

1002879

# Honours Dissertation

Level 4

2013/14

by

Laura Pasternak

Law with Spanish language, LL.B

University of Glasgow

**Conduct a critical and comparative study on the lawfulness of immigration detention in Spain and the United Kingdom. Examine the human rights implications in the context of each legal system's vertical implementation of International and European law. Evaluate the effectiveness of the Common European Asylum System in terms of immigration detention.**

Maria Fletcher, Dissertation Supervisor

04/03/14

## Table of Contents

<b>Key and Abbreviations</b> .....	page 3
<b>Introduction</b> .....	page 7
<b>Chapter I. Legal basis for immigration detention in Spain and the UK</b> .....	page 12
- International law.....	page 12
- European law.....	page 14
- Domestic law.....	page 18
<b>Chapter II. Asylum-seekers and discrimination</b> .....	page 22
- Art. 5 – detention of asylum-seekers.....	page 22
- Discriminatory ‘ethnic profiling’ in Spain and nationality listing in the UK.....	page 26
<b>Chapter III. Duration, legal limbos and procedural safeguards</b> .....	page 30
- Duration: ‘directive of shame’ in Spain or indefinite detention in UK?.....	page 30
- ‘Legal limbos’ encountered in Spain and the UK.....	page 33
- Challenging the legality of decision to detain.....	page 36
<b>Chapter IV. Internal regulation, criminalisation and vulnerable detainees</b> .....	page 42
- Internal regulation.....	page 42
- Criminalisation.....	page 47
- Vulnerable persons – children, asylum seekers and victims of gender discrimination... .....	page 50
<b>Chapter V. Evaluation of CEAS immigration detention regulation</b> .....	page 52
<b>Conclusion</b> .....	page 54
<b>Appendix</b> .....	page 57
<b>Bibliography</b> .....	page 58

## Key and Abbreviations

### Key

♦ (in superscript) = translation mine.

### Abbreviations♦

AEDH	Asociación Europea de Derechos Humanos / European Association of Human Rights
AIDA	Asylum and Information Database
AI(TC)A	Asylum and Immigration (Treatment of Claimants) Act
APD	Asylum Procedures Directive
APDHA	Asociación Pro Derechos Humanos de Andalucía / Association in favour of Human Rights in Andalucía
APP	Advisory Panel Procedure
ATCSA	Anti-terrorism, Crime and Security Act
BID	Bail for Immigration Detainees
CC	Código Civil Español / Spanish Civil Code
CE	Constitución Española / Spanish Constitution
CEAR	Comisión Española de Ayuda del Refugiado / Spanish Commission of Refugee Aid
CEAS	Common European Asylum System
CEAP	Common European Asylum Policy
CFREU	Charter of Fundamental Rights of the European Union
Ch(s).	Chapter(s)
CIDOB	Barcelona Centre for International Affairs
CIE	Centro de Internamiento de Extranjeros / Internment Centres for Foreigners
CIO	Chief Immigration Officer
COE	Council of Europe
CRSR	Convention Relating to the Status of Refugees (The Geneva Convention)

DA	Detention Action
DCR	Detention Centre Rules
DEVAS	Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union
DFT	Detention Fast Track
DNSA	Detained Non-Suspensive Appeals
DSOMISRC	Detention Services Operating Standards Manual for Immigration Service Removal Centres
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
ECRI	European Commission against Racism and Intolerance
Eds	Editors
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
EJML	European Journal of Migration and Law
EIG	Enforcement Instructions and Guidance
EP	European Parliament
EU	European Union
EUI	European University Institute (Italy)
GMFUS	German Marshall Fund of the United States
HET	Holocaust Educational Trust
HMI	Her Majesty's Inspectorate
HMIP	Her Majesty's Inspector of Prisons
HMPS	Her Majesty's Prison Service
HOOS	Home Office Operating Standards
HRC	Human Rights Committee (UNHRC)
HRO	Human Rights Observatory
ImmAR	Immigration Appeal Reports
IRC	Immigration Removal Centres
IA	Immigration Act
IAA	Immigration and Asylum Act
ICCPR	International Covenant on Civil and Political Rights

ICI	Independent Chief Inspector
IFRP	Independent Family Returns Panel
JCHR	Joint Committee on Human Rights
LDSG	London Detainee Support Group
LO	Ley Orgánica / (Organic) Law
LOE	Ley Orgánica de Extranjería / Immigration Act
LODYLE	Ley Orgánica de Derechos Y Libertades de los Extranjeros y de su integración social / Law on the Rights and Freedoms of Foreigners and of their social integration
M/C Journal	A Journal of Media and Culture
MO	Migration Observatory
NAIU	National Asylum (and Third country) Intake Unit
NIAA	Nationality, Immigration and Asylum Act
NGO	Non-Governmental Organisation
OEM	Operation Enforcement Manual
Ox	University of Oxford
Para(s)	Paragraph(s)
PPO	Prisons and Probation Ombudsman
Pt	Part
RCD	Reception Conditions Directive
RD	Returns Directive
REDYLE	Reglamento sobre los Derechos Y Libertades de los Extranjeros / Regulation for the Rights and Freedoms of Foreigners
RRA	Race Relations Act
RSC	Refugee Studies Centre
SIAC	Special Immigration Appeals Commission
UDHR	Universal Declaration of Human Rights
UNCRC	United Nations Convention on the Rights of the Child
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Committee
UN	United Nations
UK	United Kingdom
UKBA	United Kingdom Border Agency

WLW Women's Link Worldwide

WWII World War Two

## Introduction

*My life is prohibited,  
the authorities say.*

*I go alone with my sorrow:  
My lone sentence.  
To run is my destiny,  
For I carry no papers<sup>1</sup>...  
They call me clandestine.  
I am the outlaw.*

*Clandestine Black Hand,<sup>2</sup>  
Clandestine Peruvian,  
Clandestine African;  
Illegal Marijuana.<sup>3</sup>*

Manu Chao – in his song ‘Clandestino’ – encapsulates the figure of an immigrant as an illegal person, ostracised from a society with a hostile attitude towards immigration. It is submitted that this perception is perpetuated by the ever-increasing use of immigration detention in the EU.<sup>4</sup> Media fearmongering and a lack of transparency or awareness about the existence and running of detention centres and their inmates are rife. Detainees are regarded as ‘undeserving’ and often as criminals in the UK.<sup>5</sup>

---

<sup>1</sup> Documentation as proof of identity.

<sup>2</sup> This was the singer’s (see no.3) previous band: ‘Mano Negra’ 1987-1995.

<sup>3</sup> Lyrics from Chao, M. (1998) *Clandestino*. Europe, Mexico, US: Virgin, EMI, Ark21 (respectively).

<sup>4</sup> Landgren, K, ‘Comments on the UNHCR position on detention of refugees and asylum seekers’, in Hughes, J *et al.* (eds), *Detention of asylum seekers in Europe: Analysis and perspectives* (The Hague, 1998), 159.

<sup>5</sup> Taylor, D, ‘The UK dehumanises immigrants- no wonder tragedies happen in detention’ (January, 2014) *The Guardian* (theguardian.com), accessed 13.02.14.

Spaniards refer to unauthorised persons as ‘sin papeles’ or ‘ilegales’ which translates as ‘those with no papers’ and ‘illegals’ respectively. The verb used to attribute these names is ‘ser’ as opposed to ‘estar’ which asserts that being ‘unauthorised’ is a permanent – as opposed to a temporary – condition. This stigmatisation is currently exacerbated in Spain where immigrants are viewed as scapegoats of the economic crisis.<sup>6</sup> These widely-held prejudices<sup>7</sup> generate hatred and racism.<sup>8</sup> They must be addressed and eradicated.

To this end, this study will critically compare the lawfulness of immigration detention in Spain and the UK. It will manifest human rights violations experienced in both countries in the context of national, European and International law. The comparison will highlight and evaluate the differences in each country’s immigration detention estate and in turn assess the effectiveness of the respective domestic laws and the detention regulations in the CEAS.

---

O’Nions, H, ‘No right to liberty: the detention of asylum seekers for administrative convenience’ *EJML* 10 (2008), 183.

<sup>6</sup> Morán, A.J, *et al.*, ‘Los CIEs para extranjeros en España: una evaluación crítica’ *Revista CIDOB d’afers internacionals*, n.<sup>o</sup> 99 (September, 2012), 217.

<sup>7</sup> GMFUS, *Transatlantic trends: key findings 2013*: 44% (=European average) of Spanish population view immigration as more of a problem than an opportunity. UK= 64%. Concerns about illegal immigration in both Spain (74%) and the UK (80%) exceed the European average (71%).

<sup>8</sup> UNGA, Ruteere, M, ‘Report of the special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance: visit to Spain’ (6 June 2013) A/HRC/23/56/Add.2, para 58.

In Chapter I the legal framework surrounding immigration detention in Spain and the UK will be compared in terms of the vertical implementation of International and European law. Chapter II will scrutinise the peculiarities of potential breaches of arts. 5 and 14 ECHR<sup>9</sup> in each country. Chapter III will compare the duration of detention, the ‘legal limbos’ encountered in both countries and evaluate the procedural safeguards for challenging the legality of detention, contemplating art. 6 ECHR. Chapter IV will contrast the internal regulation and criminalisation in the detention centres in both countries, considering vulnerable persons and arts. 3, 6, 8 and 14 ECHR. Chapter V will consider the merits of the CEAS as a result of the disparities identified throughout the study.

It is essential to provide a brief overview of the current British and Spanish immigration detention estates. In Spain, detention is divided into short-term detention<sup>10</sup> and internment, which lasts significantly longer. For the purposes of this study, internment in Spain will hereinafter be referred to as detention. Spain has seven CIEs in use and the UK has eleven IRCs. Notwithstanding, Spain has a larger capacity for detention.<sup>11</sup> Detention in both countries is employed either to prevent unauthorised entry or pending removal.

---

<sup>9</sup> Rome, 4.XI.1950.

<sup>10</sup> ≠ > 72 hours as per CE 1978, art. 17.2.

<sup>11</sup> See Appendix for maps of CIEs and IRCs in Spain and UK sourced from Global Detention Project ‘Europe Profiles’ last updated in February 2013 (Spain) and June 2011 (UK) ([www.globaldetentionproject.org](http://www.globaldetentionproject.org)), accessed 13.02.14;

N.B. Total does not include short-term holding facilities in the UK; Morán *et al.*, ‘Los CIEs para extranjeros en España: una evaluación crítica’, 210; and Issue Brief ‘Immigration removal/detention centres’ ([www.politics.co.uk](http://www.politics.co.uk)), accessed 14.02.14.

In Spain, CIEs detain economic migrants as subjects of the Africa-to-Europe ferry trade; migrants pending deportation after committing a criminal offence; migrants pending removal unable to extend their leave to remain since unemployed; and unauthorised immigrants or failed asylum-seekers. In the UK, IRCs generally detain deportees following committal of a criminal offence; asylum-seekers; overstayers or those who breach conditions of leave;<sup>12</sup> and unauthorised immigrants. The Africa-to-Europe ferry trade is a notoriously polemic issue in Spain which has augmented the use of detention.<sup>13</sup> However, these particular migrants only represent 25% of CIE inmates.<sup>14</sup> 60% of all detainees in Spain have already established social, familial or working ties prior to admittance.<sup>15</sup> 50% of inmates in the UK are asylum-seekers, unlikely to have established strong personal links prior to detention.<sup>16</sup>

In Spain, the deaths of Samba Martine in 2011 and Ibrahim Sissé in 2012 following medical negligence while in detention catalysed widespread public denunciation of CIEs.<sup>17</sup> In the UK, detainees have protested with hunger strikes and through suicide. The most recent atrocity involved Alois Dvorzak, an 84-year-old detainee with dementia, who died while wearing handcuffs *after having been removed* from Harmondsworth IRC on account of his illness.<sup>18</sup> The ‘Centro de Capuchinos’ CIE in Málaga and Oakington IRC are examples of detention centres in Spain and the UK

---

<sup>12</sup> IAA 1999, s.10.

<sup>13</sup> Wilsher. D, *Immigration Detention: Law, History, Politics* (New York, 2012), 202.

<sup>14</sup> Morán *et al.*, ‘Los CIEs para extranjeros en España: una evaluación crítica’, 211-212.

