

IMMIGRATION IN THE UK AND THE USA: PRIORITIES IN DETENTION AND DEPORTATION



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Mémoire de M2 Recherche

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Session de Juillet 2017

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INTRODUCTION

Immigration control has long been a sensitive area of public policy which impacts “national identity, state sovereignty, citizenship, freedom of movement and fundamental civil liberties.”¹ In recent years it has been present in political rhetoric throughout the world, from Europe to North America, the Middle East and Australasia. Inevitably, the debate on migration control and one of its forms, deportation, creates polarising views.² In the United Kingdom, the EU Referendum vote in June 2016 saw the country decide to leave after 43 years of membership. The Brexit vote was largely influenced by political rhetoric on immigration and the perceived impact of immigrants on social services, employment as well as cultural differences. In the United States, Donald Trump spearheaded his campaign with an anti-immigrant, and an anti-Muslim rhetoric, with slogans such as “Build that Wall” in reference to a border wall along the Southern border with Mexico, and a promise to implement a Muslim ban preventing Muslims from entering the country.

On November 10, 2016, Jeh Johnson, the former United States Secretary of Homeland Security released a statement on border security. He declared that

Our borders cannot be open to illegal migration. We must, therefore, enforce the immigration laws consistent with our priorities. Those priorities are public safety and border security. Specifically, we prioritize the deportation of undocumented immigrants who are convicted of serious crimes and those apprehended at the border attempting to enter the country illegally. Recently, I have reiterated to our Enforcement and Removal personnel that they must continue to pursue these enforcement activities. Those who attempt to enter our country without authorization should know that, consistent with our laws and our values, we must and we will send you back.³

This dissertation shall carry out a comparative political study of the immigration systems of the United Kingdom and the United States, focusing precisely on these priorities in relation to deportation and detention. Focus shall lead to the factors that influence governmental decision-

¹ Catherine Puzzo. “Immigration Controls in Britain and France (1970-1986): a Comparative Study of Policy .” *School of Language and International Studies University of Surrey*, 2000.

² Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 22. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

³ Jeh Johnson. “Statement by Secretary Johnson On Southwest Border Security.” Department of Homeland Security, 10 Nov. 2016, www.dhs.gov/news/2016/11/10/statement-secretary-johnson-southwest-border-security. Accessed 24 Nov. 2016.

making, the reasons behind this prioritisation and the impact of the concept known as prosecutorial discretion.

This dissertation focuses on two cases: The United Kingdom and the United States that have been chosen for several reasons. First, both nations are major receiving countries, and the two have among the largest migrant, resident and naturalized populations in the world (The USA has over 46 million immigrants in 2015, 14,3% of its total population. The UK had almost 9 million immigrants, 11,3% of its total population.⁴ In total that year, the UN estimated that there were 244 million international migrants in the world.⁵ The US was home to 18,85% of them and the UK home to 3,68%). Furthermore, since the 1990s, both countries have been the target of ever-increasing numbers of immigrants including asylum applicants and in response to sharply increased migration pressures, they have sought to expand immigration control, notably through deportation. With that aim, both countries have had to decide how to prioritise their immigration policies according to their needs and available resources.

It is important to note that there are often definitional variations between countries. For example, one country may define an ‘adult’ differently to another, or define the terms of free speech in a different manner. Any relevant differences in terminology must be pointed out for the implications they may have on the research.

We must define the concept of migrant as well as distinguish both between different forms of deportation and removal as well as variations between our two case-countries. The importance of differentiating between these definitions is crucial. Migration is a fact. People move from one country to another, either voluntarily or by force of necessity. The principal difficulty is “defining what that means in such a way that it can be consistently measured.”⁶ Some of the questions that will depend on the county of arrival are “Who counts as a migrant? Who is foreign to a given country? Under what circumstances can someone be said to have changed the country in which they live?”⁷ For these questions, and many more that arise when studying migration, there is no definitive answer. There is no single measure of migration but

⁴ “International Migrant Stock 2015.” *United Nations*, United Nations Population Division | Department of Economic and Social Affairs, www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml. Accessed 13 Jan. 2016.

⁵ “Number of International Migrants Reached 244 Million in 2015.” *United Nations*, United Nations, 12 Jan. 2016, www.un.org/sustainabledevelopment/blog/2016/01/244-million-international-migrants-living-abroad-worldwide-new-un-statistics-reveal/. Accessed 20 Jan. 2016.

⁶ Olivier Hawkins. “Migration Statistics.” *UK Parliament*, House of Commons Library, 4. 20 June 2017, researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06077. Accessed 20 June 2017.

⁷ *Ibid.*

an array of measures that can be used to understand and analyse the movement of people around the world. For example, when considering the definition of migrant, the answer can be:⁸

- Someone whose country of birth is different to their country of residence.
- Someone whose nationality is different to their country of residence.
- Someone who changes their country of usual residence for a period of at least a year, so that the country of destination effectively becomes the country of usual residence.⁹

According to the migration observatory, “different definitions have significant consequences for data, both in terms of numbers of migrants (stocks and flows) and for the analysis of the impacts of migration.”¹⁰ The term migrant is also used very indiscriminately in public discourse creating confusion to the exactitude of the term and combining issues of “immigration, race/ethnicity, and asylum.” The word migrant is often used to refer to asylum seekers and refugees, and despite these categories representing only a small portion of all immigrants, they “have attracted a great deal of public and policy attention.”¹¹ It seems evident that conflicting definitions “pose challenges for policy, particularly since many ‘migrants’ are not subject to immigration control and legislation.”¹²

Again, here it is necessary to distinguish between asylum-seeking migrants and those who are not seeking refuge. If a migrant is simply a person who leaves their country of residence to move to a new one, then an asylum seeker is someone who does so “from fear of persecution for reasons of race, religion, social group, or political opinion.”¹³ There is also the case of migrants who arrive in a host country without the intention of claiming asylum but are forced to do so after the situation in their country of origin changes (e.g. war). Asylum seekers are therefore in theory a subset of migrants and are included in official estimates of migrant stocks and flows. However, the United Nations differ in their definition. According to *The UN Convention on the Rights of Migrants*:¹⁴ [we define] a migrant worker as a “person who is to

⁸ Bridget Anderson, and Scott Blinder. “Who Counts as a Migrant? Definitions and Their Consequences.” *Migration Observatory*, University of Oxford, 2. 11 Jan. 2017, www.migrationobservatory.ox.ac.uk/resources/briefings/who-counts-as-a-migrant-definitions-and-their-consequences/. Accessed 25 Jan. 2017.

⁹ In the UK, people staying for less than a year are not counted as migrants.

¹⁰ Bridget Anderson, and Scott Blinder. “Who Counts as a Migrant? Definitions and Their Consequences.” *Migration Observatory*, University of Oxford, 2. 11 Jan. 2017, www.migrationobservatory.ox.ac.uk/resources/briefings/who-counts-as-a-migrant-definitions-and-their-consequences/. Accessed 25 Jan. 2017.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Oliver Hawkins. “Migration Statistics.” *UK Parliament*, House of Commons Library, 6. 20 June 2017, researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06077. Accessed 20 June 2017.

¹⁴ *United Nations Convention on Migrants’ Rights*. United Nations Educational, Scientific and Cultural Organization, 2003, *United Nations Convention on Migrants’ Rights*, unesdoc.unesco.org/images/0014/001435/143557e.pdf. Accessed 11 Feb. 2016.

be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national." From this a broader definition of migrants follows: "The term 'migrant' in article 1.1 (a) should be understood as covering all cases where the decision to migrate is taken freely by the individual concerned, for reasons of 'personal convenience' and without intervention of an external compelling factor."¹⁵ This notion of a freely taken decision clearly excludes refugees from the United Nations' definition of migrants. Refugees and asylum seekers generally fall under the protection of the 1951 United Nations Convention and Protocol Relating to the Status of Refugees,¹⁶ (known as the 1951 Refugee Convention¹⁷). The United Kingdom also adheres to "UN and European agreements on refugees and human rights and therefore must not return asylum applicants to a place where they are likely to face torture or persecution."¹⁸ Asylum is a form of protection given by a country to someone fleeing from persecution in their own country.¹⁹ The United States has recognized its responsibility toward refugees through the enactment of the Refugee Act of 1980²⁰ which set annual refugee admissions and implemented an asylum procedure.²¹ Approximately 3 million refugees have been resettled in the US since the passing of the Act.²²

In the United Kingdom there are three main categories of state-enforced or enforceable departures: deportations, administrative removals and voluntary departures.

¹⁵ Oliver Hawkins. "Migration Statistics." *UK Parliament*, House of Commons Library, 6. 20 June 2017, researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06077. Accessed 20 June 2017.

¹⁶ "Convention and Protocol Relating to the Status of Refugees." *UNHCR*, United Nations, www.unhcr.org/3b66c2aa10. Accessed 7 Apr. 2016.

¹⁷ The 1951 Geneva Convention is the main international instrument of refugee law. The Convention clearly spells out who a refugee is and the kind of legal protection, other assistance and social rights he or she should receive from the countries who have signed the document. The Convention also defines a refugee's obligations to host governments and certain categories or people, such as war criminals, who do not qualify for refugee status. The Convention was limited to protecting mainly European refugees in the aftermath of World War II, but another document, the 1967 Protocol, expanded the scope of the Convention as the problem of displacement spread around the world.

¹⁸ Scott Blinder. "Migration to the UK: Asylum." *Migration Observatory*, University of Oxford, 3. 20 July 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/. Accessed 11 Aug. 2016.

¹⁹ "What Is a Refugee? Definition and Meaning." *USA for UNHCR*, United Nations, www.unrefugees.org/what-is-a-refugee/. Accessed 25 Jan. 2016.

²⁰ "Refugee Act of 1980." 1980, www.gpo.gov/fdsys/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf.

²¹ Professor Borjas notes that refugees cost about \$7,000 in social services per individual admitted. *IMPACT OF IMMIGRANTS*, *supra* note 1, at 35. However, no comprehensive cost/benefit analysis has been undertaken with respect to refugees and asylees. Frequently, those who seek protection in the United States from persecution in their home countries are highly skilled and potentially productive. See Neuffer, *Many Refugees Founder in New York Job Market*, *N.Y. Times*, May 24, 1987, § 1, pt. 2, at 40, col. 3.

²² Jens Manuel Krogstad, and Jynnah Radford. "Key Facts about Refugees to the U.S." *Pew Research Center*, 30 Jan. 2017, www.pewresearch.org/fact-tank/2017/01/30/key-facts-about-refugees-to-the-u-s/. Accessed 27 Feb. 2017.

The first category, 'deportations', applies to people whose "removal from the country is deemed 'conducive to the public good' by the Secretary of State."²³ Deportation can also be recommended by a court when conviction of a criminal offence occurs, notably when that conviction carries a prison term²⁴ Dr. Emanuela Paoletti of the Refugee Studies Centre at Oxford, uses Gina Clayton's definition of deportation:

Deportation is a process of enforced departure from the UK pursuant to an order signed by the Home Secretary which also prevents the deportee from returning to the UK unless and until the order is revoked. In this respect it may be distinguished from the other forms of enforced departure. Although removal, supervised and voluntary departure will affect the ability of the individual to return to the UK, unlike a deportation order they do not have any continuing legal force beyond the departure date (Clayton, 2006: 544-545).²⁵

The second category, 'administrative removals' "apply to a larger set of cases involving the enforced removal of non-citizens."²⁶ It concerns those who have gained access to the country illegally or deceptively, have over-stayed their visa, or "otherwise violated the conditions of their leave to remain in the UK."²⁷ Some who fall under this category, are people who have been refused legal permission to enter upon arrival and subsequently removed. They have therefore never officially entered the country but will be counted in the statistics of administrative removals. The third main category, 'voluntary departures' involves people who are told they must leave and do so of their own accord without being forcibly removed. The term 'voluntary' describes the method of departure rather than the choice of whether to depart. According to the Migration Observatory, "there are three kinds of voluntary departures".²⁸ Some leave with the help of official Assisted Voluntary Return schemes. Others make their own travel arrangements and inform the government of their departure. Finally, some people

²³ Scott Blinder. "Deportations, Removals and Voluntary Departures from the UK." *Deportations, Removals and Voluntary Departures from the UK*. The Migration Observatory, 23 June 2014. Web. 01 July 2015.

²⁴ Scott Blinder, and Alexander Betts. "Deportations, Removals and Voluntary Departures from the UK." *Migration Observatory*, University of Oxford, 3. 19 July 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/deportations-removals-and-voluntary-departures-from-the-uk/. Accessed 9 Sept. 2016.

²⁵ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 8. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

²⁶ *Ibid.*

²⁷ Scott Blinder, and Alexander Betts. "Deportations, Removals and Voluntary Departures from the UK." *Migration Observatory*, University of Oxford, 3. 19 July 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/deportations-removals-and-voluntary-departures-from-the-uk/. Accessed 9 Sept. 2016.

²⁸ Scott Blinder, and Alexander Betts. "Deportations, Removals and Voluntary Departures from the UK." *Migration Observatory*, University of Oxford, 3. 19 July 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/deportations-removals-and-voluntary-departures-from-the-uk/. Accessed 9 Sept. 2016.

leave the country without informing the authorities. This final category was unaccounted for in official statistics up until 2005.²⁹

Those are the three main categories of state-enforced or enforceable departures. There is however a term which is often used and whose meaning must be clarified: ‘removal’ and how it relates to deportation in the British context. There is a tendency for confusion in the use of the term. As already stated, administrative removals are defined by the Immigration and Asylum Act 1999 and concern those

Who do not have any legal right to stay in the UK. This includes persons who: (1) enter, or attempt to enter, the UK illegally, (2) overstay their period of legal right to remain in the UK, (3) breach their conditions of leave, (4) are subject to deportation action; and (5) persons who have been refused asylum³⁰

According to Dr. Paoletti, the term removal is used in different ways, which inevitably leads to the aforementioned confusion:

one use of the term “administrative removal” refers to removal on the grounds which used to be grounds for deportation. Another use of the term “administrative removal” is to refer to all removals, using “administrative” to distinguish it from deportation which has an enduring legal effect. Eventually all enforced departures including deportation end in removal. This is why the term is often used to “describe the actual embarkation on transport which takes the person away and all such departures are preceded by removal directions” (Clayton, 2006: 573).³¹

Therefore, while the terms “deportation” and “removal” are theoretically distinct notions, they are often used interchangeably.³² For the purposes of this study, and the comparative process, we consider both removal and deportation to be synonymous.

In the United States, there is a contrast between the notions of removal and return. Removal is understood as “an order issued by the Department of Homeland Security based on the determination that the presence of the alien is in violation of Section 237 of the Immigration

²⁹ Scott Blinder, and Alexander Betts. “Deportations, Removals and Voluntary Departures from the UK.” *Migration Observatory*, University of Oxford, 3. 19 July 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/deportations-removals-and-voluntary-departures-from-the-uk/. Accessed 9 Sept. 2016.

³⁰ “Immigration and Asylum Act 1999.” *Legislation.gov.uk*, Statute Law Database, 22 Nov. 1999, www.legislation.gov.uk/ukpga/1999/33/section/2. Accessed 17 Sept. 2015.

³¹ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 9. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

³² Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 7. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

and Nationality Act”³³ Section 237 regulates the deportation of aliens excluded from admission, or entering in violation of the law. On the other hand, return is the situation where an alien who has been arrested is offered the opportunity to return to their home country “without being placed in immigration proceedings.”³⁴ This scenario is favourably applied to “non-criminal aliens who are apprehended by the Border Patrol.”³⁵

In the US, Deportation is defined as the “official removal of an alien from the United States.”³⁶ Deportation proceedings can be initiated against aliens for multiple reasons. These include committing an aggravated felony within the United States, failure to register a change of address, using falsified or fraudulent documents to gain entry to the country.³⁷ Deportation can also be instigated for “aiding or encouraging another alien to enter the country illegally; engaging in marriage fraud to gain US admission [and] participating in an activity that threatens the US's national security; voting unlawfully.”³⁸ The notion of ‘alien’ is defined by federal immigration law as well as “the rights, duties, and obligations associated with being an alien in the United States, and how aliens gain residence or citizenship within the United States.”³⁹ In the country’s legislation, the term alien is used to define any person who is not a citizen or national of the United States.⁴⁰ Aliens are divided into several subcategories including “resident and nonresident, immigrant and nonimmigrant, and documented and undocumented (‘illegal’).”⁴¹

In summary, both countries define terms differently and caution must be used with some terms which are similar or the same as those in the British system but which have different meanings. In the US, the term alien is used to define any person who is not a citizen or national of the United States. The word alien is much more common in the US than it is in Britain. However, the *British Nationality Act* 1981 defines “alien” as meaning “a person who is neither

³³ “Immigration and Nationality Act.” *Government Publishing Office*, United States Congress, 21. 27 June 1952, www.uscis.gov/laws/immigration-and-nationality-act. Accessed 27 June 2016.

³⁴ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 11. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

³⁵ *Ibid.*

³⁶ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Definition of Terms." Department of Homeland Security, 24 July 2012. Web. 02 July 2015.

⁴¹ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

a Commonwealth citizen nor a British protected person nor a citizen of the Republic of Ireland.”⁴² The United States also defines departures and removals differently. Deportation is defined by the Department of Homeland Security (DHS) as “the formal removal of an alien from the United States when the alien has been found removable for violating the immigration laws. In opposition to the British case where deportation is decided by an immigration officer, in the US, deportation is ordered by an immigration judge without any punishment being imposed or contemplated.”⁴³ Here there is no mention of it being 'conducive to the public good'. The DHS defines removal as “the expulsion of an alien from the United States. This expulsion may be based on grounds of inadmissibility or deportability.”⁴⁴ Where the US also varies in definitions is in its explanation of voluntary departure. The Department of Homeland Security defines it as “the departure of an alien from the United States without an order of removal.”⁴⁵ This contrasts with the British system where immigrants have already been informed of their obligation to leave the territory.

The reason we need to consider this variety of definitions is that they also affect data. Depending on how one defines a migrant, statistics, including both stocks and flows, on immigration and emigration will change. For example, current official government estimates (LTIM, based on the IPS) include several groups that would be excluded under other definitions. First, the IPS views all people of all nationalities as migrants, including UK nationals as well as EU nationals, so long as they are crossing national boundaries with the intent of staying for at least one year. Yet UK nationals obviously would not be considered migrants if defining migrants as ‘foreign nationals’; EU nationals are migrants in this definition, but not if migrants are defined as those subject to immigration controls.⁴⁶

Ultimately, for the purposes of this study, and the comparative process, we consider both removal and deportation to be synonymous and to mean the forced removal of a person from the territory of the deporting state to their country of origin or another safe state.

This dissertation will demonstrate why deportation is such an important part of the immigration process and vital to having control of the country. It also shows how prioritisation

⁴² British Nationality Act 1981, Elizabeth II. Chapter 61. London: The Stationery Office, 1981. Web. 02 June 2015.

⁴³ Definition of Terms." Department of Homeland Security, 24 July 2012. Web. 02 July 2015.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Bridget Anderson, and Scott Blinder. “Who Counts as a Migrant? Definitions and Their Consequences.” *Migration Observatory*, University of Oxford, 6. 11 Jan. 2017, www.migrationobservatory.ox.ac.uk/resources/briefings/who-counts-as-a-migrant-definitions-and-their-consequences/. Accessed 25 Jan. 2017.

influences the reach of deportation and the factors that influence the decision-making behind these priorities.

The argumentation of this paper shall develop these points over the course of five chapters. In the first, an explanation of methodology. The second shall present a historical summary of immigration control and policy in both countries. Chapter three will present the agencies responsible for immigration control as well as information about sources. Chapter four will focus on the specifics of deportation, detention and asylum. Finally chapter five shall develop the reasoning and the implementation of governmental priorities in immigration control, specifically in detention and removal.

CHAPTER 1

METHODOLOGY OF COMPARATIVE STUDIES

I. THE COMPARATIVE METHOD

Research must be based on solid methodological grounds. This chapter will first reflect on the methodology of comparative studies. Then, it will explain how the comparative method will be applied in this study. Finally, it will discuss some of the limitations and danger of the comparative method.

According to Leonardo Morlino in *Introduction à la politique comparée*: “Any research which aims to be ‘scientific’, even in the broadest sense, must beforehand carry out an analysis of its methodological aspects.”¹ In the case of this study of immigration, this means a reflection on the methodology of comparative studies is necessary before its application. The subsequent requirement is a definition of the concept of comparison. The Oxford Dictionary defines “comparison” as: “[a] consideration or estimate of the similarities or dissimilarities between two things or people.”² This simple definition masks the complexities involved in the comparative process. Peter Lor, professor and researcher considers how this applies to the social sciences and political studies:

comparison is inherent in all science, including the social sciences, where comparative research has historically played a significant role in their development as scientific disciplines. However, there is little agreement in the social sciences on the question whether the comparative method should be considered a distinct subfield (as suggested by terms such as comparative education or comparative politics) or as a methodology.³

According to political scientist and sociologist Cécile Vigour, however, comparative methodology is in fact a toolbox, a “boîte à outils.”⁴ No matter the study area, comparison is a reflective task. To compare is to analyse and decipher the significance of data and events to

¹ Leonardo Morlino. Introduction. *Introduction À La Politique Comparée*. Paris: A. Colin, 2013. 9. Print. Translation: Toute recherche qui se veut “ scientifique ”, même au sens le plus large du terme, ne peut faire abstraction d’une analyse préalable de ses aspects méthodologiques.

² "Comparison." *Oxforddictionaries.com*. Oxford University Press, n.d. Web. 30 Apr. 2016.

³ Peter Lor. "Methodology in Comparative Studies." *International and Comparative Librarianship*. Vol. Draft. 2011. 2. Print.

⁴ Cécile Vigour. *La Comparaison Dans Les Sciences Sociales: Pratiques Et Méthodes*. Paris: La Découverte, 2005. 18. Print.

determine causality and meaning. Comparison is used to build detailed and insightful analysis which provide relevant and useful information on the compared elements. Emile Durkheim stated that: “[c]omparative sociology is not a special branch of sociology; it is sociology itself, in so far as it ceases to be purely descriptive and aspires to account for facts.”⁵ He goes further into this explanation, stating that:

We have seen that sociological explanation consists exclusively in establishing relationships of causality, that a phenomenon must be joined to its cause, or, on the contrary, a cause to its useful effects. Moreover, since social phenomena clearly rule out any control by the experimenter, the comparative method is the sole one suitable for sociology.⁶

This theory can also be found in McNeill and Chapman's book on the methodology of research. They state that “[t]he comparative method lies at the root of any sociological research that goes beyond description. Any sociologist who is trying to identify the causes of social events and behaviour is going to be involved in making comparisons.”⁷ Both this and Durkheim's comments therefore suggest that sociology is necessarily comparative and even when it is not apparent, it compares events to other events and societies to other societies in its explanations and interpretations. Cécile Vigour talks about the advantages and benefits of using comparison in political studies. She claims that:

En remplaçant son objet de recherche dans une perspective temporelle plus longue ou en le confrontant à d'autres réalités géographiques et culturelles, le comparatiste étend son champ d'observation. [...] La comparaison doit ainsi être conçue comme une démarche, un état d'esprit destiné à déplacer le regard du chercheur. Comparer, c'est en effet non seulement accepter de se décentrer, mais également rendre plus exigeants la formulation d'hypothèses et le travail de théorisation⁸

An excellent description of the comparative process can be found in Olivier Remaud, Jean-Frédéric Schaub, and Isabelle Thireau's book *Faire des Sciences Sociales – Comparer*⁹. They state that:

si l'analyse en sciences sociales est par nature comparative, le geste comparatiste ne va pas de soi. Il a beau apparaître évident aux yeux de qui l'accomplit, il n'en demeure pas moins complexe. C'est qu'il présente un éventail très large d'opérations de connaissance qui dépendent elles-mêmes des visées que l'on se donne en pratiquant la comparaison. Tantôt celle-ci est une ressource de l'analyse. Elle permet au

⁵ Émile Durkheim, Steven Lukes, and W. D. Halls. "Rules for the Demonstration of Sociological Proof." *The Rules of Sociological Method*. New York: Free, 1982. 153. Print.

⁶ *Ibid.* p.143

⁷ Durkheim did however fall foul of the Post hoc ergo propter hoc fallacy

⁷ Patrick McNeill, and Steve Chapman. "Experiments and the Comparative Method." *Research Methods*. 3rd ed. London: Routledge, 2005. 88. Print.

⁸ Cécile Vigour. *La Comparaison Dans Les Sciences Sociales: Pratiques Et Méthodes*. Paris: La Découverte, 2005. 17-18. Print.

⁹ Olivier Remaud, Jean-Frédéric Schaub, and Isabelle Thireau. *Faire Des Sciences Sociales*. Paris: Éd. De L'École Des Hautes Études En Sciences Sociales, 2012. Print.

chercheur de progresser grâce à un travail incessant de rapprochements et de distinctions. Tantôt la comparaison constitue l'objet d'un programme de recherche. Elle appuie une dynamique de singularisation ou, au contraire, de généralisation. Elle confronte des objets, des sociétés, des processus éloignés dans le temps ou dans l'espace. Le plus souvent, elle fait face à une difficulté majeure : son inscription dans des relations asymétriques, jusqu'à l'incommensurabilité.¹⁰

This definition sums up perfectly the complexities involved in the comparative process, from deciding the goal of the comparison, to choosing what and whom to compare as well as temporal and spatial proximity and/or non-proximity. Marc Bloch in his 1928 article, on the teaching of a comparative history of European societies, reflects on the notion of comparison:

qu'est-ce, tout d'abord, dans notre domaine, que comparer ? Incontestablement ceci : faire choix, dans un ou plusieurs milieux sociaux différents, de deux ou plusieurs phénomènes qui paraissent, au premier coup d'œil, présenter entre eux certaines analogies, décrire les courbes de leurs évolutions, constater les ressemblances et les différences et, dans la mesure du possible, expliquer les unes et les autres.¹¹

Bloch concludes that for comparison to be possible, two conditions are necessary: "certain similarities between the observed events (...) and a certain disparity between the environment in which the events took place."¹² This resembles Leonardo Morlino's idea that "comparative politics is a method of controlling the presupposed empirical relationships between variables in different cases"¹³ Therefore as long as there is some form of resemblance and disparity comparison is possible. What are required however are points of comparison, what Morlino calls variables. Vincent Latour, in his reflection on the comparative process, also considers this notion of "*variables*", of valid comparative criteria and how it affects the researcher's comparative strategy:

La notion de critère est bien entendu fondamentale, car de ce critère découlera la stratégie comparative adoptée par le chercheur. Or, aborder un objet de comparaison sans stratégie comparative réelle ou avec un angle comparatif biaisé est voué à l'échec. Il s'agit même d'un des écueils majeurs de la démarche comparative. Préalablement à toute comparaison, pour pouvoir la mener à bien, il faut donc s'assurer d'avoir identifié un critère suffisamment solide. Comme le souligne l'historienne Élise Julien, il convient de ne pas comparer des objets en apparence incomparables ("des pommes avec des poires", si j'ose dire) pour, in

¹⁰ Olivier Remaud, Jean-Frédéric Schaub, and Isabelle Thireau. *Faire Des Sciences Sociales*. Paris: Éd. De L'École Des Hautes Études En Sciences Sociales, 2012. 13. Print.

¹¹ Marc Bloch. "Pour Une Histoire Comparée Des Sociétés Européennes." *Congrès International Des Sciences Historiques*. Oslo. Aug. 1928. *Université De Genève*. Web. 16. 3 Mar. 2016.

¹² *Ibid.* p.17

Translation : une certaine similitude entre les faits observés (...) et une certaine dissemblance entre les milieux où ils se sont produits.

¹³ Leonardo Morlino. Introduction. *Introduction À La Politique Comparée*. Paris: A. Colin, 2013. 20. Print.

Translation : la politique comparée est une méthode de contrôle des relations empiriques présumées entre des variables dans des cas différents

fine, arriver à la conclusion qu'effectivement, ils le sont bien. Dans ce cas-là, la comparaison tourne court et même, tourne à vide.¹⁴

What must therefore study how a researcher chooses their criteria, and what the different options that must be considered when using comparative methodology are. But before researchers delve further into these considerations, they must first contemplate the different uses of comparative research. Why does one compare? What is the aim of using comparison? According to Nancy Green, the comparative method is used so that history stops being descriptive and begins to be explanatory.¹⁵ This idea is equally developed by Dr. Vincent Latour who claims that in political science:

Le comparatisme est ancien et a une double vocation: classificatrice et normative, afin de d'identifier et d'évaluer « des meilleures pratiques », notamment par le biais d'un classement des familles de gouvernements (et de droits, pour les juristes) Cela permet de mettre en exergue l'existence de certains « modèles », propres à certains pays (ou, avec des variations plus ou moins importantes, à des groupes de pays).¹⁶

This suggests that comparison is used with a specific objective in mind, juxtaposing two (or more) countries to define them according to set variables and decipher what the differences (and similarities) between them convey. At a supra-disciplinary level, researchers, be it in history, political science, sociology, etc. consider similar questions, processes and cases and sometimes use variants of similar methodologies.

Leonardo Morlino adopts the ideas and works of Finer (1954) to explain the uses of comparison in political science. According to him, there are three possible functions of comparison:¹⁷

- A cognitive function: the investigation and analysis of different countries in order to better understand the phenomena studied. Its aim is mainly descriptive.
- An explicative function: the study of other countries and the phenomena that characterises them in order to find more reliable explanations due to being corroborated by multiple cases. Its aim is to test hypotheses.

¹⁴ Vincent Latour. "Les Politiques D'immigration Et D'intégration Au Royaume-Uni : Itinéraire De Recherche De La Civilisation Britannique Au Comparatisme." Habilitation à Diriger des Recherches. Université Toulouse 2 - Le Mirail, 2012. 51 Print.

¹⁵ Nancy Green. "L'histoire Comparative Et Le Champ Des études Migratoires." *Annales. Économies, Sociétés, Civilisations* Mobilités 45.6 (1990): 1336. *Persée.fr*. Web. 23 Mar. 2016.

¹⁶ Vincent Latour. "Les Politiques D'immigration Et D'intégration Au Royaume-Uni : Itinéraire De Recherche De La Civilisation Britannique Au Comparatisme." Habilitation à Diriger des Recherches. Université Toulouse 2 - Le Mirail, 2012. 54 Print.

¹⁷ Leonardo Morlino. Introduction. Introduction À La Politique Comparée. Paris: A. Colin, 2013. Print.

- An applicative (practical) function: the study of similar problems in different countries and the chosen solutions. Its aim is both explicative and practical.

Having decided on the reason behind the study and therefore the benefit of using the comparative method, the researcher must then make decisions, as mentioned before, regarding criteria. The main criteria are the *type* of comparison, the *level* of comparison (national, local, community, etc.) and the comparative *elements or entities* (countries, cities, ethnic groups, etc.). The two main decisions linked to the type of comparison are spatial (where to compare) and chronological (when to compare). The chronological aspect can be divided into diachronic studies and synchronic studies. The spatial element of comparative studies also relates directly to the level of analysis. According to Peter Lor “[a]ny phenomenon can be studied at various *levels of analysis*.”¹⁸ His work on literacy and education shows that investigation can take place at “the level of countries, provinces, school districts, or individual schools, classes, teachers or students.” Interestingly he notes that according to the level of analysis the researcher chooses, “different *units of analysis* might be appropriate” (cf. Table 1).

In the case of this study of immigration, this takes the form of a focus on the national level and the policies and decisions that governments and governmental agencies implement to tackle the immigration issue. Choosing an appropriate level of analysis is vital in building a viable comparative study. Selecting a comparison at a cross-national level at a sub-national level or at a local level can have profound consequences on the researcher's work, and on the units that are studied. For example, a study of immigration at a national level will generally focus on broader issues including numbers or policies, whereas at an individual level studies can focus on personal experiences, including sense of integration, discrimination, work experience, etc.

¹⁸ Peter Lor. "Methodology in Comparative Studies." *International and Comparative Librarianship*. Vol. Draft. 2011. 3. Print.

Table 1 : Levels and units of analysis in a study on immigration in the United States

Levels of analysis	Units of analysis (examples)
Country	Number of Immigrants, Countrywide policies
State	Statewide policies, urban/rural population
City	Nationality of immigrants, immigrant crime-rates, Employment rates, Neighbourhoods where they live.
Immigrant	City of origin, time in the United States, Profession, motive(s) for immigrating

Another level of analysis between which both Lor and Green differentiate is the micro-level and macro-level (Lor also considers the meso-analysis). The decision on the level of analysis will affect the approach chosen by the researcher. Macro-level studies are generally variable-oriented and micro-level studies are often case-oriented.¹⁹ Generally in variable-oriented studies, a large number of countries are studied but only a few variables are considered with little regard to the context and reality of the different countries. Sociologist Charles Ragin is critical of this approach as he believes that it tends to “eliminate complexity instead of deciphering it.”²⁰ In *case-oriented studies*, the focus is on one country or a small number of countries. The aim is to concentrate on the individual country taking into consideration aspects such as political context, social context, historical specificity and more. Leonardo Morlino believed that the level of analysis and the number of cases involved in the comparison was behind the multiplicity of comparative strategies. He differentiated between four types of comparison:²¹

- single-case study (one case, e.g. one country)
- binary study (two cases): as in my study
- area study (three to six cases)
- multiple case study (six to thirty cases, possibly more)

¹⁹ *Ibid.* p.17

²⁰ Charles C. Ragin. *The Comparative Method: Moving beyond Qualitative and Quantitative Strategies : with a New Introduction*. Oakland, CA: U of California, 2014. Print.

²¹ Leonardo Morlino. Introduction À La Politique Comparée. Paris: A. Colin, 2013. 67-70. Print.

