup>192</sup> 'EU immigrants deported by plane', bbc news online, 22.9.05.

<sup>193</sup> Migration News Sheet May 2006.

<sup>194</sup> Migration News Sheet June 2006.

<sup>195</sup> Migration News Sheet July 2006.

<sup>196</sup> Migration News Sheet August 2006.

‘more vigorously’ against church sanctuary in the future.<sup>197</sup> In May 2003, police in North Rhine-Westphalia stormed the chapel of a Dominican convent in their pursuit of members of a Kurdish family who had failed to appear for their deportation hearing, and threatened criminal proceedings against the sympathisers as ‘accessories to an infringement of the law on aliens’.<sup>198</sup>

Church sanctuary was also breached in lower Saxony in December 2004, when police forced their way into a parish building of St Jakobi, in Peine, and arrested a Vietnamese family with a ten-year-old autistic child. The family had been living in Germany for 13 years. Criminal charges were brought against the parish priest, who refused to lift the church sanctuary.<sup>199</sup>

## Resisting removal

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The criminalisation of asylum claimants and those supporting them continues right to the door of the aircraft. In the UK, rejected asylum claimants who fail to cooperate in a number of myriad ways with their own expulsion face criminal prosecution and the prospect of up to two years in prison. Failure on demand to provide information, documents or fingerprints, to apply to the authorities of another country, to complete a form accurately and to attend an interview and answer questions accurately and completely, is all criminal behaviour for immigrants.<sup>200</sup> Captains of aircraft who allow deportees off the plane can also be prosecuted under little-known provisions of the Immigration Acts.<sup>201</sup>

France, too, has long had criminal provisions for those failing to leave when required. But those witnessing deportations, and trying to stop them, have also been criminalised. In August 2003, Romain Binazon, coordinator of *Coordination sans Papiers* in France, was arrested when he attempted to stop a deportation on an Air France flight, and charged with rebellion and incitement to rebellion for trying to encourage passengers to oppose the deportation of Congolese passengers.<sup>202</sup> Also in France, three legal residents of Malian descent were prosecuted for protesting against a deportation attempt on another Air France flight in November 2002. They were accused of preventing the plane taking off for an hour, and inciting other passengers to prevent the deportation and to riot. Air France also brought civil proceedings for financial compensation for the hour’s delay.<sup>203</sup>

Even journalists attempting to record expulsions may find themselves at risk of arrest. A Malian TV crew who filmed border police manhandling deportees at Paris Charles de Gaulle airport were detained by police and their film was confiscated and erased in December 2002.<sup>204</sup>

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<sup>197</sup> *Junge Welt* 9, 29.1.03; *Frankfurter Rundschau* 5.9.03.

<sup>198</sup> *Junge Welt* 7.7.03.

<sup>199</sup> *Junge Welt* 15.12.04.

<sup>200</sup> Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 35.

<sup>201</sup> Immigration Act 1971 s 27.

<sup>202</sup> *Libération* 25.9.04.

<sup>203</sup> ‘Air France sues its own passengers’, 23.11.03, [www.noborder.org](http://www.noborder.org).

<sup>204</sup> *Agence France Presse* 7.1.03.

## Double jeopardy: foreign criminals

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The news that about a thousand foreign offenders who had served prison sentences had not been considered for deportation should have provoked a debate about the rights and wrongs of 'double jeopardy' – the principle enshrined in the Immigration Act 1971 which enables a foreign offender to be punished twice, by imprisonment and by deportation. Instead, it provoked a month of screaming headlines about rapists, murderers and paedophiles on the loose, and the resignation of the home secretary deemed responsible for the scandal.<sup>205</sup> The immigration rules were immediately amended to create a legal presumption in favour of deportation,<sup>206</sup> and hundreds of long settled migrants with good jobs and solid home lives suddenly found themselves arrested for deportation because of an isolated offence committed years before. One of these is Ernesto Leal, a Chilean refugee who came to the UK in 1977, when he was thirteen. On 1 May 2006, after 29 years in the UK, Leal was arrested and taken to Belmarsh maximum security prison, years after a one-off, out of character offence for which he had served his sentence some years before in an open prison. Leal's deportation decision was reversed by an immigration judge in August 2006,<sup>207</sup> but for many others, for whom deportation would be cruel and disproportionate – including people who have lived in the UK for most of their lives - the prospect looms.