<sup>15</sup> *Ibid.*, 212.

<sup>16</sup> Clayton. G, *Textbook on Immigration and Asylum Law* 5<sup>th</sup> edn. (UK, 2012), para 15.3.

<sup>17</sup> Morán *et al.*, ‘Los CIEs para extranjeros en España: una evaluación crítica’, 202.

<sup>18</sup> Gander. K, ‘84-year-old dementia patient died in handcuffs at immigration detention centre’ (January, 2014) ([www.independent.co.uk](http://www.independent.co.uk)), accessed 14.02.14.

which have been closed down in recent years following investigations into their deplorable living conditions.

The omnipresent stories of injustice and dehumanisation in immigration detention centres are sickening. In the ‘HET 2013 Appeal Film’ Lord Browne of Madingley stated that, ‘the only way to learn in life is by telling stories’.<sup>19</sup> Stories are more persuasive than statistics or country profiles. Which terrifying tale will it take for Spain and the UK to *fully* conform to the rule of law and legal certainty? To what extent must people suffer for these States to exhibit a basic respect for humanity? It is necessary to investigate the need to reform immigration detention law in these two countries.

---

<sup>19</sup> HET ([het.org.uk](http://het.org.uk)), accessed 15.02.14.

## **Chapter I. Legal basis for immigration detention in Spain and the UK**

In light of the need for greater protection, an examination of both domestic and ECHR legality of immigration detention in Spain and the UK is required.<sup>20</sup> The common and distinct laws applicable and the over-arching legal principles identified will be developed in the following chapters.

### **International law**

Both Spain and the UK must take into account the CRSR 1951. Art. 26 establishes that freedom of movement applies only to those lawfully within States' territory, excepting unauthorised persons and asylum-seekers. Para 1 of art. 31 provides that unauthorised refugees should escape penalties imposed by States where they seek asylum with good cause immediately on arrival. Goodwin-Gill asserts that 'penalty' should encompass detention. However, para 2 essentially permits detention until authorisation or removal, subject to what is 'necessary'. This has been interpreted broadly by States.<sup>21</sup>

The UDHR 1948 recognises the prohibition of arbitrary detention in art. 9. Also, art. 9 ICCPR 1966 contains the right to liberty and freedom from arbitrary detention, except where prescribed by law. The drafting committee's definition of 'arbitrariness' incorporated 'injustice, unpredictability, unreasonableness, capriciousness and unproportionality'.<sup>22</sup> The UNHRC is the treaty body responsible for enforcing the

---

<sup>20</sup> Blake. N QC, *et al.*, *Immigration, asylum & human rights* (New York, 2003), 119.

<sup>21</sup> Hailbronner. K, 'Detention of asylum seekers' *EJML* 9 (2007), 163.

<sup>22</sup> Bossuyt. M.J, *Guide to the 'Travaux Préparatoires' of the ICCPR* (Leiden, 1987), 172.

ICCPR. It is significantly less deferential to States with regards to detention, especially compared with the ECtHR.<sup>23</sup>

Another common source of International law to Spain and the UK is the UNCRC 1989. Spain ratified this Convention in 1990. It was ratified by the UK in 1991 with a reservation in respect of immigration matters. This was renounced in 2008, the relevance of which will be discussed in Chapter IV.

---

<sup>23</sup> Wilsher. D, 'Immigration detention and the CEAP' in Baldaccini. A *et al.*, *Whose freedom security and justice? EU immigration and asylum policy* (Oxford, 2007) 395 at 402.

## European law

### *Council of Europe*

Art. 5 ECHR enshrines the right to liberty and freedom from arbitrary detention. Para (1)(f) permits lawful detention to prevent unauthorised entry or where deportation or extradition is pending. The ECHR offers a wide margin of discretion for the purposes of preventing unauthorised entry.<sup>24</sup>

The ECtHR is the leading international human rights court from an immigration detention perspective given the volume of relative jurisprudence it has produced.<sup>25</sup> It established four conditions in order to avoid ‘arbitrariness’ when employing detention to prevent unauthorised entry. It should be: performed in good faith; closely connected to the aim of preventing unauthorised entry; executed in an appropriate location in humane conditions; and subject to the principle of proportionality in light of the purpose of the detention.<sup>26</sup> Where detention is used pending deportation, it need not be necessary.<sup>27</sup> It must not be arbitrary<sup>28</sup> and should be proportional to the aims pursued. The reasons for detention must be given promptly, providing an interpreter is available (if required).<sup>29</sup> The ECHR was originally deferential towards state sovereignty and has abstained from imposing time limits to detention or mandatory judicial authorisation.

---

<sup>24</sup> Hailbronner, ‘Detention of asylum seekers’, 166.

<sup>25</sup> Wilsher, ‘Immigration detention and the CEAP’ (see no.22), 397.

<sup>26</sup> *Zamir v. UK*, (1983) (no.9174/80) DR 40, 42

Murdoch. J *et al.*, *Human rights in Scotland* 3<sup>rd</sup> edn. (West Sussex, 2011), 472.

<sup>27</sup> *Chahal v. UK*, (1996) 23 EHRR 413.

<sup>28</sup> *Amuur v. France* (1996) 22 EHRR 533.

<sup>29</sup> *Čonka v. Belgium*, (2002) (no.51564/99) ECHR 2002-I.

However, the Parliamentary Assembly has recommended that a comprehensive code be established to regulate detention.<sup>30</sup>

### ***European Union***

#### *Relevant Directives of the CEAP*

The restrictions on detention of asylum-seekers regulated by the CEAP are generally influenced by Strasbourg jurisprudence.<sup>31</sup> Both Spain and the UK are bound by the EU APD and the RCD<sup>32</sup>. These directives are applicable until 21 July 2015. On 20 July 2015, recast versions will be applicable in Spain but not the UK as it has opted-out from them.<sup>33</sup>

The current RCD provides certain authorisation for asylum-seekers distinguishing them from illegal immigrants. It does not require judicial authorisation of detention nor a right to bail.<sup>34</sup> It prohibits mandatory detention yet does so in vague terms. The UK has taken advantage of this wide discretion by implementing fast-track mandatory detention for asylum-seekers. The directive states that detention should be lawful and ‘necessary,

---

<sup>30</sup> Wilsher, *Immigration Detention: Law, History, Politics*, ch.3.

<sup>31</sup> Wilsher, ‘Immigration detention and the CEAP’ (see no.22), 398.

<sup>32</sup> Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13; and Council Directive 2003/9 /EC laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18, respectively.

<sup>33</sup> Council Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180; and Council Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96.

<sup>34</sup> Wilsher, *Immigration Detention: Law, History, Politics*, ch.4.

for example for legal reasons or reasons of public order'.<sup>35</sup> Art. 18 APD provides that no one should be detained for the 'sole reason that he/she is an applicant for asylum' and that 'speedy judicial review' must be accessible.

### *The Returns Directive (RD)*

Spain, unlike the UK, has opted-in to the RD.<sup>36</sup> Interestingly; an independent Scotland would also opt-in in order to establish a maximum limit on the length of detention.<sup>37</sup> For illegal immigrants or detainees pending removal for deportation or extradition, this directive obliges Member States to either effect removal or regularisation in order to avoid situations of 'legal limbo'. It sets a 6-month limit on detention<sup>38</sup> and subjects detention decision-making to the proportionality test. It provides a far more comprehensive code for the operation of detention, demonstrating the EU's attempt to deter illegal immigration.

### *ECFHR*

The CFREU 2000 may surpass the protection provided by Member States' law and even International human rights law with regards to administrative detention.<sup>39</sup> While merely declaratory; it is of equivalent legal value to EU treaties, encapsulates the

---

<sup>35</sup> RCD, art. 7(3).

<sup>36</sup> Council Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

<sup>37</sup> Craig, S, 'Immigration in the White Paper- 'continuity of effect' and its limits' (December, 2013) ([www.scottishconstitutionalfuture.org](http://www.scottishconstitutionalfuture.org)), accessed 16.02.14.

<sup>38</sup> RD, art. 15(5).

<sup>39</sup> [2000] OJ C 364/01; and

Wilsher, *Immigration Detention: Law, History, Politics*, 198.

universality of human rights and protects the ‘human’ as opposed to the ‘citizen’. Indeed, the preamble of this text indicates an aspiration to comply with the UDHR. The subjects of the Charter are the EU Member States. Therefore, CFREU jurisprudence is significant in both Spain and the UK.

Art. 6 provides an indiscriminate right to the liberty and security ‘of a person’. However, art. 52 establishes that any interference with this right must be necessary and proportionate. The guarantee for a ‘necessity’ test outweighs the protection offered by Strasbourg jurisprudence for detention pending deportation following *Chahal v. UK*. The ECJ has a ‘cosmopolitan’ approach to controlling immigration detention.<sup>40</sup>

---

<sup>40</sup> Wilsher, *Immigration Detention: Law, History, Politics*, 199.

## Domestic law

States used to freely exercise their sovereignty to manage their detention estates. However; there is a pressing social need to ensure that immigration detention accords to the rule of law and safeguards human rights. Thus, vertical implementation of International and European law which endeavours to meet this function is crucial. Notwithstanding, many aspects of European law are highly politicised and incorporate cultures of restrictionism and deterrence upon which Member States have been unwilling to compromise. The erratic standards of International law regarding immigration detention must effect an arduous regulatory task at domestic level.<sup>41</sup> It is fitting to compare the domestic law in Spain and the UK in light of their respective transposition and observance of EU and International law.

### *Spain*

CIEs were established in Spain by a Ministerial Order expressed in the LOE (1/7/1985)<sup>42</sup> on the rights and freedoms of foreigners. Art. 26.2 contained the power to ‘judicially agree, for preventative or cautionary reasons, entry into centres which are not penitentiary of foreigners who fall into the determined reasons for expulsion while based on file’.<sup>43</sup> This limitation of the constitutional right to liberty<sup>43</sup> was first endorsed by the Constitutional Court in the following case: STC 115/1987. Restrictions must be

---

<sup>41</sup> Wilsher, ‘Immigration detention and the CEAP’ (see no.22), 406.

<sup>42</sup> Now defunct.

<sup>43</sup> CE, art. 17.

proportionate. This case verified that detention should be of an ‘exceptional nature’ and judicially approved.<sup>44</sup>

Art. 17 CE provides that the restriction of liberty must not be for any longer than ‘absolutely necessary’.<sup>45</sup> The HRO at Barcelona University asserted that administrative detention is inherently unconstitutional, as ‘people are detained because of what they are as opposed to what they have done’.<sup>46</sup>

The regulations for the deprivation of liberty are based in the LODYLE 4/2000, revised by the LO 8/2000, LO 11/2003, LO 14/2003 and the LO 2/2009. This law outlines the specific circumstances whereby a foreigner’s right to liberty can be derogated. It does not include, however, the constitutional necessity test. ‘Internment’ in Spanish law is the product of a decision to extend the ‘detention’ period. It is made by the Facilitator of the removal order and is subject to subsequent judicial authorisation.<sup>47</sup> Art. 62.1 LODYLE ascertains the content of an internment decree and the procedural requirements therein.

Spain must interpret national law in accordance with ECHR legality. It is bound by Strasbourg case law. However, the ECHR is subject to review by the Constitutional Court and the CE has a higher legal status in Spanish law.<sup>48</sup>

---

<sup>44</sup> APDHA, *CIEs en España* (October 2008), 5.

<sup>45</sup> General State Prosecution Office\*, Circular 3/2001 (December), 6.

<sup>46</sup> Morán *et al.*, ‘Los CIEs para extranjeros en España: una evaluación crítica’, 208.

<sup>47</sup> STC 236/2007 and LODYLE, art. 60.1.

<sup>48</sup> CC 1889, art. 1.2.