All decisions provide their own advantages and disadvantages. Some are critical of the selection of countries as comparators as sometimes a country's internal diversity can be obscured. For example, in Britain, GDP per person in the richest area is over five times the national average and nearly ten times that of the poorest area.²² Political scientist Arend Lijphart, has discussed the issue of “whole-nation bias” and the arguments for and against the focus on countries:

large-scale statistical studies in comparative politics tend to be limited to national political systems. This tendency, which Rokkan (1970: 49) has branded as the “whole-nation bias,” is partly the result of pragmatic considerations: it is relatively easier to obtain data about nations than about subnational units and private associations. (...) The comparative method requires the careful selection of cases that fit the research problem, and this is highly conducive to the analysis of subnational cases. In fact, most of the scholars who have written about the comparative method insist that the study of sectors within a single nation offers the ideal setting for controlled comparisons.²³

Lijphart is therefore more in favour of subnational analysis rather than studies at a national level. The difficulty is that higher levels of analysis (e.g. country) tend to signify sacrificing detail to get a bigger picture. In the case of immigration, Table 1 aims to present a basic view of different possible levels of study and the impact on the units of analysis. In comparative studies, it is particularly important to be clear about the levels and units of analysis. As Peter Lor expresses it, “[g]enerally, a study of a single country can be very intensive and conducted in considerable detail, but the more countries there are, the less intensively each one will be studied.”²⁴ The methodology used in many-country comparisons is generally quantitative rather than qualitative as statistical data is collected on more than one variable. Qualitative methods are rare and unusual when dealing with a large number of countries as they require a deeper and more thorough understanding of each individual country which would be difficult and time-consuming with 10, 30 or 100 countries. Qualitative data is therefore preferred in comparative studies that focus on few countries (or single-case studies). Few-country comparisons are appreciated for their “insight-generating, in-depth studies of cases as wholes and as opportunities to study multiple and conjunctural causation.”²⁵ The advantage of few-case comparisons is presented in Charles Ragin's approach to the case-oriented study:

The goals of case-oriented investigation often are both historically interpretive and causally analytic. Interpretive work attempts to account for significant historical

²² "Divided We Stand." *The Economist*. The Economist Newspaper, 11 Mar. 2011. Web. 23 May 2016.

²³ Arend Lijphart. The comparable cases strategy in comparative research. *Comparative political studies* Vol.8 N°2 1975. 166-167 Print.

²⁴ Peter Lor. "Methodology in Comparative Studies." *International and Comparative Librarianship*. Vol. Draft. 2011. 8. Print.

²⁵ *Ibid.* p.14

outcomes or sets of comparable outcomes or processes by piecing evidence together in a manner sensitive to historical chronology and offering limited historical generalizations which are sensitive to context. Thus, comparativists who use case-oriented strategies often want to understand or interpret specific cases because of their intrinsic value. Most, but not all, case oriented work is also causal-analytic. This companion goal is to produce limited generalizations concerning the causes of theoretically defined categories of empirical phenomena common to a set of cases.²⁶

What Ragin's approach implies is that the case (e.g. the country) itself is equally important as the variables studied. According to Lor, few-country studies permit a more relevant and useful study:

because in few-country comparisons the comparativist studies the selected countries in depth and is closer to the data, the problems of comparability and concept stretching (...) are alleviated: appropriate countries can be chosen, and richer, multidimensional, less abstract concepts can be employed. Furthermore, considerable attention can be paid to unravelling complex relationships, including relationships of multiple and conjunctural causation, within each country, and over time.²⁷

The crucial question in any comparison – but even more so with few-country studies – is the choice of which ones to select. As stated by Ragin, “in few-country studies the countries are not selected by sampling. Instead they are carefully selected for the purpose of the study”²⁸ In the case of this study, I chose to focus on the United Kingdom and the United States, two English-speaking nations which are both multi-cultural immigration countries but that tend to have a tough stance on immigration. The two have intimate political and economic ties and both are seen as El Dorado's by many immigrants. It seems obvious, though still worth stating, that there is little relevance in comparing elements that are so divergent that little or no similarities can be found. (e.g. Russia and Gibraltar). Neither is there any interest in comparing elements that are almost identical so much so that little difference of notable interest can be found, “when countries are selected for comparison, they should be comparable in respect of the phenomenon or theory that is primary interest in the study.”²⁹ Entities that are going to be compared need to have both similarities and differences, attributes they share and attributes they differ upon. Depending on the study they wish to partake in, the researcher can begin with one basic step: “narrowing the field to countries in particular regions or in particular categories, such as democratically governed countries, francophone countries, Islamic countries or

²⁶ Charles C. Ragin. *The Comparative Method: Moving beyond Qualitative and Quantitative Strategies ; with a New Introduction*. Oakland, CA: U of California, 2014. Print.

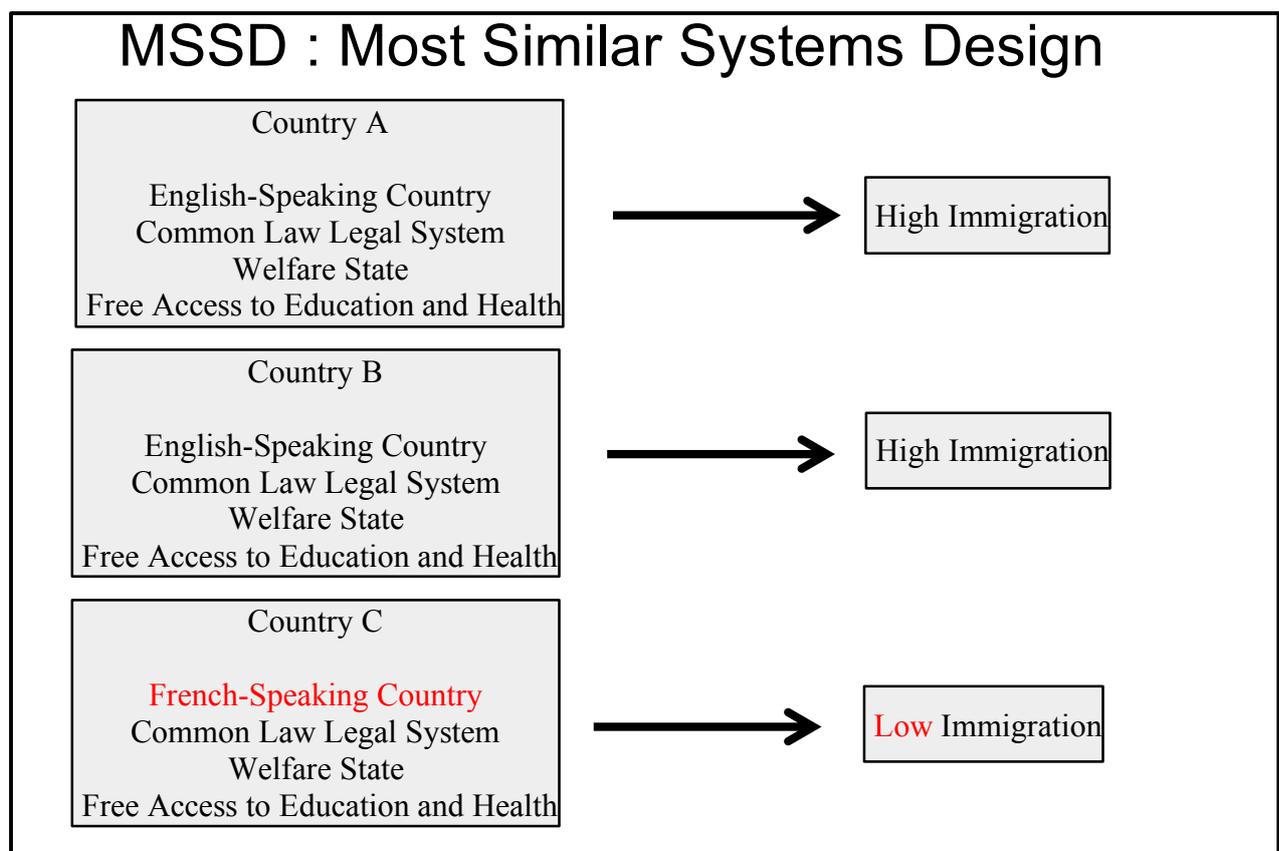
²⁷ Peter Lor. "Methodology in Comparative Studies." *International and Comparative Librarianship*. Vol. Draft. 2011. 14. Print.

²⁸ Charles C. Ragin. *The Comparative Method: Moving beyond Qualitative and Quantitative Strategies ; with a New Introduction*. Oakland, CA: U of California, 2014. 15. Print.

²⁹ Peter Lor. "Methodology in Comparative Studies." *International and Comparative Librarianship*. Vol. Draft. 2011. 15. Print.

developing countries.”³⁰ If the aim is to discover causal relationships or factors of conjunctural causation, then two basic strategies for selecting countries for comparison are generally used. Designed by British philosopher J.S. Mill; they are the Most Similar Systems Design (MSSD) and the Most Different Systems Design (MDS). In a most similar systems design, countries chosen are very similar in all aspects except for the particular variable which researchers wish to study. (This is illustrated in Figure 1.)

Figure 1 : Immigration and the Welfare State: most similar systems design (Hypothetical data)

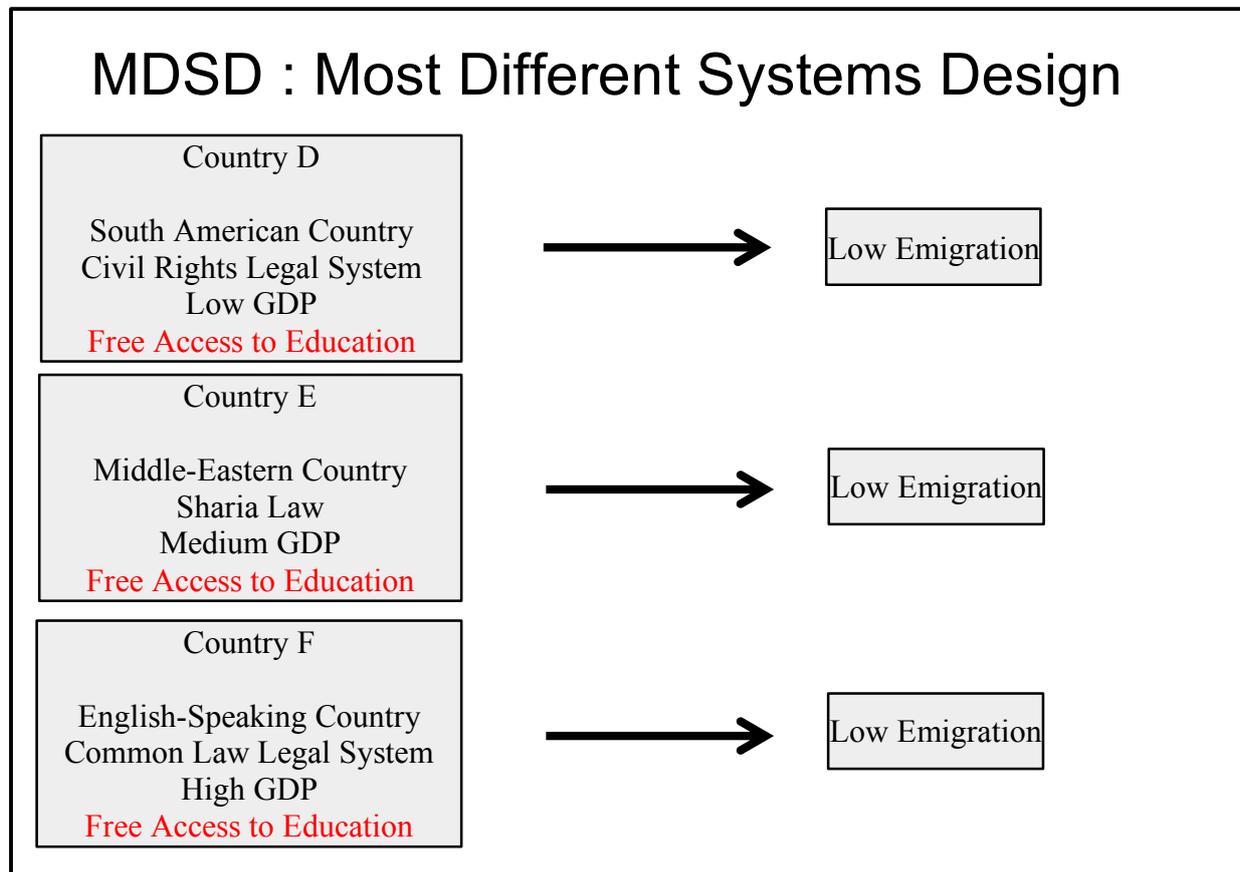


According to this data, countries A, B and C are alike in respect of their common legal system, welfare state, and the availability of free access to education and health services. In effect, we have control of the influence of those variables. Where they differ is that country C has a cultural-linguistic group that differs to countries A and B do. We can therefore hypothesise that in these cases there is a relationship between the use of English as national language and high levels of immigration. Note that we did not say that the presence of a welfare state determines or causes high immigration, it is however a possible contributing factor.

³⁰ Peter Lor. "Methodology in Comparative Studies." International and Comparative Librarianship. Vol. Draft. 2011. 15. Print.

In the most different systems design the opposite approach is used. Countries of different natures are chosen but all of which share a particular variable/phenomenon, etc. (This is illustrated in Figure 2.)

Figure 2: Immigration and education: most different systems design (Hypothetical data)



One thing we must be wary of is the assumption of causal link. In order to avoid the post hoc fallacy and presumptuous dissertations, in general we can only put forward that there is a probable link between variables. For example, the countries depicted in Figure 2 differ in respect of their cultural-linguistic groups, their GDP, and the legal system in place. Because low emigration is a common factor despite the differences in these factors, this suggests that there is a relationship between low emigration and the one factor they do have in common, free education. Again, the researcher must not forget that they cannot say with absolute certainty that free education is responsible for low emigration. It is a possible contributing factor.

Another notion that the researcher must not forget is time. There are two basic types of temporal analysis: the synchronic analysis and the diachronic analysis. Constantine Behler defines a diachronic study or analysis as concerning itself with “the evolution and change over

time of that which is studied; it is roughly equivalent to *historical*.³¹ He also defines a synchronic study which “in contrast, limits its concern to a particular moment of time.”³² Thus synchronic sociology takes a society as a working system at a particular point in time without concern for how it has developed to its present state. Of course, synchronic analysis is by nature subject to hypertrophy, the researcher does not focus solely on a single day but generally several months or years, focusing on the events leading up to and those following the target episode. Furthermore, as stated by Catherine Puzzo, “setting exact time limits would lead to difficulties”³³, even if specific starts and end dates have been selected, “it is necessary to go beyond the dates to analyse these years in a diachronic perspective by referring to previous events but also considering future developments.”³⁴ One must not forget that it is also possible to compare different cases from completely different time periods. For example, one can compare the American Civil War in the 1800s and the 20th Century Spanish Civil War. March Bloch studied this idea of diachrony of synchrony and stated that:

[dans l'approche diachronique] on choisit des sociétés séparées dans le temps et l'espace par des distances telles que les analogies, observées de part et d'autre, entre tel ou tel phénomène, ne peuvent, de toute évidence, s'expliquer ni par des influences mutuelles, ni par aucune communauté d'origine. (...) Mais il est une autre application du procédé de comparaison : étudier parallèlement des sociétés à la fois voisines et contemporaines, sans cesse influencées les unes par les autres, soumises dans leur développement, en raison précisément de leur proximité et de leur synchronisme, à l'action des mêmes grandes causes, et remontant, partiellement du moins, à une origine commune.³⁵

Bloch believed that the second type of comparison, though more limited, had more value. He claimed that synchronic analysis was “more capable of being rigorous on classification and being critical about causality. It can hope to come to conclusions that are less hypothetical and more precise.”³⁶ His conclusions on the subject are well summed up in Vincent Latour's paper on the comparative method:

Marc Bloch plébiscitait un comparatisme à portée réduite, consistant à étudier en parallèle de sociétés proches, ayant connu des évolutions similaires, s'étant mutuellement influencées de par leur proximité et « soumises à l'action des mêmes

³¹ Constantin Behler. "Diachronic / Synchronic." University of Washington, 25 Sept. 2007. Web. 5 Apr. 2016.

³² *Ibid.*

³³ Catherine Puzzo. "Immigration Controls in Britain and France (1970-1986): A Comparative Study of Policy." Thesis. School of Language and International Studies University of Surrey, 2000. 62. Print.

³⁴ *Ibid.*

³⁵ Marc Bloch. "Pour Une Histoire Comparée Des Sociétés Européennes." Congrès International Des Sciences Historiques. Oslo. Aug. 1928. Université De Genève. Web. 17-19. 3 Mar. 2016.

³⁶ Marc Bloch. "Pour Une Histoire Comparée Des Sociétés Européennes." Congrès International Des Sciences Historiques. Oslo. Aug. 1928. Université De Genève. Web. 19. 3 Mar. 2016.
Translation: [p]lus capable de classer avec rigueur et de critiquer les rapprochements, il peut espérer aboutir à des conclusions de fait à la fois beaucoup moins hypothétiques et beaucoup plus précises.

grandes causes ». Selon le père de l'historiographie française contemporaine, de telles comparaisons étaient aptes à mettre en évidence des phénomènes peu visibles et à élaborer de concepts transversaux, les différences relevées méritant tout autant l'attention du chercheur que les ressemblances.³⁷

This study on immigration is implemented along those lines, a synchronic study of two countries' policies on immigration during the same period: the USA from 2008 to 2016 and the UK from 2010 to 2016.

II. APPLICATION OF THE COMPARATIVE METHOD

The focus of this analysis is deportation and detention, and how the United Kingdom and the United States have prioritised the implementation of both procedures. This dissertation will compare how their policies have evolved over time and what the causes and consequences have been for the two countries. We shall compare the causes of the use of deportation as well as its expansion over time. By confronting two different societies, and showing how the workings of their two immigration systems influence deportation, this study will attempt to reconsider the inherent usefulness and necessity of deportation.

The goal of this comparison is understanding why deportation is such an important part of the immigration process and vital to having control of the country. It is also to see how prioritisation influences the reach of deportation and the factors that influence the decision-making behind these priorities.

The choice of a binary study enables an in-depth study of both cases: the UK and the US. While a multiple case study with many more countries would have also been interesting, it would have required huge sacrifices in the details for each case as was mentioned above.

Of the three functions of comparative method put forward by Leonardo Morlino, this study will serve mainly a cognitive function which will investigate and analyse the two countries to better understand the phenomenon of deportation. This study is part descriptive, part explanatory, and it will expand understanding of the concepts under study: notably deportation and detention, but also asylum. The focus on asylum explains in part, the expansion in deportation as a response to increasing levels of asylum applications.

This comparison will take place mainly at a national level with general considerations of government policy without focusing on impact in any specific area or location. It must be noted

³⁷ Vincent Latour. "Les Politiques D'immigration Et D'intégration Au Royaume-Uni : Itinéraire De Recherche De La Civilisation Britannique Au Comparatisme." Habilitation à Diriger des Recherches. Université Toulouse 2 - Le Mirail, 2012. 54 Print.

however, that some regions (e.g. the Southern Border in the USA) are affected by immigration at a much greater degree than others. It will also have a general focus on immigration while also delving into the issues of distinct groups such as foreign criminals and asylum seekers.

The analysis will present the evolution of immigration control over time but will ultimately focus on the Obama Administration (2008-2016) and the Cameron Administration (2010-2016). The study will be a mixture of synchronic and diachronic analysis as there is a clear focus on the 21st century but there is much to be said about past events and the evolution of immigration policy and the use of deportation. These dates correspond to the beginning of the first terms in office of Barack Obama (Democratic Party) as President of the United States, and of David Cameron (Conservative Party) as Prime Minister in the United Kingdom, as well as the end of both men's leadership of their countries' governments.

III. LIMITS OF THE COMPARATIVE METHOD

This chapter has shown how comparison is used in the research of social science and political studies. However, the comparatist must also be fully aware of the limits of comparative research. The four most common difficulties in the use of comparative methodology are Galton's problem, the "learning process", the use of concepts and the fundamental problem of causal inference.

Galton's problem states that explaining phenomena in a particular society is growing gradually more difficult due to development of countries in similar fashion due to transfusion, importation, assimilation, etc. Indeed, ever-growing political, economic and social interdependency between countries, means that true independence between the populations of two nations cannot be guaranteed nor generally considered to be a legitimate assertion.³⁸ How important this is depends on the nature of the study and how independent the cases have to be from each other. In the case of this comparison between the United Kingdom and the United States for example, the "special relationship" between the two countries and the economic and historical links between the two mean that neither can be considered as independent from the other. This should not however cause a problem in the case of this study on immigration as the question posed is how both the UK and the USA react to certain forms of immigration and their political, economic and cultural independence from each other is not a necessity.

³⁸ Andrew Lindridge. "Galton's Problem." *Blackwell Reference Online*. The Blackwell Encyclopedia of Management, n.d. Web. 7 May 2016.

The second difficulty, “the learning process”, is linked to the first. The learning process for a country can be either a positive one or a negative one. When it is a positive learning process, then the country uses past events or events in other countries as an inspiration for decisions they take and they see those events/countries as examples to replicate. The learning process is to be considered a negative one when an example is used as something to avoid at all costs. Let's compare two examples, Japan and Canada. Japan has a foreign population below 2% and its immigration policy is one of the strictest in the world with the country essentially closed to outsiders. The effect the Japanese immigration policy is having is an ageing of the country's population as well as extreme labour shortage. Japan's population is set to be reduced by more than 30 million (from 127 million to 90 million) by 2050.³⁹ One solution – that is highly controversial in Japan – would be to have an open-border policy and invite immigrants to come in. Canada on the other hand has a very different view on the question of immigration. Canada has a low birth rate, and needs immigration both for demographic and economic growth. Canada uses a points system to decide who it authorises to enter, live and work in the country. Unlike Australia, a sponsor, job or employer is not required, only proof of certain skills. Applicants are awarded points for proficiency in education, languages and job experience. Canada's population is expected to increase from 36,5 million in 2016 to over 60 million by 2060 with two-thirds of that increase due to immigration.⁴⁰ Any country studying their immigration policy can use the examples of Japan and Canada as examples for their own policy learning from the mistakes of one and the success of the other. Both of these difficulties, – Galton's problem and the learning process – must be overcome as much as possible by avoiding too naive a research line that ignores these inevitable aspects of transfusion and interdependence.

Another difficulty that must be taken into consideration is the notion of concepts which was referred to by Lor (cf. Quote p.6). Indeed, when comparing two countries, one must be very careful to define as precisely as possible the various concepts being used. The main reason for this is that depending on the different countries, but also the person reading, basic concepts can have disparate meanings. One commonly cited example is the notion of “public school” which has opposite meanings in the US and the UK. In his book, *Issues and Alternatives in comparative social research*, Charles Ragin considers this idea of “concept”:

³⁹ *Population Projections for Japan: 2001-2050*. National Institute of Population and Social Security Research, 2002, *Population Projections for Japan: 2001-2050*, www.ipss.go.jp/pp-newest/e/ppfj02/ppfj02.pdf .

⁴⁰ Canada. Statistics Canada. *Population Projections for Canada, Provinces and Territories*. N.p., 18 June 2010. Web. 19 May 2016.

one of the primary goals of comparative social science is to make general statements about relationships. Making general statements requires using concepts. At the level of cases, concepts are represented through observable variables. Even the statement that “case 2 is too different from case 1 with respect to attribute A to be considered a comparable instance” involves using general concepts to define comparability and thus engages researchers and audiences in discourse about variables.⁴¹

Leonardo Morlino also studies the use of concepts including the triangle of reference (Ogden and Richards)⁴², the rules of conceptualisation and the Porphyrian tree.⁴³ According to him precision when it comes to the use of – and distinction between – concepts will lead to the possibility of “a study that examines relationships, and offers possible explanations for similar phenomena, articulated with greater clarity”⁴⁴ The danger according to him is that:

chaque concept empirique bien formulé serait ainsi si profondément et inextricablement lié au contexte et à l’objet pour lequel il est élaboré qu’il serait impossible de l’exporter, c’est-à-dire de l’appliquer à d’autres réalités qui seraient semblables donc seulement en apparence. En d’autres termes, comparer un parti socialiste d’un pays donné (et la notion théorique qui le concerne) avec celui d’un autre pays est un “forçage”. Il s’agit de notions et réalités très différentes. Lorsque, malgré tout, on procède à la comparaison, le résultat est superficiel, si ce n’est complètement banal.⁴⁵

Comparison must therefore be used with much care and maximum clarity. Using vague or notional concepts must be avoided and definitions must be given with as much precision as possible while differences in the meaning of concepts between cases should always be clearly stated. In this study we shall define the important concepts required to clearly understand their implications in the research.

The final of the four common difficulties in comparative studies is the problem of causal inference. Stated simply, an event that occurs multiple times can possibly have a different cause for each occurrence. For example, if we consider three waves of immigration from a country A to a country B:

- the first caused by a lack of job opportunities in country A and a surplus of job opportunities in country B.
- the second caused by a military conflict in country A.
- the third caused by persecution of a religious or ethnic minority in country A.

⁴¹ Charles C. Ragin. Introduction. *Issues and Alternatives in Comparative Social Research*. Leiden, The Netherlands: E.J. Brill, 1990. 1. Print.

⁴² Leonardo Morlino. Introduction À La Politique Comparée. Paris: A. Colin, 2013. 77-85. Print.

⁴³ *Ibid.* 85-91.

⁴⁴ *Ibid.* 85.

Translation: une étude qui examine les relations et propose des explications possibles de phénomènes similaires (...) articulée avec une plus grande clarté.

⁴⁵ Leonardo Morlino. Introduction À La Politique Comparée. Paris: A. Colin, 2013. 140. Print.

So, we have three waves of immigration all caused by different events. This does not mean however that the other causes had no impact. This is where the researcher must try to ascertain the extent to which various events and episodes in a country have an impact. What is more, we must not omit the fact that certain events in the receiving country (B) can have an impact on immigration waves, including high levels of job opportunities and immigration-friendly government policies, etc. In a sense this problem of causality can be likened to the *post hoc fallacy* which can be expressed as follows:

- **A** occurred, then **B** occurred. Therefore, **A** caused **B**.

When aiming to determine causality—defined by Johnson, Reynolds, and Mycoff as “a connection between two entities that occurs because one produces, or brings about, the other with complete or great regularity”⁴⁶—one must be wary of how the various factors (people, events, governments, etc.) relate and react with each other and distinguish between cause, consequence and unrelated parallel events. A discussion on causality at Wesleyan University stated that:

Determining causality can be challenging since causation does not equal correlation and in what is called the ‘fundamental problem of causal inference’, causal inferences can never be certain due to their theoretical nature. Nevertheless, causal theories that are designed to show the causes of a phenomenon are a pivotal part of political science research and may be a key component of a thesis research paper’s hypothesis.⁴⁷

This can be summed up by G. Sartori: “the theoretical component of comparison is hard to ‘manipulate’: those who navigate by chance and without a compass can at any moment encounter difficulties.”⁴⁸ According to Vincent Latour:

le chercheur devra néanmoins prendre garde, comme le souligne Élise Julien, à ne pas “conforter les clivages nationaux, à pétrifier les oppositions, sans voir les interférences et les dynamiques qui peuvent se produire.” En effet, un des écueils possibles des comparaisons (et une des principales sources de défiance à leur égard) est de les utiliser comme des prétextes afin de figer les modèles et in fine, de légitimer certains au détriment d’autres (l’un au détriment d’un autre, dans le cas des comparaisons transmanche).⁴⁹

⁴⁶ Janet Buttolph Johnson, Henry T. Reynolds, and Jason D. Mycoff. *Political Science Research Methods*. Los Angeles: SAGE Reference/CQ, 2016. Print.

⁴⁷ "Causality: A Discussion." *A Users Guide to Political Science*. Wesleyan University, 31 Jan. 2011. Web. 17 Apr. 2016. <<http://govthesis.site.wesleyan.edu/research/causality/>>.

⁴⁸ Leonardo Morlino. *Introduction À La Politique Comparée*. Paris: A. Colin, 2013. 140. Print.
Translation : « le volet théorique de la comparaison est difficile à « manipuler »: « celui qui navigue au hasard et sans boussole peut à tout moment se retrouver en difficulté »

⁴⁹ Vincent Latour. "Les Politiques D’immigration Et D’intégration Au Royaume-Uni : Itinéraire De Recherche De La Civilisation Britannique Au Comparatisme." *Habilitation à Diriger des Recherches*. Université Toulouse 2 - Le Mirail, 2012. 59 Print.

From this brief reflection on comparative methodology we can ascertain that the comparative process exponentially increases the complexity and the risks of the analysis for the researcher. But the result can be compelling and thought provoking.

CHAPTER 2

HISTORICAL CONTEXT

This chapter shall present a brief introduction of immigration in a historical context. Its aim is to enable the reader to acquire a better understanding of how the United States and the United Kingdom reached the current situation of immigration numbers and policy.

I. THE UNITED KINGDOM

Immigration and immigration control in the United Kingdom have evolved over time. Today, it is a country that receives vast numbers of immigrants every year. In the year ending June 2016, net migration to the UK was 335,000. This means 335,000 more people immigrated into the country than emigrated out of it.¹ However, that has not always been the case. The United Kingdom had been a historical exporter of people. For centuries, the UK has been both a destination for immigrants and a source of emigrants. At the culmination of the British Empire, Britons had emigrated to countries across the globe. According to the paper *A Simple Guide to UK Migration Controversies* published by the Royal Geographical Society in 2007,

the benefits of this migration are not in doubt. Immigration supplied the labour that aided the post-war economic recovery. More recently the UK's good macro economic performance has been underpinned by embracing the opportunities offered by globalisation, including those offered by increased immigration²

The United Kingdom had a net outflow of migrants until 1982. From the mid-1980s onwards, the number of people migrating to the UK began to rise and has been constantly higher than the number of those emigrating since 1994.³ Between 1982 and 1997, average net international migration stood at about 50,000 a year⁴ and since the 1990s, immigration has “increased to historically high levels” with net migration exceeding 100,000 every year since 1998 (See

¹ Lord Andrew Green. “Net Migration Statistics.” *Migration Watch UK*, www.migrationwatchuk.org/statistics-net-migration-statistics. Accessed 23 Nov. 2016.

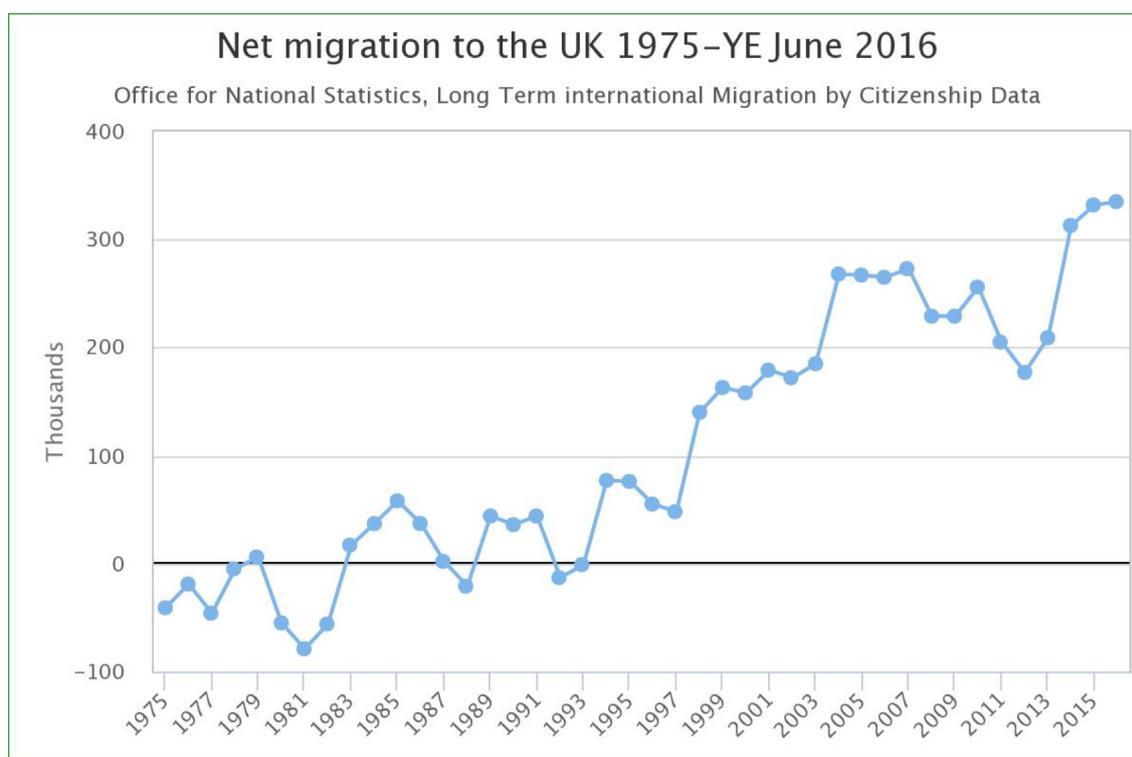
² *UK Migration Controversies: A Simple Guide*. Royal Geographical Society, 2009. www.rgs.org/NR/rdonlyres/4711AA55-F60A-4B16-9F30-27DEF5232C03/0/MigrationFINAL.pdf. Accessed 28 Feb. 2016.

³ Will Sommerville, et al. “United Kingdom: A Reluctant Country of Immigration.” *Migration Policy Institute*, 21 July 2009, www.migrationpolicy.org/article/united-kingdom-reluctant-country-immigration. Accessed 24 June 2016.

⁴ *UK Migration Controversies: A Simple Guide*. Royal Geographical Society, 2009. www.rgs.org/NR/rdonlyres/4711AA55-F60A-4B16-9F30-27DEF5232C03/0/MigrationFINAL.pdf. Accessed 28 Feb. 2016.

Illustration 1 below).⁵ Since the turn of the century, a surge in migration has seen net migration fluctuate between just under 200,000 and 335,000, which has been caused and largely sustained by economic growth. Since the early 2000s, “an extraordinary wave of mobility from Eastern European countries, particularly Poland, whose citizens have free movement and labor rights following European Union (EU) enlargement” have boosted immigration levels.⁶

Figure 3: Migration Figures (UK)



This trend of increasing immigration is common to nearly all developed countries across the world.⁷ In fact, the UK has a relatively small foreign-born population (9.7%) compared to some countries, including “Australia (23.8%), Canada (19.1%).”⁸ The rates of countries like

⁵ Oliver Hawkins. “Migration Statistics.” *UK Parliament*, House of Commons Library, 3. 20 June 2017, researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06077. Accessed 20 June 2017.