## Double jeopardy: use of anti-terror laws

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The war on terror and the war on asylum converge in the treatment of migrants and asylum seekers suspected of terrorism or support for terrorism. But the breadth of the definition of 'terrorism' and the politics of its use means that those suspected of support for anti-western positions or for liberation struggles not supported by the west are also targeted. For those migrants and asylum seekers caught up in the 'war on terror', life in the asylum country can become a nightmare worthy of Kafka. The story of V, an Algerian asylum seeker, serves as an illustration. On 16 June 2006, 'V' returned home after withdrawing his appeal against deportation, fully aware that he risked torture as a suspected terrorist on his return. He was one of four Algerians held for up to four years as terrorist suspects, who wrote to the *Guardian* in April saying they would rather go home than endure the 'cruelty' inflicted on them by Britain. 'We know that we face torture in our country of origin but some of us have come to the decision that a quick death is preferable to the slow death we feel we are enduring here,' they said.<sup>208</sup>

V was one of a number of north Africans arrested in September 2002 on suspicion of involvement in a terrorist plot involving the poison ricin, and acquitted in April 2005 following two and a half years' detention in maximum security conditions. His freedom was shortlived – he was detained for deportation in September 2005 on the basis of the evidence rejected by the jury in the criminal trial. Others had been detained since December 2001 with no criminal trial, and none in prospect, under the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), which authorised indefinite detention without charge or trial for foreign nationals suspected of international terrorism. After three

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<sup>205</sup> 'Killers, rapists, paedophiles ... 1,000 convicted foreign criminals who should have been deported are at large', *Daily Mail* 26 April 2006; *Guardian* 26 April 2006. In fact, only a handful of the most serious offenders had re-offended since release. See Webber, 'Fit for purpose? The foreign prisoners scandal' in *Socialist Lawyer* No 44, July 2006.

<sup>206</sup> Statement of changes to Immigration Rules, HC 1337, July 2006.

<sup>207</sup> See [friendofernesto.org.uk](http://friendofernesto.org.uk).

<sup>208</sup> *Guardian* 26 April 2006, 19 June 2006; Amnesty International, *Human Rights: a broken promise* (EUR 45/004/2006) 23 February 2006. One of the four, who withdrew his appeal in March, was still in HMP Long Lartin in November, waiting for travel documents to be issued.

years in Belmarsh, most of the dozen or so national security detainees had succumbed to psychiatric illness and despair.<sup>209</sup>

In December 2004 the judicial committee of the House of Lords declared the indefinite detention provisions of ATCSA incompatible with fundamental human rights, since they discriminated against foreigners, who were no more likely to be terrorists than British citizens. Lord Hoffmann rejected the provisions on a broader basis, observing that under the Act:

*'Someone who has never committed any offence and has no intention of doing anything wrong may be reasonably suspected of being a supporter on the basis of some heated remarks overheard in a pub. The question in this case is whether the United Kingdom should be a country in which the police can come to such a person's house and take him away to be detained indefinitely without trial ... The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.'*

The Home Office did not release the Belmarsh detainees until March 2005, by which time a new Prevention of Terrorism Act had been rushed through parliament creating a regime of 'control orders'. The control orders imposed on foreign terrorist suspects were draconian in the extreme, including residence orders, electronic tagging, twelve- or 18-hour curfews, prohibitions on electronic communications equipment including mobile phones and internet access, advance vetting of all visitors and correspondents, and 24-hour access to their rooms by police and monitors. Control orders imposing such conditions on British citizens under the PTA were declared unlawful by the Court of Appeal in August 2006,<sup>210</sup> but remain perfectly lawful ways for the Home Office to control immigrants perceived as a national security threat,<sup>211</sup> as an alternative to detention – and detention pending deportation can itself be unlimited in time. Thus, the acquitted 'no ricin' defendants, including V, were re-arrested for deportation in September 2005 (the Home Office having decided to obtain a 'no torture' agreement with Algeria)<sup>212</sup> and (save for V and one other, who have returned to Algeria) remain in detention at time of writing, a year later.