## ***UK***

The statutory basis for immigration detention in the UK is the IA 1971 schs 2 and 3 and the NIAA 2002 s.62. The power to detain is normally exercised at the discretion of a CIO: pending examination; pending a removal decision; pending removal (IA sch 2); or pending deportation (IA sch 3). He/she must then take into account whether there are sufficient reasons to detain and, where applicable, for how long the subject had previously been detained.<sup>49</sup> The UKBA's EIG must be considered.<sup>50</sup> Common law also requires that statements and usual practices communicated to practitioners are observed.<sup>51</sup>

The HRA 1998 should guarantee that UK law conforms to ECHR legality. Immigration Officers in the UK must also comply with the Home Office's OEM which explicitly refers to art. 5 ECHR.<sup>52</sup>

## ***Comparison***

A shortcoming of both Spain and the UK's national law is that the decision-making process rests mainly in the hands of subjective decision-makers. The Spanish Facilitator of the removal order and British CIO enjoy wide discretion when deciding to detain. In the interests of maintaining impartiality, surely this decision should be solely attributed

---

<sup>49</sup> Clayton, *Textbook on Immigration and Asylum Law*, paras 15.3-15.4.

<sup>50</sup> EIG, ch.55.3.1.

<sup>51</sup> *Nadarajah & Amirthanathan v. SSHD* [2003] EWCA Civ 1768.

<sup>52</sup> O'Nions, 'No right to liberty: the detention of asylum seekers for administrative convenience', 167.

to the judiciary?<sup>53</sup> While Spanish law provides for judicial authorisation of the decision to detain, the plurality of political, administrative and judicial institutions involved in the decision-making process creates many inconsistencies.<sup>54</sup> There is a general lack of communication between the courts and administrative authorities.<sup>55</sup> Furthermore, the statutory guidance appears vacuous and insufficiently prescriptive. Gelsthorpe's research of the decision to detain asylum-seekers in the UK exposed this immigration officer's acknowledgement:

I decide myself. Yes there are criteria, but I don't think they're particularly clear or particularly helpful. I think they're all very vague and it's really the CIO at the end of the day who makes the decision.<sup>56</sup>

The alleged arbitrariness of Spanish and UK law in light of their International and European obligations will be scrutinised in the following chapters.

---

<sup>53</sup> Martínez et al., *La nueva regulación de la inmigración y la extranjería en España* (Valencia, 2012), ch.VI para 3.1.

<sup>54</sup> Morán et al., 'Los CIEs para extranjeros en España: una evaluación crítica', 208.

<sup>55</sup> Morán. A.J et al., 'Los CIEs en España: origen, funcionamiento e implicaciones jurídico-sociales' *Revista CIDOB d'afers internacionals*, n.º 26 (October, 2012), 6.

<sup>56</sup> Weber et al., *Deciding to detain: How Decisions to Detain Asylum-Seekers Are Made at Points of Entry* (Cambridge, 2002), 73.

## Chapter II. Asylum-seekers and discrimination

### Art. 5 – detention of asylum-seekers

One of the monumental differences between immigration detention in Spain and the UK is that the latter permits the detention of asylum-seekers pending resolution of their asylum claim while the former only permits detention until admission into the asylum procedure. Is the latter arbitrary?

#### *Spain*

In Spain, as soon as asylum proceedings are underway and the claim is being determined, the asylum-seeker is released. If the claim is inadmissible, the asylum-seeker remains in detention and their claim is assessed under a 3-month accelerated procedure. The admissibility review of the claim must be determined within four days of application to the asylum process.<sup>57</sup>

#### *UK*

Since 2000, the UK has operated a fast-track asylum detention procedure. It involves the detention of asylum-seekers where it is thought that their claims can be decided quickly. Since 2003, the resolution of claim and exhaustion of right to appeal – during detention – should last no longer than two weeks.<sup>58</sup> However, where a claim is refused,

---

<sup>57</sup> Global Detention Project ‘Europe Profiles’ (Spain).

<sup>58</sup> Clayton, *Textbook on Immigration and Asylum Law*, para 12.4.

the detention continues until removal. In 2010-11, the average period pending removal for these cases was 58 days.<sup>59</sup> Oakington was the most renowned for the fast-track regime, where it was first implemented. It was known as the cornerstone of the government's asylum procedure.<sup>60</sup>

The legality of this system was assessed in *Saadi v. UK*.<sup>61</sup> It established that detaining asylum-seekers is permitted where preventing unauthorised entry under art. 5(1)(f) as entry is 'unauthorised until authorised'. This case set a crucial precedent. It neglected the individual determination of 'necessity' provided by the RCD. Detention was employed purely for administrative convenience. Alternatives to detention were not considered, contravening International soft law. *Saadi* surpassed the permissible reasons for detaining asylum-seekers provided by the UNHCR Executive Committee's Conclusion No. 44 (XXXVII) 1986. The UNHCR has commented that such detention is 'inherently undesirable'.<sup>62</sup>

This case essentially assimilates asylum-seekers with illegal immigrants or deportees. In doing so, it negates 'the lawful status of seeking asylum',<sup>63</sup> undermining the 'status of people fleeing persecution'.<sup>64</sup> The UKBA's stated in 2012 that detainees can 'leave at any time to return to their home country'.<sup>65</sup> This highlights gross ignorance of the asylum-seeker's predicament. Indeed, Ophelia Field identifies the legal paradox where

---

<sup>59</sup> DA, *Fast track to despair: the unnecessary detention of asylum-seekers* (May, 2011), 4.

<sup>60</sup> *R (Saadi) v. Secretary of State* [2001] EWCA Civ 1512; [2002] UKHL 41.

<sup>61</sup> (2008) (no.13229/02) EHRLR 407.

<sup>62</sup> UNHCR, *Guidelines on applicable Criteria and Standards relating to the Detention of Asylum seekers* (Geneva, 1999), para 1.

<sup>63</sup> Clayton, *Textbook on Immigration and Asylum Law*, para 15.14.

<sup>64</sup> O'Nions, 'No right to liberty: the detention of asylum seekers for administrative convenience', 173.

<sup>65</sup> Issue Brief 'Immigration removal/detention centres'.

‘a person’s presence may be simultaneously lawful and yet, (...) unauthorised’.<sup>66</sup> The ECtHR’s interpretation permits ‘further mistreatment of this vulnerable group in the interests of immigration control’.<sup>67</sup> It ludicrously implies that asylum-seekers deserve a lesser right to liberty than criminals or persons of unsound mind. It is submitted that the right to seek asylum is diluted where deprivation of liberty is inevitable. Moreover, *Saadi* illustrates the vast margin of appreciation enjoyed by contracting states with respect to the ‘necessity’ test.<sup>68</sup>

### ***Comparison***

The 4-day time limit for the admissibility decision of an asylum claim in Spain is inappropriate and demanding. It can be emotionally difficult for genuine asylum-seekers to divulge every harrowing aspect of their claim for international protection in such a short space of time. However, there is scope for this deadline to be extended to a maximum of 10 days at the request of either the Interior Minister<sup>♦</sup> or the UNHCR.<sup>69</sup> The position in Spain seems significantly more favourable compared to the fast-track detention in the UK. The Spanish regime resembles UK policy prior to March 2000 when the fast-track policy was introduced. Will Spain soon follow suit?

---

<sup>66</sup> O’Nions, ‘No right to liberty: the detention of asylum seekers for administrative convenience’, 174; and

Field *et al.*, ‘Alternatives to detention of asylum seekers and refugees’ (April, 2006) *UNHCR Legal and Protection Policy Research Series*, POLAS/2006/03, Appendix 1, para 34.

<sup>67</sup> Case comment, ‘Immigration detention: unauthorised entry – reasons for detention – art. 5’ *EHRLR* 2008 3, 407-410.

<sup>68</sup> O’Nions, ‘No right to liberty: the detention of asylum seekers for administrative convenience’, 171-173.

<sup>69</sup> Ley 12/2009 regulating the right to asylum and subsidiary protection,<sup>♦</sup> art. 21.

The fast-track policy reflects the politicisation of the asylum procedure where the speed of processing asylum claims is prioritised over individualised decision-making. Such decision-making is quintessential to the apposite consideration of an asylum claim.<sup>70</sup> It is submitted that the UK's detention for administrative convenience is arbitrary and therefore in breach of International human rights law.<sup>71</sup>

---

<sup>70</sup> Wilsher, *Immigration Detention: Law, History, Politics*, 153.

<sup>71</sup> UNHRC, *International criticism: Concluding Observations of the HRC: United Kingdom* (2001) CCPR/CO/73/UK; CCPR/CO/73/UKOT, 16.

## Discriminatory ‘ethnic profiling’ in Spain and nationality listing in the UK

### *Spain*

When assessing the lawfulness of immigration detention in Spain,<sup>72</sup> art. 5 ECHR can be examined in conjunction with art. 14. The practice of ‘ethnic profiling’<sup>73</sup> occurred in migratory raids conducted by the police. They used the ‘suspect method’ where people could be detained at the General Police Station and questioned about their immigration status and identity. They were selected if they possessed specific physical features which alluded to their nationality. The raids occurred in routine places (metro entrances, ‘plazas’, parks etc.), at specific times and police often had to procure a quota of people.<sup>74</sup> They were described as a ‘mechanism of social control (...) based on stereotypes’.<sup>75</sup>

These raids were denounced in many ways. In *Williams v. Spain*, an African-American Spanish citizen experienced an identity check as part of a migratory raid to detain illegal immigrants.<sup>76</sup> She was told that she was a target because she was black. Williams initiated racial discrimination proceedings under arts. 14 CE and the ECHR exhausting all domestic remedies including an appeal to the Spanish Constitutional Court. She then issued a complaint to the UNHRC which found a violation of art. 26 ICCPR. The ECRI also expressed their disapproval at the raids since they ‘reinforce the prejudices against

---

<sup>72</sup> Morán *et al.*, ‘Los CIEs para extranjeros en España: una evaluación crítica’, 206-207.

<sup>73</sup> Brandariz, J.A, *Sistema penal y control de los inmigrantes: Gramática del migrante como infractor penal* (Granada, 2011), 110.

<sup>74</sup> Berdié, A, ‘La policía fija cupos de arrestos a “sin papeles” por barrios’ *El País* (February, 2009).

<sup>75</sup> Morán *et al.*, ‘Los CIEs para extranjeros en España: una evaluación crítica’, 206.

<sup>76</sup> (2009) CCPR/C/96/D/1493/2006.

determined ethnic groups and legitimise racism and racial discrimination in the general population'.<sup>77</sup> The raids were clearly an arbitrary means of detaining illegal immigrants.

In 2012, this unlawful aspect of Spanish immigration detention was changed after the Government in Madrid decided to stop 'ethnic profiling' in migratory raids. The General Director of the police issued a Circular 1/2012 which eradicated racial discrimination from migratory detention policy.

## **UK**

The UK also arguably engaged art. 14 ECHR. Under the fast-track policy for detaining asylum-seekers, immigration officers used to have to implement the OEM which contained a list which catalogued 'safe' countries from which detainees should originate. These countries supposedly had a low risk of persecution or nationals who had accumulated a track record of contravening immigration control. This practice enabled rapid decision-making. At EU level, the APD facilitates the practice of nationality criteria. The domestic legal basis was s.19D RRA 1976, as inserted by the AI(TC)A 2004.

The use of these lists encourages default decision-making neglecting adequate consideration of the merits of a particular case.<sup>78</sup> In *Saadi*, Oakington IRC detained the applicant due to his Iraqi nationality for administrative expediency. However, the presumption that he was unlikely to have suffered persecution was eventually rebutted.

---

<sup>77</sup> ECRI, *Cuarto Informe sobre España* CRI(2011)4, pt VII, 45.

<sup>78</sup> O'Nions, 'No right to liberty: the detention of asylum seekers for administrative convenience', 175.

Unfortunately, art. 14 was not considered by the ECtHR. This was a striking example of arbitrary detention where decision-making was rushed, prejudicial and devoid of objectivity.<sup>79</sup>

The use of nationality listing in the UK was abolished in 2008 and substituted by the DFT & DNSA – Intake Selection (AIU Instruction) para 2.2.<sup>80</sup> This eradicated racial discrimination and concluded that ‘assessment must be made on a case-by-case basis’.