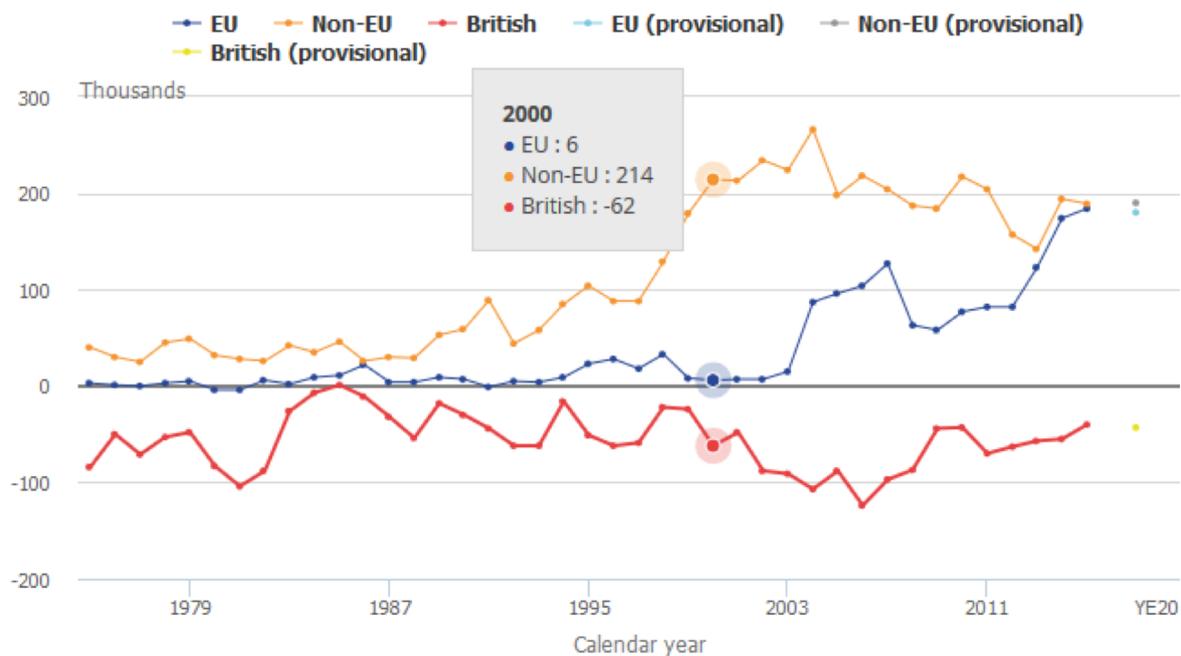
⁶ Will Sommerville, et al. “United Kingdom: A Reluctant Country of Immigration.” *Migration Policy Institute*, 21 July 2009, www.migrationpolicy.org/article/united-kingdom-reluctant-country-immigration. Accessed 24 June 2016.

⁷ “International Migrant Stock 2015.” *United Nations*, United Nations Population Division | Department of Economic and Social Affairs, www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml. Accessed 13 Jan. 2016.

⁸ Will Sommerville, et al. “United Kingdom: A Reluctant Country of Immigration.” *Migration Policy Institute*, 21 July 2009, www.migrationpolicy.org/article/united-kingdom-reluctant-country-immigration. Accessed 24 June 2016

Germany and the United States while lower than the previous two examples are still higher than the UK with Germany at 13.1% and the United States at 12.8%.⁹ This increase in international migration is due in part to economic globalisation, regional economic and political integration, differences in living standards around the world and increasing political instability across the globe. With ever-increasing levels of migration and population movements around the world, come measures to control and regulate population flux. These are largely effective as most immigrants comply with immigration regulations, and enter countries legally. For example, while citizens from within the EU can travel to and work in the UK freely, non-EU citizens cannot. In fact, recent immigration reforms have led to more checks on people entering the country, tighter border controls, fines for sponsors of overstayers, and an improved visa and work permits regime.

Figure 4: Net Long-Term International Migration by Citizenship, UK, 1975 to 2016



Until the beginning of the 20th century, and the Aliens Act 1905, the UK had almost no immigration law in any form. Following the Second World War, “two contrasting trends changed the nature of UK immigration.”¹⁰ On the one hand, citizens from countries inside the

⁹ *Ibid.*

¹⁰ Will Sommerville, et al. “United Kingdom: A Reluctant Country of Immigration.” *Migration Policy Institute*, 21 July 2009, www.migrationpolicy.org/article/united-kingdom-reluctant-country-immigration. Accessed 24 June 2016.

United Kingdom (England, N. Ireland, Scotland, Wales), Ireland and the Commonwealth enjoyed free movement and the right to settle. As the country developed its relationship with the European continent through both the EEC and subsequently the European Union, this has led to Europeans enjoying “free movement and exemption from UK immigration control.”¹¹ On the other hand, citizens of many other countries who formerly had access to the United Kingdom, notably former British Colonies, have seen their access gradually restricted by government legislation. Under the British Nationality Act of 1948¹², all British subjects born within the territories of the Crown, had the right “to enter, work and settle with their families in Britain.”¹³ These rights were gradually eroded by “exclusionary measures”¹⁴ in the 1960s and 1970s. In the 1950s and early 1960s, a prosperous Britain saw an unprecedented amount of immigration from Commonwealth countries. Fear of the country being overwhelmed led to the implementation of restrictive legislation. Three pieces of legislation were enacted in the 1960s and 1970s, with the aim of “zero net immigration.”¹⁵ These were the Commonwealth Immigrants Act in 1962¹⁶, The Commonwealth Immigrants Act in 1968¹⁷ and the Immigration Act in 1971¹⁸. The consequences of these legislative measures were multifold:

They increased the categories of those who could be denied entry to and expelled from Britain to include black and Asian Commonwealth citizens, differentiating for the first time in law the rights of British subjects whose passports were issued in Britain and British subjects whose passports were issued by other Commonwealth countries.¹⁹

¹¹ “Immigration Act 1988.” *Legislation.gov.uk*, Statute Law Database, 10 May 1988, www.legislation.gov.uk/id/ukpga/1988/14. Accessed 6 Oct. 2016.

¹² “British Nationality Act 1948.” *Legislation.gov.uk*, Queen's Printer of Acts of Parliament, www.legislation.gov.uk/ukpga/Geo6/11-12/56/contents/enacted. Accessed 11 Feb. 2017.

¹³ Alice Bloch, and Liza Schuster. *At the extremes of exclusion: Deportation, detention and dispersal*. Ethnic and Racial Studies Vol. 28 No. 3, 495. May 2005

¹⁴ *Ibid.*

¹⁵ Will Sommerville, et al. “United Kingdom: A Reluctant Country of Immigration.” *Migration Policy Institute*, 21 July 2009, www.migrationpolicy.org/article/united-kingdom-reluctant-country-immigration. Accessed 24 June 2016.

¹⁶ “Commonwealth Immigrants Act 1962.” *Legislation.gov.uk*, Queen's Printer of Acts of Parliament, <https://web.archive.org/web/20110927012831/http://www.britishcitizen.info/CIA1962.pdf>. Accessed 14 Mar. 2016.

¹⁷ “Commonwealth Immigrants Act 1968.” *Legislation.gov.uk*, Queen's Printer of Acts of Parliament, <https://web.archive.org/web/20110927012905/http://www.britishcitizen.info/CIA1968.pdf>. Accessed 14 Mar. 2016.

¹⁸ “Immigration Act 1971.” *Legislation.gov.uk*, Statute Law Database, 1 Jan. 1983, www.legislation.gov.uk/ukpga/1971/77. Accessed 14 Mar. 2016.

¹⁹ Alice Bloch, and Liza Schuster. *At the extremes of exclusion: Deportation, detention and dispersal*. Ethnic and Racial Studies Vol. 28 No. 3, 495. May 2005

The 1971 Immigration Act, repealed all former legislation and provided the structure for all current UK immigration law. This Act gave “the Home Secretary [...] significant rule-making powers on entry and exit.”²⁰ The effect of the law was simple:

Commonwealth citizens lost their automatic right to remain in the UK, meaning they faced the same restrictions as those from elsewhere. They would in future only be allowed to remain in UK after they had lived and worked here for five years. A partial “right of abode” was introduced, lifting all restrictions on immigrants with a direct personal or ancestral connection with Britain.²¹

The 1971 British Nationality Act effectively changed the status of Commonwealth citizens to aliens by introducing the concept of patriality that only allowed those who were born in the UK or who had close ancestral links to the UK, the right to entry and abode.²² A House of Commons Home Affairs Committee on Immigration Control stated that the 1971 Act consisted of

(1) a set of rules (primary and secondary legislation and the Immigration Rules 50), supplemented by policy and practice guidance, which together set out who is allowed to enter or remain in the UK and

(2) a set of authorities to apply these rules, whether overseas (visa applications), at the border, or in the UK (applications to stay).²³

There was, however, little emphasis in the Act on deporting or dealing with those breaking the rules while already present in the UK.

In 1979, the General Elections, saw the incumbent Labour Prime Minister James Callaghan replaced by the Conservative Margaret Thatcher. During the Conservative rule, policy remained consistent with previous Labour decisions, “albeit with a stronger emphasis on limitation and restriction.”²⁴ The British Nationality Act of 1981²⁵ put an end to the tradition of automatic right of citizenship to any person born on British soil. The Conservative Thatcher government increased the amount of removals that it carried out compared to the proceeding

²⁰ Will Sommerville, Will, et al. “United Kingdom: A Reluctant Country of Immigration.” *Migration Policy Institute*, 21 July 2009, www.migrationpolicy.org/article/united-kingdom-reluctant-country-immigration. Accessed 24 June 2016.

²¹ “UK Immigration Acts through the Ages.” *BBC News*, BBC, 10 Oct. 2013, www.bbc.com/news/uk-politics-24463873. Accessed 27 Aug. 2015.

²² Alice Bloch, and Liza Schuster. *At the extremes of exclusion: Deportation, detention and dispersal*. Ethnic and Racial Studies Vol. 28 No. 3, 495. May 2005

²³ House of Commons, Home Affairs Committee, *Immigration Control*, Fifth Report of Session 2005–06 Volume I HC 775–I, 23 July 2006 p.17

²⁴ Will Sommerville, et al. “United Kingdom: A Reluctant Country of Immigration.” *Migration Policy Institute*, 21 July 2009, www.migrationpolicy.org/article/united-kingdom-reluctant-country-immigration. Accessed 24 June 2016.

²⁵ “British Nationality Act 1981.” *Legislation.gov.uk*, Statute Law Database, 1 Jan. 1982, www.legislation.gov.uk/ukpga/1981/61. Accessed 24 Dec. 2015.

Labour government. In his 1994 book *Frontiers of Identity: The British and the Others*²⁶, Robin Cohen claimed that at the time this increase in removals was used to keep the Euro-sceptics and the Powellites happy. From the late 1980s onwards, there was a distinct change in focus of immigration policy. The 1988 Immigration Act, introduced by the then Conservative government, limited the right to appeal against deportation for asylum seekers as well as the scope of appeals for those without UK citizenship.²⁷ The UK government purposefully targeted asylum seekers in their new legislation because of several factors. Among them were notably the collapse of the Soviet Union and conflicts in the former Yugoslavia. Many people left their homelands in the hope of a better life and fleeing war and headed for European countries including the UK. Asylum applications rose rapidly, increasing from 2,905 in 1984, to 44,840 in 1991.²⁸

1984	2,905
1985	4,398
1986	4,266
1987	4,256
1988	3,998
1989	11,640
1990	26,205
1991	44,840

As the numbers of asylum seekers increased, so did efforts to legislate as domestic legislation was almost non-existent.²⁹ In the 1990s, two major Parliamentary Acts were

²⁶ Robin Cohen. *Frontiers of Identity: the British and the Others*. London, Longman, 1994.

²⁷ Alice Bloch, and Liza Schuster. *At the extremes of exclusion: Deportation, detention and dispersal*. Ethnic and Racial Studies Vol. 28 No. 3, 495. May 2005

²⁸ Oliver Hawkins. "Asylum Statistics." *UK Parliament*, House of Commons Library, 3. 30 March 2017, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01403>. Accessed 20 April 2017.

²⁹ Until the 1990s, the UK was only tied by international conventions. This led to great difficulty in solving asylum requests and the need for the subsequent legislation.

enacted. The first was the 1993 Asylum and Immigration Appeals Act which, among other things, introduced fines for airline companies who transported undocumented travellers to the British territory. In 1996, the Asylum and Immigration Act made it “a criminal offence to employ anyone unless they had permission to live and work in the UK,”³⁰ as well as restricted welfare and introduced measures that would lead to a reduction in asylum claims.

There was a shift in immigration policy once Labour came to power in 1997. Policy followed a direction of “selective openness.”³¹ There was a two-sided approach that both encouraged economic migration and developed a tough security and control framework. The major distinction made in immigration control is

between people who have the right of abode in the UK and those who do not. The former (British citizens and some Commonwealth nationals) are hardly affected by immigration controls, whereas most of the latter need specific permission or “leave” from the immigration authorities to enter or remain in the UK. The various categories of leave are set out in the Immigration Rules and include for example visitor, student, working holidaymaker, spouse, and minister of religion. Only some of these categories can lead to permanent settlement (indefinite leave). Where a person is granted limited leave, it will usually include restrictions on working or claiming benefits.³²

There is as previously mentioned, a different set of rules that applies to nationals of the European Union who are mostly exempt from immigration control. During this period of the 1990s, the UK received between 20,000 and 40,000 asylum applications per year. However, the 9/11 terrorist attacks in 2001 led to increased efforts to fight illegal immigration and to limit the number of asylum applicants. The Labour government introduced several pieces of legislation, notably the Nationality, Immigration and Asylum Act 2002³³ which “created the first English test and citizenship exam for immigrants.”³⁴ It also introduced further measures to combat bogus marriages and help develop economic immigration. It introduced visas for highly skilled economic immigrants who could come to the UK despite the lack of a job offer. It was in that year, 2002, that asylum applications peaked, the country received more asylum

³⁰ “UK Immigration Acts through the Ages.” *BBC News*, BBC, 10 Oct. 2013, www.bbc.com/news/uk-politics-24463873. Accessed 27 Aug. 2015.

³¹ Will Sommerville, et al. “United Kingdom: A Reluctant Country of Immigration.” *Migration Policy Institute*, 21 July 2009, www.migrationpolicy.org/article/united-kingdom-reluctant-country-immigration. Accessed 24 June 2016.

³² House of Commons, Home Affairs Committee, *Immigration Control*, Fifth Report of Session 2005–06 Volume I HC 775–I, 23 July 2006 p.17

³³ “Nationality, Immigration and Asylum Act 2002.” *Legislation.gov.uk*, Statute Law Database, www.legislation.gov.uk/ukpga/2002/41/contents. Accessed 24 Mar. 2016.

³⁴ “UK Immigration Acts through the Ages.” *BBC News*, BBC, 10 Oct. 2013, www.bbc.com/news/uk-politics-24463873. Accessed 27 Aug. 2015.

applications than any other country, 15.2 percent of the worldwide total of 555,310.”³⁵ This led to the Sangatte crisis in Calais, which in turn led to intense public pressure to limit the number of asylum seekers, and undocumented migrants entering the country.³⁶ Bowing to public pressure, the Labour government passed legislation aimed at limiting asylum application as well as increasing removals of those who had not been granted refugee status after the appeals process had concluded. This has led to a gradual increase in detention of asylum seekers. Some NGOs have raised concerns over

asylum seekers' employment and access to quality housing, health, and education. They have also campaigned vigorously against several aspects of asylum-seeker hardship, including detention — particularly of children and families — destitution, and access to justice.³⁷

2003 saw the creation of “new “fast-track” procedures”³⁸ known as the Detained Fast Track (DFT) system for asylum applications. It allowed detention of asylum seekers while their claim was being decided, and reduced asylum seekers' benefit entitlements. Ultimately this succession of measures restricting and reducing possibilities for immigration was an expression of the country's rejection of certain unwanted foreign nationals. Since the 2001 attacks in New York City, more and more countries have used deportation as a tool to deal with these unwanted foreign nationals. This has been accompanied by an emphasis on the “security dimension of “migration management”³⁹ by politicians in many countries.

As stated, in 2016, the United Kingdom had a net migration flow of about 335,000. Net immigration contributed approximately 4 million people to the UK population from 2000 to 2016 (see Table 1). This 4 million figure is comprised of “growing numbers of workers, international students, asylum seekers (applications spiked between 2000 and 2002), and family members reunifying with those already in the country.”⁴⁰ Since the middle of the 1990s, net immigration has consistently exceeded 100,000 people per year and only once since 2003

³⁵ Will Sommerville, et al. “United Kingdom: A Reluctant Country of Immigration.” *Migration Policy Institute*, 21 July 2009, www.migrationpolicy.org/article/united-kingdom-reluctant-country-immigration. Accessed 24 June 2016.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 12. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

⁴⁰ Will Sommerville, et al. “United Kingdom: A Reluctant Country of Immigration.” *Migration Policy Institute*, 21 July 2009, www.migrationpolicy.org/article/united-kingdom-reluctant-country-immigration. Accessed 24 June 2016.

has net migration been below 200,000 (177,000 in 2012).⁴¹ Despite the implementation of some restrictions by governments, there was a consensus on the benefits of economic migration. Up until the financial crisis in 2008, which led to the global recession, the UK “enjoyed high growth, low unemployment, and large numbers of unfilled job vacancies.”⁴² Foreign migrants were a perfect source of labour to fill in the gaps. These foreign workers “made up more than 13 percent of the country's labor force in 2008 — up from 7 to 8 percent a few decades ago.”⁴³ However, following public disquiet about the amount of economic migration, the government introduced “a new approach in 2008 that it first announced in 2005: a 5-tier Points-Based System (PBS) incorporating revised and consolidated versions of existing labor migration schemes.”⁴⁴ The PBS was formed through the Immigration, Asylum and Nationality Act 2006⁴⁵ and was phased in from 2008 to 2010. However, the British system of immigration control suffers from one—up until now—unavoidable flaw. One that the PBS could not help remedy. It is a part of the European Union. As a member of the European Union, the United Kingdom is part of the European Single Market. This refers to the concept of the EU as one territory without internal borders and which guarantees the free movement of goods, capital, services and labour. This fourth and final notion, the free movement of labour signifies that any national of an EU country has the right to travel to and reside in any other EU country. Therefore, any regulation or legislation the British government could implement would not concern EU nationals. They are exempt from any restrictions on movement and therefore any restrictions on migration. Hence the Points-Based-System applies solely to non-EU nationals. Yet it is from these EU countries that most economic migrants have come because of this unfettered access.⁴⁶ It is for this reason that immigration was such an important issue in the Brexit vote, in which the British people decided to leave the European Union. Ultimately, the PBS moved the system away from the employers and gave more control to the government and in order to focus on economic migrants, the government tried to make it harder for all other forms of migrant to

⁴¹ Lord Andrew Green. “Net Migration Statistics.” *Migration Watch UK*, www.migrationwatchuk.org/statistics-net-migration-statistics. Accessed 23 Nov. 2016.

⁴² Will Sommerville, et al. “United Kingdom: A Reluctant Country of Immigration.” *Migration Policy Institute*, 21 July 2009, www.migrationpolicy.org/article/united-kingdom-reluctant-country-immigration. Accessed 24 June 2016.

⁴³ *Ibid.*

⁴⁴ “A Points Based System: How It Works.” *Wayback Machine*, Home Office UK Border Agency, 19 Dec. 2007, web.archive.org/web/20071227074840/http://www.bia.homeoffice.gov.uk/managingborders/managingmigration/apointsbasedsystem/howitworks. Accessed 28 Jan. 2017.

⁴⁵ “Immigration, Asylum and Nationality Act 2006.” *Legislation.gov.uk*, Statute Law Database, 30 Mar. 2006, www.legislation.gov.uk/ukpga/2006/13. Accessed 29 May 2016.

⁴⁶ This was one of the main reasons many people in the UK voted to leave the European Union in June 2016, a decision known as Brexit.

enter and stay in the country. The impact of this was that very different types of immigrant were represented as one group, notably asylum seekers and illegal immigrants to enter and stay in the country.

For many years, the Home Office's Immigration and Nationality Directorate (IND) was responsible for administering the immigration system. In 2006, after becoming embroiled in multiple controversies, the then Home Secretary described the IND as "not fit for purpose".⁴⁷ In 2008, the United Kingdom Border Agency replaced the IND and was in charge of immigration control, customs enforcement, detention and removal.⁴⁸ However, the UKBA was found to be consistently under-performing, providing poor service, having caused a backlog of hundreds of thousands of cases, and receiving a large and increasing number of complaints. In a House of Lords debate the UKBA was called a service "falling apart at the seams" by Lord Avebury.⁴⁹ A 2011 report on the work of the UK Border Agency by the Secretary of State for the Home Department stated that "the level of waste at the UK Border Agency is unacceptable,"⁵⁰ and included illegal penalties, bad debt write-off, and staff and asylum seekers overpayments. In 2013, the Government abolished the UKBA as an executive agency. It was subsequently replaced by three agencies, The Border Force, UK Visas and Immigration, and Immigration Enforcement.

In their focus on illegal immigrants, refugees, and asylum seekers, there have been many claims that asylum seekers are in fact 'bogus' or 'economic migrants'. However, the majority of asylum seekers and refugees do in fact come from countries affected by war, violence and human rights abuses. The rationalisation for refugees choosing the UK is manifold:

Some asylum seekers have little or no choice in their final destination. Others have the financial and social resources to exert a degree of choice. Democracy, opportunity and better life chances for children are assumed to exist in all Western countries with additional factors being the presence of family or friends in a country, language and cultural legacy of empire, images and preconceptions. There is little or no empirical

⁴⁷ Melanie Gower. "Organisational Reforms to the Immigration System since 2006." *UK Parliament*, House of Commons Library, 14 Oct. 2014, researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06719#fullreport. Accessed 11 Apr. 2016.

⁴⁸ Will Sommerville, et al. "United Kingdom: A Reluctant Country of Immigration." *Migration Policy Institute*, 21 July 2009, www.migrationpolicy.org/article/united-kingdom-reluctant-country-immigration. Accessed 24 June 2016.

⁴⁹ "Lords Hansard Text for 19 Jul 2012." *UK Parliament*, House of Lords Library, 19 July 2012, www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120719-0002.htm. Accessed 3 Apr. 2016.

⁵⁰ United Kingdom, House of Commons, Home Department. "The Work of the UK Border Agency (April-July 2011)." *The Work of the UK Border Agency (April-July 2011)*, Secretary of State for the Home Department, 1. Dec. 2011. www.gov.uk/government/uploads/system/uploads/attachment_data/file/228748/8253.pdf. Accessed 13 Feb. 2016.

evidence that welfare support is a principle motivation for choosing to come to the UK.⁵¹

In any case, only a tiny amount of the world's refugees are granted refuge in the UK: 300,000 between 2000 and 2014.⁵²

Because of the complexity of immigration situations, “those who do not have formal, legal status in a country are increasingly described as ‘irregular’ migrants,”⁵³ undocumented migrants or illegal migrants. The term ‘irregular migration’ is used to refer to several cases. It can refer to those who enter a country without legal authorisation. It can also be used to refer to those migrants who enter the country legally but then fail to leave the territory once their right to stay expires (e.g. visa expires, asylum application fails, etc.). While it is impossible to know the extent of ‘illegal or irregular migration’ because of its very nature, a 2005 report commissioned by the Home Office offered “a ‘best guess’ number between 310,000 and 570,000 irregular migrants in the UK.”⁵⁴ A more recent report from the London School of Economics, using a similar methodology but based on figures through the end of 2007, estimates a higher figure somewhere between 417,000 and 863,000.⁵⁵ The scale of irregular migration has increased in line with that of international migration. It is estimated between 10% and 15% of Europe’s 56 million migrants have irregular status.⁵⁶ Irregular migration is a complex and problematic issue for governments, it can “challenge society’s social and economic systems of governance and undermine its legal order. It also undermines public confidence in migration and asylum policies.”⁵⁷ Solutions to the problem are generally bifold, either tighten conditions or legalise the status of irregular migrants. The Labour Government’s policy since the turn of the century led to tightened conditions via additional external measures (tougher visa conditions), and internal measures (identity management, increased employer compliance, more public service compliance, and regularization).

⁵¹ *UK Migration Controversies: A Simple Guide*. Royal Geographical Society, 2009. www.rgs.org/NR/rdonlyres/4711AA55-F60A-4B16-9F30-27DEF5232C03/0/MigrationFINAL.pdf. Accessed 28 Feb. 2016.

⁵² “UNHCR Statistics - The World in Numbers.” *UNHCR*, popstats.unhcr.org/en/overview#_ga=1.80991839.975112216.1486527553. Accessed 4 Nov. 2016.

⁵³ *UK Migration Controversies: A Simple Guide*. Royal Geographical Society, 2009. www.rgs.org/NR/rdonlyres/4711AA55-F60A-4B16-9F30-27DEF5232C03/0/MigrationFINAL.pdf. Accessed 28 Feb. 2016.

⁵⁴ *Ibid.*

⁵⁵ Will Sommerville, et al. “United Kingdom: A Reluctant Country of Immigration.” *Migration Policy Institute*, 21 July 2009, www.migrationpolicy.org/article/united-kingdom-reluctant-country-immigration. Accessed 24 June 2016.

⁵⁶ *UK Migration Controversies: A Simple Guide*. Royal Geographical Society, 2009. www.rgs.org/NR/rdonlyres/4711AA55-F60A-4B16-9F30-27DEF5232C03/0/MigrationFINAL.pdf.

⁵⁷ *Ibid.*

In their 2010 Manifesto, the Conservative Party claimed that while immigration had been a source of enrichment for the nation and that they wanted to encourage highly skilled migration, it was “too high and need[ed] to be reduced.”⁵⁸ They wished to “take net migration back to the levels of the 1990s – tens of thousands a year, not hundreds of thousands.”⁵⁹ They also stated that “extremists, serious criminals and others find our borders far too easy to penetrate.”⁶⁰ To fight this, the Conservative party promised to “enhance national security, improve immigration controls, and crack down on the trafficking of people, weapons, and drugs.”⁶¹ They also wished to “extend early deportation of foreign national prisoners to reduce further the pressure on our prison population⁶² which had more than doubled under the Labour Party. Having to form a coalition with the Liberal Democrats, led to some compromise on certain issues. The Coalition Agreement stated that the government would put an end to the detention of immigrant children and that

The Government believes that immigration has enriched our culture and strengthened our economy, but that it must be controlled so that people have confidence in the system. We also recognise that to ensure cohesion and protect our public services, we need to introduce a cap on immigration and reduce the number of non EU immigrants.⁶³

Once in power, David Cameron implemented an immigration policy of “good immigration, not mass immigration.”⁶⁴ In their first two years in power, the Home Office “reviewed the eligibility criteria and conditions attached to the main non-European immigration categories.”⁶⁵

This led to various changes, including:

- limiting the number of visas for skilled workers with a job offer
- stricter criteria determining who is eligible to stay permanently in the UK
- creating selective visa provisions for high skilled/‘high value’ migrants (such as investors, entrepreneurs and those with ‘exceptional talent’)

⁵⁸ “Conservative Manifesto 2010.” *UK General Election 2017*, 121. 18 Apr. 2010, www.general-election-2010.co.uk/conservative-party-manifesto-2010-general-election. Accessed 18 Aug. 2016.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Melanie Gower. “Immigration and Asylum: Changes Made by the Coalition Government 2010 - 2015.” *UK Parliament*, House of Commons Library, 2. 24 Mar. 2015, researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05829. Accessed 2 May 2015.

⁶⁴ “David Cameron on Immigration.” *The Guardian*, Guardian News and Media, 13 Apr. 2011, www.theguardian.com/politics/2011/apr/14/david-cameron-immigration-speech-full-text. Accessed 18 May 2016.

⁶⁵ Melanie Gower. “Immigration and Asylum: Changes Made by the Coalition Government 2010 - 2015.” *UK Parliament*, House of Commons Library, 2. 24 Mar. 2015, researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05829. Accessed 2 May 2015.

- amending student visa conditions in order to deter abuse
- closing the post-study work visa and replacing it with more limited provisions
- introducing new family visa eligibility criteria
- restricting new migrants' entitlements to certain welfare benefits

A 2012 Home Office review of *Immigration and asylum policy: Government plans and progress made*, stipulated that “while the right type of immigration can stimulate growth, badly managed migration has led to serious social impacts in some areas, with pressure being placed on key public services such as schools, the health service, transport, housing and welfare.”⁶⁶ In a February 2012 speech on ‘Making immigration work for Britain’, the Minister of State for Immigration, Damian Green explained:

Our first priority has been, and remains, to get the system back under control, to get the numbers down and keep them down. We have laid the foundations for a sustainable system. Now we shall shape it, to make it work for Britain. The main point I make today is that everyone who comes here must be selected to make a positive contribution. That is at the heart of our commitment to reduce net migration. We have talked in the past about a Points Based System. In the future it will be more accurate to talk about a contribution-based system. Whether you come here to work, study, or get married, we as a country are entitled to check that you will add to the quality of life in Britain. There are people who think that all immigrants are bad for Britain. There are also people who think that all immigrants are good for Britain. To move the immigration debate on to a higher level let's take it as read that they are both wrong, and that the legitimate question in today's world is how can we benefit from immigration.⁶⁷

Then Home Secretary, Theresa May, “argued that it is possible to “attract more of the brightest and the best at the same time as we reduce the overall number”, by being more selective about the criteria for entry”⁶⁸ and reaffirmed the governments wish to reduce net migration from the hundreds of thousands to the tens of thousands. David Cameron did introduce an upper annual limit of immigration supposedly in the range of the tens of thousands. In May 2014, the Cameron government passed the Immigration Act 2014.⁶⁹ The Act had the aim of facilitating the process of removing people who had been refused permission to stay in the UK and to create a “more ‘hostile environment’ for people living in the UK without a valid immigration status.”⁷⁰ It also made provision to prevent private landlords from renting houses to people

⁶⁶ *Ibid.* p.3

⁶⁷ *Ibid.* p.4

⁶⁸ *Ibid.* p.3

⁶⁹ “Immigration Act 2014.” *Legislation.gov.uk*, Statute Law Database, 10 Oct. 2013, www.legislation.gov.uk/ukpga/2014/22/section/66. Accessed 24 June 2016.

⁷⁰ Mealnie Gower. “Immigration and Asylum: Changes Made by the Coalition Government 2010 - 2015.” *UK Parliament*, House of Commons Library, 24 Mar. 2015, researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05829. Accessed 2 May 2015.

without status preventing illegal immigrants from obtaining driving licenses and bank accounts. In November 2014, the Government admitted that it would fail to cut net migration to the tens of thousands and the pledge quickly began to unravel.⁷¹ In the year ending June 2016, net migration to the UK was 335,000, which means that 335,000 more people immigrated into the country than emigrated out of it.⁷²

The British example is however uniquely British and differs greatly from the example of many other countries, including the US. Great Britain once possessed the greatest Empire the world has ever seen. The United States was a part of that Empire and is a nation built on the backs of immigrants from across the globe.

II. THE UNITED STATES OF AMERICA

Immigration is one of the most divisive and controversial issues in the United Kingdom and is possibly even more so in the United States. Multiple factors underpin the debate, including political ideology, the question of race and ethnicity, public opinion, and socio-economic impact.⁷³ In a report on the driving factors of immigration policy, Facchini and Steinhardt state that “immigration and immigration policy have been at the forefront of the US policy debate ever since independence,”⁷⁴ a clear consequence of the United States being born from successive waves of European immigrants. This contrasts somewhat with the British case where immigration policy was not implemented until the beginning of the 20th century, a result of the countries long standing colonial-emigration status. As in all countries, it is a polarizing debate, but one in which opinions diverge greatly:

Even within political parties, heterogeneous opinions co-exist. For example, Watanabe and Becerra (2006) report that, “The Republican Party is split among those who want tougher restrictions, those who fear alienating the Latino vote and business owners who are pressing for more laborers to fill blue collar jobs in construction, cleaning, gardening and other industries.” In the usually pro-immigration Democratic Party, labor union constituents are concerned about foreign worker inflows.⁷⁵

Immigration patterns have evolved over time, immigrants who travelled to the United States in the 18th century were different to those who travel to the country in the 21st. The

⁷¹ “Immigration Act 2014.” *Legislation.gov.uk*, Statute Law Database, 10 Oct. 2013, www.legislation.gov.uk/ukpga/2014/22/section/66. Accessed 24 June 2016.

⁷² Nicholas Watt, and Rowena Mason. “Theresa May Downgrades Cameron Pledge to Reduce Net Migration.” *The Guardian*, Guardian News and Media, 10 Nov. 2014, www.theguardian.com/uk-news/2014/nov/10/theresa-may-downgrades-cameron-pledge-reduce-net-migration. Accessed 24 Sept. 2016.

⁷³ Giovanni Facchini, and Max Friedrich Steinhardt. *What Drives U.S. Immigration Policy? Evidence from Congressional Roll Call Votes*. Bonn, 2011, <http://ftp.iza.org/dp5561.pdf>

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

reasons for their arrival has remained relatively constant however: protection from political and religious persecution, family reunion, and seeking economic opportunity⁷⁶ Following the foundation of the first colony in Jamestown, Virginia, in 1607, ever-increasing numbers of migrants travelled to the New World. From a population of 350 in 1610, the ‘United States’ grew to 250,000 by 1700 and 3.9 million by 1790. Most of these migrants (excluding slaves from the African continent) originated from Europe and were for the majority indentured servants.⁷⁷ It was at that time that United States Congress enacted its first immigration policy: the Naturalization Act of 1790.⁷⁸ This Act restricted naturalization (the process by which US citizenship is granted to a foreign citizen or national) to those who had resided in the country for a minimum of two years and were "free white persons" of "good moral character". The two-year period was later prolonged to 5-years by an amendment in 1795. The 5-year period is still in force today⁷⁹ During the 19th and early 20th century, most migration continued to come from Europe, first Northern Europe and then Southern and Eastern Europe. By 1860, the population had risen to 31 million, and in July 1868, the Fourteenth Amendment to the US Constitution was ratified, giving all children born within the United States automatic citizenship at birth. In 1870, the country modified its naturalization laws to allow African-Americans the right to become naturalised citizens.⁸⁰ This right was not however extended to Asian Americans. In 1875, Congress passed the first restrictive federal immigration law, the Page Act.⁸¹ It banned the entry of “undesirable” immigrants. Those who fell under this category included any individual from an Asian country, working as forced labour, engaging in prostitution, and people who were convicts in their own country. In 1882, Congress passed the Chinese Exclusion Act⁸² which restricted most immigration from China until it was repealed in 1943.⁸³

⁷⁶ “Police Chiefs Guide to Immigration Issues.” *Homeland Security Digital Library*, International Association of Chiefs of Police, 9. July 2007, www.hsdl.org/c/police-chiefs-guide-to-immigration-issues/. Accessed 10 Feb. 2016.