The Belmarsh national security internees, and national security detainees awaiting deportation, can appeal to the Special Immigration Appeals Commission. But under the SIAC system, unlike in a normal court or Tribunal, neither the appellant nor his representative will see or hear the evidence underlying the decision, if the Secretary of State deems its disclosure not conducive to national security. Instead, a special advocate is appointed by the Commission from a security-vetted panel, who sees the restricted material and 'represents the interests' of the appellant in closed sessions. Needless to say, the special advocate cannot disclose any of the 'closed' material to the appellant or get his response to the allegations. A number of special advocates, and a member of the Commission,<sup>213</sup> have resigned in protest at the inherent unfairness of the system,<sup>214</sup>

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<sup>209</sup> See the Statement by the Royal College of Psychiatrists in respect of the psychiatric problems of detainees held under the 2001 Anti-Terrorism, Crime and Security Act, January 2005. See also the 24<sup>th</sup> report of the Joint Committee on Human Rights, 2006-7, para 143.

<sup>210</sup> *JJ and others v Secretary of State for the Home Department* [2006] EWCA Civ 1141, 1 August 2006.

<sup>211</sup> For a recent example see 'Iraqi faces control order after court clears him of terror video charges', *Guardian* 30.8.06.

<sup>212</sup> See text and fn 232 below.

<sup>213</sup> Brian Barder, a security services representative, who wrote explaining his decision in the London Review of Books (Vol 26 no 6, 18.3.04).

which, in the words of six special advocates, ‘contradict[s] three of the cardinal principles of criminal justice: a public trial by an impartial judge and jury of one’s peers, proof of guilt beyond reasonable doubt, and a right to know, comment on and respond to the case made against the accused’.<sup>215</sup>

The allegations behind national security detention and deportation of asylum seekers have been known in some cases to emanate from the security services of the states they have fled. The global war on terror means increasingly open cooperation with the security and intelligence services of countries from which asylum seekers have fled, including Turkey, Algeria, Libya, Lebanon, Jordan, Egypt, Syria, Tunisia and Morocco. Such cooperation sometimes leads to the characterisation of an asylum claimant as a ‘terrorist’ rather than involved in legitimate political dissent, as is alleged to have happened in the case of the Tunisian Mouldi Chaabane, stripped of refugee status and demonised in Germany because the Tunisian security services persuaded the German authorities that he was a supporter of terrorism.<sup>216</sup> The show trials of alleged ‘terrorists’ in France in the late 1990s were based to a large extent on information provided by the Algerian security services.<sup>217</sup> More recently, much of the information relied on to justify the detention and deportation of the Belmarsh detainees and of the acquitted ‘ricin conspirators’ came from contradictory and wholly unreliable testimony obtained from the questioning of an alleged co-conspirator in the custody of the Algerian security services, Mohammed Meguerba, who subsequently alleged that he had been tortured in detention.<sup>218</sup>

The Terrorism Act 2000 banned not just Al Qaeda but also organisations like the PKK<sup>219</sup> which have mass support as representing aspirations for self-determination of oppressed minorities, and in doing so has made ‘suspect communities’ of the exile Tamil, Kurdish, Algerian and other refugee communities who fled political repression. Supporters of exile organisations continuing with political activities are at risk of prosecution for organising meetings, making collections, even wearing colours or T-shirts implying support for a banned organisation.<sup>220</sup> Individuals and community groups can have bank accounts

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<sup>214</sup> See ‘lawyer attacks anti-terror laws’, BBC news online, 20 December 2004, on Ian Macdonald QC’s resignation; ‘It’s Britain’s Guantánamo’, Guardian Unlimited 20 January 2005, on Rick Scannell’s.

<sup>215</sup> Letter to the Times 7 February 2004, quoted in JCHR, ‘Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge detention’ (24<sup>th</sup> report of session 2005-6, 1 August 2006), fn 39.

<sup>216</sup> See ‘Terrorismus auf Bayerische Art’, de.indymedia.org, 15 June 2005. For Statewatch’s Observatory on CIA Renditions and detention: <http://www.statewatch.org/rendition/rendition.html> and Statewatch’s Observatory on “Terrorists” list: monitoring proscription, designation and asset-freezing see: <http://www.statewatch.org/terrorlists/terrorlists.html>

<sup>217</sup> There was evidence of very close collaboration between the French and Algerian security authorities in relation to the Touchent case (1997) and the Chalabi trial (1998). See FIDH March 1999 (No 271-2): ‘France: paving the way for arbitrary justice: report of international mission.

<sup>218</sup> See ‘Questions over ricin conspiracy’, BBC news online 13.4.05; ‘I was tortured, says ricin plotter’, Times online 9.5.05. The House of Lords reversed the Court of Appeal’s shameful ruling that evidence obtained abroad through torture could not be ruled inadmissible in SIAC cases, in *A v Secretary of State for the Home Department* [2005] UKHL 71.