### ***Comparison***

A parallel can be drawn between these distinct practices which most likely engaged art. 14 ECHR. In assessing their lawfulness it is vital to consider whether or not the motives for such racial discrimination – social control and administrative efficiency – were proportional. In both Spain and the UK, the discriminatory policies were widely condemned as arbitrary. Changes in policy were effected. However; did the use of ‘ethnic profiling’ and nationality listing constitute a disproportionate breach of art. 14? When reviewing international refugee law, Patricia Tuitt argues that ‘focus on the racial or ethnic origins of the refugee can then be used to argue that mass migration is economic at its source’.<sup>81</sup> Furthermore, it is relevant that, in the UK, 100% of applicants in 2006 and 2007 were initially refused asylum.<sup>82</sup> These cases must have been automatically struck-out. Careful, individualised decision-making directly influencing

---

<sup>79</sup> Blake QC *et al.*, *Immigration, asylum & human rights*, 133.

<sup>80</sup> Now titled ‘Detained fast track processes’.

<sup>81</sup> Tuitt, P., *The Law’s Construction of the Refugee* (London, 1996), at 19.

<sup>82</sup> Home Office: asylum statistics 1st quarter 2007 (31.03.07), Table 17, 18. Same figure for 4<sup>th</sup> quarter 2006.

people's lives was jeopardised for administrative efficiency. This was highly disproportionate to the aims pursued.

To conclude, given the successful policy revisions in both Spain and the UK and the resulting emphasis on case-by-case assessment in national policies based in the APD,<sup>83</sup> immigrants should be more protected from racial discrimination in the future.

---

<sup>83</sup> Art. 27(2)(b).

### Chapter III. Duration, legal limbos and procedural safeguards

#### Duration: ‘directive of shame’ in Spain or indefinite detention in UK?

##### *Spain*

Spain’s opt-in to the RD is of particular legal significance while being socially rather controversial. Art. 15(5) and (6) set out a 6-month time limit for immigration detention which can be extended to a maximum of 12 months. To transpose this directive, Spain’s national law was revised. The preexisting 40-day limit for CIE detention<sup>84</sup> was extended to 60 days by the LO 2/2009, modifying art. 62.2 LODYLE. The RD stimulated a backlash of criticism in Spain. It has been dubbed the ‘directive of shame’<sup>♦</sup> by various NGOs and associations for immigrants attributing to it the ‘exclusion of a migrated population’.<sup>♦85</sup>

##### *UK*

The stance of immigration detention duration in the UK is even more precarious. There is no established statutory time limit. This is a rarity in western democracy and the UK is one in only three of the forty-eight members of the COE without a limit.<sup>86</sup> It is shocking that the average length of detention of foreign national prisoners was 190 days

---

<sup>84</sup> LO 7/1985

<sup>85</sup> Morán *et al.*, ‘Los CIEs para extranjeros en España: una evaluación crítica’, 204.

<sup>86</sup> Clayton, *Textbook on Immigration and Asylum Law*, para 15.5.

in 2011.<sup>87</sup> Furthermore, research has established that subjects detained for longer than a year are unlikely to be removed.<sup>88</sup>

For asylum-seekers, detention under the fast-track procedure is supposed to last up to 14 days.<sup>89</sup> However, this timescale is flexible and there are often excessive delays pending removal where a claim has been refused. It is simply a *timescale* and not a *time limit*. As such, the detainee lives in a state of uncertainty about the duration of his/her detention.

The case of *Chahal* established a test of ‘due diligence’ with which authorities had to comply when facilitating removal by way of deportation. *Saadi* employed this test. *Mikolenko v. Estonia* coupled it with a new test for the ‘realistic prospect of removal’ where the diplomatic discourse about readmission was taken into account.<sup>90</sup> The evolving Strasbourg jurisprudence has overlooked humanitarian considerations and effectively labelled ‘aliens as disruptive interstate problems’ as opposed to individuals with universal rights.<sup>91</sup>

---

<sup>87</sup> ICI of UKBA, *A thematic inspection of how the UKBA manages foreign national prisoners* (February-May 2011), 20.

<sup>88</sup> DA (then, the LDSG), *No return, no release, no reason: challenging indefinite detention* (September 2010), 3.

<sup>89</sup> DFT & DNSA, *Detained fast track processes* (2008), para 2.2.2.

<sup>90</sup> (no. 10664/05) ECHR 2009.

<sup>91</sup> Wilsher, *Immigration Detention: Law, History, Politics*, 157.

### *Comparison*

The limit imposed by the RD affecting Spain represents the collective, restrictive stance of Member States where immigration control is favoured over the fundamental right to liberty.<sup>92</sup> However; at least in Spain a limit to the duration of detention exists. The indefinite immigration detention in the UK is unnecessary, outdated and disproportionate. Even criminals in the UK are afforded a 10-day limit for detention without charge.<sup>93</sup> It is thus submitted that both situations in Spain and the UK are worthy of criticism. A lesser time limit of detention than that provided by the RD would be preferable. The ECtHR has hinted at, but not prescribed for, the exercise of limits to detention in order to fully comply with art. 5.<sup>94</sup> Such adaptations in national, European and International law are crucial to bring immigration detention within the rule of law, respecting detained persons' inalienable right to freedom from arbitrary detention.

---

<sup>92</sup> *Ibid.*, 196.

<sup>93</sup> O'Nions, 'No right to liberty: the detention of asylum seekers for administrative convenience', 181 (unless reasonable suspicion of terrorist offence).

<sup>94</sup> *Abdolkhami and Karmia v. Turkey*, (no.30471/08) ECHR 2009, §135.

## **‘Legal limbos’ encountered in Spain and the UK**

### *Spain*

The ‘legal limbo’ status arises where detainees are released from detention – usually when the time limit has expired – prior to their regularisation or deportation. They remain on Spanish soil and are vulnerable to being detained again. This is a result of the legal paradox of the LO 4/2000 arts. 62.3 and 58.<sup>95</sup>

A certificate stating the length of detention should be provided on release; however, the delay in receiving this can last up to 60 days.<sup>96</sup> An inmate’s testimony published in a CEAR report revealed that:

They don’t give you any documentation, no papers which can prove that you were inside the CIE, this is the worst as you get out and on the same corner they catch you and put you back in again.<sup>97</sup>

The delay in regularisation or deportation can be caused by the denial of citizenship; the inability to source the travel documents required for expulsion; or the lack of bilateral agreement of readmission between Spain and the foreigner’s country of origin.<sup>98</sup>

---

<sup>95</sup> Morán *et al.*, ‘Los CIEs para extranjeros en España: una evaluación crítica’, 209.

<sup>96</sup> *Ibid.*, 214.

<sup>97</sup> Pérez-Sales. P (CEAR), *Situación de los CIE para extranjeros en España* (December, 2009) DEVAS, 140.

<sup>98</sup> Morán *et al.*, ‘Los CIEs para extranjeros en España: una evaluación crítica’, 209.

The RD was supposed to address the situation of legal limbo.<sup>99</sup> However, it failed to include a mechanism to guarantee the regularisation of released detainees. Immigrants in ‘legal limbo’ are devoid of any civil, social or economic rights and many resort to working illegally as they cannot get a work visa until authorised. They are outlaws in the face of EU law.<sup>100</sup>

The *legal limbo* crystallises the role of the State in producing illegality through the ambiguity in the drafting and application of the law and the administrative procedures of migration control.<sup>101</sup>

## **UK**

The distinct ‘legal limbo’ status in the UK is apparent in cases of temporary admission.<sup>102</sup> It affects people whose claim for asylum<sup>103</sup> or entry is outstanding. At this stage they are liable to detention pending examination. If their claim is denied, the temporary admission continues pending the issue of a removal order. The majority of immigrants in the UK affected by this ‘legal limbo’ are asylum-seekers.

The power to grant temporary admission is established in the IA sch 2 para 21 and the NIAA s.62(3). Temporary admission is granted for renewable periods and is normally subject to ‘reporting’ conditions, where the immigrant must present himself to the

---

<sup>99</sup> EC, ‘Return and readmission’ (Last updated 13.08.2013) ([www.ec.europa.eu](http://www.ec.europa.eu)), accessed 19.02.14.

<sup>100</sup> Wilsher, *Immigration Detention: Law, History, Politics*, 197.

<sup>101</sup> Morán *et al.*, ‘Los CIEs para extranjeros en España: una evaluación crítica’, 209.

<sup>102</sup> Clayton, *Textbook on Immigration and Asylum Law*, para 15.10.

<sup>103</sup> If on bail or exempt from fast-track procedure.

Home Office on a regular basis.<sup>104</sup> There is a greater likelihood that they will be detained when reporting. There is no right to appeal against the ‘legal limbo’ status. The subject enjoys little to no welfare rights.

### *Comparison*

Both ‘legal limbos’ pose an uncertain state of existence for the immigrant. Art. 5 ECHR is not engaged as subjects are not deprived of their physical liberty. Notwithstanding, there is a constant threat of detention. Social exclusion is likely since they cannot work or enjoy any temporary welfare rights. The ‘legal limbo’ encountered in Spain does not occur in the UK as information regarding legal status is granted to released detainees of IRCs. The procedure is therefore far more transparent in the UK than in Spain. However, the ‘legal limbo’ of temporary admission is also undesirable. Both countries, as well as the EU, should look to revise these legal vacuums in immigration detention. A delicate balance must be struck between two aims: providing respect for universal human rights and controlling irregular immigration.

---

<sup>104</sup> 1971 Act, sch 2 para 21(2).

### **Challenging the legality of decision to detain**

In order for immigration detention to be lawful under art. 5 ECHR, there must be procedural safeguards in place so that the legality of the detention can be judicially challenged. This must be applied without discrimination as to the legal status of the detainee.<sup>105</sup> The need for judicial scrutiny emanates from the risk of unfettered administrative discretion in the decision-making process in both countries.

#### ***Spain***

In Spain,<sup>106</sup> judicial authorisation is a prevalent factor in the decision-making process. STC 236/2007 interprets art. 60.1 LODYLE where the judiciary has the jurisdiction to either adopt or reject an administrative decision to ‘detain’. Art. 62.1 LODYLE provides that the judge must take into account the proportionality of ‘internment’ and the entire circumstances of the case including: the risk of the immigrant absconding or refusing to leave the country; whether there are any administrative or criminal sanctions or procedures pending; the absence of identification documentation and;<sup>107</sup> the risk to public health balanced with the health of the individual. Art. 62.1 provides that the Public Prosecutor will oversee the procedure in line with art. 124.1 CE. The trial judge is responsible for choosing the CIE destination and can hear complaints of detainees in relation to their rights. They also have visiting rights.<sup>108</sup>

---

<sup>105</sup> McBride, J, *Access to justice for migrants and asylum seekers in Europe*, (COE, May 2009), 97.

<sup>106</sup> Martínez *et al.*, *La nueva regulación de la inmigración y la extranjería en España*, ch.VI para 3.2.

<sup>107</sup> A revision post LO 2/2009 since law previously demanded for documentation proving legal status which was mostly impossible to obtain.

<sup>108</sup> LODYLE, art. 62.6.

In response to pressing social criticism regarding human rights violations in the ‘CIE de la Zona Franca’ in Barcelona, the government has installed two ‘surveillance courts’.<sup>♦</sup>

### **UK**<sup>109</sup>

There are various procedural safeguards available in the UK. There is no statutory appeal of the decision to detain included in the NIAA. However, the decision is judicially reviewable. The normal jurisdiction of judicial review is relaxed when the right to liberty is considered. The judge can rule on the case’s merits as well as on points of law.<sup>110</sup> Another procedural safeguard from detention in the UK is the option to apply for bail under the IA sch 2 paras 22 and 29, and IAA 1999 s.54. In criminal proceedings the right to bail is statutorily enshrined. However, in immigration detention it is simply a common law presumption. The IAA used to provide for automatic bail hearings but this provision was revised by the NIAA s.2. In practice, they were never used and thus the potential benefits were never ascertained. The bail process has been criticised for being unfair, obscure, remote and lacking in legal representation.<sup>111</sup>

Despite the existence of routes to challenge the legality of immigration detention in the UK, it should be noted that none apply automatically. Only when immigration detention involves national security<sup>112</sup> can an appeal be made to the SIAC.<sup>113</sup>

---

<sup>109</sup> Clayton, *Textbook on Immigration and Asylum Law*, paras 15.11.1-15.11.4.

<sup>110</sup> *R (A (Somalia)) v. SSHD* [2007] EWCA Civ 804.

<sup>111</sup> BID, *A nice judge on a good day: immigration bail and the right to liberty* (July, 2010).

<sup>112</sup> ATCSA 2001.