⁷⁷ Jeanette Altarriba, and Roberto R. Heredia. “An Introduction to Bilingualism: Principles and Practies.” *An Introduction to Bilingualism: Principles and Practies*, Lawrence Erlbaum Associates, New York, 2008, p. 212.

⁷⁸ “A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 - 1875.” *Library of Congress*, rs6.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001%2Fllsl001.db&recNum=226. Accessed 11 Aug. 2016.

⁷⁹ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

⁸⁰ *Ibid.*

⁸¹ “1875 Page Law.” *Government Publishing Office*, Library of Congress, https://library.uwb.edu/Static/USImmigration/1875_page_law.html Accessed 25 Oct. 2016.

⁸² “Chinese Exclusion Act 1882.” *Library of Congress*, Primary Documents in American History, www.loc.gov/rr/program/bib/ourdocs/chinese.html. Accessed 25 Apr. 2016.

⁸³ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007,

It is considered that “restrictionist immigration policies were birthed (...) with the Chinese Exclusion Act”.⁸⁴ It was also the first time a distinction was made between ‘legal’ and ‘illegal’ immigrants.⁸⁵

By the turn of the century, in 1900, over 76 million people lived in the United States and the numbers continued to increase at an accelerated pace. In 1907 alone, 1,3 million migrants entered the country. Population levels had reached 106 million by 1920 and in 1921, Congress passed the Emergency Quota Act (also known as the Emergency Immigration Act)

creating national immigration quotas, which gave way to the Immigration Act of 1924 capping the number of permissible immigrants from each country in a manner proportional to the number already living within the United States. The aggregate number from the eastern hemisphere could not eclipse 154,227 immigrants.⁸⁶

The intention of both acts was to restrict immigration from Southern and Eastern Europe and consolidate the exclusionary measures aimed at Asian immigration.

Both the nature and the reasoning behind immigration to the United States has changed since the beginning of the twentieth century

at the beginning of the twentieth century, immigrants primarily traveled from Europe; by the end of the century, immigrants were predominantly from Asia and Latin America. Although immigrants in the first half of the twentieth century were motivated by the prospect of employment, immigrants today are often drawn to immigrate in order to be reunited with family and enjoy political freedom.⁸⁷

The issues raised by this migration does however remain constant. Indeed, the concerns and fears created by influxes new migrants persevere, notable “concern about job competition and the direct and indirect impact on low-wage, low-skill Americans, particularly African Americans, legal Hispanics and poor whites.”⁸⁸ While there have been some reforms in the second half of the twentieth century and in the early 21st century, immigration continues to be a polarizing issue that is unlikely to dissipate anytime soon.

The Immigration and Nationality Act of 1952⁸⁹ (INA 52) got rid of race-based quotas and replaced them with nationality-based quotas. These quotas were enforced and regulated by

www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

⁸⁴ Jeffrey A. Jenkins, and Sidney M. Milkis, editors. “Federalism and the Politics of Immigration Reform.” *The Politics of Major Policy Reform in Postwar America*, Cambridge Univ. Press, New York, 2014, p. 182

⁸⁵ “Police Chiefs Guide to Immigration Issues.” *Homeland Security Digital Library*, International Association of Chiefs of Police, 7. July 2007, www.hsdl.org/c/police-chiefs-guide-to-immigration-issues/. Accessed 10 Feb. 2016.

⁸⁶ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

⁸⁷ Jeffrey A. Jenkins, and Sidney M. Milkis, editors. “Federalism and the Politics of Immigration Reform.” *The Politics of Major Policy Reform in Postwar America*, Cambridge Univ. Press, New York, 2014, p. 182.

⁸⁸ *Ibid.*

⁸⁹ “Immigration and Nationality Act.” *USCIS*, 1952, www.uscis.gov/laws/immigration-and-nationality-act. Accessed 20 Aug. 2016.

the Immigration and Naturalization Service (INS) which was formed in 1933 by a merger of the Bureau of Immigration and the Bureau of Naturalization. The ‘INA 52’ defined an ‘alien’ “as any person lacking citizenship or status as a national of the United States.”⁹⁰ Aliens can be resident, non-resident, immigrants, non-immigrants, documented and undocumented. Recent migration policy has been the consequence of high levels of immigration to the United States since the 1970s.⁹¹ Bipartisanship efforts in 1965 led to the passing of the second Immigration and Nationality Act (INA 65). It abolished what Milkis and Jenkins called the “racist national-origin quotas”⁹² system, in place since the 1920s, and implemented a system that focused on family ties. The Act also created immigration policy that favoured “highly skilled professionals, scientists, and artists along with unskilled labourers for jobs in fields experiencing a labor shortage.”⁹³ The consequences were an unintentional increase in immigration levels through “expansion in legal immigration from Asia and undocumented workers across the US-Mexico border.”⁹⁴ Because of its Bipartisan support, the law went relatively unchallenged despite the increase in immigration.⁹⁵ In 1986, the Immigration Reform and Control Act (IRCA)⁹⁶ was passed with the aim of reducing the flow of illegal aliens entering the country by reducing their possibilities of work.⁹⁷ Indeed, the Act explicitly prohibited employers from hiring them.⁹⁸ It was a policy in response to growing fear about the increasing numbers of illegal immigrants from Third World countries and their impact on poverty in the United States.⁹⁹ The law also granted amnesty for all immigrants who had been

⁹⁰ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

⁹¹ Giovanni Facchini, and Max Friedrich Steinhardt. *What Drives U.S. Immigration Policy? Evidence from Congressional Roll Call Votes*. Bonn, 2011, <http://ftp.iza.org/dp5561.pdf>

⁹² Jeffery A. Jenkins, and Sidney M. Milkis, editors. “Federalism and the Politics of Immigration Reform.” *The Politics of Major Policy Reform in Postwar America*, Cambridge Univ. Press, New York, 2014, p. 182.

⁹³ *Ibid.* p.182

⁹⁴ *Ibid.* p.183

⁹⁵ *Ibid.* p.183

⁹⁶ “Immigration Reform and Control Act of 1986 (IRCA).” *USCIS*, Department of Homeland Security, 29 Sept. 2016, library.uwb.edu/Static/USImmigration/1986_immigration_reform_and_control_act.html. Accessed 11 Oct. 2016.

⁹⁷ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

⁹⁸ Miriam J. Wells. “The Grassroots Reconfiguration of U.S. Immigration Policy.” *International Migration Review*, Blackwell Publishing Ltd, 1308. 16 Mar. 2006, onlinelibrary.wiley.com/doi/10.1111/j.1747-7379.2004.tb00239.x/abstract. Accessed 26 Mar. 2017.

⁹⁹ *Ibid.*

living in the United States since January 1, 1982,¹⁰⁰ it led to the legalization of almost 3.5 million illegal immigrants as permanent residents.¹⁰¹ According to Jenkins and Milkis:

by the early 1980s, Congress attempted to address both legal and illegal immigration in a single legislative effort. (...) [In the end, after much lobbying] the legislative effort was split, with illegal immigration to be dealt with first. The Immigration and Reform Act of 1986 was the first stage of the legislation., addressing the rising tide of illegal immigrants in an attempt to close the “back door” to illegal immigration in order to “keep the front door open.”¹⁰²

The law however was highly controversial and was described by John Skrentny as “one of the great policy failures of American history.”¹⁰³ Months of bargaining led to a ‘compromise’ legislative effort. It offered amnesty to millions who could henceforth become citizens, and in exchange it also contained provisions that would see the borders secured, ensuring that undocumented persons could no longer enter and remain in the United States as easily as before. Ultimately the attempts to secure the border were a failure and according to Skrentny

IRCA's failure to seal the border taught restrictionists not to make any more grand bargains,” and it has led to the inability of groups to work together to solve common concerns. IRCA has left behind a legacy of distrust that has contributed to the inability of Congress to make needed reforms.¹⁰⁴

The subsequent major pieces of legislation on immigration came in the early 1990s when Republican President George H. W. Bush signed the Immigration Act of 1990¹⁰⁵ and the Armed Forces Immigration Adjustment Act 1991.¹⁰⁶ The latter allowed “foreign service members who had served 12 or more years in the US Armed Forces to qualify for permanent residency and, in some cases, citizenship.”¹⁰⁷ Miriam Wells states that immigrant-restrictive discourse intensified in the early 1990s as immigrants were blamed for taking jobs from legitimate residents, depleting social welfare coffers, increasing crime, causing political turmoil, and

¹⁰⁰ Jeffery A. Jenkins, and Sidney M. Milkis, editors. “Federalism and the Politics of Immigration Reform.” *The Politics of Major Policy Reform in Postwar America*, Cambridge Univ. Press, New York, 2014, p. 185.

¹⁰¹ Giovanni Facchini, and Max Friedrich Steinhardt. *What Drives U.S. Immigration Policy? Evidence from Congressional Roll Call Votes*. Bonn, 2011, <http://ftp.iza.org/dp5561.pdf>

¹⁰² Jeffery A. Jenkins, and Sidney M. Milkis, editors. “Federalism and the Politics of Immigration Reform.” *The Politics of Major Policy Reform in Postwar America*, Cambridge Univ. Press, New York, 2014, p. 184-5.

¹⁰³ *Ibid.* p.184

¹⁰⁴ *Ibid.*

¹⁰⁵ “Immigration and Nationality Act 1990.” *Government Publishing Office*, Library of Congress, [library.uwb.edu/Static/USImmigration/1990_immigration_and_nationality_act.html](http://www.library.uwb.edu/Static/USImmigration/1990_immigration_and_nationality_act.html). Accessed 25 Oct. 2016.

¹⁰⁶ “Armed Forces Immigration Adjustment Act of 1991.” *GovTrack.us*, Library of Congress, www.govtrack.us/congress/bills/102/s296/text. Accessed 17 June 2017.

¹⁰⁷ Giovanni Facchini, and Max Friedrich Steinhardt. *What Drives U.S. Immigration Policy? Evidence from Congressional Roll Call Votes*. Bonn, 2011, <http://ftp.iza.org/dp5561.pdf>

engendering state fiscal shortfalls and the sustained downturn of the economy.¹⁰⁸ This led to the passing of the Immigration Act of 1990 (IMMACT)¹⁰⁹ Whereas IRCA, had focused on illegal migration, IMMACT focused on legal immigration. It revised the existing visa allocation system introduced new provisions for skilled immigration. Indeed, “several studies indicated a skill gap in the workforce, suggesting the possibility of a shortage of skilled labor.”¹¹⁰ It increased the annual cap for immigrant visas from 530,000 per year to 700,000 per year, a substantial increase.¹¹¹ It almost tripled employment-based immigration from 54,000 to 140,000.¹¹² There was also a provision included, which diversified “the national origins of immigrants coming to the United States”.¹¹³ Overall, the law led to a 500,000 annual increase of immigrants.¹¹⁴ The act also increased the U.S Border patrol’s resources and power. This build-up of resources on the border continued with the passing of a new law in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).¹¹⁵ The Act’s main focus was “to improve border control by imposing criminal penalties for racketeering, alien smuggling and the use or creation of fraudulent immigration-related documents and increasing interior enforcement by agencies charged with monitoring visa applications and visa abusers.”¹¹⁶ Firstly, the bill increased the size of the US Border Patrol. Secondly, the law ordered “the construction of a fence along the most heavily trafficked areas of the US–Mexico border”¹¹⁷ Perhaps more importantly, the Act made the process of deporting illegal immigrants a significantly easier process. Firstly, it increased the categories of immigrants subject to

¹⁰⁸ Miriam J. Wells. “The Grassroots Reconfiguration of U.S. Immigration Policy.” *International Migration Review*, Blackwell Publishing Ltd, 1308. 16 Mar. 2006, onlinelibrary.wiley.com/doi/10.1111/j.1747-7379.2004.tb00239.x/abstract. Accessed 26 Mar. 2017.

¹⁰⁹ “Immigration and Nationality Act 1990.” *Government Publishing Office*, Library of Congress, library.uwb.edu/Static/USimmigration/1990_immigration_and_nationality_act.html. Accessed 25 Oct. 2016.

¹¹⁰ Jeffery A. Jenkins, and Sidney M. Milkis, editors. “Federalism and the Politics of Immigration Reform.” *The Politics of Major Policy Reform in Postwar America*, Cambridge Univ. Press, New York, 2014, p. 185.

¹¹¹ “Immigration and Nationality Act 1990.” *Government Publishing Office*, Library of Congress, library.uwb.edu/Static/USimmigration/1990_immigration_and_nationality_act.html. Accessed 25 Oct. 2016.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ Jeffery A. Jenkins, and Sidney M. Milkis, editors. “Federalism and the Politics of Immigration Reform.” *The Politics of Major Policy Reform in Postwar America*, Cambridge Univ. Press, New York, 2014, p. 187.

¹¹⁵ “Illegal Immigration Reform and Immigration Responsibility Act.” *Cornell University*, 19 Aug. 2010, www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act. Accessed 12 Apr. 2016.

¹¹⁶ “Illegal Immigration Reform and Immigration Responsibility Act.” *Cornell University*, 19 Aug. 2010, www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act. Accessed 12 Apr. 2016.

¹¹⁷ Giovanni Facchini, and Max Friedrich Steinhardt. *What Drives U.S. Immigration Policy? Evidence from Congressional Roll Call Votes*. Bonn, 2011, <http://ftp.iza.org/dp5561.pdf>

detention and removal¹¹⁸ and was the beginning of large-scale deportation that continue to this day¹¹⁹

The IIRIRA targeted criminal noncitizens for deportation [and] expanded crime-related removal grounds for noncitizens, permitting deportation based on lesser violations than previous policy allowed. For example, the Act provided that any noncitizens convicted of crimes with a sentence of one year or longer be eligible for deportation after their completed sentence. By expanding the categories under which immigrants could be removed on criminal grounds, the IIRIRA led to thousands of deportations to Central American nations.¹²⁰

Wells claims that IIRIRA's pledge was take back control of the nation's borders via

an expanded range of offenses for which immigrants could be deported, increased penalties for violations, streamlined apprehension and deportation procedures that abridged immigrants' due process rights, sharp limits on immigrants' access to public services, and an unprecedented concentration of personnel, equipment, and technology along the US-Mexico border.¹²¹

It allowed the U.S Border police to recruit 1,000 more personnel as well as barring admission for aliens found to be unlawfully present in the United States for 180 days for a total of three years. If the illegal immigrant had been present in the country for a period exceeding twelve months, they were barred from admission or any legal status for ten years.¹²²

Immigrant-restrictive political rhetoric subsided in the late 1990s as the country's financial and economic situation improved but the twin towers attacks in September 2001 led to new "immigrant-constraining policies, administrative practices, and court decisions."¹²³ Collectively, these measures have significantly limited movement, rights, and opportunities for immigrants in the United States.¹²⁴ The events on September 11, 2001 were major catalysts for measures aimed at reducing illegal immigration and tightening immigration law enforcement.¹²⁵ By 2002, the budget of the Immigration and Naturalization Service (INS) had

¹¹⁸ Jacqueline Hagan, et al. "U.S. Deportation Policy, Family Separation, and Circular Migration." *International Migration Review*, Blackwell Publishing Inc, 5 Mar. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1747-7379.2007.00114.x/abstract. Accessed 6 Apr. 2016.

¹¹⁹ Jonah M. Temple, *The Merry-Go-Round of Youth Gangs: The Failure of the US Immigration Removal Policy and the False Outsourcing of Crime*, 31 B.C. Third World L.J. 193 (2011), <http://lawdigitalcommons.bc.edu/twlj/vol31/iss1/8>

¹²⁰ *Ibid.* 196.

¹²¹ Miriam J. Wells. "The Grassroots Reconfiguration of U.S. Immigration Policy." *International Migration Review*, Blackwell Publishing Ltd, 1308. 16 Mar. 2006, onlinelibrary.wiley.com/doi/10.1111/j.1747-7379.2004.tb00239.x/abstract. Accessed 26 Mar. 2017.

¹²² Jeffery A. Jenkins, and Sidney M. Milkis, editors. "Federalism and the Politics of Immigration Reform." *The Politics of Major Policy Reform in Postwar America*, Cambridge Univ. Press, New York, 2014, p. 189.

¹²³ Miriam J. Wells. "The Grassroots Reconfiguration of U.S. Immigration Policy." *International Migration Review*, Blackwell Publishing Ltd, 1308. 16 Mar. 2006, onlinelibrary.wiley.com/doi/10.1111/j.1747-7379.2004.tb00239.x/abstract. Accessed 26 Mar. 2017.

¹²⁴ *Ibid.*

¹²⁵ Giovanni Facchini, and Max Friedrich Steinhardt. *What Drives U.S. Immigration Policy? Evidence from Congressional Roll Call Votes*. Bonn, 2011, <http://ftp.iza.org/dp5561.pdf>

increased by 1300% compared to 1986 and the Border Patrol budget was 1000% its 1986 level. Officers, border patrolling and deportations grew exponentially.¹²⁶ It has been argued that such measures increase retention of illegal immigrants rather than deterring them as the costs and risks rose

due to increased border security, many immigrants were hesitant to return once they had entered the country, a “perverse consequence” of heavy border enforcement. Thus, the illusion of a “controlled border,” begun in the 1990 legislation, may have only exacerbated illegal entry and the greater illegal immigrant population on the whole.¹²⁷

In March 2003, the Department of Homeland Security (DHS) was formed and replaced the Immigration and Naturalization Service. The Bush Administration formed the DHS in order to foster “increased intelligence sharing and dialogue between agencies responsible for responding to domestic emergencies, such as natural disasters and domestic terrorism.”¹²⁸ Due to little success passing legislation at the federal level, and major differences in needs and situations from one state to the next, the states began to take measures into their own hands. By July 2006 “thirty states had passed fifty-seven laws that dealt with some aspect of immigration reform.”¹²⁹ Nearly all of those laws made it more complicated for “illegal immigrants to receive government benefits such as unemployment, driver's licences, employment in government-funded projects, and gun permits.”¹³⁰ This relative gridlock at the federal level continued under the Obama administration. Congress once again was unable to reach consensus on the issue. The most significant changes since between 2008 and 2016 came either at “the state level or through administrative channels.”¹³¹

On June 27, 2013, the US Senate passed a bill (S. 744¹³²) that formed a comprehensive approach to modernising the US immigration system. Called the Border Security, Economic

¹²⁶ Jeffery A. Jenkins, and Sidney M. Milkis, editors. “Federalism and the Politics of Immigration Reform.” *The Politics of Major Policy Reform in Postwar America*, Cambridge Univ. Press, New York, 2014, p. 187.

¹²⁷ *Ibid.*

¹²⁸ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

¹²⁹ Jeffery A. Jenkins, and Sidney M. Milkis, editors. “Federalism and the Politics of Immigration Reform.” *The Politics of Major Policy Reform in Postwar America*, Cambridge Univ. Press, New York, 2014, p. 192.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² “A Guide to S.744: Understanding the 2013 Senate Immigration Bill.” *American Immigration Council*, 10 July 2013, www.americanimmigrationcouncil.org/research/guide-s744-understanding-2013-senate-immigration-bill. Accessed 8 Mar. 2016.

Opportunity, and Immigration Modernization Act, the bill took a comprehensive approach to modernizing the US¹³³ Indeed, its provisions were manifold and included:¹³⁴

- providing a ‘tough but achievable’ pathway to citizenship for undocumented immigrants (most of the 11 millions undocumented immigrants would be eligible for citizenship)
- increasing border security substantially (increased and improved “technology, personnel, fencing, and funding to ramp up border security to an unprecedented level.” It stated that DHS had to complete 700 miles of fences along the border and almost double the number of full-time US Customs and Border Protection agents from today’s 21,391 to 38,405 by 2021)
- providing significant resources towards improved enforcement in the country’s interior (use of the E-Verify system—the government’s Internet-based work-authorization system by employers)
- provisions toward the DREAM Act (“The bill allows anyone who entered the country before age 16, who has completed high school and some college or military service, and who has been in registered provisional immigrant status for at least five years to apply for permanent residence and citizenship.”)
- clearing the extensive green card backlog
- reforming the visa and green card system (merit-based green cards for individuals considered to be in the interest of the nation –highly skilled, advanced-degree professionals, etc.– as well as the inclusion of a “lesser-skilled “W” visa category”)
- protecting farmworkers and stabilizing the agricultural industry
- providing immigrant workers with rights that will decrease workplace violations

This bill, the most comprehensive and significant since 1996, despite being a bipartisan effort and passing easily in the Senate, failed to pass the Republican controlled House of Representatives who refused to even consider it.¹³⁵ Speaker of the House, John Boehner, declared the reasons House Republicans refused to consider the bill were that

the American people and their elected officials don't trust him [President Obama] to enforce the law as written (...) Until that changes, it is going to be difficult to make progress on this issue. The crisis at our southern border reminds us all of the critical importance of fixing our broken immigration system. It is sad and disappointing that-

¹³³ Philip E. Wolgin. “2 Years Later, Immigrants Are Still Waiting on Immigration Reform.” *Center for American Progress*, 24 June 2015, www.americanprogress.org/issues/immigration/news/2015/06/24/115835/2-years-later-immigrants-are-still-waiting-on-immigration-reform/. Accessed 12 Apr. 2017.

¹³⁴ Team, the CAP Immigration. “The Facts on Immigration Today.” *Center for American Progress*, 23 Oct. 2014, www.americanprogress.org/issues/immigration/reports/2014/10/23/59040/the-facts-on-immigration-today-3/. Accessed 14 Nov. 2016.

¹³⁵ Steven T. Dennis. “Immigration Bill Officially Dead: Boehner Tells Obama No Vote This Year, President Says (Updated) (Video).” *Roll Call*, 30 June 2014, www.rollcall.com/white-house/immigration-bill-officially-dead-boehner-tells-obama-no-vote-this-year/. Accessed 11 Aug. 2016.

faced with this challenge- President Obama won't work with us, but is instead intent on going it alone with executive orders that can't and won't fix these problems.¹³⁶

Obama responded that due to the Republicans refusal to implement any reform, executive orders were the only viable alternative. The President has the constitutional and legal prerogative to take executive action on immigration.¹³⁷ One of the most important pieces of legislation proposed under the Obama administration was the DREAM Act (the Development, Relief, and Education for Alien Minors Act):

The DREAM Act would allow illegal alien students to gain "conditional nonimmigrant status" if they have had "good moral character" since entry into the United States, as determined by the Department of Homeland Security; have graduated from a US high school, have a GED or otherwise have gained admittance to an institution of higher education; arrived in the United States before the age of sixteen, prior to enactment of the bill; and have lived in the country continuously for at least five years. An applicant (...) may be granted temporary residence once they have completed two years of armed service, acquired a degree from an institution of higher learning, or completed two years and are in good standing in a program for a bachelor's degree or higher.¹³⁸

Though it never passed into law, in August 2012, it was partially implemented by a presidential executive order called the DACA¹³⁹ (Deferred Action for Childhood Arrivals) directive. DACA provides "administrative relief from deportation [for] eligible immigrant youth who came to the United States when they were children"¹⁴⁰ DACA protection expires every two years and must be renewed. It not only provides protection from deportation but also a work permit. As of January 2017, 740,000 people have benefited from DACA.¹⁴¹ Since its implementation, House Republicans have attempted multiple time to defund the DACA program, first in June 2013 (Steve King, R-IA) and again in August 2014. Despite his promises to repeal DACA

¹³⁶ *Ibid.*

¹³⁷ Team, the CAP Immigration. "The Facts on Immigration Today." *Center for American Progress*, 23 Oct. 2014, www.americanprogress.org/issues/immigration/reports/2014/10/23/59040/the-facts-on-immigration-today-3/. Accessed 14 Nov. 2016.

¹³⁸ Jeffery A. Jenkins, and Sidney M. Milkis, editors. "Federalism and the Politics of Immigration Reform." *The Politics of Major Policy Reform in Postwar America*, Cambridge Univ. Press, New York, 2014, p. 192-3. The legislation also bars any immigrant who has committed marriage or voter fraud, committed a felony or three misdemeanors, abused student visa provisions, engaged in persecution, poses a public health risk, or is likely to become a public charge. Applicants must also agree to pay taxes; demonstrate an ability to read write and speak English; and have an understanding of the fundamentals of the history, principles, and form of government of the United States typically required for naturalization

¹³⁹ "Consideration of Deferred Action for Childhood Arrivals (DACA)." *USCIS*, Department of Homeland Security, www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca. Accessed 15 July 2016.

¹⁴⁰ What Is DACA?" *University of California at Berkeley*, Undocumented Student Program, undocu.berkeley.edu/legal-support-overview/what-is-daca/. Accessed 9 Aug. 2016.

¹⁴¹ Miami Herald Editorial Board. "Fortunately, Trump Gives Young, Undocumented DREAMers a Reprieve - for Now." *Miami Herald*, 23 Jan. 2017, www.miamiherald.com/opinion/editorials/article128334459.html. Accessed 21 Feb. 2017.

during the presidential campaign, as of June 2017, Trump has made no effort to end the program, preferring to concentrate on deporting undocumented criminals.¹⁴²

As already discussed, over time, the immigrant population has evolved considerably, both in number and origin:

The 2005 American Community Survey, Foreign-Born Population report of the US Census makes these challenges clear: Of the 34.2 million persons in the 2005 US Census survey, 12% were foreign born. 53% of foreign-born individuals were from Latin America, 27% from Asia, 14% from Europe and 6% from other parts of the world.¹⁴³

By 2012, the foreign-born population had risen to 40.7 million (a 31.2 percent increase since 2000, from 31.1 million to 40.7 million people). Of those 40.7 million, 11.8 percent emigrated from Europe and 28 percent came from Mexico.¹⁴⁴ By 2014, that number had risen again, with the immigrant population estimated at 42.4 million people.

Figure 6: Numerical Size and Share of the Foreign-Born Population in the United States, 1970-2014

Year	Size of Immigrant Population (Millions)	Immigrant Share of Total U.S. Population (%)
1970	9.6	4.7
1980	14.1	6.2
1990	19.8	7.9
2000	31.1	11.1
2010	40.0	12.9
2014	42.4	13.3

Source: Migration Policy Institute (MPI) tabulation of data from the U.S. Census Bureau's 2010 and 2014 American Community Surveys (ACS), and 1970-2000 decennial Census.

While the exact number is almost impossible to determine, it is estimated that of those 42.4 million immigrants, approximately 11.1 million were present in the country illegally.¹⁴⁵ With

¹⁴² Dara Lind. "It's Official: Trump Is Keeping 750,000 Unauthorized Immigrants Safe from Deportation." *Vox*, Vox, 16 June 2017, www.vox.com/policy-and-politics/2017/6/16/15815850/trump-daca-dapa-dreamers. Accessed 25 June 2017.

¹⁴³ "Police Chiefs Guide to Immigration Issues." *Homeland Security Digital Library*, International Association of Chiefs of Police, 7. July 2007, www.hsdl.org/c/police-chiefs-guide-to-immigration-issues/. Accessed 10 Feb. 2016.

¹⁴⁴ Team, the CAP Immigration. "The Facts on Immigration Today." *Center for American Progress*, 23 Oct. 2014, www.americanprogress.org/issues/immigration/reports/2014/10/23/59040/the-facts-on-immigration-today-3/. Accessed 14 Nov. 2016.

¹⁴⁵ Jens Manuel Krogstad, et al. "5 Facts about Illegal Immigration in the U.S." *Pew Research Center*, 27 Apr. 2017, www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/. Accessed 25 May 2017.

the arrival of Trump to power, there are many uncertainties about how the United States' immigration policy will look over the next four or possibly eight years.

CHAPTER 3

GOVERNMENT STATISTICS AND AGENCIES

All research requires data. In the case of this study, much data comes from government sources, think-tanks, and NGOs and includes documents such as statistics, government committee reports, briefings, legislation and more. It is necessary to briefly discuss where these sources come from as well as their potential weaknesses. This chapter will then delve into several important issues: who oversees immigration and the devolution of immigration powers. Both the US and the UK, have organisations or governmental agencies who are charged with managing immigration. This involves everything from border surveillance to issuing visas. In the US, this function is carried out by the Department of Homeland Security. In the UK, the Home Office oversees these tasks. However, while immigration is not a devolved power in the UK, in the US individual states may pass laws on some aspects of immigration depending on the needs of their state and the political tendencies of its inhabitants.

I. GOVERNMENT STATISTICAL SOURCES¹

A. The United Kingdom

In January 2017, the House of Commons released a briefing paper on *Migration Statistics*,² providing a guide to understanding UK migration statistics. It explains the concepts and methods used in measuring migration and setting out a range of data on migration in the UK and in European Union countries.³ There are numerous sources of statistics available both to the government and the public. In the United Kingdom, a multitude of different organisations

¹ Oliver Hawkins. "Migration Statistics." *UK Parliament*, House of Commons Library, 20 June 2017, researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06077. Accessed 20 June 2017.

There was no systematic attempt to measure the extent of international migration before the introduction of the IPS in 1964. Before then, the extent of international migration can only be loosely estimated from census data, by measuring the proportion of population change that is not attributable to recorded births and deaths. Specifically, the change in the population due to the difference between the number of births and deaths is subtracted from the total observed change in the population and the remainder is assumed to be due to migration. This figure is then averaged over the period between the two censuses to estimate average annual net migration. These estimates are therefore produced indirectly and should be treated with some caution.

² Oliver Hawkins. "Migration Statistics." *UK Parliament*, House of Commons Library, 20 June 2017, researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06077. Accessed 20 June 2017.

³ *Ibid.*

provide data and statistics on migration and issues related to immigration.⁴ These include governmental agencies, as well as non-governmental organisations (NGOs). Firstly, let us consider the various sources of data the government has at its disposal.

Since 2011, the Home Office has regularly published data in its Immigration statistics quarterly release⁵. Produced four times a year, it includes data and analysis on the topics of:

- work
- study
- family
- passenger arrivals and visitors
- asylum
- extensions of stay
- settlement
- citizenship
- detention
- returns

As of June 2017, the most recent edition, published on May 25, 2017, covers the period from January to March 2017. The Home office has also released *Migrant journey*, every year since 2010, and released its sixth edition in 2016: *Migrant journey: sixth report*.⁶ The aim of the report is to help understand the processes that migrants go through when they decide to stay in the UK or switch their immigration status helps to inform Parliament and the public on the impact of changes to the Immigration Rules.

⁴ Richard Keen, et al. "Sources of Statistics." *UK Parliament*, House of Commons Library, 10 Mar. 2015. 44-45. researchbriefings.parliament.uk/ResearchBriefing/Summary/RP15-12#fullreport. Accessed 22 Sept. 2016.

⁵ "Immigration Statistics Quarterly Release." GOV.UK, Home Office, 25 May 2016, www.gov.uk/government/collections/immigration-statistics-quarterly-release. Accessed 12 June 2017. At the end of May 2017, the 1st quarterly release of the year was published. Data from the May 2017 edition was not used in this dissertation.

⁵ "Immigration Statistics Quarterly Release." GOV.UK, Home Office, 1 Dec. 2017,

⁶ "Migrant Journey: Sixth Report." *GOV.UK*, Home Office, 17 Feb. 2016, www.gov.uk/government/statistics/migrant-journey-sixth-report. Accessed 7 Sept. 2016.

Most other state-provided data, comes from the Office for National Statistics (ONS).⁷ They publish documents such as the ONS Migration Indicators Suite,⁸ the Migration Statistics Quarterly Report,⁹ an annual report on Long-Term International Migration (LTIM).¹⁰ The ONS's data provides detailed and up-to-date figures related to international migration in and out of the UK. The Migration Statistics Quarterly Reports provide very recent, almost real-time, data. The Long-Term International Migration Estimates are useful for more detailed and plurennial analysis. The Migrant Journey reports study immigration outcomes notably related to asylum and settlement in the UK.

In December 2016, the House of Commons published a briefing paper on Asylum Statistics.¹¹ It analyses asylum statistics and trends in the UK and other EU countries. It gives information about the number of asylum applications and their outcomes. This study of asylum applications and outcomes is relatively new and was not available in the past. Researchers generally acknowledge that when national sources are available and trustworthy, they are generally preferable for examining trends in individual countries, while international sources are better for comparing countries.

International migration statistics come from an array of sources and provide data from a multitude of country and regional sources.¹² When using international statistics, it is important to verify if the figures from national sources have been harmonised, or possibly suffer from comparability issues. The Statistical Office of the European Commission, known as EuroStat¹³ publishes data on immigration, emigration and the acquisition of citizenship for European Union countries together with a range of other statistics.¹⁴ The UN's Department of Economics and Social Affairs provides worldwide estimates of migration populations and

⁷ Richard Keen, et al. "Sources of Statistics." *UK Parliament*, House of Commons Library, 10 Mar. 2015. 44-45. researchbriefings.parliament.uk/ResearchBriefing/Summary/RP15-12#fullreport. Accessed 22 Sept. 2016.

Yago Zayed, et al. "Sources of Statistics 2016." *UK Parliament*, House of Commons Library, 13 July 2016. 49-50. researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7637#fullreport. Accessed 21 Nov. 2016.

⁸ (Office for National Statistics; UK wide, by local authority; annual release; from mid 2003)

⁹ (Office for National Statistics; UK wide; from May 2009)

¹⁰ (Office for National Statistics; UK wide, England & Wales; annual; from 2008)

¹¹ Oliver Hawkins. "Asylum Statistics." *UK Parliament*, House of Commons Library, 30 Mar. 2017, researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01403. Accessed 17 Apr. 2017.

¹² Richard Keen, et al. "Sources of Statistics." *UK Parliament*, House of Commons Library, 10 Mar. 2015. 44-45. researchbriefings.parliament.uk/ResearchBriefing/Summary/RP15-12#fullreport. Accessed 22 Sept. 2016.

¹³ "Your Key to European Statistics." *European Commission*, Eurostat, ec.europa.eu/eurostat.