<sup>219</sup> The organisation changed its name a number of times in response to banning, and is now known as Kongra-Gel, but in the UK the Proscribed Organisations (Name Changes) Order 2006 (SI 2006/1919) bans it under its new name. For the full list of proscribed organisations under the Terrorism Act see Schedule 2 as amended by the Terrorism Act (Proscribed Organisations) (Amendment) Orders 2001 (SI 2001/1261), 2002 (SI 2002/2724), 2005 (SI 2005/2892) and 2006 (SI 2006/2016).

<sup>220</sup> Membership or professed membership of a proscribed organisation is an offence under s 11 punishable by ten years’ imprisonment (triable either way); inviting support for a proscribed organisation, including organising or addressing a meeting to be addressed by a member or professed member, is an offence under s 12 (same penalties), and wearing an item of clothing or displaying an article so as to arouse reasonable suspicion of membership or support, is an offence under s 13 (summary only, 6 months/level 5 fine).

frozen if they provide financial support to relief organisations at home deemed ‘terrorist’ by MI5 or the US Treasury Office’s Foreign Assets Control.<sup>221</sup> Asylum seekers claiming to fear prolonged detention and torture from their state because of membership or support for a banned organisation risk a prison sentence if they disclose, let alone manifest, that support in the UK. In addition, they have a huge uphill struggle with claims based on support for organisations deemed terrorist by the UN, the UK or the EU. When membership or support attracts a ten-year sentence in the UK, it becomes more difficult to argue that detention for political opinions at home is persecutory.<sup>222</sup>

Finally, asylum seekers manifesting support for a proscribed organisation, or who are deemed to support, encourage or glorify ‘terrorism’ (broadly defined as it is to embrace liberation movements and violent street protests),<sup>223</sup> risk exclusion from refugee status and deportation. It is not just suspected war criminals from the former Yugoslavia, Rwanda and Sierra Leone<sup>224</sup> whose claims are referred to the War Crimes Unit of the Home Office<sup>225</sup> for investigation and possible exclusion from refugee status under Article 1F of the Refugee Convention.<sup>226</sup> The 2006 Immigration, Asylum and Nationality Act in effect amends the Refugee Convention by excluding from refugee status asylum claimants believed to be involved in preparation or instigation of terrorism (as broadly defined in the 2000 Terrorism Act) or in encouraging or inducing others’ involvement.<sup>227</sup> This could catch anyone vocally objecting to the invasion forces in Iraq and Afghanistan or expressing support for Chechen or Palestinian liberation struggles.

Deportation which is deemed ‘conducive to the public good’ on national security grounds has long been a feature of UK immigration law. In 2004, France, Germany and Spain all brought in legislation allowing the deportation of foreigners who had not been convicted of criminal offences. German and Spanish laws provided for the deportation of foreigners assessed as representing a future threat to national security. Links with ‘unconstitutional’ organisations could provide the evidential basis for the threat, and on that basis the German Land of Hessen deported ten Muslim clerics in the first two weeks of February 2005.<sup>228</sup> In the Netherlands, too, the residence rights of a number of imams were rescinded when they were accused of contributing to the radicalisation of Muslim youth. France has introduced measures providing for deportation for expressions of provocation, discrimination or hatred towards individuals or groups, and has introduced

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<sup>221</sup> See ‘Bank deals of 5,000 terror suspects tracked’, *Guardian* 10 September 2006. According to the article, 5,000 accounts have been ‘flagged up’ and 200 frozen on information from MI5 or the US Treasury Office. Schedule 6 of the Terrorism Act allows police to order banks to surrender information about individuals’ accounts. These measures are separate from those authorised under the Terrorism (United Nations Measures) Order 2001, SI 2001/3365 or Al-Qa’ida and Taliban (United Nations Measures) Order 2002 (SI 2002/111, under which the Bank of England can require clearing banks to freeze the assets of individuals and organisations named on UN Security Council lists. See Fekete, ‘Anti-terrorism and human rights’, ERB 47, Spring 2004.

<sup>222</sup> The House of Lords accepted in 2003 that suspected terrorists detained and ill-treated at home could be refugees: *Sivakumar v Secretary of State for the Home Department* [2003] UKHL 14.