<sup>113</sup> Replaced APP following the art. 5(4) breach identified in *Chahal* as it lacked qualities of a court.

The fast-track procedure in the UK involves a formal and documented review made one day after the initial detention by an Inspector and then repeated at weekly intervals until the asylum claim is resolved.<sup>114</sup> For appeals, a 2-day period applies respectively: to give notice of an appeal; for the respondent's reply; and for the hearing to be fixed. Legal representation is not guaranteed.<sup>115</sup> The speed of this process renders it virtually ineffective. The JCHR concluded that asylum-seekers are 'unlikely to reveal the full extent of experiences to the authorities in such a short-time period' and that 'this problem will be exacerbated where they are not able to access legal advice and representation'.<sup>116</sup>

### ***Habeas corpus in Spain and UK***

The prerogative writ of *habeas corpus* is another form of challenging the legality of immigration detention. It exists in both Spain and the UK and serves to prevent 'detention or imprisonment which is incapable of legal justification'.<sup>117</sup>

Art. 17(4) CE recognises *habeas corpus* in Spain. Notably, it highlights the legal need to limit the duration of detention.<sup>118</sup> The *habeas corpus* procedure is not included in the LODYLE but it is nonetheless readily accessible to detained immigrants in Spain.

---

<sup>114</sup> OEM, ch.38.8.

<sup>115</sup> Immigration and Asylum Appeal (Fast Track Procedure) Rules 2005, SI 2005/560; and Clayton, *Textbook on Immigration and Asylum Law*, para 12.4.

<sup>116</sup> Department for Constitutional Affairs, *Asylum and Immigration Tribunal – fast track procedure rules, response to consultation*, CP(R) 05/05, para 226.

<sup>117</sup> *Halsbury's Laws* vol. 1(1) (2001 reissue), para 208.

<sup>118</sup> STC 341/1993.

In the UK, *habeas corpus*<sup>119</sup> can contest the jurisdiction to detain, as opposed to judicial review proceedings which assess the legality of the detention decision.<sup>120</sup> The scope of *habeas corpus* was significantly reduced when the IAA s.140(1) legalised detention where there are reasonable grounds of suspicion that directions for removal may be given. Where *habeas corpus* is applicable, it can be argued either independently of, or simultaneously to, the judicial review proceedings.

The benefits of *habeas corpus* when compared with judicial review in the UK are outlined in *R v. SSHD ex p Sheikh*.<sup>121</sup> It applies irrespective of the time limits imposed by judicial review and, as a writ of right, grants the detainee more autonomy when challenging the decision. Furthermore, it avoids the stricter ‘standing’ and authorisation requirements for judicial review.

### ***Comparison***

There is a plurality of procedural guarantees for challenging the legality of detention in both countries. The salient difference between Spain and the UK is that judicial supervision in Spain is integral to the decision-making process whereas in the UK it is available but not automatic. It has to be actively sought after.

The Spanish procedure could benefit from a simplification of the number of institutions authorising the decision to detain. Also, there is no right to bail in Spanish law for

---

<sup>119</sup> Clayton, *Textbook on Immigration and Asylum Law*, para 15.11.4.

<sup>120</sup> *R v. SSHD ex p Muboyayi* [1991] 4 All ER 72.

<sup>121</sup> [2001] ImmAR 219.

immigration detention. Its use is restricted to criminal detention.<sup>122</sup> Spain should look to incorporate a bail process. This would make a significant difference to the lives of many irregular immigrants detained in Spain who would presumably be willing to comply with any reporting requirements if freed from detention. However, both the UK and potentially Spain should ensure such a process is adequate and free from ‘arbitrariness’.

In the UK, judicial review is a valuable challenge to the CIO’s decision. However, access to judicial review is restricted. The appeal of fast-track detention of asylum-seekers in the UK is devoid of efficacy as there is no guarantee of legal representation. The Inspector’s review does not offer the same protection as judicial supervision. While *habeas corpus* exists in both countries, it is more effective in Spain than in the UK.

The ECtHR have thus far missed the opportunity to redefine the requirement for judicial approval in line with art. 5(4) ECHR. In *Saadi* the Court hinted that this necessity increases in direct proportion to the duration of detention.<sup>123</sup> Furthermore, the RD failed to include a requirement for mandatory judicial review. It would be refreshing for the EU to incorporate mandatory judicial scrutiny of detention as part of the CEAS. This would acknowledge the CFREU and guarantee that detention is ‘humane, absolutely necessary and not unduly lengthy’.<sup>124</sup>

---

<sup>122</sup> Bingham Centre for the Rule of Law, *Immigration detention the rule of law- National report: Spain* (May, 2013), 12.

<sup>123</sup> Para 45.

<sup>124</sup> Wilsher, *Immigration Detention: Law, History, Politics*, 206.

Furthermore, art. 6 ECHR merits consideration. Until recently, it could not afford protection to regulate judicial decisions extending the period of detention. This was not regarded as constituting a ‘determination of civil rights’ or criminal charge.<sup>125</sup> However, *A. and others v. the UK* required the SIAC to comply with the same fair trial entitlements offered in criminal proceedings.<sup>126</sup>

A criminalisation of immigration detention – by expanding the scope of art. 6 – may offer far more protection to detainees.<sup>127</sup> Since criminalisation already exists in terms of the social perception of immigrants and the conditions of immigration detention,<sup>128</sup> perhaps so too should procedural safeguards be criminalised in order to afford the same protection and judicial scrutiny to detainees. This would ensure immigrants are just as protected by the law as criminals.

---

<sup>125</sup> *Vikulov and others v. Latvia* (dec.) (no. 16870/03) 2004;

McBride, *Access to justice for migrants and asylum seekers in Europe*, 99.

<sup>126</sup> [2009] 49 EHRR 29, para 217.

<sup>127</sup> Wilsher, *Immigration Detention: Law, History, Politics*, 167.

<sup>128</sup> See Chapter IV.

## Chapter IV. Internal regulation, criminalisation and vulnerable detainees

The inner workings of CIEs and IRCs must be compared to assess their lawfulness. A Spanish manifesto title (aimed at either improving the regulation of – or closing – CIEs) elucidates the message of this chapter: ‘The law should not be discarded at the doors of the CIE’.<sup>129</sup> The internal regulation and criminal nature of the centres which affect the personal conditions of inmates will be assessed. Then, some examples of vulnerable detainees and human rights violations will be discussed.

### Internal regulation

#### *Spain*

Art. 60.2 LODYLE provides that detainees should be provided with social, legal, cultural and sanitary services. The only right they are deprived of is the ‘right to roam’. The LO 2/2009 introduced art. 62 bis 1(b) LODYLE, which implicitly incorporates arts. 2, 3 and 8 ECHR. Art. 62 bis devises a comprehensive list of a detainee’s rights and responsibilities. Art. 155 provides that the internal regimes of CIEs should be regulated by the Minister of the Interior.<sup>♦</sup> The Order of the Presidential Minister of 22 February 1999 is applicable.<sup>♦</sup> However, there is a great deal of irregularity in its application and – in practice – centre rules are created by centre directors.<sup>130</sup>

---

<sup>129</sup> Andalucía Acoge, ‘Que el derecho no se detenga a la puerta de los CIE’ ([www.acoge.org](http://www.acoge.org)), accessed 27.02.14.

<sup>130</sup> Pueblos Unidos, *Miradas tras las rejas* (2011), 19, 31.

The conditions documented in CIEs are deplorable. Isolation from the outside world, the poor state of bedrooms and a lack of social support and notification of the return date have a considerable negative effect on the wellbeing and psychological stability of inmates.<sup>131</sup> Detainee testimonials indicate that physical violence is commonplace in CIEs.<sup>132</sup> Furthermore, interpreters are often not available when legally required and interns have to substitute in this role.<sup>133</sup> Medical services are privatised and there is often limited availability of medical staff in CIEs.

Awareness of the conditions of CIEs in Spain climaxed in 2012 when the CIE in Málaga was closed down following three undocumented fires, accounts of sexual abuse on the part of police and dangerous facilities.<sup>134</sup> The law is now being developed to improve internal regulation. However, drafts released in June 2012 were widely criticised as unsatisfactory.<sup>135</sup>

## **UK**

The OEM is used in IRC internal regulation. Seven of the eleven IRCs in the UK are run privately by either G4S, Serco, Mitie PLC or GEO Group. Four are operated by the HMPS. With a view to rectifying the vast amount of complaints concerning malpractice, the UKBA introduced the DSOMISRC in 2005, complementing the DCR 2001 and the HOOS. Also, the Prisons Act 1952 and the IAA established an

---

<sup>131</sup> Morán *et al.*, 'Los CIEs para extranjeros en España: una evaluación crítica', 208.

<sup>132</sup> Morán *et al.*, 'Los CIEs en España: origen, funcionamiento e implicaciones jurídico-sociales', 9.

<sup>133</sup> Pueblos Unidos, *Miradas tras las rejas*, 8, 19.

<sup>134</sup> Europa Press, 'El CIE de Capuchinos de Málaga cerrará definitivamente a partir del día 20' (June, 2012) ([www.elmundo.es](http://www.elmundo.es)), accessed 28.02.14.

<sup>135</sup> Global Detention Project 'Europe Profiles' (Spain).

independent board of community volunteers to monitor each IRC. The HMIP is another IRC monitoring body.<sup>136</sup>

Conditions in many IRCs are appalling. There have been cases involving investigations into arts. 3<sup>137</sup> and 8 ECHR rights. Criticism of the conditions peaked in 2010 when Oakington IRC closed down following a BBC undercover documentary, a PPO report and an HMI report; revealing incidents of racism, physical abuse, internal failings and the likelihood of suicide and self-harm.<sup>138</sup>

### *Comparison*

With regards to substantive regulation, there is no doubt that quintessential human rights are safeguarded in Spanish law, mainly through the LODYLE. However, the complementary legislation affecting the internal regulation of CIEs really ought to be in the form of a Royal Decree, as opposed to a Ministerial Order; for it to bear more legal force and protect human rights more effectively.<sup>139</sup> Similarly, in the UK, the manuals refer to the standards expected. However, given the ubiquitous stories of ill-treatment in detention centres; surely more legal safeguards are required to hold private parties responsible for their actions and omissions in the management of IRCs? Detention centres in both countries operate under vacuous regulation which is not competent to deter the unlawful conduct of those responsible for running them.

---

<sup>136</sup> Global Detention Project 'Europe Profiles' (UK).

<sup>137</sup> Eg. *R (on the application of AM and others v. SSHD and Kalyx, BID intervening)* [2009] EWCA Civ 219.

<sup>138</sup> Global Detention Project 'Europe Profiles' (UK).

<sup>139</sup> Martínez *et al.*, *La nueva regulación de la inmigración y la extranjería en España*, ch.VI para 3.5.

The lack of available interpreters in Spain is paralleled in the UK. In Dungavel IRC in Strathaven, inmates interpret fellow inmates' legal interviews. This kind of interpretation is misleading and biased as legal advice often becomes infiltrated with fellow inmates' advice, often doing more harm than good.

The privatisation of detention centres in both countries is equally disturbing. In Spain, the recent deaths resulted from the contracting-out of health services. The privatisation on a far wider scale in the UK demands critique of private companies' motives that run IRCs, given the atrocious stories about their practices. Simply stated: they draw profit from admissions to their centres. The more inmates they have, the more money they make. It is a lucrative business.<sup>140</sup> Moreover, does this financial impetus influence government policy with regards to installing detention centres?<sup>141</sup>

It is evident that these companies are abusing their position of power. The UK Government is similarly at fault. In *ID and others v The Home Office*,<sup>142</sup> it tried and failed to use private contractors as a 'veil' to avoid liability for unlawful detention. This blatant evasion of responsibility forms the precarious foundation of the UK immigration estate, seemingly detached from humanitarian considerations.

---

<sup>140</sup> Bacon. C, 'The evolution of immigration detention in the UK: the involvement of private prison companies' (Ox, September 2005), RSC Working Paper No.27, 16-20.

<sup>141</sup> Clayton, *Textbook on Immigration and Asylum Law*, para 15.12.

<sup>142</sup> [2006] 1 WLR 1003.