¹⁴ (The Statistical Office of the European Commission; Europe; annually; 1960 onwards)

rates.¹⁵ The Office of the United Nations High Commissioner for Refugees (UNHCR) is a source of information on asylum and refugees around the world in both the UN High Commissioner for Refugees' Statistical Online Population Database¹⁶ and the United Nations Asylum Trends publications¹⁷

In the UK one must be wary of comparing present data on migration with that from the past. If, for example, we consider the example of departures and removals:

data collection has changed dramatically and might still be improving, it is impossible to draw firm conclusions about trends in removals and departures since 2005: any increases might be the result of changing data collection rather than due to actual increases in departures¹⁸

But this is unfortunately, not the only difficulty in the obtention and understanding of data.

One of the major problems related to data on foreign nationals in custody is the lack of specificity on the offences that caused incarceration as well as the nature of the foreign person's immigration status:

the data is frequently presented in conjunction with that assessing the numbers of asylum seekers in custody, and the same individual may be classified as an asylum seeker or a non-asylum seeker at different points in time. It is not clear whether individuals were in the UK illegally and committed an offence for which they were then imprisoned, aside from the issue of their illegal status or whether they are in prison as a result of being in the UK illegally.¹⁹

Furthermore, the lack of reliable data on the outcome of failed asylum applicants is particularly striking and debilitating. It is considered a "critical weakness in existing data sources"²⁰ Indeed, while some rejected applicants depart voluntarily or through government schemes, and are therefore counted in the statistics, many others either depart without notifying authorities or remain in the UK illegally. There is little reliable data on these two categories. According to the latest report on migration by the Migration Observatory,

the Home Office has begun to use passenger data from airlines and other sources to track departures, but it may be some time before the data can be used reliably for statistical purposes. Thus, estimates of asylum's role in net migration are uncertain, as total outflows can currently only be guessed. The Office of National Statistics

¹⁵ "United Nations." *United Nations*, United Nations Department of Economic and Social Affairs, www.un.org/development/desa/en/.

¹⁶ (United Nations High Commissioner for Refugees; worldwide; 1960 onwards)

¹⁷ (United Nations High Commissioner for Refugees)

¹⁸ Scott Blinder, and Alexander Betts. "Deportations, Removals and Voluntary Departures from the UK." *Migration Observatory*, University of Oxford, 3. 19 July 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/deportations-removals-and-voluntary-departures-from-the-uk/. Accessed 9 Sept. 2016.

¹⁹ Organised crime, corruption and the movement of people across borders in the new enlarged EU: A case study of Estonia, Finland and the UK (see doc)

²⁰ Scott Blinder. "Migration to the UK: Asylum." *Migration Observatory*, University of Oxford, 9. 20 July 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/. Accessed 11 Aug. 2016.

assumes the departure of some percentage of asylum seekers in its widely-used estimate of Long-Term International Migration, or LTIM, as in Figure 1 (ONS 2008: 10-11).²¹

In 2011, the Migration Observatory released a report on the *Top Ten Problems in the Evidence Base for Public Debate and Policy-Making on Immigration in the UK*.²² It is a detailed summary of the major issues with immigration statistics in the UK and their implications:

1. There is significant uncertainty about estimates of the number of people emigrating and, by extension, net-migration figures.
2. Data sources differ on numbers of migrants coming to the UK: The government collects data on inflows of migrants through three primary sources, which provide different estimates of total immigration. Although the three sources measure slightly different aspects of immigration, uncertainty remains about the reasons for the discrepancy.
3. Net-migration: Different data sources suggest different figures. Two major data sources (the International Passenger Survey and the Annual Population Survey) disagree about the level and changes of net-migration over time. This is a problem because reducing net-migration is a key policy objective of the current Government.
4. There is no systematic data on the immigration status of migrants in the UK. We therefore do not know the numbers and characteristics of migrants on different types of residence permits. Consequently, analyses of the impacts of policy changes that affect specific entry channels or groups of migrants are limited.
5. The existing estimates on local area migrant statistics are very imprecise. The Census is the best source of demographic data for small geographical units but it happens only every ten years. In the intercensal period, the only data sources are surveys that yield very imprecise estimates of the size and characteristics of the migrant population at the local level.
6. There is no clear definition of immigrant in public opinion nor how the public defines the “immigrants” it wants reduced.
7. There is no systematic data and analysis of the impact of migrants on public services, notably about health and education, and even less information about the value of migrants’ contributions to the provision of public services.
8. There is little research on the impact of immigrants on housing. This includes, directly and indirectly, on house prices, rents, and social housing at national and local levels.
9. There is great uncertainty about student migration. While it has become the focus of policy debate, the evidence base lacks sufficient information about the number of students, the extent of non-compliance with immigration rules among international students, and the impact of foreign students on the broader economy and society.

²¹ *Ibid.*

²² “Top Ten Problems in the Evidence Base for Public Debate and Policy-Making on Immigration in the UK.” *Migration Observatory*, University of Oxford, 5 Apr. 2011, www.migrationobservatory.ox.ac.uk/resources/reports/top-ten-problems-in-the-evidence-base-for-public-debate-and-policy-making-on-immigration-in-the-uk/. Accessed 9 Feb. 2016.

10. We know little about the numerous characteristics and impacts of irregular (illegal) migrants. Irregular migrants in the UK are likely to have important impacts on, for example, labour markets, the provision of public services, government finances and social cohesion. Yet, as it is the case in many but not all other immigration countries, the data and information about the number, characteristics and impacts of irregular migrants are extremely limited.

B. The United States of America

In the United States, much of the statistical data is provided by the Department of Homeland Security. The agencies—which are presented in the next part—provide much data about border security, citizenship and immigration services, and immigration enforcement. Since the passage of the Homeland Security Act of 2002, the Office of Immigration Statistics (OIS) collects and disseminates to the public data and information useful in evaluating the social, economic, environmental, and demographic impact of immigration laws and establishing standards of reliability and validity for immigration statistics.²³

Essentially this means that DHS and its agencies provide access to its reports and statistics. These can be found in several locations. DHS has a *Yearbook of Immigration Statistics*, which is a “compendium of tables that provides data on foreign nationals who were granted lawful permanent residence, were admitted into the United States on a temporary basis, applied for asylum or refugee status, or were naturalized.”²⁴

- DHS has detailed information about:
- lawful permanent residents (LPRs), also known as “green card” holders
- Refugees and asylees
- Naturalization which confers U.S. citizenship upon foreign nationals who have fulfilled the requirements Congress established in the Immigration and Nationality Act (INA).
- U.S. nonimmigrant admissions whom are nonimmigrant foreign nationals granted temporary admission into the United States.
- Immigration Enforcement Actions where DHS gives information on actions to prevent unlawful entry into the United States and to apprehend and repatriate aliens who have violated or failed to comply with U.S. immigration laws.
- Immigration priorities

²³ “Immigration Data & Statistics.” *Department of Homeland Security*, www.dhs.gov/immigration-statistics. Accessed 26 June 2017.

²⁴ “Immigration Data & Statistics.” *Department of Homeland Security*, www.dhs.gov/immigration-statistics. Accessed 26 June 2017.

- Population estimates

In general, both countries have data that is easily available and accessible. However British data suffers, at times, from a lack of data collection in the past.

II. GOVERNMENT IMMIGRATION AGENCIES

This chapter will delve into several important issues: who oversees immigration and devolution of powers. Both the US and the UK, have organisations or governmental agencies who are charged with managing immigration, from border surveillance to issuing visas. In the US, this function is carried out by the Department of Homeland Security. In the UK, the Home Office oversees these tasks. However, while immigration is not a devolved power in the UK, in the US individual states may pass laws on some aspects of immigration depending on the needs of their state and the political tendencies of its inhabitants.

A. Organisation of the Home Office & Department of Homeland Security

1. The Home Office (UK)

In the United Kingdom, the responsibility for managing all matters related to immigration falls to the Home Office. The Home Office is a ministerial department of Her Majesty's Government of the United Kingdom. According to their website, "The Home Office is the lead government department for immigration and passports, drugs policy, crime, fire, counter-terrorism and police."²⁵ In matters of immigration, its goal is to "ensure the flow of people and goods through the system is efficient, while working towards its target to reduce net migration."²⁶ As already stated, in 2008, the UK Border Agency (UKBA) was formed to control the border and control immigration. However, in 2013, after a scathing report about the agency's failures and global incompetence, it was superseded by three separate organisations. It was replaced by the 'UK Visas and Immigration',²⁷ 'Immigration Enforcement',²⁸ and the 'Border Force'.²⁹ As its name implies, UK Visas and immigration (UKVI) operates the visas system in the United Kingdom. It manages approximately 3 million applications a year,

²⁵ "About Us." *GOV.UK*, Home Office, www.gov.uk/government/organisations/home-office/about.

²⁶ United Kingdom, Home Office, National Audit Office. "Reforming the UK Border and Immigration System." *Reforming the UK Border and Immigration System*, 2014. 5. Accessed 3 Feb. 2016.

²⁷ "UK Visas and Immigration." *GOV.UK*, UK Visas and Immigration, www.gov.uk/government/organisations/uk-visas-and-immigration.

²⁸ "Immigration Enforcement." *GOV.UK*, Immigration Enforcement, www.gov.uk/government/organisations/immigration-enforcement.

²⁹ "Border Force." *GOV.UK*, Border Force, www.gov.uk/government/organisations/border-force.

considering applications for citizenship. It also runs the UK's asylum service, manages appeals from unsuccessful applicants and regulates the register of sponsors.³⁰ Immigration Enforcement (IE) oversees "preventing abuse, tracking immigration offenders and increasing compliance with immigration law."³¹ It also works to regulate migration in a manner which is "in line with government policy, while supporting economic growth."³² IE can conduct residential and business "visits" to verify compliance with immigration laws. IE agents known as 'Immigration Officers' have the power to arrest those who commit immigration offences. A person arrested can be served a notice of 'Administrative Removal'. In sum, "Immigration Enforcement's remit is to enforce the law for those who break immigration rules."³³

Border Force (BF), the third division is responsible for controlling the border by carrying out immigration and customs controls for people and goods entering the UK. According to their website, the Border Force "promotes national prosperity by facilitating the legitimate movement of individuals and goods, whilst preventing those that would cause harm from entering the UK."³⁴ Their responsibilities include checking immigration status, baggage, vehicle, and cargo verification, patrolling the UK coastline and searching vessels, gathering intelligence, and alerting the police and security services to people of interest.³⁵

2. Department of Homeland Security (USA)

The equivalent to the British Home Office in the United States is the US Department of Homeland Security (DHS). The Department was formed in response to the 9/11 terrorist attacks in 2001 with the aim of protecting the nation, within, at, and outside its borders. Its main responsibilities include preventing terrorism and enhancing security, securing and managing the nation's borders, enforcing and administering immigration laws, safeguarding and securing cyberspace and ensuring resilience to disasters.³⁶ The Department has a considerable budget, in fiscal year 2016, the US federal government allocated "\$64.9 billion in total budget authority, \$51.9 billion in gross discretionary funding, \$41.2 billion in net discretionary funding, and

³⁰ "UK Visas and Immigration." *GOV.UK*, UK Visas and Immigration, www.gov.uk/government/organisations/uk-visas-and-immigration.

³¹ "Immigration Enforcement." *GOV.UK*, Immigration Enforcement, www.gov.uk/government/organisations/immigration-enforcement.

³² *Ibid.*

³³ United Kingdom, Home Office, National Audit Office. "Reforming the UK Border and Immigration System." *Reforming the UK Border and Immigration System*, 2014. 5. Accessed 3 Feb. 2016.

³⁴ "Border Force." *GOV.UK*, Border Force, www.gov.uk/government/organisations/border-force/about.

³⁵ *Ibid.*

³⁶ "Our Mission." *Department of Homeland Security*, 11 May 2016, www.dhs.gov/our-mission. Accessed 13 June 2016.

\$4.0billion in discretionary fees.”³⁷ In order to have control over immigration matters, in March 2003, DHS absorbed the INS (Immigration and Naturalization Service) and subsequently separated the immigration services into three distinct bureaus: Citizenship and Immigration Services (CIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP).³⁸

The role of the US Citizenship and Immigration Services is to carry out most of the administrative functions which previously fell under the United States Immigration and Naturalization Service (INS). Their tasks include promoting national security, eliminating immigration case backlogs, and improving customer services. The service deals with immigrant visa petitions, naturalization petitions, and asylum and refugee applications. They also make decisions at service centres, and manage all other immigration benefits functions except immigration enforcement. According to their website, the USCIS’ strategic goals include:³⁹

- Strengthening the security and integrity of the immigration system.
- Providing effective customer-oriented immigration benefit and information services.
- Supporting immigrants’ integration and participation in American civic culture.
- Promoting flexible and sound immigration policies and programs.
- Strengthening the infrastructure supporting the USCIS mission.
- Operating as a high-performance organization that promotes a highly talented workforce and a dynamic work culture.

US Immigration and Customs Enforcement (ICE) mission is to “protect America from the cross-border crime and illegal immigration that threaten national security and public safety.”⁴⁰ The bureau is tasked with enforcing laws governing border control, customs, trade and immigration, they oversee immigration enforcement, investigating illegal movement of people and goods and helping in the fight against terrorism. According to the government, ICE has

more than 20,000 employees in more than 400 offices in the United States and 46 foreign countries. The agency has an annual budget of approximately \$6 billion,

³⁷ “Budget-in-Brief Fiscal Year 2016.” *Department of Homeland Security*, www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf. Accessed 12 Feb. 2017.

³⁸ Miriam J Wells. “The Grassroots Reconfiguration of U.S. Immigration Policy.” *International Migration Review*, Blackwell Publishing Ltd, 1336. 16 Mar. 2006, onlinelibrary.wiley.com/doi/10.1111/j.1747-7379.2004.tb00239.x/abstract. Accessed 26 Mar. 2017.

³⁹ “About Us.” *USCIS*, Department of Homeland Security, 30 Dec. 2016, www.uscis.gov/aboutus. Accessed 18 Jan. 2017.

⁴⁰ “What We Do.” *ICE*, www.ice.gov/overview.

primarily devoted to two operational directorates — Enforcement and Removal Operations (ERO) and Homeland Security Investigations (HSI).⁴¹

They are responsible for identifying, investigating, and dismantling vulnerabilities regarding the nation's border, economic, transportation, and infrastructure security. According to the agency's former Director, “on any given day, there are about 30,000 immigrants in ICE custody.”⁴²

The final bureau that forms the core of immigration regulation in the United States is the Bureau of Customs and Border Protection (CBP), which is responsible for enforcement at US borders⁴³ This is the one of the largest law enforcement agencies in the world with more than 60,000 employees who are charged with facilitating lawful international trade and travel. CBP is in control of “customs, immigration, border security, and agricultural protection”⁴⁴ On an average day

CBP welcomes nearly one million visitors, screens more than 67,000 cargo containers, arrests more than 1,100 individuals, and seizes nearly 6 tons of illicit drugs. Annually, CBP facilitates an average of more than \$3 trillion in legitimate trade while enforcing US trade laws.⁴⁵

III. DEVOLUTION AND STATE POWERS

Both in the United States and in the United Kingdom there is a certain form of devolution of powers. In the UK, certain powers are transferred to regional bases, notably the Scottish Parliament (Holyrood, Edinburgh), the National Assembly for Wales (Senedd, Cardiff) and the Northern Ireland Assembly (Stormont, Belfast). Immigration however, is not one of the devolved powers.⁴⁶ All decisions related to immigration remain solely in the hands of the main UK parliament at Westminster.

The situation in the United States is supposedly the same, with immigration decisions made at a federal level. However, the theory is often inconsistent with the reality of the terrain. The federal government controls the visa process and therefore can set the goals of its

⁴¹ “About.” *ICE*, www.ice.gov/about.

⁴² *Director John Morton Explains ICE's Priorities on Deportation* by Marcus Stern ProPublica, Sep. 9, 2010, 7:42 p.m. <<https://www.propublica.org/article/director-john-morton-explains-ices-priorities-on-deportation>>

⁴³ Miriam J Wells. “The Grassroots Reconfiguration of U.S. Immigration Policy.” *International Migration Review*, Blackwell Publishing Ltd, 1336. 16 Mar. 2006, onlinelibrary.wiley.com/doi/10.1111/j.1747-7379.2004.tb00239.x/abstract. Accessed 26 Mar. 2017.

⁴⁴ “About.” *CBP*, www.CBP.gov/about.

⁴⁵ *Ibid.*

⁴⁶ “A Guide to Devolution in the UK.” *BBC News*, 18 Sept. 2016, www.bbc.com/news/uk-politics-35559447. Accessed 10 Dec. 2016.

immigration policies.⁴⁷ The United States is a federal republic, divided into 50 states, one federal district (District of Columbia), and several other territories and small possessions. These different states have “limited legislative authority regarding immigration.”⁴⁸ The extent of state authority depends on the issues concerned “if legislation governs removal or admission of immigrants, referred to as “pure” immigration, the federal government controls; if the legislation governs rights and obligations of noncitizens while in the country, states may jointly govern.”⁴⁹ This means therefore that the federal state controls migration policy, but both the federal governments and the local or state governments have joint control over issues relating to residency. This is reiterated by the work of Linda Bosniak who considers two distinct options about how immigrants should be treated in the regulatory system

there are questions about admission, deportation, and political asylum that clearly fall into the purview of the federal government, and there are other issues that concern procedures, education, health care, and welfare benefits fall into the category of alienage law. Alienage law “is a composite of rules and standards set by state and federal law across a wide variety of regulatory domains” where aliens are only one of many potential groups affected by the law.”⁵⁰

This double-sided issue has led to more and more intervention at the state level, due notably to the increasing percentage of foreign-born immigrants in the US. This is also the consequence of little progress at the federal level and creates what some consider “a real hope for policy change and innovation.”⁵¹ There is also consideration in the United States of the power of state police making arrests for violations of federal law. While we will not go into the details of state versus federal law, certain crimes fall under state jurisdiction while others fall under federal jurisdiction. According to the *Police chiefs guide to immigration issues*, most immigration violations are at a federal level of the law and of a civil nature⁵², rather than criminal⁵³. Civil

⁴⁷ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

⁴⁸ *Ibid.*

⁴⁹ Jeffery A. Jenkins, and Sidney M. Milkis, editors. “Federalism and the Politics of Immigration Reform.” *The Politics of Major Policy Reform in Postwar America*, Cambridge Univ. Press, New York, 2014, p. 181.

⁵⁰ *Ibid.*

⁵¹ Jeffery A. Jenkins, and Sidney M. Milkis, editors. “Federalism and the Politics of Immigration Reform.” *The Politics of Major Policy Reform in Postwar America*, Cambridge Univ. Press, New York, 2014, p. 181.

⁵² Civil law involves wrongs committed against a private party, which may or may not be specified by statute in the US (as we have some common law causes of action and an “open” judiciary that permits any claim for damages that can be proven to have been caused by the actions of another). The party claiming damages files the case, and must serve the defendant(s) and other interested parties, bearing the cost along the way. Civil judgments are *usually* money damage awards, but may also include orders that a party do something or refrain from continuing to do something. These orders are enforced by the party themselves, with the option to request a contempt of court finding if circumstances meet that standard.

⁵³ Criminal law involves wrongs that are deemed to be committed against the state, and require specific statutory authority for any such wrong to be brought as criminal charges against a defendant. The state is named as the plaintiff, and is represented by an employee (a prosecutor or “district attorney”), and the defendant is (in the

violations include being in the United States illegally and failing to depart after a visa has expired. Criminal violations include “illegally entering the United States, alien smuggling and willfully disobeying an order of removal”⁵⁴ This distinction between criminal and civil violations is extremely important as it will have a significant impact on the outcome of any legal challenges. Indeed, being in the United States without documentation is not a crime. It is a violation of immigration laws, and the consequence is deportation. The reason deportation is not punishment is an 1893 Court decision, *Fong Yue Ting vs. United States*. That court decision reads as follows:

[Deportation] is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions ... which the Government of the nation ... has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law, and the provisions of the Constitution securing the right of trial by jury and prohibiting unreasonable searches and seizures and cruel and unusual punishments have no application.⁵⁵

According to this decision, which still holds in court today, deportation is an administrative procedure which ensures that people abide by the terms of their visas. When they do not, they face the possibility of being returned to their countries of origin. While it may sound counter-intuitive, fighting a civil offence can oftentimes be more difficult than fighting a criminal one as defendants are not granted the due process protections that are automatic in criminal proceedings.

While a discussion of the civil/criminal nature of offenses is important, it is important to remember that while immigration law is generally decided at a federal level,

the authority of state police to make arrests for violation of federal law is not limited to those situations in which they are exercising delegated federal power. Rather, such arrest authority inheres in the States’ status as sovereign entities. It stems from the basic power of one sovereign to assist another sovereign. This is the same inherent authority that is exercised whenever a state law enforcement officer witnesses a federal crime being committed and makes an arrest. That officer is not acting pursuant

US) entitled to Constitutional protections throughout the trial. Criminal punishments can include jail time, fines, and conditions of release or probation, all of which are enforced by the power and authority of the state.

⁵⁴ “Police Chiefs Guide to Immigration Issues.” *Homeland Security Digital Library*, International Association of Chiefs of Police, 9. July 2007, www.hsdl.org/c/police-chiefs-guide-to-immigration-issues/. Accessed 10 Feb. 2016.

⁵⁵ Anya Golash-Boza. “Is Immigration Law Civil or Criminal?” *Stop Deportations Now*, Social Scientists on Immigration Policy, 1 Aug. 2011, stopdeportationsnow.blogspot.fr/2011/08/is-immigration-law-civil-or-criminal.html. Accessed 13 Aug. 2016.

to delegated federal power. Rather, he is exercising the inherent power of his state to assist another sovereign.⁵⁶

State officers can enforce state law violations “even if their ability to enforce federal immigration law is restricted or non-existent.”⁵⁷ If immigration violations are discovered during an investigation, law enforcement officers can contact federal authorities.⁵⁸ Ultimately this signifies that there is almost no protection from state officers, for offenders of immigration law, whether that be at a federal or state level. In either case they can be arrested.

This chapter has presented some of the sources of government statistics, which government agencies are responsible for immigration and what the impact of devolution of powers is in the US. The following chapter will present a brief discussion on deportation and detention.

⁵⁶ Kris W. Kobach. “State and Local Authority to Enforce Immigration Law: A Unified Approach for Stopping Terrorists.” *Center for Immigration Studies*, June 2004, cis.org/StateEnforcement-LocalEnforcement. Accessed 11 Feb. 2016.

⁵⁷ “Police Chiefs Guide to Immigration Issues.” *Homeland Security Digital Library*, International Association of Chiefs of Police, 13-14. July 2007, www.hsdl.org/c/police-chiefs-guide-to-immigration-issues/. Accessed 10 Feb. 2016.

⁵⁸ “Police Chiefs Guide to Immigration Issues.” *Homeland Security Digital Library*, International Association of Chiefs of Police, 13-14. July 2007, www.hsdl.org/c/police-chiefs-guide-to-immigration-issues/. Accessed 10 Feb. 2016.

CHAPTER 4

DETENTION AND DEPORTATION

Deportation has many implications, both for the deportee and for the country that wishes to carry out the deportation. One of the possible implications is detention. However, immigration-related detention is not used only in cases of deportation. Chapter five will first discuss the general notions of deportation and detention before studying the reasoning and justification behind the processes in both countries.

I. GENERAL PRESENTATION OF DEPORTATION, DETENTION AND ASLYUM

A. Deportation

As stated in the introduction, for the purposes of this dissertation, deportation has been defined as the removal of a non-national from the country they are in to their country of origin or another safe country. In all countries individuals can become eligible for deportation for three specific reasons:

- entering the state illegally
- breaching the specified terms associated with legal entry and residence¹
- Gaining entrance or continued residence in the state on a basis of a claim to asylum under the 1951 Convention Relating to the Status of Refugees that has come, after a process of determination, to be rejected.

The act of deporting someone raises a huge number of questions. Gibney and Hansen claim that “deportation goes directly to the heart of concerns raised by liberalism, democracy and human rights.”² Deportation has a somewhat secondary status, it is not generally the go-to response of governments and the judiciary. It is both a “complicated and a controversial state

¹ This includes prisoners who are deported once their sentence has been carried out or deported to their country during their sentence to fulfil that sentence in their home country.

² Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 1. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

power.”³ It is nevertheless undeniable that national sovereignty gives the “right of a people to control its borders as well as to define the procedures for admitting “aliens” into its territory”⁴ and by extension to remove those whom it has not authorised to enter and/or stay. This sovereignty over its borders has however been questioned because of its somewhat contradictory nature with liberal principles:

according to this understanding of the liberal-democratic polity, such sovereignty claims are constrained by human rights, which individuals are entitled to, not in virtue of being members of a polity, but insofar as they are human beings simpliciter. The notion of universal human rights extending to all persons shapes the manner in which entry and exit norms are conceived and enforced. In this sense, a paradox has been observed: the institutionalisation of liberal values hampers the authority of the liberal state.⁵

To put it more simply, “the capacity to exercise border control is fundamental to liberal democracy” and to the sovereignty of the state. But it is also these liberal values concerned with human rights and due process that limit the power a state has to control migration.⁶ However, we must also remember that the government’s duty is to fulfil the wishes and the needs of its people:

policy in a liberal democracy must in some measure reflect the aggregated preferences of its citizens. And nowhere does a majority of the citizenry support open borders; indeed, even in the US, only once in the post-war period, in 1953, have more than 10% of Americans wanted increased immigration (itself a far cry from unfettered immigration).⁷

Nonetheless, even if these paradoxical notions are ignored, deportation is still a lengthy and extremely problematic tool. Finding and removing individuals to other countries are “time-consuming and resource-intensive activities.”⁸ It can also be a tool of considerable brutality when deportation takes individuals away from their families and “cruelly uproots people from

³ Matthew J. Gibney. “Asylum and the Expansion of Deportation in the United Kingdom.” *Government and Opposition*, Blackwell Publishing Ltd, 147. 15 Apr. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00249.x/full. Accessed 26 Mar. 2017.

⁴ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 7. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

⁵ *Ibid.*

⁶ Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 1. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

⁷ *Ibid.*

⁸ Matthew J. Gibney. “Asylum and the Expansion of Deportation in the United Kingdom.” *Government and Opposition*, Blackwell Publishing Ltd, 147. 15 Apr. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00249.x/full. Accessed 26 Mar. 2017.

communities.”⁹ The act of physically removing individuals against their will cuts the social, personal and professional bonds created over the course of residence. Even if one concedes the necessity of deportation, there is no denying the hardships it entails.¹⁰ It is action of a coercive nature implemented by government agents and implicates what are “often extremely vulnerable men, women and, perhaps most controversially of all, children.”¹¹ Deportation is coercive in nature because forcible expulsion from the territory of a state requires “bringing the full powers of the state to bear against an individual.”¹² Gibney and Hansen stated very bluntly that “[d]eportation severs permanently and completely the relationship of responsibility between the state and the individual under its authority in a way that only capital punishment surpasses.”¹³

Deportation, as well as detention, has always been part of the “state’s arsenal of control.”¹⁴ However, as mentioned before, it is not an instrument used extensively by states. In fact, despite a dramatic increase in asylum applications in the UK, and, therefore, an increase in asylum rejections, deportation remains a relatively residual immigration control device, despite considerable interest over the practice in the media.

It is important to note, that despite any intentions to deport on behalf of the host country, a person can only be deported if the grounds exist. In the United Kingdom, they are set out in Section 3(5) of the Immigration and Asylum Act 1999 whereby

a person who is not a British citizen shall be liable to deportation from the United Kingdom (a) if the Secretary of State deems his deportation to be conducive to the public good
or
(b) if another person to whose family he belongs is or has been ordered to be deported” (Clayton, 2006: 550).¹⁵

⁹ *Ibid.*

¹⁰ Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 1-2. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

¹¹ Matthew J. Gibney. “Asylum and the Expansion of Deportation in the United Kingdom.” *Government and Opposition*, Blackwell Publishing Ltd, 147. 15 Apr. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00249.x/full. Accessed 26 Mar. 2017.

¹² Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 1-2. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

¹³ *Ibid.*

¹⁴ Alice Bloch, and Liza Schuster. *At the extremes of exclusion: Deportation, detention and dispersal*. Ethnic and Racial Studies Vol. 28 No. 3, 508. May 2005

¹⁵ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 7. 2010, *Deportation, Non-Deportability and Ideas of Membership*,

This means that if the Secretary of State deems a person dangerous then that person can be deported, the second part signifies that the dependable of any deportee are also possible candidates for deportation. The word “liable” is crucial as it leaves open the possibility to not deport. Since 2008 in the UK, this has also included foreign offenders of common law. However, states face two problems: non-removability and/or the principle of non-refoulement. Non-removability is the general concept of not being able to remove a person from the country. The practice of non-refoulement signifies not forcing refugees or asylum seekers to return to a country in which they are liable to be subjected to persecution. These suggest that individuals eligible for deportation cannot be removed, with return delayed or prevented by “the state of origin’s reluctance to accept the individual back or by human rights conditions in the country of return.”¹⁶ This has led to the appearance of a gap—though it is not the only cause—between the number of people eligible for deportation and the number actually deported in any given year. This in turn has given the impression that in recent years, deportation has come to be seen “more like a symbolic than a practical power for liberal states; a power that – while nominally at their disposal – is tightly constrained in its exercise by practical difficulties and liberal norms.”¹⁷ This itself raises many questions. The rise in numbers of refugees and asylum seekers has led to the creation of “complex, quasi-judicial refugee status determination systems for separating genuine from illegitimate asylum claims.”¹⁸ The same can be said for countries where the borders are rife with foreign nationals attempting to enter the country without authorisation. Such systems come at the cost of endless hours of work and extensive financial resources. The important question that stems from this is that “if rejections have little impact on whether or not asylum seekers remain in the country, then there is a serious question about the point of it all.”¹⁹ This so-called deportation gap²⁰ will inevitably lead to loss of public support for an already heavily criticised asylum institution. According to Gibney and Hansen,

www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

¹⁶ Matthew J. Gibney. “Asylum and the Expansion of Deportation in the United Kingdom.” *Government and Opposition*, Blackwell Publishing Ltd, 163. 15 Apr. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00249.x/full. Accessed 26 Mar. 2017.

¹⁷ *Ibid.* p.147-8

¹⁸ Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 7. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

¹⁹ *Ibid.*

²⁰ Matthew J. Gibney. “Asylum and the Expansion of Deportation in the United Kingdom.” *Government and Opposition*, Blackwell Publishing Ltd, 169. 15 Apr. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00249.x/full. Accessed 9 Apr. 2017.

“there is a large gap between rejected asylum applicants and removals. Measured in raw numbers and against governments stated aims, deportation is wholly ineffective.”²¹ The reasoning behind the continued use of deportation must therefore be questioned. The simple answer is that deportation serves a regulative function which “can be partly explained in terms of electoral politics and public expectations. The state needs deportation to assure public opinion of its authority within national borders.”²²

Deportation is ultimately a politically motivated tool that is useful for governments to use as examples of their work fighting unwanted immigration. It is certainly important and useful in the case of criminals and dangerous foreign nationals. It also serves as an important dissuasive power to those thinking of illegally entering a country. It would seem, nevertheless, that the most effective way of avoiding resorting to deportation is to stop migrants from entering the country in the first place. This is a strategy that both countries in this study have attempted to implement via strong borders and extra-national barriers.

B. Detention

As previously stated, one element in the state’s arsenal of control is detention. Since the end of the 1980s, the detention of asylum seekers and other migrants has increased throughout Europe and the West.²³ In the case of immigration, it is a controversial practice that has been highly criticised both in the UK and the US. Daniel Wilsher, in his book *Immigration Detention: Law, History, Politics* (2008) stated that

the detention of foreigners under the auspices of immigration powers has grown enormously in both its scope and scale during the last thirty years. In a pattern repeated throughout developed nations, and increasingly copied by others, unauthorized or rejected foreigners are being held in prison-like facilities for extended periods without serious legal controls or accountability. The causes of this rise in immigration-related detention are many, but the results are clear; imprisonment of individuals without the normal due process safeguards commonly demanded in liberal democracies is now taking place on a vast scale.²⁴

²¹ Matthew J. Gibney and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 7. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

²² Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 6. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

²³ Alice Bloch, and Liza Schuster, *At the extremes of exclusion: Deportation, detention and dispersal*. *Ethnic and Racial Studies* Vol. 28 No. 3, 500. May 2005

²⁴ Daniel Wilsher. “Immigration Detention: Law, History, Politics.” *Immigration Detention: Law, History, Politics*, Cambridge University Press, Cambridge, 2014, p. ix.

The Migration Observatory in the UK defines detention as the act of “detaining asylum seekers and other migrants for administrative purposes, typically to establish their identities, or to facilitate their immigration claims resolution and/or their removals.”²⁵ Its aim is to temporarily detain those who do yet have the authorisation to enter but also those who no longer hold that authorisation. Wilsher develops this idea and shows that

the greatest growth in immigration detention in modern times has been that applied to a new category – those who are unauthorized. They are termed variously ‘irregular’, ‘undocumented’ or ‘illegal’ in different contexts, but usually share a lack of immigration authorization to enter or remain in a state²⁶

Unlike imprisonment, which is a criminal procedure, detention is an administrative process²⁷ and a migrant may be detained for multiple reasons:²⁸

- to carry out removal
- to establish a person’s identity or basis of claim
- where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release, i.e. a risk of absconding
- where there is a risk of harm to the migrant or the public

There are also other socio-economic factors that impact the likelihood of detention. It is an effective way of “preventing social integration” for immigrants who may not be authorised to remain in the country in the long term. An example that is often given by the authorities is that of asylum seekers who live in the country pending a decision on their application. This process can take months, and even years, and will inevitably see the migrant interact with the community in which they live, and form social connections. In turn, this community then fights and petitions the government to allow the migrant to stay. One tool that is used to avoid these interactions is detention. Detention is also a useful tool to avoid absconsion and therefore losing track of an individual’s location.²⁹ A migrant who is allowed into the country pending a decision

²⁵ Stephanie J. Silverman. “Immigration Detention in the UK.” *Migration Observatory*, 1 Sept. 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/. Accessed 17 Oct. 2016.

²⁶ Daniel Wilsher. “Immigration Detention: Law, History, Politics.” *Immigration Detention: Law, History, Politics*, Cambridge University Press, Cambridge, 2014, p. xi.