<sup>223</sup> Terrorism Act 2000. For definitions of terrorism see Ahmad, Eqbal: ‘Terrorism, theirs and ours’, *irr* news online 11 October 2001.

<sup>224</sup> In each case, UN Tribunals have been set up to try war criminals, and suspects are sent to the relevant tribunal or (subject to human rights claims) returned home for trial.

<sup>225</sup> Set up in 2004: see Home Office website, [www.ind.homeoffice.gov.uk](http://www.ind.homeoffice.gov.uk).

<sup>226</sup> Article 1F excludes from refugee status those reasonably suspected of engaging in war crimes, crimes against humanity or serious non-political crimes perpetrated before arrival (held to include terrorism by the House of Lords in *T v Home Office* [1996]).

<sup>227</sup> Immigration, Asylum and Nationality Act 2006 ss 54, 55.

<sup>228</sup> Fekete, “Speech crime” and deportation, *Race & Class* 47(3) (2006), 82-92

a draft European Council resolution on information exchange on expulsion of ‘radical preachers inciting hatred and violence’.<sup>229</sup> In such a climate, Muslim preachers publicly expressing condemnation of Bush and Blair’s wars in Iraq and Afghanistan, of Russian human rights abuses in Chechnya and of Israel’s war crimes in Lebanon risk deportation, as do refugees seeking to promote the self-determination of their communities through liberation speeches in the host country. For foreigners who are accused of inciting hatred, the criminal law, with its fair trial guarantees and right to be heard, tends to be neglected in favour of deportation – and in some cases, the right of appeal can be exercised only after removal.<sup>230</sup>

National security deportation requires no proof of criminal conspiracy, merely an administrative assessment of the risk believed to be posed by an individual, which a national security Tribunal such as SIAC (in the UK) is expected to defer to.<sup>231</sup> But even where removal follows legal hearings where due process has been followed, the risks of ill-treatment of anyone suspected of terrorism in western Europe are immeasurably enhanced by security cooperation which ensures that the authorities of the receiving country will be aware of the identity, place and time of arrival of those they consider their political foes. Memoranda of understanding which purport to guarantee the safety of returnees, favoured by the Swedish, British and German governments among others as a way of getting rid of unwanted foreigners suspected of terrorism,<sup>232</sup> have been condemned by (among others) the UN Committee Against Torture, the UN Human Rights Commissioner and the Council of Europe Committee of Experts, and described as a tool to circumvent human rights obligations rather than fulfil them.<sup>233</sup> They are worth nothing, as the joint parliamentary human rights committee noted, without stringent monitoring, which is never allowed.<sup>234</sup> However, in one notorious case, prime minister Tony Blair questioned the need for diplomatic assurances providing for protection against torture and fair trial guarantees for four Islamic Jihad members: on a memo describing Foreign Office negotiations with the Egyptian government over the men’s return, he scrawled, ‘Get them back .. Why do we need all these things?’<sup>235</sup>

Deportation to a country where a deportee faces torture or inhuman or degrading treatment or punishment is prohibited by Article 3 of the European Convention on Human Rights – a legal ban which the UK, in common with other European governments, will seek to lift in the case of foreign terrorist suspects in the European Human Rights Court in Strasbourg in October 2006.<sup>236</sup> A more insidious and frightening (because secret) way of circumventing the ban on deportation to torturing states is the

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<sup>229</sup> Ibid; EU Action Plan on Combating Terrorism, 22 July 2006, 11882/06.

<sup>230</sup> In France, Italy and the Netherlands: see Fekete op cit.

<sup>231</sup> The judicial committee of the House of Lords told SIAC to defer to the executive’s assessment of national security risks, in *Rehman v Secretary of State for the Home Department* [2001] UKHL 47.

<sup>232</sup> Memoranda of understanding have been concluded with Lebanon, Jordan and Libya, but negotiations with the Algerian authorities have stalled over the issue of independent monitoring. In August 2006, the Special Immigration Appeals Commission upheld the government’s decision to deport a suspected terrorist to Algeria despite the lack of an agreement, see ‘Row as judges back Blair in key terror case’, *Guardian* 25.8.06.