The effects of privatisation on inmates and employees were aptly portrayed by an ex-employee of Serco who worked in an Australian detention centre, through his candid, illustrative piece in the *Global Mail*.<sup>143</sup> The emotional effects of immigration detention he witnessed and experienced at Serco's mercy are present in both Spain and the UK. It is difficult to compare whether the treatment of detainees by private companies in the UK or by the police in Spain is worse. Regardless, managing bodies should be as independent as possible from financial or political motives.

A comparison must be made between the methods of moderating the operation of detention centres in Spain and the UK. In Spain, supervisory courts are providing a judicial solution to curb the police who run the CIEs. Such judicial scrutiny is desirable in the UK. The monitoring bodies in place have proved to be ineffective and insufficiently impartial in terms of bridling private companies.

Finally, both countries would benefit from establishing a common system of internal regulation of detention centres. This would leave little to the discretion of those in charge of running them. Apparently, this option is already being considered and developed by Spanish authorities.<sup>144</sup>

---

<sup>143</sup> Wallman. S (illustrator), *At work inside our detention centres: a guard's story* (serco-story.theglobalmail.org), accessed 27.02.14.

<sup>144</sup> Morán *et al.*, 'Los CIEs para extranjeros en España: una evaluación crítica', 202.

## Criminalisation

A comparison of the criminal nature of detention centres in Spain and the UK is significant in light of human rights law.

It is a contradictory paradigm that CIEs in Spain should ‘not be of penitentiary character’,<sup>145</sup> yet they are commonly referred to as ‘jails for migrants’. This results from the uncanny similarity of CIE rooms to prison cells, the operational methods and the sparse legal framework of internal regulation.<sup>146</sup> A NGO attorney commented,

If the CIE is not a prison, why is it managed as if it were? In prison you are a person; in the CIE (you) are a number.<sup>147</sup>

This is reminiscent of the dehumanisation which occurred in WWII. Inmates are similarly robbed of their personalities and treated like tagged animals in CIEs.

Detention centres in the UK have also been criticised for their internal conditions akin to those traditionally encountered in prisons. Indeed, Ms Anne Owers, the Chief Inspector of Prisons, stated in a report on Heathrow holding centres that ‘detainees were treated as “parcels rather than people”; and parcels whose contents and destination were sometimes incorrect’.<sup>148</sup>

---

<sup>145</sup> LODYLE, art. 60(2).

<sup>146</sup> Morán *et al.*, ‘Los CIEs para extranjeros en España: una evaluación crítica’, 210.

<sup>147</sup> Global Detention Project ‘Europe Profiles’ (Spain).

<sup>148</sup> HMIP, *Report on the unannounced inspections of five non-residential short-term holding facilities: Queen’s Building and Terminals*, (1-4 Heathrow Airport, 10-13 October 2005), 5.

Medical examinations conducted upon entry to IRCs and CIEs have different objectives. In the UK, detainees are examined upon arrival and throughout their stay to monitor their welfare and check that they are not self-harming. However, in Spain, they are examined to check for illicit substances. This highlights prejudices inherent in a system where unauthorised immigrants are treated like criminals. The extent of the degrading nature of these examinations is evident in the following testimony:

They took me inside the centre and did the routine procedure on me, a body examination, naked and thorough, and when I say thorough I mean thorough.<sup>149</sup>

The RD affecting Spain acknowledges that detention should occur in specialised detention centres or in prisons (where there is a shortage of centres).<sup>150</sup> Prisons are also used in the UK. Two thirds of CIEs in Spain<sup>151</sup> and almost half of the IRCs in the UK used to be prisons or military barracks. Indeed, many IRCs were purpose built to Category B prison standards (high security).

The prison culture present in detention centres in both countries is inalienable from its confines. It will exist despite the reform proposed in Spain to change the name of detention centres from CIEs to ‘Centres of Controlled Stay for Foreigners’.<sup>152</sup> The UK controversially changed the name of ‘detention centres’ to IRCs in 2002.<sup>153</sup> Name changes are unlikely to reflect a governmental or societal ‘makeover’. This would occur

---

<sup>149</sup> Morán *et al.*, ‘Los CIEs en España: origen, funcionamiento e implicaciones jurídico-sociales’, 11.

<sup>150</sup> RD, art. 16(1).

<sup>151</sup> Ferrocarril Clandestino *et al.*, *Voces desde y contra los CIE* (October, 2009), 36-37.

<sup>152</sup> Morán *et al.*, ‘Los CIEs para extranjeros en España: una evaluación crítica’, 216.

<sup>153</sup> NIAA, s.66.

only if the internal regulation dramatically improved; inmates were no longer treated as criminals; and the ‘horror’ stories significantly diminished.

Given the resemblance of immigration detention centres to prisons, a positive criminalisation of their operation is necessary. As detainees are already being treated like criminals, it should be ensured that they are afforded the minimum rights available in prison. This logic is partly being applied in the UK where the HMPS regulates the inner workings of some IRCs. Spain has proposed a training course (Course for the Prevention of Working Risks in CIEs)<sup>♦</sup> for the National Police to provide them with specialised knowledge to safely and legally run CIEs.<sup>154</sup>

The overall effects of the negative criminalisation of detention centres in Spain and the UK must not be ignored.

The jail-like system imprints in one’s subjectivity a lack of control over your own life and it crystallises the extent of the State’s power exercised over the individual through the action of control mechanisms.<sup>♦155</sup>

---

<sup>154</sup> Morán *et al.*, ‘Los CIEs para extranjeros en España: una evaluación crítica’, 215.

<sup>155</sup> *Ibid.*, 214.

**Vulnerable persons – children, asylum seekers and victims of gender discrimination**

A comparison of the lawfulness of immigration detention in Spain and the UK must have regard to the status of vulnerable persons in detention. With regard to children, the UK was subject to widespread denunciation until 2008 when it revoked its opt-out from the UNCRC for immigration matters. Save the Children stated that:

The UK has one of the most open-ended and unsupervised detention systems in Europe due to a lack of statutory criteria and the absence of a statutory limit on the length of time children can be detained.<sup>156</sup>

The UK had ineffectively transposed art. 18(1) RCD into domestic law and was compromising children's rights with indefinite detention and a lack of legal representation and opportunities for bail. International, European and domestic law were engaged. However, the revocation of the opt-out indicated a shift in approach to child detention. In 2010, the UK government proposed to stop detaining minors and introduced the IFRP.<sup>157</sup> 1000 children were detained in 2009, but only 240 in 2012.<sup>158</sup> Nonetheless, children are still being detained and the issue is unresolved.

The fact that Spain had opted-in to the UNCRC reflects its earlier prioritisation of children's rights over immigration detention policy. Furthermore, art. 258.7 REDYLE

---

<sup>156</sup> 'Memorandum' Home Affairs Committee, *Immigration Control 5<sup>th</sup> report*. (London, 2005-2006), HC 775-11 (written evidence).

<sup>157</sup> Global Detention Project 'Europe Profiles' (UK).

<sup>158</sup> MO, *Briefing: Immigration Detention in the UK 2<sup>nd</sup> revision*. (Ox, November 2013), 2.

2393/2004 prevents unaccompanied minors from entering CIEs. This blanket prohibition offers greater protection to immigrant children in Spain than in the UK.

The UK is also distinctive in its mandatory detention of asylum seekers. The supposedly shorter length of detention does not mitigate the resulting psychological effects, given the detainee's constant state of vigil regarding relocation and uncertainty relating to authorisation.<sup>159</sup>

Spain is most commonly criticised for its discrimination of women and unethical approach to gender-related issues. A WLW report investigated CIEs across Spain in 2010-12 and outlined many deficiencies.<sup>160</sup> Women complained of arts. 3, 8 and 14 ECHR violations. Sexual abuse took place at the now closed CIE in Málaga. A Brazilian woman had an abortion in the CIE after being raped by one of the guards.<sup>161</sup> Her fellow inmates who had also suffered sexual abuse were deported immediately. She, too, was also ultimately deported. There have also been countless instances of deportation despite outstanding allegations of sexual abuse in the UK.

Arts. 3, 6, 8 and 14 ECHR should be engaged. Detention excessively affects these vulnerable detainees' interests causing disadvantages wholly disproportionate to the aims pursued. Detention is therefore disproportionate where atrocities such as these are not properly addressed.

---

<sup>159</sup> Gill. N, 'Longing for stillness: the forced movement of asylum seekers' (2009) *M/C Journal*, Vol.12, No.1; 3.

<sup>160</sup> *Mujeres en los CIE: realidades entre rejas* (2012);

Also, see video following investigations: ([www.womenslinkworldwide.org](http://www.womenslinkworldwide.org)), accessed 01.03.14.

<sup>161</sup> APDHA, *CIEs en España*, 9.

## Chapter V. Evaluation of CEAS immigration detention regulation

The premise behind the CEAS is laudable. It was established to guarantee a minimum level of protection to asylum-seekers, whichever EU country they enter. Indeed, the EC is conscious that:

Asylum must not be a lottery. EU Member States have a shared responsibility to welcome asylum seekers in a dignified manner, ensuring they are treated fairly and that their case is examined to uniform standards so that, no matter where an applicant applies, the outcome will be similar.<sup>162</sup>

However, this study shows that this seemingly utopian scheme has yet to be effectively implemented. An asylum-seeker would be treated very differently if he/she arrived in Spain or the UK; regardless of the nature of the persecution he/she had suffered. Not only is this a result of the various opt-outs by the UK, but also the lack of a common system regulating the procedural safeguards and internal regulation of detention centres.

This has resulted in EU Member States gaining various reputations in light of their unique reception conditions. It has been argued that this creates an ‘asylum shopping’ culture.<sup>163</sup> The fear of which – Des Places argues – ‘has led to a competitive restrictionism amongst States’.<sup>164</sup> It seems contradictory and highly exclusive that while the EU supports the ideal of free movement for EU citizens, it restricts the liberty of

---

<sup>162</sup> EC, ‘CEAS’ (ec.europa.eu), accessed 01.03.14.

<sup>163</sup> O’Nions, ‘No right to liberty: the detention of asylum seekers for administrative convenience’, 152.

<sup>164</sup> Des Places. SB, *Evolution of asylum legislation in the EU: Insights from regulatory competition theory*, EUI Working Papers 2003/16.

non-EU citizens so systematically.<sup>165</sup> EU Institutions do not represent a common front with regards to the CEAS, as indicated in the EP's Resolution on the CEAS highlighting shortcomings in human rights protection.<sup>166</sup>

The current CEAS provisions on immigration detention have been described as 'deeply unsatisfactory from the perspective of providing protection against arbitrary detention for asylum seekers'.<sup>167</sup> The RCD has been implemented to differing degrees across Europe.<sup>168</sup> Surely a common, more prescriptive system of immigration detention should be enforced? This was essentially proposed by the EP when drafting the CEAS provisions. However, the European Council opted for a 'floor, not a ceiling, to refugee protection' which 'effectively emasculated any restrictions on member state's discretion to detain'.<sup>169</sup>

As a result, the CEAS has been rendered ineffective while Member States still enjoy relatively unbridled discretion with regard to their immigration detention estates. Alternatives to detention should be promoted by the CEAS. It has a long way to go to harmonise standards across the EU.<sup>170</sup> If it fulfils this expectation, its provisions will most likely be vulnerable to opt-ins and opt-outs, typically on the UK's part.

---

<sup>165</sup> Wilsher, *Immigration Detention: Law, History, Politics*, 172.

<sup>166</sup> (26.09.06) B6-0508/2006, paras 11,12.

<sup>167</sup> Wilsher, 'Immigration detention and the CEAP' (see no.22), 418.

<sup>168</sup> Hailbronner. 'Detention of asylum seekers', 164.

<sup>169</sup> Wilsher, 'Immigration detention and the CEAP' (see no.22), 420-421.

<sup>170</sup> ECRE, *Not there yet: an NGO perspective on challenges to a fair and effective CEAS* (Belgium, 2012/13) AIDA.

## Conclusion

In summation, this study highlights the different approaches to immigration detention taken by Spain and the UK. The critique throughout intimates various improvements which both legal systems should make to ensure that immigration detention is only used where ‘necessary’ and lawful. Such changes must respect fundamental human rights, in particular art. 5 ECHR.