²⁷ This can be of huge importance, as it limits the rights of the detainee. Due process rights and legal representation are more limited than in the case of criminal detention.

²⁸ Stephanie J. Silverman. “Immigration Detention in the UK.” *Migration Observatory*, 1 Sept. 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/. Accessed 17 Oct. 2016.

²⁹ Matthew J. Gibney. “Asylum and the Expansion of Deportation in the United Kingdom.” *Government and Opposition*, Blackwell Publishing Ltd, 152-3. 15 Apr. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00249.x/full. Accessed 9 Apr. 2017.

can easily disappear into the wild and be almost impossible to find. It must be noted that detention is not limitless and absolute, liberal norms affect the possibilities of detention notably for families and especially children. Child detention in many countries is forbidden. In the UK, it is an extremely controversial issue.³⁰ In 2015, 38 children were detained for at least three days.³¹ Ultimately, detention avoids the risks of people integrating into society as well as losing track of the location of certain individuals who might be candidates for deportation. The practice of detention is in turn highly related to Government escalation of deportation, as the deportation process rests largely on the ability to detain, notably those it considers unlikely to be granted asylum, as well as those it considers dangerous and wishes to remove.³²

C. Asylum

Deportation has been used by some countries since the 19th century. In their book on *Deportation and the liberal state*, Gibney and Hansen put forth that “in contemporary Europe and North America, it has gained new relevance through post-war asylum policy.”³³ Asylum is defined as “protection given by a country to someone fleeing from persecution in their own country.”³⁴ Asylum applications are a long and complicated process: an asylum seeker is someone who has applied for asylum and is awaiting a decision on whether they will be granted refugee status. An asylum applicant who does not qualify for refugee status may still be granted leave to remain in the UK for humanitarian or other reasons. An asylum seeker whose application is refused at initial decision may appeal the decision through an appeals process and, if successful, may be granted leave to remain.³⁵ In the United States, the refugee applicant must prove “actual fear.”³⁶ This means that applicants must have

³⁰ *Ibid.*

³¹ “The Work of the Immigration Directorates (Q1 2016).” *UK Parliament*, House of Commons Library, 27 July 2016, www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/151/151.pdf. Accessed 14 Sept. 2016. p.36

³² Matthew J. Gibney. “Asylum and the Expansion of Deportation in the United Kingdom.” *Government and Opposition*, Blackwell Publishing Ltd, 161. 15 Apr. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00249.x/full. Accessed 9 Apr. 2017.

³³ Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 9-10. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

³⁴ Oliver Hawkins. “Asylum Statistics.” *UK Parliament*, House of Commons Library, 30 Mar. 2017, researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01403. Accessed 17 Apr. 2017.

³⁵ *Ibid.*

³⁶ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

an honest and genuine fear of being persecuted for some immutable trait, such as religion, race, and nationality. Seekers of asylum must show a fear that membership in a social or political group has caused past persecution or has caused a well-founded fear that persecution will occur upon returning.³⁷

Asylum was at first a way of resettling communist defectors and then those fleeing conflict in communist countries (Hungary 1956, Czechoslovakia, 1968). Decolonization and conflicts in the post-WWII world led to a sudden surge in non-European refugees and asylum seekers. What's more, people were more aware of the disparities between rich and poor countries and travelling was made much easier and cheaper than ever before.³⁸ Whereas in the immediate aftermath of World War II, many Northern European countries actively recruited migrant labour, by the 1970s, most countries had changed their stances on immigration:

France, Germany, Switzerland, Scandinavia and the UK had all ended policies that encouraged or tolerated labour migration from Southern Europe and former colonies/the third world." Around the same time, even countries of permanent settlement, such Canada and Australia, found themselves cutting back on immigration, in part due to rising unemployment. The result was that the asylum system became one of the few remaining access points to the West.³⁹

This use of asylum has of course led to increasing scrutiny and legislation from countries on the receiving end of many asylum applications. But recent numbers on asylum and refugees have shown that this asylum applications are unlikely to stop. Instead they will continue to rise as the number of displaced people do. In 2015, the United Nations High Commissioner for Refugees (UNHCR) stated that by the end of 2014 almost 60 million people were either displaced within their country or had fled internationally.⁴⁰ It was the highest level ever recorded. In 2015 that number rose again to reach a new record of 65.3 million people.⁴¹ That is the equivalent of 1 in every 113 people on Earth. It is also higher than the entire population of the United Kingdom and approximately 20% of the population of the United States. By mid-

³⁷ Henry Han. "Immigration Law: An Overview." *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

³⁸ Matthew J. Gibney, and Randall Hansen. "Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom." *UNHCR*, United Nations, 9-10. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

³⁹ Matthew J. Gibney, and Randall Hansen. "Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom." *UNHCR*, United Nations, 9-10. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

⁴⁰ "Worldwide Displacement Hits All-Time High as War and Persecution Increase." *UNHCR*, 18 June 2015, www.unhcr.org/en-us/news/latest/2015/6/558193896/worldwide-displacement-hits-all-time-high-war-persecution-increase.html. Accessed 29 Oct. 2016.

⁴¹ "Global Forced Displacement Hits Record High." *UNHCR*, 20 June 2016, www.unhcr.org/afr/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html. Accessed 30 July 2016.

2014, there were 1.2 million asylum seekers worldwide. That number more than doubled to 3.2 million by the end of 2015.⁴²

Now that we have general information on the processes of deportation, detention and asylum, the rest of the chapter will delve into the specificities of the American and British systems on each of the three issues, continuing firstly with asylum, then deportation and finally detention.

II. ASYLUM, DEPORTATION, AND DETENTION IN THE UK AND THE US

A. Asylum

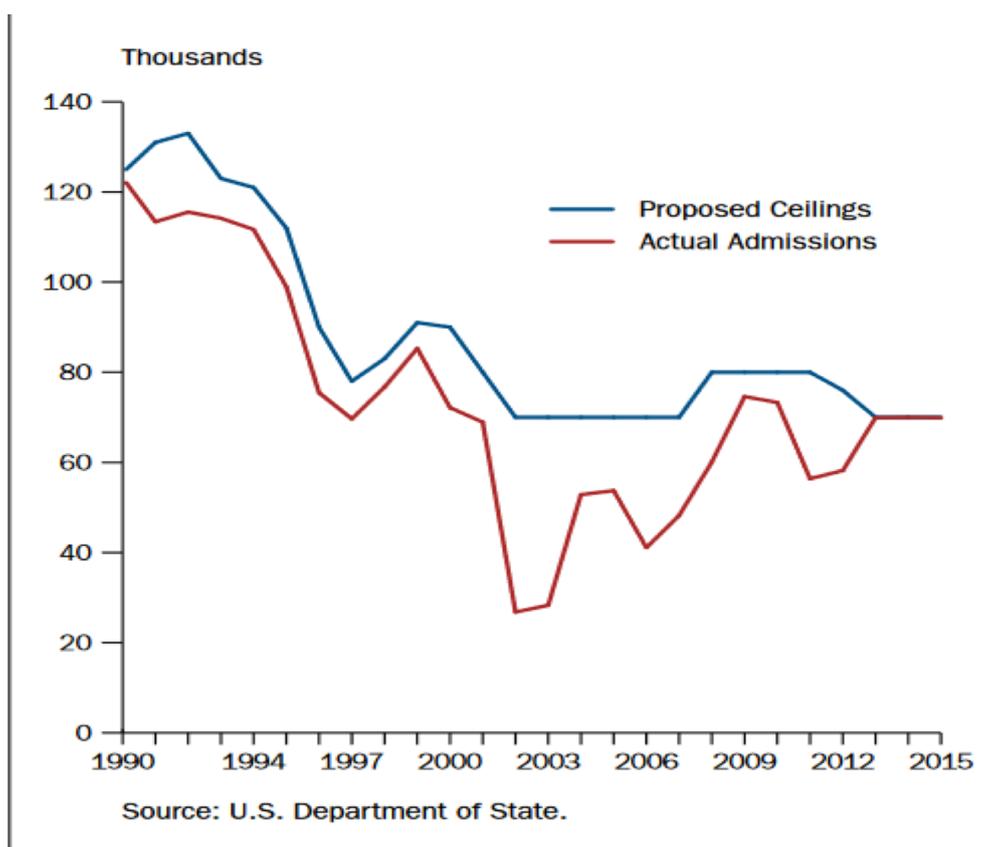
In the United States, the Obama administration responded to the humanitarian crisis by increasing the number of refugees the United States would accept each year. He increased the number from 70,000 in 2015 to 85,000 in 2016 and 110,000 in 2017.⁴³ This is the largest increase in refugee admissions in the country since 1990. The highest point for refugee admissions came in 1993 when 142,00 people were accepted into the country. Following that, the refugee admission ceiling (the maximum the country would accept) decreased steadily.⁴⁴ It was reduced to 70,000 in 2013 but back up in the last two years (see figure below).

⁴² “Global Trends 2015 Forced Displacement in 2015.” *UNHCR*, 20 June 2016, www.unhcr.org/576408cd7. Accessed 26 June 2016.

⁴³ Nahal Toosi, et al. “Obama Raises Refugee Goal to 110,000, Infuriating GOP.” *POLITICO*, 14 Sept. 2016, www.politico.com/story/2016/09/obama-refugees-228134. Accessed 8 Dec. 2016.

⁴⁴ “Trends in International Migration.” *OECD.org*, Organisation For Economic Co-Operation and Development, 184. 1998, www.oecd.org/els/mig/2717787.pdf. Accessed 29 Mar. 2016.

Figure 7: Refugee Admissions and Proposed Ceilings to the United States: 1990 to 2015



The United States has a history of refugee resettlement that dates to the Second World War. In 1948, the country passed the Displaced Persons Act⁴⁵ to address the European migration crisis.⁴⁶ The US passed further legislation a few years later through the Refugee Relief Act of 1953, and then the Fair Share Refugee Act in 1960. The United States is also a signatory of the 1967 United Nations Protocol relating to the Status of Refugees⁴⁷ which prohibits the United States from returning a refugee to a country where his or her life or freedom would more likely than not be threatened on account of a protected ground. In 1980, they signed the Refugee Act which amended the Immigration and Nationality Act to implement a geographically and politically neutral refugee definition. It defined the term refugee as “aliens with a fear of persecution upon returning to their homelands, stemming from their religion, race, nationality,

⁴⁵ *U.S. Immigration Legislation: 1948 Displaced Persons Act*. University of Washington-Bothell, library.uwb.edu/Static/USimmigration/1948_displaced_persons_act.html. Accessed 13 May 2016.

⁴⁶ “Displaced Persons Act of 1948.” *Immigration to the United States*, immigrationtounitedstates.org/464-displaced-persons-act-of-1948.html. Accessed 9 July 2016.

⁴⁷ “Convention and Protocol Relating to the Status of Refugees.” *UNHCR*, United Nations, www.unhcr.org/3b66c2aa10. Accessed 7 Apr. 2016.

membership in certain social groups, or political opinions.”⁴⁸ The 1980 Refugee Act also put in place formal refugee and asylum programs.⁴⁹ The United States was just one of the many countries in the world that changed its refugee policy and legislation during the 20th century. The UK also adapted its laws to the growing plight of refugees and asylum seekers. The United Kingdom signed the 1951 Refugee Convention, known as the Geneva Convention. It also passed The Human Rights Act 1998 which incorporated into UK law the rights contained in the European Convention on Human Rights. The UK therefore grants ‘Refugee’ status to successful asylum seekers.

The United Kingdom has, however, long seemed to be a reluctant receiver of refugees and asylum seekers. The Labour Government under Tony Blair made wholesale changes to British immigration law in 1997 passing six Acts of Parliament in 13 years, secondary legislation and other legislation with an immigration dimension. They passed legislation that focused on asylum controls and opened ways in for economic migrants.⁵⁰ Critics claim that asylum seekers were presented as a threat and that the consequence was hostility towards all migrants with debates about some migrants being ‘less wanted’ than others.⁵¹ Success on dealing with immigration was, however, increasingly related to fulfilling quotas. Being able to control asylum numbers was symbolic of the overall immigration system. Jack Straw, then Home Secretary, declared that “there is a limit on the number of applicants, however genuine, that you can take.”⁵² This had both its advantages and disadvantages for the government, “numerical targets were set for the time of the overall process and removals, which focused increased attention on the asylum process but also provided a simple means for opponents of the Government to attack them, that of missed targets.”⁵³

⁴⁸ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

⁴⁹ United States, Department of Homeland Security, Office of Immigration Statistics, and Nadwa Mossad. “Annual Flow Report: Refugees and Asylees 2015.”, Department of Homeland Security, Nov. 2016. www.dhs.gov/immigration-statistics. Accessed 21 Dec. 2016.

⁵⁰ Gareth Mulvey. “When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK.” *Journal of Refugee Studies*, Oxford University Press, 17 Nov. 2010, jrs.oxfordjournals.org/content/23/4/437.full. 437. Accessed 22 Oct. 2016.

⁵¹ Gareth Mulvey. “When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK.” *Journal of Refugee Studies*, Oxford University Press, 17 Nov. 2010, jrs.oxfordjournals.org/content/23/4/437.full. 437. Accessed 22 Oct. 2016.

⁵² Liza Schuster. “The Use and Abuse of Political Asylum in Britain and Germany.” *The Use and Abuse of Political Asylum in Britain and Germany*, Frank Cass, London, 2003, p. 170.

⁵³ Gareth Mulvey. “When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK.” *Journal of Refugee Studies*, Oxford University Press, 17 Nov. 2010, jrs.oxfordjournals.org/content/23/4/437.full. 439. Accessed 22 Oct. 2016.

Historically, the national origins and numbers of asylum seekers have evolved, while the reasons behind them, fleeing war and persecution across the globe, have remained constant:

asylum applications across Europe rose sharply in the late 1980s, and skyrocketed after the fall of the Berlin Wall and the outbreak of civil war in Yugoslavia. Between 1985 and 1995, more than five million claims for asylum were lodged in Western states. By 2000 the number of claims had dropped off somewhat to 412,700 for the states of Western Europe. Arrivals nonetheless remain extremely high by historical standards, and took off in late-1990s Britain.⁵⁴

Asylum applications rose gradually and peaked in the 1990s and early 2000s. That number dropped (see table below) but is on the rise again. In 2012, 29,367 people were granted asylum in the United States. By 2015, this number had fallen slightly to 26,124. The number of refugees⁵⁵ hit its post-2001 peak in 2009 at 76,600. In 2015, “69,920 refugees were admitted to the United States, virtually unchanged from the previous year.”⁵⁶ In the United Kingdom, successful asylum applicants have grown gradually from 4,906 in 2004 to 9,151 in 2015. Numbers did peak the previous year, in 2014, when 11,209 people were granted asylum in the UK. It is of course important to remember that the year asylum is granted is very often different to the year the application was submitted. Someone who is granted asylum in 2015 may well have originally applied in 2014, 2013 or even earlier.

In the United States, there are certain grounds for refusal of refugee status no matter the case. These include any “aliens who actively persecuted individuals of a certain race, political opinion, religion, nationality, or members of a certain social group.”⁵⁷ Asylum is also generally denied to anyone previously convicted of murder. Under international refugee law, no person has a categorical right to asylum. This is what allows countries to accept or refuse asylum seekers. However, countries must respect fundamental human rights, notably the principle of

⁵⁴ Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 4. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

⁵⁵ In the USA, applicants for refugee status are outside the United States, whereas applicants seeking asylum are either in the United States or arriving at a US port of entry. In the UK data on asylum seekers are considered separately from data on resettled refugees. Unlike asylum seekers, who make their own way to the UK to claim asylum, resettled refugees are identified outside of the country and brought here with the help of the UK government and the United Nations. However, in both countries, and across the globe, both terms are often used interchangeably.

⁵⁶ United States, Department of Homeland Security, Office of Immigration Statistics, and Nadwa Mossad. “Annual Flow Report: Refugees and Asylees 2015.”, Department of Homeland Security, Nov. 2016. www.dhs.gov/immigration-statistics. Accessed 21 Dec. 2016.

⁵⁷ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

non-refoulement, which is the practice of not forcing refugees or asylum seekers to return to a country in which they are liable to be subjected to persecution.⁵⁸

Britain signed the 1951 UN Convention and 1967 Protocol relating to the status of Refugees. They do, however, insist that whenever possible they will return asylum seekers to safe third countries or territories or even back to their home countries when safe, rather than offering them asylum.⁵⁹ Furthermore, the Labour Party under Tony Blair elected for detention “as a standard response for all failed asylum seekers” and undocumented migrants.⁶⁰ In the United States, asylum seekers whose application is refused and have exhausted all their appeals are expected to leave immediately and are generally placed in removal proceedings and either removed or detained until removal is possible.⁶¹ Both countries have responded to the issue of non-refoulement in different ways. Up until 2003, in the UK, those who would otherwise be removed were given the status of “Exceptional Leave to Remain” to provide them with some form of protection.⁶² Since April of 2003, “Exceptional Leave” have been replaced by two new forms of leave:

- Humanitarian Protection and
- Discretionary Leave

These were granted at the discretion of the Home secretary in “defined and tightly focused” circumstances.⁶³ Most importantly, this refugee status is temporary, valid for only five years and evolves according to the situation in the refugees’ home country.

Under the laws of the United States, “foreign citizens who have become disillusioned with their homeland cannot take temporary refuge within the United States.”⁶⁴ In fact, the main

⁵⁸ *Non-refoulement* provisions are included in several U.N. documents. See, e.g., 1951 Convention, *supra* note 53, art. 33; Declaration on Territorial Asylum, Dec. 14, 1967, art. 3, G.A. Res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6716 (1967).

⁵⁹ Mary Bosworth. “Border Control and the Limits of the Sovereign State.” *Sage Journals, Social & Legal Studies*, 1 June 2008, 205. journals.sagepub.com/doi/abs/10.1177/0964663908089611. Accessed 21 July 2016.

⁶⁰ *Ibid.*

⁶¹ “Appeals Process After a Denied Asylum Application.” *AllLaw.com*, www.alllaw.com/articles/nolo/us-immigration/appeals-process-denied-asylum-application.html. Accessed 26 June 2017.

⁶² “United Kingdom: Information on the Meaning of the Term ‘Exceptional Leave to Remain’ with Regards to a Person’s Immigration Status, on the Reasons for Which a Person Might Receive This Status and Whether There Are Any Provisions in Place to Re-Apply for ‘Exceptional Leave to Remain’ after Having Left the Country.” *Refworld*, Immigration and Refugee Board of Canada, 1 Dec. 1993, www.refworld.org/docid/3ae6ac7570.html. Accessed 11 Sept. 2016.

⁶³ “Exceptional Leave To Remain In The UK.” *Southern England Solicitors*, www.southernenglandsolicitors.com/exceptional-leave-to-remain-in-the-uk/. Accessed 12 Apr. 2016.

⁶⁴ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

refugee legislation, The Refugee Act of 1980 purposefully excluded the possibility of temporary refuge as “a form of refugee status that the US government will recognize.”⁶⁵ There is an important contrast between the two cases. The UK only ever giving temporary refuge, the US refusing to do so, instead offering refugee status that is essentially valid for life.⁶⁶ In the case of the United Kingdom, this has led to the erection of “a whole range of barriers designed to ensure that migrants do not reach the national territory”⁶⁷ in order to avoid the issue of irremovability (not being able to remove them once they have arrived).

Questions have been asked about the number of deportations compared to the number of failed asylum applications. In 2003, Gibney and Hansen asked why “while large numbers of asylum seekers arrive, and few are given refugee status, fewer still are forced to leave the country.”⁶⁸ They argued that “deportation only touches a small minority of those whom the state has formally forbidden from remaining on its national territory.”⁶⁹ As we have just mentioned, one of the reasons is the irremovability of some people who are given leave to remain under exceptional circumstances and are therefore in the country legally. We must therefore question why in the case of the UK, they are relatively ‘reluctant’ to accept asylum applications but fail to send back unsuccessful applicants. Gibney claims that part of this is strategic on behalf of the government. He claims that “asylum may have been a necessary focus for Britain’s deportation turn”⁷⁰ He firstly argues that

the putative damage to the credibility of asylum processes done by rejected asylum seekers remaining in the UK provided the government with a powerful argument to dampen criticism from those concerned with human rights in Westminster and beyond. Increasing deportation rates were defended as necessary to secure the

⁶⁵ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

⁶⁶ Refugees are admitted to the US as refugees and remain in that status for 12 months. They are authorized and expected to work during this time. After 12 months, they are required to apply to adjust their status to Legal Permanent Resident (commonly known as a “green card holder”).

⁶⁷ Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 14. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

⁶⁸ Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 4. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

⁶⁹ Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 4. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

⁷⁰ Matthew J. Gibney. “Asylum and the Expansion of Deportation in the United Kingdom.” *Government and Opposition*, Blackwell Publishing Ltd, 169. 15 Apr. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00249.x/full. Accessed 9 Apr. 2017.

credibility of the asylum system that human rights activists claimed to value so highly.⁷¹

Therefore, by using deportation against asylum seekers, despite their relatively small proportion of total immigrants, the Government can make deportation seem more acceptable in the eyes of the people. Gibney also states that

asylum was important because of the idea of the ‘deportation gap’. Asylum applications are officially registered, as are removals. These registrations can be used publicly to monitor the adequacy or inadequacy of government performance. In contrast, the number of illegal migrants cannot be determined, and thus the failings of the government are less obvious and less easily exploited.⁷²

Ironically, asylum, whose origin was to help migrants fleeing persecution, has been used to enhance the coercive powers of the state. Asylum seekers and refugees are certainly seen both in the UK and the US as an unnecessary drain on resources and oftentimes as a problem. Recent rhetoric in the US, UK, France and throughout Europe has focused on the “invasion of migrants”, many of whom are asylum seekers and refugees. But there has been much historic precedent to this. In 2006, Jack Straw defended the Home Office against criticism by arguing that

the fundamental problem with the Home Office is not the quality of the staff but the nature of the individuals it has to deal with.... They are dysfunctional individuals many of them—criminals, asylum seekers, people who do not wish to be subject to social control (Hansard 25 May 2006 Col 1641).⁷³

The same year, Blair stated that

the world is changing so fast that the reality we are dealing with—mass migration, organized crime, Anti-Social Behaviour—has engulfed systems designed for a time gone by. When we can’t deport foreign nationals even when inciting violence, the country is at risk⁷⁴

By linking migration with crime, violence and risk, the Prime Minister was clearly showing migrants in an unfavourable light. In a speech on criminal justice, he claimed that

each time someone is the victim of ASB, of drug related crime; each time an illegal immigrant enters the country or a perpetrator of organized fraud or crime walks free, someone else’s liberties are contravened, often directly, sometimes as part of wider society.⁷⁵

⁷¹ Matthew J. Gibney. “Asylum and the Expansion of Deportation in the United Kingdom.” *Government and Opposition*, Blackwell Publishing Ltd, 169. 15 Apr. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00249.x/full. Accessed 9 Apr. 2017.

⁷² *Ibid.*

⁷³ Gareth Mulvey. “When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK.” *Journal of Refugee Studies*, Oxford University Press, 17 Nov. 2010, jrs.oxfordjournals.org/content/23/4/437.full. 445-6. Accessed 22 Oct. 2016.

⁷⁴ “In Full: Tony Blair's Speech.” *BBC News*, BBC, 26 Sept. 2006, news.bbc.co.uk/2/hi/uk_news/politics/5382590.stm. Accessed 26 May 2016.

⁷⁵ “Prime Minister's Speech on Criminal Justice Reform.” *The Guardian*, Guardian News and Media, 23 June 2006, www.theguardian.com/politics/2006/jun/23/immigrationpolicy.ukcrime1. Accessed 26 May 2016.

This led inevitably to a polarised comparison between ‘good’ migrants and ‘bad’ migrants. Those who were wanted and welcome, and those who were not. This juxtaposition of good and bad led to Labour policy created on the basis that “economic value and social provision should act to encourage only the most wanted, while other migrants would face new restrictions.”⁷⁶ This led to John Reid, the Home Secretary, stating in early 2007 that “we have not been tough enough in policing access to such services as council housing, legal aid or NHS care’ (Guardian 24 February 2007).⁷⁷ He wanted to make living in the country illegally “ever more uncomfortable and ever more constrained.”⁷⁸

Furthermore, there is, both in the United States and United Kingdom, a use of the notion of ‘illegals’ to refer to any undocumented migrant. Both Mary Bosworth and Gary Mulvey agree that this terminology leads to a criminalization of undocumented aliens by using a “criminal justice imagery.”⁷⁹ It suggest that those who arrive without documentation or work without visas, are dangerous, undeserving and criminal. In many cases, “by being represented both as a threat and as ‘bogus’ claimants”, asylum seekers lose affective and legal ‘entitlements’ to British hospitality. Detention and expulsion are, for these people, considered appropriate.⁸⁰ This increase in detention and the expansion of the detention state under Labour was a clear sign of the criminalisation of asylum seekers:

despite usually maintaining that detention was only for those at risk of absconding (see for example Mike O’Brien Hansard 15 January 1998 Col 281), the Government at times argued that detention was a matter of capacity rather than principle. Jack Straw stated that ‘there are many more people who ought to be detained than can be detained’ (Hansard 27 July 1998 Col 48).⁸¹

In general, Labour immigration policy focused significantly on asylum seekers. Policy and rhetoric inevitably led to a dual immigration process in which “asylum seekers were contextualized as a threat and talked of in crisis language, while the numerically larger labour

⁷⁶ Gareth Mulvey. “When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK.” *Journal of Refugee Studies*, Oxford University Press, 17 Nov. 2010, jrs.oxfordjournals.org/content/23/4/437.full. 447. Accessed 22 Oct. 2016.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Mary Bosworth. “Border Control and the Limits of the Sovereign State.” *Sage Journals*, Social & Legal Studies, 1 June 2008, 205. journals.sagepub.com/doi/abs/10.1177/0964663908089611. Accessed 21 July 2016.

⁸⁰ Mary Bosworth. “Border Control and the Limits of the Sovereign State.” *Sage Journals*, Social & Legal Studies, 1 June 2008, 205. journals.sagepub.com/doi/abs/10.1177/0964663908089611. Accessed 21 July 2016.

⁸¹ Gareth Mulvey. “When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK.” *Journal of Refugee Studies*, Oxford University Press, 17 Nov. 2010, jrs.oxfordjournals.org/content/23/4/437.full. 442. Accessed 22 Oct. 2016.

migration numbers were welcomed by all the political parties.”⁸² In the UK, the figures on deportation include every individual person deported. This includes failed asylum seekers, but also visa-overstayers, those convicted of a crime and non-asylum seeking clandestine migrants. Up until recently data was poor on differentiating between these different categories. Since 2010, under the coalition and conservative governments, there has been an improvement in data collection and therefore more precision in what is available.

Ultimately, despite all the rhetoric about asylum seekers, they represent a small amount of those deported, and have seen their numbers half since 2006. The case of asylum is also important because it “involves individuals who have identified themselves to the state”, in contrast with, for instance, undocumented migrants.⁸³ It is, however, important to note how the deportation of asylum seekers was used to destigmatize, in a sense, deportation, and help increase the number of deportations while attempting to reduce public outcry.

B. Deportation

We discussed earlier the general elements of deportation, here we shall consider the specificities of the American and British systems. In 1798, the earliest form of deportation legislation for either country came in the USA, in the form of the Alien and Sedition Acts.⁸⁴ It gave power to the President of the United States to order the departure from the territory of “all aliens deemed dangerous”⁸⁵ According to Daniel Wilsher, the Act was enacted in a

climate of fear over European, particularly French Jacobin, radicalism and justified as a measure to protect national security. It gave power to the president to order aliens to depart where he judged them to be treasonable or dangerous to peace or safety.⁸⁶

The United Kingdom did not enact immigration law until 1905, a result of changing attitudes towards alien immigrants. Wilsher states that these included

⁸² Gareth Mulvey. “When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK.” *Journal of Refugee Studies*, Oxford University Press, 17 Nov. 2010, jrs.oxfordjournals.org/content/23/4/437.full. 444. Accessed 22 Oct. 2016.

⁸³ Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 6. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

⁸⁴ “Alien and Sedition Acts.” *Library of Congress*, Primary Documents in American History, www.loc.gov/rr/program/bib/ourdocs/Alien.html. Accessed 26 June 2016.

⁸⁵ United States, Congress, Bureau of Immigration and Customs Enforcement. “ENDGAME Office of Detention and Removal Strategic Plan, 2003 - 2012.” *ENDGAME Office of Detention and Removal Strategic Plan, 2003 - 2012*, American Civil Liberties Union of Massachusetts. 2-1. aclum.org/sites/all/files/education/ice/endgame.pdf. Accessed 30 Dec. 2015.

⁸⁶ Daniel Wilsher. “Immigration Detention: Law, History, Politics.” *Immigration Detention: Law, History, Politics*, Cambridge University Press, Cambridge, 2014. 3.

fears about anarchists and violent political activists, anti-semitism towards poor Jewish immigrants and economic depression leading to competition for jobs. Conditions in the East End of London, where many Russian Jews were crowded together in poor conditions, allowed local politicians to call for general restrictions on immigration.⁸⁷

Ultimately, it led to a broad parliamentary consensus that aliens could be subject to detention and expulsion. The Aliens Act 1905⁸⁸ defined the conditions for deporting alien individuals, for the first time, in the section titled Expulsion of Undesirable Aliens. The act states that “the Secretary of State may, if he thinks fit, make an order [...] requiring an alien to leave the United Kingdom within a time fixed by the order, and thereafter to remain out of the United Kingdom.” The legislation also permitted “expulsion orders for aliens convicted of felonies or those in receipt of parochial relief, without ostensible means or living in overcrowded or unsanitary conditions.”⁸⁹ The timing of the first American legislation owes much to the nature of the American nation as a ‘country of immigrants’. Immigration that needed some form of regulation. Great Britain, long being a low-immigration and a high-emigration country, did not necessarily have a need to legislate deportation.

Fifty years after the British implemented their first immigration law, the US Congress considerably extended the federal expulsion power to include a wider category of aliens via the Immigration and Nationality Act 1952 (INA). The INA included “19 general classes of deportable aliens” and defined the grounds that could be used to justify exclusion (at the time of application for admission) to the United States. These included health, criminal, moral, and economic grounds.⁹⁰ This was the beginning of the expansion of deportation powers and the ability of the state to remove unwanted aliens. The next step in the process for the United States, was in 1955, when the Office of Detention and Removal (DRO) was established, with the aim to carry out the task of deportations. This task now lies with the DRO’s successor, the Enforcement and Removal Operations (ERO) which is under the responsibility of US Immigration and Customs Enforcement (ICE).

While migration in the immediate post-WW2 period was often incentivised and encouraged, a change occurred in the 1970s. Wilsher stated that

⁸⁷ *Ibid.* p. 36.

⁸⁸ “Aliens Act 1905.” *United Settlement*, www.uniset.ca/naty/aliensact1905.pdf. Accessed 10 Feb. 2016.

⁸⁹ Daniel Wilsher. “Immigration Detention: Law, History, Politics.” *Immigration Detention: Law, History, Politics*, Cambridge University Press, Cambridge, 2014, p. 41.

⁹⁰ United States, Congress, Bureau of Immigration and Customs Enforcement. “ENDGAME Office of Detention and Removal Strategic Plan, 2003 - 2012.” *ENDGAME Office of Detention and Removal Strategic Plan, 2003 - 2012*, American Civil Liberties Union of Massachusetts. 1-2. aclum.org/sites/all/files/education/ice/endgame.pdf. Accessed 30 Dec. 2015.

a new and diffuse climate of fear over migration emerged. Those simply entering or arriving without permission, whether seeking asylum or economic opportunity, became seen as a ‘security’ threat.

(...)

Justification was sought in a range of *bureaucratic instrumental* goals; as a deterrent to irregular migration outside of permitted channels, to secure removal or maintain the ‘integrity’ of immigration laws and as a form of public or national security precaution.⁹¹

In the UK, this led to the passage of the Immigration Act 1971. The Act provides the power for the Secretary of State to make or revoke a deportation order. In the US, this eventually led to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. It expanded the grounds of deportation for criminal matters, increasing the number of crimes that made people subject to removal.

As previously mentioned, changes made by the Home Office, in the UK in 2008, introduced a new category of foreign national offender (FNO) which creates grounds for deportation for anyone falling into that category. Since then, nationals from outside the European Economic Area who are convicted of a crime in the UK and receive a prison sentence of 12 months or more fall under the “automatic” deportation provisions of the UK Borders Act 2007.⁹² Since its creation in 2012, Immigration Enforcement (IE) then carries out the task of deporting the foreign national back to their country of origin.

These legislative texts and government directives have led to an increase in the number of removals carried out by both countries compared to the 20th century, albeit with removal numbers falling in the second decade of the 21st century. Emanuela Paoletti, in her study on deportation, non-deportability and ideas of membership, stated that since 1925 in the US, the number of people subject to deportations has exceeded 46 million, with more than 44 million people actually ordered to leave.⁹³ Since 1997, the US has seen the numbers of deportations almost triple, from 114,432 in 1997 to 319,382 in 2007.⁹⁴ This trend continued under Obama during his first term, with ICE reporting the removal of 369,221 aliens in 2008 (an average of more than 1,000 deportations a day) and 409,849 in 2012. Since then deportations have

⁹¹ Daniel Wilsher. “Immigration Detention: Law, History, Politics.” *Immigration Detention: Law, History, Politics*, Cambridge University Press, Cambridge, 2014, p. 57

⁹² Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 9. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

⁹³ Warning: This does not mean that 44 or 46 million people were actually deported.

⁹⁴ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 11. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

decreased gradually to 240,255 in 2016.⁹⁵ As for the United Kingdom, since 2005⁹⁶, enforced removals have gradually declined (see table below). In 2015, 12, 056 people were deported compared to 20,808 in 2005. In 2015, 30% (12,056 people) left the UK via enforced removal. Meanwhile, 35% (14,206 people) departed and notified the UK Government, 4% (1,635) left through Assisted Voluntary Return programmes, with the remaining 32% (12,999) classified as ‘other confirmed departures’.⁹⁷ This peak and decline is mostly due to the high number of asylum applications in the 1990s and early 2000s that ultimately led to deportation but took a significant amount of time to be processed. The United States is subject to a similar phenomenon. Indeed, voluntary departures, defined as “the departure of an alien from the United States without an order of removal”⁹⁸ correspond to many more returns than deportation as seen for the dates 1982-2011 in the figure below.