<sup>233</sup> See *No guidelines on empty promises*, Human Rights Watch, 3 April 2006; see Joint Committee on Human Rights 3<sup>rd</sup> report 2005-6, 5 December 2005, HL 75/HC 561, paras 120ff), and the JCHR’s 19<sup>th</sup> report 2005-6, ‘The UN Convention Against Torture’, 26 May 2006, which expresses grave concerns about relying on such assurances (paras 129ff)

<sup>234</sup> See JCHR, 19<sup>th</sup> report, minutes 18 May 2006.

<sup>235</sup> *Youssef v Home Office* [2004] EWHC 1884 (AB), 30 July 2004. Statewatch News Online, UK: Egyptian national “unlawfully detained” after intervention by Prime Minister, November 2004

<sup>236</sup> In the test case of *Ramzi v the Netherlands*.

phenomenon of 'rendition', the unlawful removal of foreign nationals to torturing states. The word is associated with recent allegations regarding the CIA, and secret detention sites in Poland and Romania,<sup>237</sup> but the practice has been noted for some years, in relation to asylum seeking or migrant 'terrorist suspects' from middle eastern countries, 'rendered' by European governments who ought to have been protecting them, as well as by the US.<sup>238</sup> The lid was lifted on the practice in 2005. In June 2005 Egyptian president Hosni Mubarak asserted that the US government had rendered 50-60 suspects to Egypt over three years, and American Civil Liberties Union spokesman said that 100 to 150 renditions to middle eastern countries was a conservative estimate.<sup>239</sup> Condemnation of secret detention and rendition has been universal. The Council of Europe's Parliamentary Assembly has called for the dismantling of the system of secret detention and unlawful inter-State transfers, and a review of bilateral agreements between member states and the US government,<sup>240</sup> and its Secretary General strongly condemned those (including the British prime minister) suggesting that human rights were an obstacle to the war on terror. 'Either they haven't read [the Human Rights Convention] he said, 'or they haven't understood it'.<sup>241</sup> The EU network of independent experts on fundamental rights has detailed the obligations of member states vis-à-vis secret detention and rendition by foreign forces stationed in their territory,<sup>242</sup> and member states found to be engaging in actions violating human rights could have their voting rights suspended. The UN Committee Against Torture said in a report in May 2006 that secret detention and rendition of terrorist suspects would violate the UN Convention Against Torture.<sup>243</sup>

## Conclusion

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The exclusionary imperatives of reduction of numbers arriving and an increase in those removed are driving European asylum policy steadily to a penal model. This had its beginnings in the early 1980s, and in 1992, the Ad Hoc Committee formulating EU asylum policy pre-Maastricht stated its view that intercontinental movement to seek asylum was 'unlawful'. Now, the whole panoply of criminal powers, including the regular use of the criminal law, segregation from society, mass detention, fingerprinting and electronic tagging, is brought to bear on asylum claimants. Immigration police have all the powers and none of the accountability of 'normal' police. Private sector guards on minimum wages are recruited to keep asylum claimants in order and to deport them, and may use 'reasonable force' in doing so.

There is a frightening continuity between the treatment of asylum claimants and that of terrorist suspects. In the name of the defence of our way of life and our enlightenment values from attack by terrorists or by poor migrants, that way of life is being destroyed by creeping authoritarianism, and those values – amongst which the most important is the universality of human rights – betrayed.

Frances Webber, November 2006

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<sup>237</sup> 'Europe under rendition cloud', BBC news online, 8 June 2006.

<sup>238</sup> See cases before UN Committee Against Torture (CAT) such as *Arana v. France* (relating to an ETA member's removal to Spain), *Agiza v Sweden* (2001) on the rendition of an asylum seeker to Egypt.

<sup>239</sup> 'US suspects face torture overseas', BBC news online 14 June 2005.

<sup>240</sup> Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states, Resolution 1507 (2006), adopted 27 June 2006.

<sup>241</sup> Migration News Sheet June, July 2006.

<sup>242</sup> 'Human rights responsibilities of EU member states in the context of CIA activities in Europe (extraordinary rendition)', CFR Opinion 3-2006, 25 May 2006.

<sup>243</sup> UN Committee Against Torture, 36<sup>th</sup> session, CAT/C/USA/CO/2, 18 May 2006.

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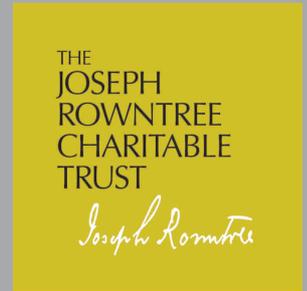
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