Both countries should reform their domestic law to ensure that impartial decision-making is at the heart of their immigration detention estates. The UK’s fast-track procedure is arbitrary and breaches fundamental human rights. While Spain does not enforce such a blanket policy, it must equally refrain from rushed and generalised examination of asylum claims. Fortunately, ‘ethnic profiling’ and nationality listing are now discarded practices (in Spain and the UK respectively). They were disproportionate and in breach of art. 14 ECHR.

The UK must put an end to indefinite immigration detention and create a reasonable statutory limit. Spain should emulate the UK’s system by addressing its ‘legal limbo’ through issuing formal recognition of inmates’ stay in CIEs. Both systems should avoid the social exclusion resulting from ‘legal limbo’ scenarios and should establish temporary welfare rights. The UK should adopt a procedure for automatic judicial supervision of immigration detention as already developed in Spain. This is necessary given the remoteness of judicial review and *habeas corpus*. However, the available procedures to challenge detention in Spain require simplification. Spain would benefit from establishing a right to bail in immigration detention. It is submitted that standards

should be harmonised with regards to procedural safeguards by the CEAS and that art. 6 ECHR should apply to immigration detention.

Both domestic legal frameworks relating to the internal regulation of detention centres are insufficiently dogmatic. The UK should facilitate judicial monitoring of the internal operation of IRCs, as has been made available recently in Barcelona. This would ensure the accountability of private companies authorised to run IRCs. This is vital given their lack of respect for human rights in the past decade. The prison culture of detention centres in both Spain and the UK means that detainees are deserving of the same guarantees a criminal would receive in prison. With regards to vulnerable detainees, the UK should create a statutory prohibition for child detention, such as that already imposed in Spain. Human rights must be prioritised in the cases of asylum-seekers and victims of gender discrimination.

Ultimately, given the differences identified in the way Spain and the UK enforce immigration detention as a whole, the CEAS lacks efficacy with regards to harmonising standards across the EU. That being said, the system does have potential to address shortcomings in the protection of human rights in immigration detention across Europe. It should encourage alternatives to detention. It is paramount that immigration detention must not be subject to the political and societal whims of the EU and its Member States, but only to the rule of law and judicial scrutiny.

It is clear from the outset that immigration detention interferes with fundamental human rights. This is true regardless of whether a person enters a country legally or illegally.<sup>171</sup> Everyone has the right to liberty and this right should be universal, absolute and inalienable. However, has this right become a ‘citizen right’ as opposed to a ‘human right’?

The joint partly dissenting opinion in *Saadi* stated:

It is a crime to be a foreigner? We do not think so.

Spain and the UK must echo this outlook. They should take heed of Lord Browne of Madingley’s words and listen to the stories of immigration detainees. They ought to commit to a radical reform of immigration detention law and prioritise human rights. This would, in turn, convey a better message about immigrants to their nationals.

---

<sup>171</sup> Hailbronner. ‘Detention of asylum seekers’, 159.

## Appendix

### Detention centres in Spain



and the UK.



## Bibliography

### Books

Baldaccini. A *et al.*

*Whose freedom security and justice? EU immigration and asylum policy*

(Oxford, 2007)

Blake. N QC *et al.*

*Immigration, asylum & human rights*

(New York, 2003)

Bossuyt. M.J

*Guide to the 'Travaux Préparatoires' of the ICCPR*

(Leiden, 1987)

Brandariz, J.A

*Sistema penal y control de los inmigrantes: Gramática del migrante como infractor penal*

(Granada, 2011)

Clayton. G

*Immigration and Asylum Law*

Fifth edition

(Great Britain, 2012)

Cohen, S

*No-one is illegal*

(Great Britain, 2003)

Hughes. J and Liebaut. F (editors)

*Detention of asylum seekers in Europe: Analysis and perspectives*

(The Hague, 1998)

Martínez DB *et al.*

*La nueva regulación de la inmigración y la extranjería en España*

(Valencia, 2012)

McBride. J

*Access to justice for migrants and asylum seekers in Europe*

First edition

(Strasbourg, 2009)

Murdoch. J *et al.*

*Human rights in Scotland*

Third edition

(West Sussex, 2011)

Steiner. H.J and Alston. P

*International Human Rights in Context: Law Politics Morals*

Second edition

(New York, 2000)

Tuitt. P

*The Law's Construction of the Refugee*

(London, 1996)

Weber *et al.*

*Deciding to detain: How Decisions to Detain Asylum-Seekers Are Made at Points of Entry*

(Cambridge, 2002)

Wilsher. D

*Immigration detention: Law, History, Politics*

First edition

(New York, 2012)

Zweigert. K and Kötz. H  
*An Introduction to Comparative Law*  
 Third revised edition  
 (United States, 1998)

### **Book Articles**

Wilsher. D  
 ‘Immigration detention and the CEAP’:  
 Baldaccini. A *et al.*  
*Whose freedom security and justice? EU immigration and asylum policy*  
 (Oxford, 2007)  
 395-426

### **Cases**

*ECtJR jurisprudence:*

*A. and others v. the UK* [2009] 49 EHRR 29  
*Abdolkhamsi and Karmia v. Turkey*, (no.30471/08) ECHR 2009  
*Amuur v. France* (1996) 22 EHRR 533  
*Zamir v. UK*, (1983) (no.9174/80) DR 40  
*Chahal v. UK*, (1996) 23 EHRR 413  
*Čonka v. Belgium*, (2002) (no.51564/99) ECHR 2002-I  
*Mikolenko v. Estonia* (no. 10664/05) ECHR 2009  
*R (Saadi) v. Secretary of State* (2008) (no.13229/02) EHRLR 407  
*R v. SSHD ex p Muboyayi* [1991] 4 All ER 72  
*Vikulov and others v. Latvia* (dec.) (no. 16870/03) 2004

*Common law cases:**ID and others v The Home Office* [2006] 1 WLR 1003*Nadarajah & Amirthanathan v. SSHD* [2003] EWCA Civ 1768*R (A (Somalia)) v. SSHD* [2007] EWCA Civ 804*R (on the application of AM and others v. SSHD and Kalyx, BID intervening)* [2009] EWCA Civ 219*R (Saadi) v. Secretary of State* [2001] EWCA Civ 1512; [2002] UKHL 41*R v. SSHD ex p Sheikh* [2001] ImmAR 219*Spanish cases:*

STC 115/1987

STC 236/2007

STC 341/1993

*Williams v. Spain* (2009) CCPR/C/96/D/1493/2006**CD**

Chao. M

*Clandestino*

(1998) Europe, Mexico, US: Virgin, EMI, Ark21 respectively.

**Constitution**

Spanish Constitution 1978

**Databases**

Asylum and Information Database

Electronic Immigration Network

HUDOC

IUSTEL

La Ley Digital

LexisNexis UK and Spain

Westlaw ES Arazandi

Westlaw UK

**Electronic Sources of Law**

*Agencia Estatal: Boletín Oficial del Estado / State Agency: Official State Bulletin*

[www.boe.es](http://www.boe.es)

*Case law of the European Court of Human Rights*

[hudoc.echr.coe.int](http://hudoc.echr.coe.int)

*Law of the European Union*

[eur-lex.europa.eu](http://eur-lex.europa.eu)

***Official website of the European Union***

Title: 'Common European Asylum System'

Author: European Commission

Date: Last updated 5 December 2013

Page URL: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm)

Site URL: [ec.europa.eu](http://ec.europa.eu)

Date Viewed: 1 March 2014

Title: 'Return and readmission'  
Author: European Commission  
Date: Last updated 13 August 2013  
Page URL: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/immigration/return-readmission/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/immigration/return-readmission/index_en.htm)  
Site URL: [ec.europa.eu](http://ec.europa.eu)  
Date Viewed: 19 February 2014

***Official website of the United Nations Human Rights Council***

[www.unhcr.org](http://www.unhcr.org)

***Official website of the United Nations High Commissioner for Refugees***

[www.ohchr.org](http://www.ohchr.org)

**Illustration**

Title: *At work inside our detention centres: a guard's story*  
Illustrator: Wallman. S  
Page URLs: [serco-story.theglobalmail.org](http://serco-story.theglobalmail.org)  
Site URL: [theglobalmail.org](http://theglobalmail.org)  
Date Viewed: 27 February 2014

**International law**

Convention Relating to the Status of Refugees (The Geneva Convention) 1951

European Convention on Human Rights

Rome, 4. XI. 1950

International Covenant on Civil and Political Rights 1966

United Nations Convention on the Rights of the Child 1989

Universal Declaration of Human Rights 1948

United Nations High Commissioner for Refugees, Executive Committee's Conclusion  
No. 44 (XXXVII) 1986

### **Journal Articles**

Billings. P; edited by MacDonald. I

'The treatment of asylum seekers in the UK'

*Journal of Social Welfare & Family Law*

Vol.29, No. 1, March 2007

49-65

Case comment

'Immigration detention: unauthorised entry – reasons for detention – art. 5'

*European Human Rights Law Review*

2008 3

407-410

Gill. N

'Longing for stillness: the forced movement of asylum seekers'

*M/C Journal*, Vol.12, No.1

(2009)

Hailbronner. K

'Detention of asylum seekers'

*European Journal of Migration and Law* 9

(2007)

159-172

‘Article 6: the right to a fair trial’

*Human Rights Review*

2012

Morán. A.J, *et al.*

‘Los CIEs en España: origen, funcionamiento e implicaciones jurídico-sociales’

*Revista CIDOB d’afers internacionals*, n.º 26

(October, 2012);

‘Los CIEs para extranjeros en España: una evaluación crítica’

*Revista CIDOB d’afers internacionals*, n.º 99

(September, 2012)

O’Nions. H

‘No right to liberty: the detention of asylum seekers for administrative convenience’

*European Journal of Migration and Law* 10

(2008)

Ruiz de Larramendi. AM

‘Asilo y refugio en la Unión Europea: España y el Reino Unido’

*Puentes: hacia nuevas investigaciones en la mediación intercultural*

No. 2, 2002

93-103

### **Legal Encyclopaedia**

*Halsbury’s Laws*

Vol. 1(1)

(2001 reissue)

## Legislation

*UK:*

### *Acts of Parliament*

Anti-terrorism, Crime and Security Act 2001

Asylum and Immigration (Treatment of Claimants) Act 2004

Human Rights Act 1998

Immigration Act 1971

Immigration and Asylum Act 1999

Nationality, Immigration and Asylum Act 2002

Prisons Act 1952

Race Relations Act 1976

### *Statutory Instruments*

Immigration and Asylum Appeal (Fast Track Procedure) Rules 2005, SI 2005/560

*Spain:*

Código Civil Español 1889 / Spanish Civil Code

Ley 12/2009 regulating the right to asylum and subsidiary protection<sup>♦</sup>

LO 7/1985

LODYLE 4/2000, revised by the LO 8/2000, LO 11/2003, LO 14/2003 and the LO 2/2009

Ministerial Order expressed in LOE (1/7/1985)

Order of the Presidential Minister of 22 February 1999

REDYLE 2393/2004

*EU:*

*Primary Legislation*

Charter of Fundamental Rights of the European Union  
[2000] OJ C 364/01

*Secondary Legislation*

Council Directive 2003/9/EC laying down minimum standards for the reception of  
asylum seekers [2003] OJ L 31/18

Council Directive 2013/33/EU laying down standards for the reception of applicants for  
international protection (recast) [2013] OJ L 180/96

Council Directive 2013/32/EU on common procedures for granting and withdrawing  
international protection (recast) [2013] OJ L 180

Council Directive 2008/115/EC on common standards and procedures in Member  
States for returning illegally staying third-country nationals [2008] OJ L 348/98

Council Directive 2005/85/EC on minimum standards on procedures in Member States  
for granting and withdrawing refugee status [2005] OJ L 326/13

European Parliament's Resolution on the CEAS  
(26.09.06) B6-0508/2006

**News Articles**

Title: 'Amnistía Internacional critica la detención «indiscriminada» de “sin papeles”

Author: Europa Press

Date: 22 February 2013

Page URL: <http://www.laverdad.es/murcia/rc/20130222/sociedad/critica-detencion-indiscriminada-papeles-201302221414.html>

Site URL: [www.laverdades](http://www.laverdades.com)

Date Viewed: 30 February 2013

Title: 'Aumentan los inmigrantes que murieron cuando trataban de llegar a España'