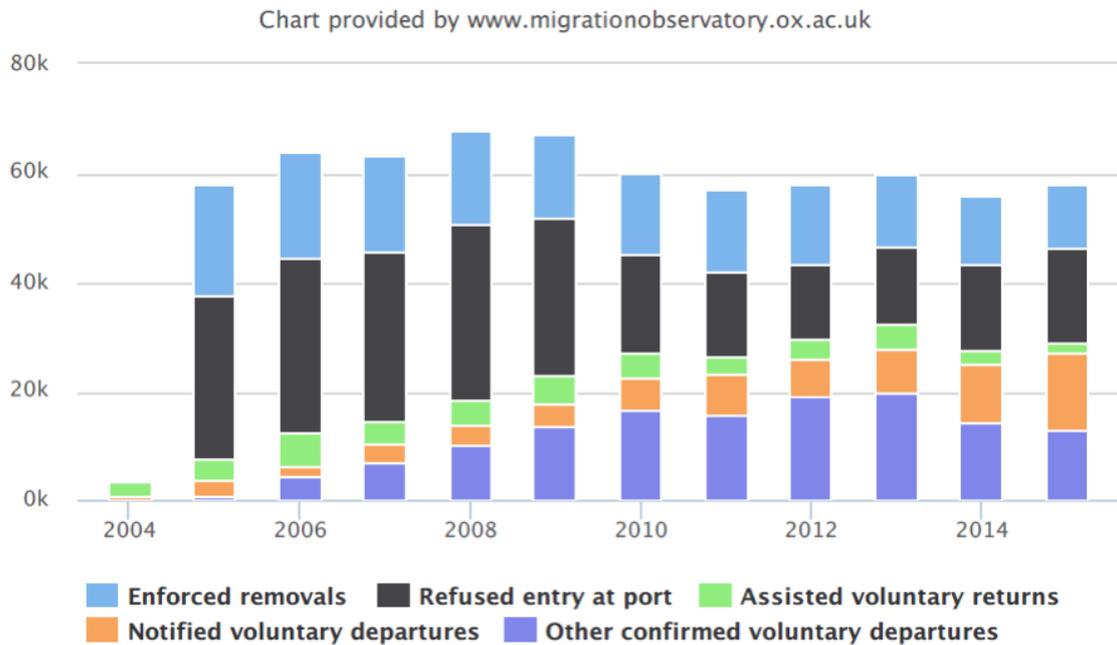
⁹⁵ “FY 2016 ICE Immigration Removals.” *ICE*, www.ice.gov/removal-statistics/2016. Accessed 12 Jan. 2017.

⁹⁶ Data on removals come from Home Office administrative sources. Home Office data classify removals and departures mainly by the categories discussed above, which are essentially procedures used by the government for ensuring departures. Since data collection has changed dramatically and might still be improving, it is impossible to draw firm conclusions about trends in removals and departures since 2005: any increases might be the result of changing data collection rather than due to actual increases in departures.

⁹⁷ Scott Blinder, and Alexander Betts. “Deportations, Removals and Voluntary Departures from the UK.” *Migration Observatory*, University of Oxford, 3. 19 July 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/deportations-removals-and-voluntary-departures-from-the-uk/. Accessed 9 Sept. 2016.

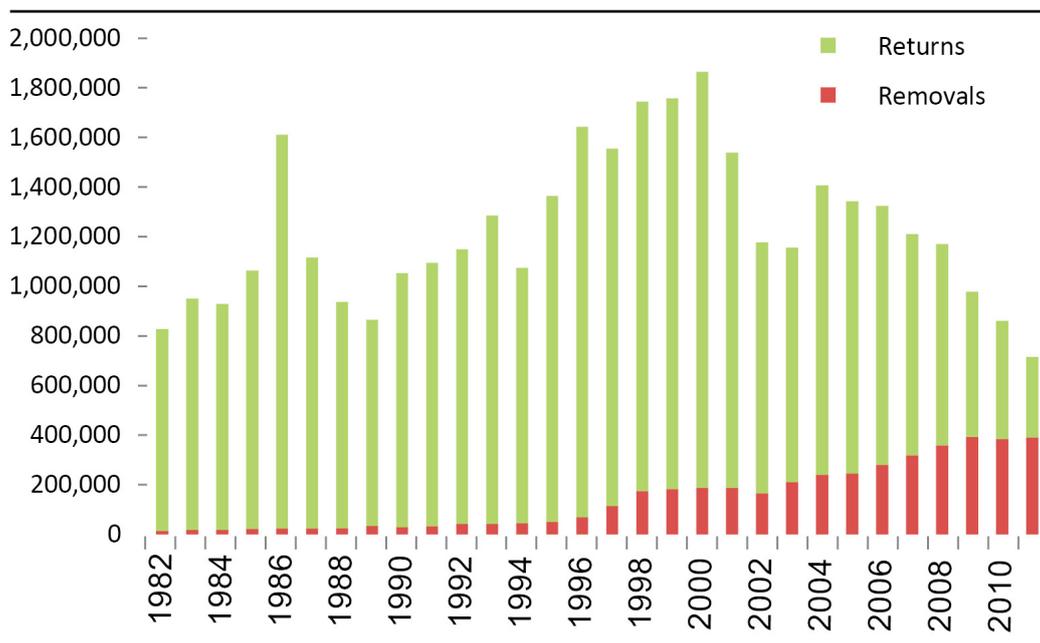
⁹⁸ “Definition of Terms.” *Department of Homeland Security*, 3 Nov. 2016, www.dhs.gov/immigration-statistics/data-standards-and-definitions/definition-terms. Accessed 25 Jan. 2017.

Figure 8: Removals and Departures by Type, 2004-2015 (UK)



Source: Home Office, Immigration Statistics, Q1 2015, table rv.01

Figure 9: Deportations: 1982-2011 (USA)



Source: DHS

Deportations in the last few years have slightly decreased, but overall levels are still much higher than any time in British history. In 2006, the British Prime Minister Tony Blair celebrated the strong increases in number of deportations, notably of rejected asylum seekers. Blair's government had the aim of "prevent[ing] fraudulent asylum seekers misusing the

asylum route to gain entrance to the British labour market.”⁹⁹ Britain has not been the only country to increase deportations. As already stated, deportation used to deal with FNO’s and asylum seekers has increased in “many Western countries, including (...) the Netherlands, Germany, Canada, Australia” and the United States.¹⁰⁰ In the US, the impact of government policy on deportation of criminals, has been a considerable increase in the practice since the 1990s. According to a study by the Center for Migration Studies of New York:

From 1900 through 1990, removals remained fairly flat, averaging about 20,000 a year. Beginning in 1990, the number of persons removed began to slowly increase, reflecting congressional initiatives to make it easier to remove permanent resident aliens who have committed aggravated felonies. From 1990 through 1995, deportations averaged about 40,000 a year. Then, in 1996, following the passage of IIRIRA, the number of deportations exploded and a long-standing pattern of stability was interrupted. From 1996 through 2005, yearly deportations averaged more than 180,000. In 2005, the number of persons formally removed from the United States reached 208,521.¹⁰¹

Ultimately the passage of IIRIRA and subsequent legislation by the American Congress has increased deportations while simultaneously reducing relief for immigrants with family ties in the US. The laws passed gradually curtailed judicial review and restricted due process.¹⁰² Immigrant’s rights are left with less protection than in the past.

The UK government has long seen removals as a “cornerstone of its migration policy.”¹⁰³ In 2005, Charles Clarke, then Home Secretary, declared in parliament:

We want to make a major new effort to increase the removal of failed asylum seekers. We will use £30 million of savings from the asylum budget to recruit 500 new front-line staff and we will continue our efforts to reach more agreements with major source countries on returns, building on the considerable successes that we have already achieved. That will help us, by the end of the year, to return more failed asylum seekers than there are new unsuccessful claims (Hansard, 5 July 2005).¹⁰⁴

⁹⁹ Matthew J. Gibney. “Asylum and the Expansion of Deportation in the United Kingdom.” *Government and Opposition*, Blackwell Publishing Ltd, 146. 15 Apr. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00249.x/full. Accessed 9 Apr. 2017.

¹⁰⁰ Matthew J. Gibney. “Asylum and the Expansion of Deportation in the United Kingdom.” *Government and Opposition*, Blackwell Publishing Ltd, 146. 15 Apr. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00249.x/full. Accessed 9 Apr. 2017.

¹⁰¹ Jacqueline Hagan, et al. “U.S. Deportation Policy, Family Separation, and Circular Migration.” *International Migration Review*, Blackwell Publishing Inc, 5 Mar. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1747-7379.2007.00114.x/abstract. Accessed 6 Apr. 2016. p.66

¹⁰² *Ibid.* p.65

¹⁰³ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 10. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

¹⁰⁴ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 10. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

These declarations have been accompanied, before and since, by political rhetoric that is often unsympathetic towards those concerned. Parliamentary debates have often included alarmist and “securitised” rhetoric as well as including pejorative terms like deportation ‘tipping points’ and ‘setting targets for deportation’. In 2009, Phil Woolas, then Minister of State for Borders and Immigration stated:

According to the [UK Border] Agency's own provisional internal management information, [...], over 5,000 foreign national prisoners were deported in 2008. This means that the UK Border Agency yet again exceeded its target for the year as well as exceeding the previous year's record number of removals and deportations of foreign national prisoners (Hansard, 10 February 2009).¹⁰⁵

In the United States, however, political rhetoric is divided considerably between pro-immigration and anti-immigration stances, more so perhaps than in the UK. Furthermore, unlike the UK, the government does not set specific deportation targets to be met. Rather it has required the DHS to prioritise certain groups of immigrants. This prioritisation shall be the focus of the final chapter. According to Gibney and Hansen, this focus on numbers is a particularity of the British system. They state that a “particular feature of British deportation policy, unknown in Canada or Germany, is an obsession with numbers: the government sets (often unrealizable) deportation targets and the Home Office seeks to reach them.”¹⁰⁶ In her book *States Against Migrants: Deportation in Germany and the United States*, Antje Ellermann stated that “absolute numbers of deportation are rarely indicative of state capacity because they aggregate factors that determine the degree of difficulty of deportation.”¹⁰⁷ Paoletti talks about the creative response to such difficulties and to “a range of legal and administrative constraints”.¹⁰⁸ They have for example created a new restricted immigration status as an alternative to leave to remain for persons who the Government wishes to deport but who cannot be removed from the UK for human rights reasons.¹⁰⁹ This is one solution to the problem of irremovability. The Government in the UK does not want leave to remain be given simply because removal is not possible. It applies notably to people whom the state cannot remove but

¹⁰⁵ *Ibid.*p.10

¹⁰⁶ Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 8. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

¹⁰⁷ Antje Ellermann. (2009). *States Against Migrants: Deportation in Germany and the United States*. Cambridge, UK: Cambridge University Press

¹⁰⁸ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 10. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

¹⁰⁹ *Ibid.*p.10

who are considered to be a “danger to the community (Hansard, 30 April 2008)”.¹¹⁰ Inevitably, cases of irremovability and the increasing complexity of laws and regulation has also given rise to new “legal limbos” in the form of non-deportability.¹¹¹ Non-deportable migrants are both prevented from leaving the country but also from benefitting from full membership in the country. This amounts to *de facto* or *de jure* statelessness.

The effect of deportation is clear. In the US, an immigrant who has been deported can be barred from re-entry into the country for a significant period. According to current US enforcement policy, deportation orders may “bar a deportee from reentering the United States for anywhere from 5 years to life.”¹¹² In the UK, since 2008, an individual who is removed from the country “may not apply for a visa for a period of 1, 5 or 10 years, depending on whether they left under their own volition, or whether they were removed.”¹¹³ The threat of being refused entry if they are removed by force encourages immigrants to depart voluntarily and partly explains the increase in voluntary departures in recent years. In the US, voluntary departures represent over 12 million people between 2000 and 2015.¹¹⁴ Voluntary departures, in contrast to formal removals, are frequent in situations where US border patrol agents have made the apprehension. Under voluntary departure proceedings, persons waive their rights to a hearing; in doing so, they can later submit an application for admittance without penalty.¹¹⁵ In the United Kingdom, between 2004 and 2016 voluntary returns represented 277,776 people.¹¹⁶

In both countries, these returns and removals can have a significant impact on families because family separation can in some cases last a lifetime, or at the minimum a number of years. According to a 2008 study by the Center for Migration Studies of New York

the United States has in place a deportation policy that fails to recognize that many of the immigrants that are being targeted for deportation are settlers, with long-established work and family ties. In many cases, the deportation and subsequent permanent separation from family members is based on a minor immigration

¹¹⁰ *Ibid.*p.10

¹¹¹ *Ibid.*p.9

¹¹² Jacqueline Hagan, et al. “U.S. Deportation Policy, Family Separation, and Circular Migration.” *International Migration Review*, Blackwell Publishing Inc, 5 Mar. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1747-7379.2007.00114.x/abstract. Accessed 6 Apr. 2016. 76

¹¹³ “Deportation from Britain.” *InBrief.co.uk*, www.inbrief.co.uk/immigration-law/removal-from-the-uk/. Accessed 12 Apr. 2017.

¹¹⁴ United States, Congress, Office of Immigration Statistics. “2015 Yearbook of Immigration Statistics.” *2015 Yearbook of Immigration Statistics*, 2016. 103.

¹¹⁵ Jacqueline Hagan, et al. “U.S. Deportation Policy, Family Separation, and Circular Migration.” *International Migration Review*, Blackwell Publishing Inc, 5 Mar. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1747-7379.2007.00114.x/abstract. Accessed 6 Apr. 2016. 66

¹¹⁶ “Returns.” *GOV.UK*, Home Office, 23 Feb. 2017, www.gov.uk/government/publications/immigration-statistics-october-to-december-2016/returns. Accessed 25 Mar. 2017.

violation or crime for which the migrant has served time. Because deportation severs the migrant from his or her work and thus from income-generating activities, the separation poses huge economic costs to the family members in the US household, who ironically may become more dependent on the US government for assistance in the absence of the breadwinner.¹¹⁷

In the UK, deportations are generally only carried out when they are considered conducive to the public good or if their asylum application has failed. However, there are cases where people are not considered dangerous and who have lived in the country for long periods are forcibly removed for falling out of status or minor offences.¹¹⁸

It is interesting also to analyse demographic change in immigrant deportees. Between 2009 and 2015, 2.08 million people were deported from the United States. The clear majority of these, 73%, were from North America. 1.36 million people were returned to Mexico and 179,801 to Canada. Mexicans represented 65% of all deportations since 2009.¹¹⁹ A 2006, report by the US DHS, stated that in 2005

85 percent of all immigrants deported from the United States in F[inancial] Y[ear] 2005 were from Mexico and Central America, and the majority of these immigrants were deported for noncriminal reasons, such as immigration violations, use of fraudulent documents, and petty crimes that were committed years earlier¹²⁰

This, however, has since changed, as we will see in the next chapter as the Department of Homeland Security has since changed its tactics, prioritising certain categories of deportable immigrants over others. In the UK, in 2016 the highest number of enforced returns was for Albanian nationals, 1,626 people were deported, 13% of the country's total.¹²¹ The second highest was nationals of Romania, 1,589, also 13% of the total. The UK is in a similar situation to 2005 US, where the bulk of people deported are not convicted criminals but immigration offenders in cases of overstayed visas or entering the country without authorisation from the proper authorities. The Home Office has reported the number of FNO's deported each year since 2009. In 2015, 5,602 foreign national offenders were removed from the UK. These

¹¹⁷ Jacqueline Hagan, et al. "U.S. Deportation Policy, Family Separation, and Circular Migration." *International Migration Review*, Blackwell Publishing Inc, 5 Mar. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1747-7379.2007.00114.x/abstract. Accessed 6 Apr. 2016. p.84

¹¹⁸ Martin Evans. "Grandmother Who Has Been Married to Briton for 27-Years Is Deported to Singapore with Just £12 in Her Pocket ." *The Telegraph*, Telegraph Media Group, 27 Feb. 2017, www.telegraph.co.uk/news/2017/02/27/grandmother-has-married-briton-27-years-deported-singapore-just/. Accessed 24 Mar. 2017.

¹¹⁹ United States, Congress, Office of Immigration Statistics. "2015 Yearbook of Immigration Statistics." *2015 Yearbook of Immigration Statistics*, 2016, p.109

¹²⁰ Jacqueline Hagan, et al. "U.S. Deportation Policy, Family Separation, and Circular Migration." *International Migration Review*, Blackwell Publishing Inc, 5 Mar. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1747-7379.2007.00114.x/abstract. Accessed 6 Apr. 2016. p.66

¹²¹ "Returns." *GOV.UK*, Home Office, 23 Feb. 2017, www.gov.uk/government/publications/immigration-statistics-october-to-december-2016/returns. Accessed 25 Mar. 2017.

numbers have fluctuated between 4,600 and 5,600 since 2009, when these statistics became available.¹²²

In the UK, the majority of those who are removed from the country are those who have first been detained by the state. Detained immigrants can include FNO's, failed asylum seekers, asylum seekers who are waiting for a decision, documented migrants and more.¹²³ Questions must be asked of how detention works and compares in the two cases, and what impact it has on deportation.

C. Detention

The first piece of legislation setting conditions for detention in the United Kingdom was in the Aliens Restriction (Amendment) Act 1919¹²⁴ It stated that

a person who is guilty of an offence against this Act shall be liable on summary conviction to a fine not exceeding one hundred pounds or to imprisonment, with or without hard labour, for a term not exceeding six months, or, on a second or subsequent conviction, twelve months, or, in either case, to both such fine and imprisonment.¹²⁵

The powers of detention were then extended in the 1971 Immigration Act.¹²⁶ It gave power to immigration officers to detain

persons arriving in the UK while a decision is being made whether to grant leave to enter; those refused leave to enter or who are suspected of having been refused leave to enter pending directions for their removal; illegal entrants and those reasonably suspected of being illegal entrants, pending directions to remove and actual removal; and those found to be in breach of conditions attached to their leave to enter (including overstaying).¹²⁷

While the UK has expanded its detention capacity since the 1970s, the UK government has never adopted legislation requiring mandatory detention. Instead, detention policies are made by governments acting under statutory powers. Daniel Wilsher argues that the consequence is

¹²² Scott Blinder, and Alexander Betts. "Deportations, Removals and Voluntary Departures from the UK." *Migration Observatory*, University of Oxford, 3. 19 July 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/deportations-removals-and-voluntary-departures-from-the-uk/. Accessed 9 Sept. 2016.

¹²³ Matthew J. Gibney, and Randall Hansen. "Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom." *UNHCR*, United Nations, 8. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

¹²⁴ "Aliens Restriction (Amendment) Act 1919." *Legislation.gov.uk*, Queen's Printer of Acts of Parliament, www.legislation.gov.uk/ukpga/Geo5/9-10/92/enacted. Accessed 25 May 2017.

¹²⁵ *Ibid.*

¹²⁶ "Immigration Act 1971." *Legislation.gov.uk*, Statute Law Database, 1 Jan. 1983, www.legislation.gov.uk/ukpga/1971/77. Accessed 14 Mar. 2016.

¹²⁷ Alice Bloch and Schuster, Liza. *At the extremes of exclusion: Deportation, detention and dispersal*. Ethnic and Racial Studies Vol. 28 No. 3, 499. May 2005.

that “detention decisions have always been made by executive officers. The absence of judicial approval for detention has led to increasing arbitrariness, particularly as detainee numbers have risen.¹²⁸ According to Bloch and Schuster, “powers to detain are very wide and there is no automatic or independent scrutiny of the lawfulness, appropriateness or length of detention.”¹²⁹ The use of detention was increased by the implementation of the 1999 Immigration and Asylum Act.¹³⁰ Its effect was a significant increase in the number of detentions and therefore the necessity for an equivalent increase in detention capacity. Indeed, detention became a key aspect of asylum policy. The government retained old policy in which detention was used prior to removal. But new policy called for detention of asylum seekers pending a decision of their case if that decision could be made rapidly. Since the passage of the act, a multitude of new detention centres, holding centres, and removal centres have opened across the country.¹³¹

In the US, immigration detention was almost inexistent before the 1980s. Prior to that, on average only 30 people found themselves in immigration detention per day. This is in stark opposition to the change that came in the 1990s. Successive federal and state laws led to the building of a new prison every 15 days.¹³² In 1996, President Bill Clinton signed the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). These laws had an immediate impact. In 1996, 8,500 people were in detention each day, in 1998, that number was at 16,000. The laws made it easier to detain immigrants and harder to release them once in detention.

In 2009, the Obama Administration reformed the detention system, leading to significant increases in detention. That year approximately 383,000¹³³ people were detained, this dropped to 363,000 in 2010¹³⁴ but then jumped back up to 429,000 in 2011.¹³⁵ In the most recent data, from 2014, the United States Department of Homeland Security declared to have detained

¹²⁸ Daniel Wilsher. “Immigration Detention: Law, History, Politics.” *Immigration Detention: Law, History, Politics*, Cambridge University Press, Cambridge, 2014, p. 79

¹²⁹ Alice Bloch and Schuster, Liza. *At the extremes of exclusion: Deportation, detention and dispersal*. Ethnic and Racial Studies Vol. 28 No. 3, 499. May 2005

¹³⁰ “Immigration and Asylum Act 1999.” *Legislation.gov.uk*, Statute Law Database, 22 Nov. 1999, www.legislation.gov.uk/ukpga/1999/33/section/2. Accessed 17 Sept. 2015.

¹³¹ Alice Bloch and Schuster, Liza. *At the extremes of exclusion: Deportation, detention and dispersal*. Ethnic and Racial Studies Vol. 28 No. 3, 501. May 2005

¹³² “Immigration Detention Map & Statistics.” *Endisolation*, www.endisolation.org/resources/immigration-detention/. Accessed 19 Apr. 2016.

¹³³ “Immigration Enforcement Actions: 2009.” *Department of Homeland Security*, Aug. 2010, www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2009.pdf. Accessed 11 Apr. 2016.

¹³⁴ “Immigration Enforcement Actions: 2010.” *Department of Homeland Security*, June 2011, www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2010.pdf. Accessed 11 Apr. 2016.

¹³⁵ “Immigration Enforcement Actions: 2011.” *Department of Homeland Security*, Sept. 2012, www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2011.pdf. Accessed 11 Apr. 2016.

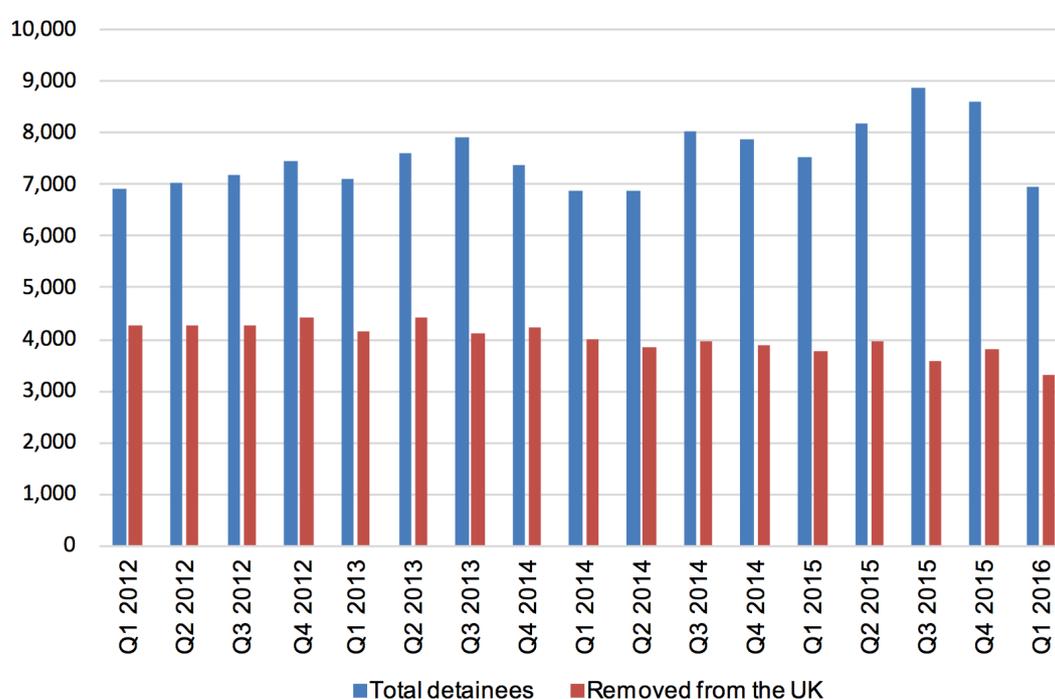
425,278 people. This is down from its record year of 2012, when 477,523 people were admitted to ICE detention facilities.¹³⁶

In the United Kingdom, migrants may be detained in many circumstances including:

- on arrival in the country to determine their right to entry
- upon presentation to an immigration office within the country
- during a check-in with immigration officials
- once a decision to remove has been issued
- after a prison sentence or following arrest by a police officer.¹³⁷

According to the Home Office, in Q1 2016, 48% of those who left immigration detention were removed from the country¹³⁸ (see table below).

Figure 10: Numbers leaving detention and removed from the country (UK)



Source: Home Office, [Immigration Statistics](#), January to March 2016, Table dt_05q

¹³⁶ “Immigration Enforcement Actions: 2014.” *Department of Homeland Security*, Jan. 2016, www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2014.pdf. Accessed 11 Apr. 2016.

¹³⁷ Stephanie J. Silverman. “Immigration Detention in the UK.” *Migration Observatory*, 1 Sept. 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/. Accessed 17 Oct. 2016.

¹³⁸ “The Work of the Immigration Directorates (Q1 2016).” *UK Parliament*, House of Commons Library, 27 July 2016, www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/151/151.pdf. Accessed 14 Sept. 2016. 34.

In the United States, Enforcement and Removal Operations, may detain migrants for multiple reasons including while pending removal. These detainees can include aliens who are arrested by ICE or who are apprehended by CBP and transferred to ICE for removal or removal proceedings. Summary removals come in three types:

- “expedited removal” for noncitizens who encounter immigration authorities at or near a US border with insufficient or fraudulent documents
- “reinstatement of removal” for noncitizens who unlawfully re-enter after a prior removal order
- “administrative removal,” for noncitizens without lawful permanent resident (LPR) status, but with a prior criminal conviction which is considered an “aggravated felony” under US immigration laws.

All three forms of summary removal impose compulsory detention. Removals under these summary processes now constitute approximately 75% of US removals.¹³⁹ As these removals have increased, so have the number of detentions that accompany them. According to the Center for Migration Studies of New York, while the increased detention capacity can partly explain the increasing numbers of detention, it cannot explain it on its own. They state that “greater turnover in the detained population, due to increasing summary removals, appears to be a significant contributor.”¹⁴⁰ CIVIC (Community Initiatives for Visiting Immigrants in Confinement), the national immigration detention visitation network declared they considered the detention system to be a “massive waste of taxpayer dollars.”¹⁴¹ On their website, they express their dismay at the ICE budget for detention approved by Congress

ICE estimates that it costs the government \$12,500 to deport each individual, but when the costs of apprehension, detention, legal processing, and transportation are combined, the government spends more than \$23,000 to deport each person. Detention alone cost taxpayers approximately \$2 billion in 2015.¹⁴²

When it comes to the issue of asylum seekers, as we have already seen, detention in the UK has expanded since the turn of the century both for “applicants whose claims are being processed and for those who are awaiting removal after a failed claim”.¹⁴³ One reason is the increase in detention capacity through the creation of new detention centres. Though it has also

¹³⁹ Mark Noferi. “Immigration Detention: Behind the Record Numbers.” *The Center for Migration Studies of New York (CMS)*, 19 July 2016, cmsny.org/immigration-detention-behind-the-record-numbers/. Accessed 30 Oct. 2016.

¹⁴⁰ *Ibid.*

¹⁴¹ “Immigration Detention Map & Statistics.” *Endisolation*, www.endisolation.org/resources/immigration-detention/. Accessed 19 Apr. 2016.

¹⁴² *Ibid.*

¹⁴³ Matthew J. Gibney. “Asylum and the Expansion of Deportation in the United Kingdom.” *Government and Opposition*, Blackwell Publishing Ltd, 161. 15 Apr. 2008, onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00249.x/full. Accessed 9 Apr. 2017.

been argued that the causality works in the opposite direction: that the increase in detention capacity is due to the increase in numbers of asylum seekers and other migrants as well as the targets set by the British Government. Gibney argues it is also due to the “government’s more efficient use of detention.”¹⁴⁴ G. Mulvey puts forth in his book on the *Problematizing of Immigration and the Consequences for Refugee Integration in the UK*, that this increased detention leads to a “process of criminalizing asylum seekers” and that detention is one part of the “three-pronged restriction regime that also includes deportation and dispersal.”¹⁴⁵ This idea and the concept of ‘cimmigration’ was developed by Juliet Stumpf in *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*.¹⁴⁶ In the United States, detention of asylum seekers is mandatory pending a DHS determination of their “credible fear” of persecution upon return. The use of summary procedures we mentioned before, means more asylum seekers are likely to be detained largely driven by applications from nationals of Mexico and the Northern Triangle region (Honduras, Guatemala, El Salvador). In 2012, 90 percent of detainees came from those countries.¹⁴⁷

Detention is controversial, but the duration of detention can sometimes be even more so. In September 2012, the UNHCR released guidelines¹⁴⁸ on the detention of asylum seekers. Intended to help governments and judges in their decision-making, they state that:¹⁴⁹

- The fundamental right to liberty and protections against arbitrary detention apply to all persons regardless of their immigration or other status;
- Detention of asylum seekers should in principle be avoided;
- Alternatives to detention need to be considered first, with detention used only as a measure of last resort;
- Those detained should “be brought promptly before a judicial or other independent authority to have the detention decision reviewed” within 24 to 48 hours;

¹⁴⁴ *Ibid.*

¹⁴⁵ Gareth Mulvey. “When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK.” *Journal of Refugee Studies*, Oxford University Press, 17 Nov. 2010, jrs.oxfordjournals.org/content/23/4/437.full. 442. Accessed 22 Oct. 2016.

¹⁴⁶ Juliet Stumpf in *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*. American University Law Review, Vol. 56, p. 367, 2006 Lewis & Clark Law School Legal Studies Research Paper No. 2007-2

¹⁴⁷ Mark Noferi. “Immigration Detention: Behind the Record Numbers.” *The Center for Migration Studies of New York (CMS)*, 19 July 2016, cmsny.org/immigration-detention-behind-the-record-numbers/. Accessed 30 Oct. 2016.

¹⁴⁸ “UNHCR Detention Guidelines.” *UNHCR*, United Nations, 2012, www.unhcr.org/505b10ee9.html. Accessed 3 Mar. 2016.

¹⁴⁹ “Human Rights First Welcomes Revised UNHCR Guidance on Use of Immigration Detention.” *Human Rights First*, www.humanrightsfirst.org/press-release/human-rights-first-welcomes-revised-unhcr-guidance-use-immigration-detention.

- The “use of prison, jails, and facilities designed or operated as prison or jails, should be avoided,” and “[c]riminal standards (such as wearing prisoner uniforms or shackling) are not appropriate.”

Importantly, it recommended that their detention decision be reviewed within 24 to 48 hours. Where the United States and the UK differ, in theory, is in the duration of detention. While in the US there is a theoretical limit of six months, in the UK, there is no legal limit to the time a person be held in detention. This goes contrary to the recommendations of the UN Working Group on Arbitrary Detention¹⁵⁰ and also somewhat explains why the UK did not adopt the 2008 European directive on detention and returning illegally staying third-country nationals, one of only three to not do so.¹⁵¹ In the country, the statistics have remained fairly consistent since 2010, according to the latest figures from the Migration Observatory, in 2016

about 81% of total immigration detainees leaving detention had been held for less than two months. It is also not uncommon for detention to span two to four months. A small but consistent minority of detainees – about 2% – are held for between 6 and 12 months, and an additional 1% held for more than a year.¹⁵²

Even the Home Affairs committee has been critical of the nation’s lack of time limit on detention. In 2016, the committee stated that the UK was guilty of the worst performance in Europe. They declared that

the UK is the only country in Europe without a time limit on detention. More people had been detained for longer than 2 months in Q1 2016 (1,066) than the previous quarter (983). Of these, 94 people had been detained for over a year, an increase from 81 in the previous quarter.

The increase in people who have been in long-term detention is the most worrying as attempts to tackle the problem have fallen short. In Q1 2016, 95 people had been detained for over a year, including one person who had been detained for more than two-and-a-half years. In the US, detention lasts an average of 27 days. Some claim that this detention of asylum seekers is in violation of international human rights law which states that “detention should be a “measure of last resort” — the exception, not the rule — and subject to strict time limits, ideally 48

¹⁵⁰ “No One Shall Be Subjected to Arbitrary Arrest, Detention or Exile” (*Universal Declaration of Human Rights, Article 9*), www.ohchr.org/Documents/Publications/FactSheet26en.pdf. Accessed 19 Sept. 2016.

¹⁵¹ “Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals.” *EUR-Lex*, European Union, 16 Dec. 2008, eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX%3A32008L0115. Accessed 15 Nov. 2016.

¹⁵² Stephanie J. Silverman. “Immigration Detention in the UK.” *Migration Observatory*, 1 Sept. 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/. Accessed 17 Oct. 2016.

hours.”¹⁵³ There is also criticism about the manipulation of data, in which many immigrants are detained for one day then released or returned to their country, bringing down the average stay in detention but hiding the reality of long-term detention.¹⁵⁴ A report from 2013 found that for “mandatory pre-hearing detainees detained six months or longer, the average length of detention was about 14 months.¹⁵⁵ In the US, one reason for the increase in detention is the demographic shift in immigrants. Whereas before, the vast majority came from Mexico and could therefore be returned to the physical border, an increasing number of immigrants come from Central America and other non-contiguous countries and must be detained prior to deportation. ICE ERO detained approximately 430,000 immigrants in 2014. Nationals of Mexico and Northern Triangle countries represented 90 percent of those. In 2012, immigrants from the latter only represented 25 percent of the total, by 2014 that number had reached 50 percent.¹⁵⁶ This in turn requires an increase in detention capacity and duration. It is important however, when talking about detention in the US to mention the case of Guantanamo Bay. The use of the facilities in Cuba to detain foreign prisoners since 9/11 has been the subject of great controversy. Wilsher states that

there are close parallels between this and the placing of aliens in ‘extra-legal’ locations like Guantanamo Bay, or in offshore processing centres. In both instances aliens have been placed in legal categories that are said to put them (and only them) beyond fundamental rights protection contained in either domestic constitutions or international treaties. By relying on ‘immigration’ powers these other, more demanding, legal principles can be avoided.¹⁵⁷

One point that must be considered for both the UK and the US is that detention cannot be seen as a measure of immigration regulation. Ultimately, only measures that lead either to entry or deportation can be considered true measures of immigration control.