Author: Blanco. PR

Date: 23 January 2013

Page URL :

[http://politica.elpais.com/politica/2013/01/23/actualidad/1358960564\\_328753.html](http://politica.elpais.com/politica/2013/01/23/actualidad/1358960564_328753.html)

Site URL: [politica.elpais.com](http://politica.elpais.com)

Date Viewed: 30 February 2013

Title: 'El CIE de Capuchinos de Málaga cerrará definitivamente a partir del día 20'

Author: Europa Press

Date: June 2012

Page URL: <http://www.europapress.es/nacional/noticia-cie-capuchinos-malaga-cerrara-definitivamente-partir-dia-20-20120612121540.html>

Site URL: [www.elmundo.es](http://www.elmundo.es)

Date Viewed: 28 February 2014

Title: 'Immigration detainee "died in handcuffs"'

Author: BBC

Date: 20 January 2014

Page URL: <http://www.bbc.co.uk/news/uk-england-london-25749685>

Site URL: [www.bbc.co.uk](http://www.bbc.co.uk)

Date Viewed: 20 January 2014

Title: 'La ONU pide a España que "erradique" las redadas policiales y las detenciones "indiscriminadas" de inmigrantes'

Author: Europa Press

Date: 15 March 2011

Page URL: <http://www.europapress.es/epsocial/noticia-onu-pide-espana-erradique-redadas-policiales-detenciones-indiscriminadas-inmigrantes-20110315172633.html>

Site URL: [www.europapress.es](http://www.europapress.es)

Date Viewed: 14 January 2014

Title: 'La policía fija cupos de arrestos a "sin papeles" por barrios'

Author: Berdié. A

Date: February 2009

Page URL: [http://elpais.com/diario/2009/02/16/madrid/1234787056\\_850215.html](http://elpais.com/diario/2009/02/16/madrid/1234787056_850215.html)

Site URL: [elpais.com](http://elpais.com)

Date Viewed: 3 March 2014

Title: 'The UK dehumanises immigrants- no wonder tragedies happen in detention'

Author: Taylor. D

Date: 17 January 2014

Page URL: <http://www.theguardian.com/commentisfree/2014/jan/17/uk-dehumanises-immigrants-detention-asylum-seekers-harmondsworth>

Site URL: [www.theguardian.com](http://www.theguardian.com)

Date Viewed: 13 February 2014

Title: 'Salmon in talks to force closure of Dungavel centre'  
 Date: 3 June 2008  
 Page URL: <http://www.scotsman.com/news/salmond-in-talks-to-force-closure-of-dungavel-centre-1-1171184>  
 Site URL: [www.scotsman.com](http://www.scotsman.com)  
 Date Viewed: 14 February 2014

Title: 'Spain's immigrants suffer in economic downturn'  
 Author: Cala. A  
 Date: 26 August 2010  
 Page URL: <http://content.time.com/time/world/article/0,8599,2013057,00.html>  
 Site URL: [content.time.com](http://content.time.com)  
 Date Viewed: 31 January 2012

Title: '84-year-old dementia patient died in handcuffs at immigration detention centre'  
 Author: Gander. K  
 Date: 16 January 2014  
 Page URL: <http://www.independent.co.uk/news/uk/home-news/84yearold-dementia-patient-died-in-handcuffs-at-immigration-detention-centre-9063548.html>  
 Site URL: [www.independent.co.uk](http://www.independent.co.uk)  
 Date Viewed: 14 February 2014

### **Other monographs**

Detention Action

*Fast track to despair: the unnecessary detention of asylum-seekers*

(May, 2011);

(then, the LDSG)

*No return, no release, no reason: challenging indefinite detention*

(September 2010)

Ferrocarril Clandestino *et al.*  
*Voces desde y contra los CIE*  
 (October, 2009)

Migration Observatory  
*Briefing: Immigration Detention in the UK*  
 2<sup>nd</sup> revision  
 (Ox, November 2013)

UNHCR  
*Guidelines on applicable Criteria and Standards relating to the Detention of Asylum seekers*  
 (Geneva, 1999)

## **Reports**

Asociación Pro Derechos Humanos de Andalucía / Association in favour of Human Rights in Andalucía♦  
*CIEs en España*  
 (October 2008)

Bail for Immigration Detainees  
*A nice judge on a good day: immigration bail and the right to liberty*  
 (July, 2010)

Bingham Centre for the Rule of Law  
*Immigration detention the rule of law- National report: Spain*  
 (May, 2013)

Department for Constitutional Affairs  
*Asylum and Immigration Tribunal – fast track procedure rules, response to consultation*  
 CP(R) 05/05

European Council on Refugees and Exiles

*Not there yet: an NGO perspective on challenges to a fair and effective CEAS*

Asylum and Information Database

(Belgium, 2012/13)

European Commission against Racism and Intolerance

*Cuarto Informe sobre España*

CRI(2011)4

Field *et al.*

‘Alternatives to detention of asylum seekers and refugees’

*UNHCR Legal and Protection Policy Research Series*

POLAS/2006/03

(April, 2006)

Her Majesty’s Inspector of Prisons

*Report on the unannounced inspections of five non-residential short-term holding facilities: Queen’s Building and Terminals*

(1-4 Heathrow Airport, 10-13 October 2005)

‘Memorandum’ Home Affairs Committee

*Immigration Control*

Fifth report

HC 775-11 (written evidence)

(London, 2005-2006)

Pérez-Sales. P

Comisión Española de Ayuda del Refugiado / Spanish Commission of Refugee Aid♦

*Situación de los CIE para extranjeros en España*

DEVAS (the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union)

(December, 2009)

Pueblos Unidos

*Miradas tras las rejas*

(2011)

Ruteere. M

United Nations General Assembly

*Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance: Visit to Spain*

A/HRC/23/56/Add.2

(June, 2013)

*Transatlantic trends: key findings 2013*

The German Marshall Fund of the United States

(2013)

United Nations Human Rights Committee

*International criticism: Concluding Observations of the HRC: United Kingdom*

(2001) CCPR/CO/73/UK; CCPR/CO/73/UKOT

Women's Link Worldwide

*Mujeres en los CIE: realidades entre rejas*

(2012)

### **State Circulars**

*Spain:*

General State Prosecution Office♦

Circular 3/2001

General Director of the Police

Circular 1/2012

**UKBA Documents**

Asylum statistics

1st quarter 2007

(31.03.07)

Table 17, 18;

4<sup>th</sup> quarter 2006

Detention Fast Track & Detained Non-Suspensive Appeals

*Detained fast track processes*

(2008)

Detention Fast Track & Detained Non-Suspensive Appeals– Intake Selection (AIU Instruction)

Detention Services Operating Standards Manual for Immigration Service Removal Centres 2005

Detention Centre Rules 2001

Enforcement Instructions and Guidance

Home Office Operating Standards

Independent Chief Inspector

*A thematic inspection of how the UKBA manages foreign national prisoners*

(February-May 2011)

Operation Enforcement Manual

**Videos**

Title: 'The Holocaust Educational Trust 2013 Appeal Film'

Author: Holocaust Educational Trust

Page URL: <http://vimeo.com/74455089>

Site URL: [het.org.uk](http://het.org.uk)

Date Viewed: 15 February 2014

Title: 'Women in Spanish Foreign Detainment Centres: From Behind Bars  
(Only in Spanish)'

Author: Women's Link Worldwide

Page URL :

[http://www.womenslinkworldwide.org/wlw/new.php?modo=detalle\\_proyectos&dc=57](http://www.womenslinkworldwide.org/wlw/new.php?modo=detalle_proyectos&dc=57)

Site URL: [www.womenslinkworldwide.org](http://www.womenslinkworldwide.org)

Date Viewed: 1 March 2014

**Websites**

Title: 'Derechoshumanos.net'

Author: Fundación Acción Pro Derechos Humanos

Site URL: [www.derechoshumanos.net](http://www.derechoshumanos.net)

Date Viewed: 3 March 2014

Title: 'Detention Action'

Author: Detention Action

Site URL: [detentionaction.org.uk](http://detentionaction.org.uk)

Date Viewed: 28 February 2014

Title: 'Europe Profiles' for Spain and UK

Author: Global Detention Project

Date: Spain last updated February 2013

UK last updated June 2011

Page URLs:

<http://www.globaldetentionproject.org/countries/europe/spain/introduction.html> ;

<http://www.globaldetentionproject.org/de/countries/europe/unitedkingdom/introduction.html>

Site URL: [www.globaldetentionproject.org](http://www.globaldetentionproject.org)

Date Viewed: 13 February 2014

Title: 'Hay alternativas, no al internamiento de los inmigrantes (CIEs)'

Author: Amnesty International

Date: Petition ended 3 December 2013

Page URL: <https://www.es.amnesty.org/actua/acciones/espana-inmigrantes-cies-jun13/>

Site URL: [www.es.amnesty.org](http://www.es.amnesty.org)

Date Viewed: 31 December 2013

Title: 'Immigration detention: what is the point?'

Author: Yeo. C

Date: 16 September 2013

Page URL: [http://www.freemovement.org.uk/2013/09/16/immigration-detention-what-is-the-point/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+FreeMovement+%28Free+Movement%29&subscribe=success#blog\\_subscription-2](http://www.freemovement.org.uk/2013/09/16/immigration-detention-what-is-the-point/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+FreeMovement+%28Free+Movement%29&subscribe=success#blog_subscription-2)

Site URL: [www.freemovement.org.uk](http://www.freemovement.org.uk)

Date Viewed: 29 September 2013

Title: 'Immigration in the White Paper- 'continuity of effect' and its limits'  
Author: Craig. S  
Date: December 2013  
Page URL:  
<http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/2745/Sarah-Craig-Immigration-in-the-White-Paper--Continuity-of-Effect-and-its-Limits.aspx>  
Site URL: [www.scottishconstitutionalfutures.org](http://www.scottishconstitutionalfutures.org)  
Date Viewed: 16 February 2014

Title: Issue Brief – 'Immigration removal/detention centres'  
Page URL: <http://www.politics.co.uk/reference/immigration-removal-detention-centres>  
Site URL: [www.politics.co.uk](http://www.politics.co.uk)  
Date Viewed: 14 February 2014

Title: 'Litigation: *Williams v. Spain*'  
Author: Open Society Foundations  
Page URL: <http://www.opensocietyfoundations.org/litigation/williams-v-spain>  
Site URL: [www.opensocietyfoundations.org](http://www.opensocietyfoundations.org)  
Date Viewed: 18 February 2014

Title: 'Migration Watch UK'  
Site URL: [www.migrationwatchuk.org](http://www.migrationwatchuk.org)  
Date Viewed: 3 March 2014

Title: 'Noticias Juridicas'  
Site URL: [noticias.juridicas.com](http://noticias.juridicas.com)  
Date Viewed: 3 March 2014

Title: Official UKBA website  
Author: UKBA  
Site URL: [www.ukba.homeoffice.gov.uk](http://www.ukba.homeoffice.gov.uk)  
Date Viewed: 3 March 2014

Title: 'Que el derecho no se detenga a la puerta de los CIE'  
Author: Andalucía Acoge  
Page URL: <http://www.acoge.org/index.php/es/areas-de-trabajo/campanas/que-el-derecho-no-se-detenga-a-la-puerta-de-los-cie>  
Site URL: [www.acoge.org](http://www.acoge.org)  
Date Viewed: 27 February 2014

Title: 'Shocking new report on detention of women asylum seekers'  
Author: Wilding. Jo  
Date: 3 February 2014  
Page URL: <http://www.freemovement.org.uk/2014/02/03/shocking-new-report-on-detention-of-women-asylum-seekers/#more-12273>  
Site URL: [www.freemovement.org.uk](http://www.freemovement.org.uk)  
Date Viewed: 3 February 2014

Title: 'Spain: fences cannot hold back the wind'  
Author: No Border Network  
Site URL: [www.noborder.org](http://www.noborder.org)  
Date Viewed: 18 October 2013

## **Working Papers**

Bacon. C

‘The evolution of immigration detention in the UK: the involvement of private prison companies’

RSC Working Paper No.27

(Oxford University, September 2005)

Des Places. SB

*Evolution of asylum legislation in the EU: Insights from regulatory competition theory*

EUI Working Papers 2003/16