This chapter has presented deportation, detention, and asylum, both in a general context and in a country-specific context. The following chapter shall focus on governmental priorities and the impact of this prioritisation.

¹⁵³ Mark Noferi. “Immigration Detention: Behind the Record Numbers.” *The Center for Migration Studies of New York (CMS)*, 19 July 2016, cmsny.org/immigration-detention-behind-the-record-numbers/. Accessed 30 Oct. 2016.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ “Immigration Enforcement Actions: 2014.” *Department of Homeland Security*, Jan. 2016, www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2014.pdf. Accessed 11 Apr. 2016.

¹⁵⁷ Daniel Wilsher. “Immigration Detention: Law, History, Politics.” *Immigration Detention: Law, History, Politics*, Cambridge University Press, Cambridge, 2014, 209.

CHAPTER 5

PRIORITIES AND PROSECUTORIAL DISCRETION

In nineteenth century Europe, the aim of migration policy was to prevent aliens from disturbing public order. Deportation was mostly restricted to “migrants unable to secure a livelihood for themselves in the host country”¹ This was the first form of prioritising the removal of a specific group of people. As we have already mentioned, many recent deportations in the United Kingdom have focused on the expulsion of failed asylum seekers, and foreign criminals. Questions must be asked of why states prioritise and once priorities have been decided, how are these priorities implemented.

Paoletti puts forth in her article on deportation, non-deportability and ideas of membership, that since the September 11, 2001, terrorist attacks in the United States and the London bombings in 2005,

migration and asylum laws have been presented as key elements in the task of reducing risk from somewhat vague external threats and from dangers posed by specific local communities. (...) Expulsions and deportations have come to be among the main devices to enforce modern migration policies.²

This returns to the idea of a politically motivated increase in deportation, as well as a non-negligible safety-element that is theoretically used in the fight against terrorism. However, the practice does not always match the theory. The United Kingdom, for example, has been highly criticised by members of its own government and the opposition for the lacklustre state of its border system and its immigration policies. In 2007, the border system and the state of immigration in the United Kingdom was highly criticised. In February that year, Shadow Minister for Immigration, Damien Green, lambasted Labour and declared “We do not have a barrier; we have a sieve. It should be relatively easy to protect an island, but we seem to find it more difficult than other countries find protecting long land borders.” (HC Deb 5 February 2007 c608).³ This statement about borders was part of a larger concern about the regulation of those who wish to enter the country. According to Mary Bosworth,

¹ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 8. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

² *Ibid.*

³ “UK Borders Bill: 5 Feb 2007: House of Commons Debates.” *They Work For You*, 5 Feb. 2007, www.theyworkforyou.com/debates/?id=2007-02-05b.589.1. Accessed 17 Dec. 2016.

this desire to reduce, monitor and police who comes into the country, though underpinned in large part by economic factors, is increasingly being presented as a matter of 'security'; from concrete walls and barbed wire fences to so called 'e-borders', countries seek to close off entry points.⁴

This has been accompanied by a polarisation between wanted and unwanted migrants. Those who would benefit the country and those seen as liabilities or as a burden. Generally, skilled or highly skilled people are encouraged to "join the polity by being allowed to settle in the UK."⁵ Refugees are often given temporary right to remain so that the nation can get rid of those it does not want when their homeland is safe. Unskilled migrants are often discouraged from travelling to the country initially through an array of external barriers. This is a first sign of the UK government's prioritisation of certain categories of migrant, but it goes much further. The British government presents this differentiation between migrants as a symbol of its "openness to foreigners".⁶ They state that

immigration, per se, is not the problem, all the discussion papers, legislation and parliamentary debate seem to claim. Rather, it is unregulated, unaccountable population shifts that are troubling; the British government is not hostile to foreigners but merely wants to be able to pick and choose the best ones.⁷

In the United States, Honig claims there is a similar situation. There is also a differentiation between certain immigrants who are considered "model minorities"⁸ and some who fail to overcome their alien status. She claims that this "xenophilia and xenophobia"⁹ have long underpinned the American Dream. Honig's statement suggests that certain migrant groups are seen much more favourably than others and that being a member of the wrong group, can make achieving the American Dream a far more difficult task. But beyond these sentiments of xenophobia, xenophilia or even distinction between the good, and the bad immigrants, there are decisions by the successive governments and agencies of both the United Kingdom and the United States that show clear priorities. These decisions fall under what is considered to be

⁴ Mary Bosworth. "Border Control and the Limits of the Sovereign State." *Sage Journals*, Social & Legal Studies, 1 June 2008, 200. journals.sagepub.com/doi/abs/10.1177/0964663908089611. Accessed 21 July 2016.

⁵ *Ibid.* 202

⁶ *Ibid.* 202

⁷ *Ibid.* 202

⁸ Bonnie Honig. "Immigrant America?: How Foreignness 'Solves' Democracy's Problems." *WorldCat*, Social Text, 1998, www.worldcat.org/title/immigrant-america-how-foreignness-solves-democracys-problems/oclc/39259189. Accessed 2 Jan. 2016.

⁹ Bonnie Honig. "Immigrant America?: How Foreignness 'Solves' Democracy's Problems." *WorldCat*, Social Text, 1998, www.worldcat.org/title/immigrant-america-how-foreignness-solves-democracys-problems/oclc/39259189. Accessed 2 Jan. 2016.

‘prosecutorial discretion’. Prosecutorial discretion is defined as “the authority of an agency or officer to decide what charges to bring and how to pursue each case. A law-enforcement officer who declines to pursue a case against a person has favourably exercised prosecutorial discretion.”¹⁰ Prosecutorial discretion as well as clearly stated priorities decide the fate of many immigrants, how they are treated, whether they are detained and ultimately whether they are considered for deportation. Firstly, we will study the reasoning behind this prioritisation and the factors that influence it. Subsequently, we will focus on the way in which these priorities are implemented.

I. EXPLAINING PRIORITISATION

A. The United Kingdom

It is important to remember that in the UK, there have been several catalysts for change in immigration control since the turn of the century. Firstly, the terrorist attacks in September 2001, as well as those in Madrid in 2004, London in 2005, and the general threat of terrorism throughout the globe has led to increased security measures. Secondly, the downturn of the economy following the 2008 economic crisis led to a rise in unemployment and less of a need to fulfil the employment shortfall with foreign nationals. Finally, and perhaps the least well known, are the failures of the past and their influence on the state of the British system especially. Turning to this final point, as we have already mentioned, in 2010, the UK Border Agency came under intense criticism from the Parliamentary Ombudsman for “consistently poor service, a backlog of hundreds of thousands of cases, and a large and increasing number of complaints”¹¹ This poor performance led to the dissolution of the agency in 2012-13, and its various divisions being separated into three distinct agencies.¹² While this helped improve the state of immigration control in the United Kingdom, there was one issue that could not be

¹⁰ “Understanding Prosecutorial Discretion in Immigration Law.” *American Immigration Council*, 26 May 2011, www.americanimmigrationcouncil.org/research/understanding-prosecutorial-discretion-immigration-law. Accessed 12 Mar. 2016.

¹¹ Ombudsman, Parliamentary. “Fast and Fair? Report by the Parliamentary Ombudsman on the UK Border Agency.” *GOV.UK*, House of Commons, 8 Feb. 2010, www.gov.uk/government/publications/fast-and-fair-report-by-the-parliamentary-ombudsman-on-the-uk-border-agency. Accessed 11 Feb. 2016.

¹² “The Work of the UK Border Agency (July-September 2012).” *UK Parliament*, House of Commons, 25 Mar. 2013, www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/792/79207.htm. Accessed 13 Nov. 2016.

solved immediately: the Border Agency backlogs. A 2012 report on the Work of the UK Border Agency found that

bearing in mind that this has been an exceptional Quarter, where 96,000 cases in the controlled archives were simply closed, we find that UKBA's progress in dealing with the backlogs is far too slow. At this rate, it would take years to deal with the current backlog. (Paragraph 73)¹³

They declared that the backlog reduction was a mere 1% and that new backlogs had begun to appear. The committee agreed that until they are able to publish a report “without the discovery of a new backlog and with a decrease in the present backlogs we will not be able to declare it fit for purpose.”¹⁴ The agency was abolished a year later. In a 2014 report by the Home Office, called *Reforming the UK border and immigration system*, they gave an updated progress report. They declared that

the Department has prioritised clearing backlogs and made additional resource available. UK Visas and Immigration has made progress in temporary and permanent migration, clearing all straightforward cases. However, by March 2014 there were nearly 301,000 open cases. Some 85,000 of these cases were normal work in progress in temporary and permanent migration, some were backlogs and the others were on hold or other types of outstanding work. Backlogs include 6,437 pre-2007 immigration cases still awaiting a decision and 25,876 old, but still live, asylum cases dating back to pre-2007. There is a risk cases on hold are not dealt with in a reasonable time. UK Visas and Immigration plans to clear workable backlogs in asylum by March 2015 (paragraphs 2.15 to 2.19).¹⁵

In July 2016, the Home Affairs Committee published a report on the work of the Immigration Directorates. While it did state progress in resolving legacy immigration applications, it concluded that the pace for case resolution was far too slow (see table below¹⁶).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ United Kingdom, Home Office, National Audit Office. “Reforming the UK Border and Immigration System.” *Reforming the UK Border and Immigration System*, 2014. 6. Accessed 3 Feb. 2016.

¹⁶ “The Work of the Immigration Directorates (Q1 2016).” *UK Parliament*, House of Commons Library, 27 July 2016, www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/151/151.pdf. Accessed 14 Sept. 2016. p.46

Figure 11: Backlog of Cases (UK)

	Q4 2015	Q1 2016	Change
Asylum cases pending a decision more than 6 months or require further review	16,703	17,028	+325
Temporary and permanent visa applications in progress outside service standards*	609	474	-135
Live legacy asylum cases	19,710	19,506	-204
Live legacy immigration cases	4,492	4,456	-36
FNOs living in the community	5,789	5,985	+196
Migration refusal pool (pre 2008 cases)	55,547	54,429	-1,118
Total	102,850	101,878	-972

Source: Home Office, Migration Statistics, May 2016

* Includes in-country and out-of-country applications (including family reunion)

According to the committee

The caseload of the OLCU is currently shrinking by an average of 250 cases per quarter. At this rate, it will take a further 24 years to clear the backlog of 23,962 outstanding cases, the majority of which date back to before 2007. It is unacceptable that people have had to wait over nine years for a conclusion to their case. The Home Office must explain why, nine years after its creation, the Older Live Cases Unit is still in existence, and when it expects the unit to have concluded its work. Sarah Rapson, the Director General of UK Visas and Immigration promised this Committee that this work would be a priority.¹⁷

Both documents mention priorities in the British system. One of the main priorities has for a long time been the resolution of problems and difficulties left behind by the former governments. The report argued that “the Department should prioritise outstanding backlogs and act to prevent cases that it classifies as unworkable building up into backlogs.”¹⁸ If you have an unlimited amount of funds, there is no need to prioritise, you can simply hire more people until the task has been completed. The British government and certainly the Home Office do not have unlimited budgets and therefore must decide how best to spend their money. In this case, the focus on eliminating backlogs, can possibly impact funds available for other necessary immigration-related tasks, for example deportation and detention. In 2007, the Home Office revealed that the 2005-6 weekly cost of detention for one person ranged “from £511

¹⁷ *Ibid.* p.27

¹⁸ United Kingdom, Home Office, National Audit Office. “Reforming the UK Border and Immigration System.” *Reforming the UK Border and Immigration System*, 2014. 9. Accessed 3 Feb. 2016.

(Lindholme IRC) to £1,344 (Colnbrook IRC).¹⁹ That same year, the Home Office claimed that the deportation crisis was caused by financial issues. The deportation crisis was “the failure to deport a large category of deportable foreign prisoners”²⁰ and was attributed to the 2003 financial crisis and in particular to “the recruitment and budgetary freeze in 2003 and 2004 (Home Office, 2007).”²¹ The resources they had were insufficient to keep up with the growing caseload. We can state therefore that financial constraints often explain the delays in deportation enforcement and inevitably the detention increase.²² Paoletti agrees that “financial issues are related to administrative hurdles which [is linked] to the relative “infrastructural capacity” of the state.”²³ The most recent data supplied by the Home Office, from Q4 of 2016 placed “the average cost per day to hold an individual in immigration detention at £86 (Home Office 2017b).”²⁴ Naturally it would make sense that if the deportation of a person is decided it would be in the financial interest of the government that it be carried out as quickly as possible so as to limit the financial burden on the state. However, this must also be considered in relation to the cost of deportation.

Financial limitations lead to the need for priorities as resources are limited. One of many examples was given by the Director General of the Immigration and Nationality Directorate (IND), Lin Homer. In 2006, she declared that “the target of 12,000 non-asylum removals per year was set not on the basis of how many people need to be removed but according to the resources available and as an improvement on the previous year’s performance.”²⁵ Furthermore, it is important to note that removals are also limited by a lack of cooperation by receiving states as well as last minute appeals that stay deportation. That very same year, the

¹⁹ Stephane J. Silverman. “Immigration Detention in the UK.” *Migration Observatory*, 1 Sept. 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/. Accessed 17 Oct. 2016.

²⁰ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 16. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

²¹ *Ibid.*

²² It is important to note that nondeportability due to financial constraints is different from “permanent” non-deportability arising, for example, from human rights considerations.

²³ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 17. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

²⁴ Stephanie J. Silverman. “Immigration Detention in the UK.” *Migration Observatory*, 1 Sept. 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/. Accessed 17 Oct. 2016.

²⁵ House of Commons, Home Affairs Committee, *Immigration Control*, Fifth Report of Session 2005–06 Volume I HC 775–I, 23 July 2006 136.

Home Affairs Committee confirmed that “the number of removals is nowhere near the likely number of people who are not entitled to be in the UK.”²⁶ Indeed, in 2004, the IND refused “32,335 applications for an extension of leave or settlement”. That year however only 10,085 non-asylum applicants were removed from the country. In May 2004, the backlog of asylum removals was estimated at “between 155,000 and 283,500.”²⁷ The committee also confirmed that “it is clear that the current rate of removal is not even keeping up with the increase in the number of those not entitled to remain in the UK.”²⁸ However, since 2004, the number of enforced removals have declined, and voluntary departures have increased²⁹ (see table in Chapter 5).

The Home affairs committee in 2006 reported that according to a study in 2003, “prioritisation in enforcement was largely determined by the political need to increase numbers of removals”.³⁰ The IND’s Director of Enforcement and Removals, Dave Roberts declared that

What we need to have is a very clear set of priorities which are ranked, if you like, in terms of an understanding of the harm that people who are here unlawfully cause the UK and target our resources accordingly. What I would argue is that, in terms of our targeted resources, we have a number of competing priorities which the Committee are very familiar with. We have a priority to remove failed asylum seekers. That is given us quite properly by ministers as a requirement. It would be quite wrong to say that was our only focus, which was why I explained in my opening remarks how we were doing in relation to non-asylum removals.³¹

This equates to another priority in the immigration system: the removal of foreign national prisoners (FNP)³², also known as foreign national offenders (FNO). Previously there were problems with the removal of FNOs. In 2006 it was stated that “over a thousand foreign national prisoners had been released from prison over the last seven years without the IND considering whether or not to deport them.”³³ This has led to the occurrence of one of two possible problems according to the IND, either “the prisoner is [...] detained beyond his or her

²⁶ *Ibid.* 99.

²⁷ *Ibid.* 99.

²⁸ *Ibid.* 100.

²⁹ Scott Blinder, and Alexander Betts. “Deportations, Removals and Voluntary Departures from the UK.” *Migration Observatory*, University of Oxford, 3. 19 July 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/deportations-removals-and-voluntary-departures-from-the-uk/. Accessed 9 Sept. 2016.

Changes in the recorded number of removals since 2004 may reflect changes in data collection on voluntary departures, however.

³⁰ House of Commons, Home Affairs Committee, *Immigration Control*, Fifth Report of Session 2005–06 Volume I HC 775–I, 23 July 2006 100-101.

³¹ *Ibid.*

³² “Foreign National Prisoners.” *Prison Watch*, www.prisonwatch.org/foreign-national-prisoners.html. Accessed 12 Apr. 2016.

³³ House of Commons, Home Affairs Committee, *Immigration Control*, Fifth Report of Session 2005–06 Volume I HC 775–I, 23 July 2006 122.

release date, or released despite the risk of absconding.”³⁴ According to the Home Office, from “June 1996 to May 2006 the number of foreign nationals in prison in England and Wales alone rose from 4,259 to 10,232.”³⁵ That number then stabilised and at the end of March 2016, “there were just under 10,000 foreign nationals within the prison population.”³⁶ The Government stated in 2006, that it had recognised that “the dramatic rise in the number of foreign national prisoners was causing problem.”³⁷ Again, as previously stated, the simplest way to solve the problem of overcrowding in prisons and the presence of FNO’s is to deport them. This, however, is harder said than done.

While data in the UK on deportations and removals is somewhat limited and imprecise, they do show that a “significant number of deportation orders are not actually enforced and hence do not result [in] actual removal.”³⁸ The Home Office reported in 2007, that

there are also high levels of attrition in the casework and cases can fall at each stage of the process. Even after a deportation order is made a removal may not take place, for example if the country of removal is uncooperative. It is estimated that only one third of cases initially considered ends with a substantive deportation³⁹

Paoletti reported a similar statement by Tory MP, Shailesh Vara, on 21 February 2008. He observed that

only a small number of illegal immigrants are ever deported from the UK. [...] We now find that a large number of those people are turned back by the country to which they are deported and returned to the UK because the Home Office has messed up their paperwork. Even when the Home Office tries to deport someone, it cannot get it right. We need an urgent statement from the Home Secretary on the continued mismanagement of her Department (Vara, 2008).⁴⁰

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ “UK Prison Population Statistics.” United Kingdom, House of Commons Library, Allen, Grahame, and Chris Watson. 20 April. 2017.

³⁷ House of Commons, Home Affairs Committee, *Immigration Control*, Fifth Report of Session 2005–06 Volume I HC 775–I, 23 July 2006 p.122

³⁸ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 13. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

³⁹ United Kingdom, Home Office, UK Border Agency. “A Review of the Failure of the Immigration & Nationality Directorate to Consider Some Foreign National Prisoners for Deportation.” *A Review of the Failure of the Immigration & Nationality Directorate to Consider Some Foreign National Prisoners for Deportation*, 2007.

⁴⁰ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 13. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

This has led to the question of whether spending resources trying to deport every FNO is worth it, whether it is better to focus on other things, for example the detention and deportation of the large number of failed asylum seekers, etc.

Deportation is very costly. For those not already in detention, it involves locating them, then detaining them and finally removing them from the country. All of this is costly, “detention is expensive and, in many countries, increasingly subject to domestic and international legal constraint.”⁴¹ As for the deportation process itself, Gibney and Hansen stated that

even if an individual is detained, normal carriers will often not take deportees, so additional chartered flights have to be arranged. Special teams of security guards have to be drafted in to pick up and accompany the deportee to the country of origin. When deportees are met at the other end by a country-of-origin team (as Romanian deportees from Germany are), these costs are borne by the deporting state. All these costs come on top of legal expenses paid in exhausted appeals. In deporting some 25,000 individuals in 2000, Germany paid \$US6,000,000.⁴²

As stated, detention alone costs £86/day. The exact cost of deportation in the UK is unknown. A Freedom of Information request in 2015 asked “how much the Government has spent on deportations in each of the last five years.”⁴³ MP John Haynes replied: “This information is not recorded on an annual basis, so cannot be provided except at disproportionate cost.” In 2015, it emerged that the Home Office had spent £14m alone on deporting some failed asylum seekers on private jets over 18 months.⁴⁴

B. The United States of America

In the United States of America, the problem of backlogs is less severe, and while asylum applications often take time, there is not the same level of problems that have plagued the British system in the last two decades. The main considerations for the government in the United States are:

⁴¹ Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 11. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

⁴² *Ibid.*

⁴³ Gavin Newlands, and John Hayes. “Deportation: Expenditure:Written Question - 10647.” *UK Parliament*, 12 Oct. 2015, www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-09-17/10647/. Accessed 20 June 2017.

⁴⁴ Diane Taylor. “£14m Spent on Private Jets to Deport Asylum Seekers in 18 Months.” *The Guardian*, Guardian News and Media, 16 Oct. 2015, www.theguardian.com/uk-news/2015/oct/16/14m-spent-on-private-jets-to-deport-asylum-seekers-in-18-months. Accessed 21 June 2017.

- the presence of an estimated 11 to 12 million undocumented immigrants in the country.⁴⁵
- the state's detention capacity
- the number of FNOs
- the amount of funding provided by the federal government

In the country, the number of apprehensions of undocumented immigrants has fallen, notably due to “the drop in illegal immigration and shifts in US immigration enforcement priorities during the Obama administration.”⁴⁶ The Department of Homeland Security discussed the issue of resources in a memorandum on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, in 2014. The memo argued that

due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. And, in the exercise of that discretion, DHS can and should develop smart enforcement priorities, and ensure that use of its limited resources is devoted to the pursuit of those priorities. DHS's enforcement priorities are, have been, and will continue to be national security, border security, and public safety. DHS personnel are directed to prioritize the use of enforcement personnel, detention space, and removal assets accordingly.⁴⁷

A written testimony by ICE director expressed the agency's wish to “continue to do the best job we can, within the bounds of existing law, to accomplish our mission, make strategic use of our resources, and improve efficiency and reporting.”⁴⁸ Now while we will delve further into the exact nature of these priorities, this is a clear acknowledgment by the DHS and ICE of choosing their battles and deciding how best to use the limited money they have. In the US, the cost of detention in 2016 was \$150/day on average. Deportation costs on average

⁴⁵ Amy Sherman. “Donald Trump Wrongly Says the Number of Illegal Immigrants Is 30 Million or Higher.” *Politifact*, 28 July 2015, www.politifact.com/florida/statements/2015/jul/28/donald-trump/donald-trump-says-number-illegal-immigrants-30-mil/. Accessed 19 Apr. 2017.

⁴⁶ Jie Zong, and Jeanne Batalova. “Frequently Requested Statistics on Immigrants and Immigration in the United States.” *Migrationpolicy.org*, 8 Mar. 2017, www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states. Accessed 21 Feb. 2016.

⁴⁷ United States, Congress, Johnson, Jeh Charles. “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants.” *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, 20 Nov. 2014. www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. Accessed 14 Apr. 2015.

⁴⁸ Sarah Saldaña. “Written Testimony of ICE Director Sarah Saldaña for a Senate Committee on the Judiciary Hearing Titled ‘Oversight of the Administration's Criminal Alien Removal Policies.’” *Department of Homeland Security*, 2 Dec. 2015, www.dhs.gov/news/2015/12/02/written-testimony-ice-director-senate-committee-judiciary-hearing-titled-%E2%80%9Coversight. Accessed 2 June 2016.

\$1,978/deportee, and deportation when including apprehension and detention costs the US government, \$10,854 per individual on average

In 2014, Daniel Costa, the Director of Immigration Law and Policy Research stated during a hearing in the Judiciary Committee of the United States House of Representatives. While talking about prosecutorial discretion and the power the President had over immigration policy, he declared that

Congress provides the executive branch with the funds to enforce the immigration laws, but it has not provided nearly enough funding to remove all 11.2 million unauthorized immigrants who reside in the United States. The US Department of Homeland Security (DHS) believes that the amount Congress has appropriated is enough to remove approximately 400,000 unauthorized immigrants per year³ (3.6 percent of the total), and that is approximately the number of unauthorized immigrants the Obama administration has been removing.⁴⁹

Costa also claimed that it would be “irrational and inefficient enforcement policy if the president did not set priorities regarding who should be removed first.”

In essence, the use of prosecutorial discretion enables the various agents of law enforcement to use their judgement on a case-by-case basis. These lead to priorities that continue to “inform [their] decisions to arrest, detain, prosecute, and remove individuals from the United States.”⁵⁰ The memo also acknowledged their desire to see that “laws are enforced fairly, humanely” while also noting that “with the understanding that each decision will affect the lives of many individuals.”⁵¹ According to Endgame, the Office of Detention and Removal Strategic Plan for 2003-2012, one of the reasons resources had to be allocated wisely, was the reprioritisation of immigration enforcement as well as new responsibilities for the agencies. The plan states that

the current population requires unique facilities, procedures and management depending on risk, criminal category, nationality, health and other special needs. Similarly, operations, policy and legislation that were developed in response to the September 11 attacks (such as the *Border Security Act* and the *USA PATRIOT Act*) further expanded DRO’s operational area of responsibility. These Acts, in particular, have reprioritized national immigration enforcement efforts and this program’s responsibilities and operations. By implementing this strategic plan and providing a guide to conduct operations, this program is making strides in altering its operations

⁴⁹ Daniel Costa. “Statement for the Record on Executive Immigration Action: Hearing in the Judiciary Committee of the United States House of Representatives: ‘President Obama’s Executive Overreach On Immigration.’” *Economic Policy Institute*, 2 Dec. 2014, www.epi.org/publication/house-judiciary-statement-record-executive-immigration/. Accessed 17 June 2017.

⁵⁰ Sarah Saldaña. “Written Testimony of ICE Director Sarah Saldaña for a Senate Committee on the Judiciary Hearing Titled ‘Oversight of the Administration’s Criminal Alien Removal Policies.’” *Department of Homeland Security*, 2 Dec. 2015, www.dhs.gov/news/2015/12/02/written-testimony-ice-director-senate-committee-judiciary-hearing-titled-%E2%80%99Coversight. Accessed 2 June 2016.

⁵¹ *Ibid.*

and resource requirements to support both current and future immigration related policy, events and activity.⁵²

The two nations ultimately have the same problem. A finite amount of resources, no matter how significant they may be. Whether the nation has ten million or ten billion to devote to border control, decisions must be made and priorities decided.

II. PRIORITIES IN DETENTION AND DEPORTATION

A. The United Kingdom

Before the UK Borders Act in 2007, the Home Office, and notably the Home Office Secretary could decide on an almost case-by-case basis whether to deport an individual. The Act changed certain rules related to the deportation. Ultimately, the UK Borders Act extended the capability of the British state “to expel those convicted of criminal offences”⁵³ Previously, all foreigners convicted of a ‘serious crime’ were placed in deportation proceedings. In the UK Borders Act, this norm was considerably extended. Henceforth, all “non-citizens convicted of any crime at all, so long as they are sentenced to [at] least 12 months, will be ejected upon completion of their sentence.”⁵⁴ The change in legislation, therefore required an increased ability to remove FNOs from the country. However, that task had to be carried out without hindering the removal of other unwanted immigrants which was already a problem with the Home Office’s focus on asylum seekers.

The Director General of the IND from 1998 to 2002, declared that “asylum and all the problems associated with it were the dominant issue for IND”⁵⁵ This was believed to still be a major focus of the IND in 2006 as their only two key priorities in the *Asylum and Immigration High Level Delivery Plan 2005-06 to 2008-09* “were to deliver the asylum “tipping point” target, by removing more failed asylum seekers than the number of new unfounded applications; and to make a further substantial reduction in asylum support costs.”⁵⁶ The Home Affairs Committee was critical of this narrow-minded approach as there was fear of disparities

⁵² United States, Congress, Bureau of Immigration and Customs Enforcement. “ENDGAME Office of Detention and Removal Strategic Plan, 2003 - 2012.” *ENDGAME Office of Detention and Removal Strategic Plan, 2003 - 2012*, American Civil Liberties Union of Massachusetts. 1-2. aclum.org/sites/all/files/education/ice/endgame.pdf. Accessed 30 Dec. 2015.

⁵³ Mary Bosworth. “Border Control and the Limits of the Sovereign State.” *Sage Journals, Social & Legal Studies*, 206. 1 June 2008. journals.sagepub.com/doi/abs/10.1177/0964663908089611. Accessed 21 July 2016.

⁵⁴ *Ibid.*

⁵⁵ House of Commons, Home Affairs Committee, *Immigration Control*, Fifth Report of Session 2005–06 Volume I HC 775–I, 23 July 2006 134.

⁵⁶ *Ibid.* 15.

in the attribution of vital resources. The committee identified “many examples of how, in practice, other work may be affected by asylum targets.”⁵⁷ Indeed while achieving asylum targets was considered a success, the IND’s focus on the asylum targets “contributed to an environment in which the foreign prisoner problem was not recognised early enough.” There was a clear need to find a balance and develop a system that could tackle both problems effectively.

The Home Affairs Committee went into detail about the deportation of Foreign National Offenders in their Fifth Report on Immigration Control in 2005-6. The stated that in 2006, there were two circumstances in which a “person can be deported following a criminal conviction”:⁵⁸

- where the court has recommended deportation and the IND has decided to pursue this
- and where the court has not made a recommendation but the IND has nevertheless deemed deportation to be “conducive to the public good.

Between April 2005 and March 2006, the Crown Court made 1,528 recommendations for deportation.⁵⁹ Ultimately however the decision to deport is made by the Home Office, whether or not the courts have made a recommendation for deportation as part of the conviction. The Committee, at the time recommended the abolition of the court recommendation system and simply that “all deportations should be considered by the Home Office solely on the grounds of whether deportation is conducive to the public good.”⁶⁰ This change of strategy would simplify the decision-making process.

The Government also bowed to public discontent and criticism in the media. In May 2006, under intense pressure following the release of dangerous foreign prisoners, the Prime Minister, Tony Blair told Parliament that “anybody who is convicted of an imprisonable offence and who is a foreign national is deported”⁶¹ John Reid the Home Secretary from May 2006 to June 2007, declared in Parliament that “the presumption should be that anyone who is here who is a foreign national who does not, in return for the privileges and rights of being in this country, observe our laws and commits a serious offence for which there is a custodial sentence

⁵⁷ *Ibid.*

⁵⁸ House of Commons, Home Affairs Committee, *Immigration Control*, Fifth Report of Session 2005–06 Volume I HC 775–I, 23 July 2006 125.

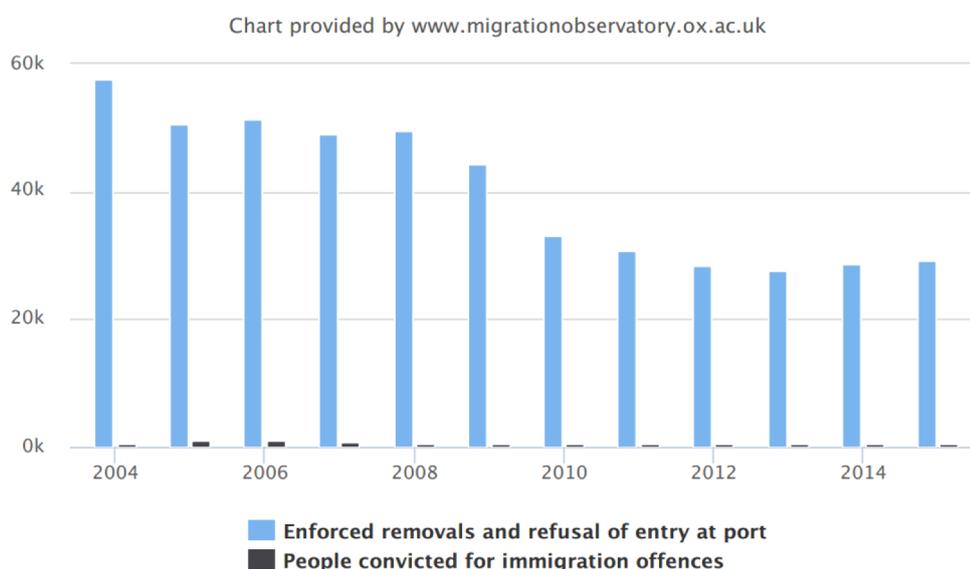
⁵⁹ *Ibid.*

⁶⁰ *Ibid.* 125-6.

⁶¹ “Balancing Freedom and Security - a Modern British Bill of Rights.” *The Guardian*, Guardian News and Media, 26 June 2006, www.theguardian.com/politics/2006/jun/26/conservatives.constitution. Accessed 29 Sept. 2016

given should face deportation.”⁶² The Committee recommended a presumption in favour of deportation and that “the offender should have to make their case as to why they should not be deported.”⁶³ This changed the way FNOs were considered. A presumption for deportation replaced the court recommendation. In their briefing on *Immigration Offences: Trends in Legislation and Criminal and Civil Enforcement*, the Migration Observatory stated that the use of criminal proceedings against people who had committed immigration violations had decreased since 2005.⁶⁴ This was due to recommendations by the UKBA and the scrapping of prosecution quotas by the Home Office.⁶⁵ In 2015, this was still true, the Home Office confirmed that “criminal proceedings against immigration offenders remain low compared to administrative action, in the form of enforced removals and refusals of entry at port.”⁶⁶

Figure 12: Administrative Actions vs Immigration Offence Convictions (UK)



Source: Home Office, Immigration Statistics, Tables rv.01 and pr.01

Source: Home Office Immigration Statistics, Table pr.01

⁶² House of Commons, Home Affairs Committee, *Immigration Control*, Fifth Report of Session 2005–06 Volume I HC 775–I, 23 July 2006. 126.

⁶³ *Ibid.* 126–7.

⁶⁴ Ana Alverti. “Immigration Offences: Trends in Legislation and Criminal and Civil Enforcement.” *Migration Observatory*, University of Oxford, 4–5. 12 Oct. 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/immigration-offences-trends-in-legislation-and-criminal-and-civil-enforcement/. Accessed 15 Jan. 2016.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* 6.

In the first few years of the new century, the Government recognised the “the benefit of encouraging voluntary returns over forced removals”⁶⁷ In 2005-6, focus was on the voluntary returns of asylum seekers and irregular migrants, notably through the Assisted Voluntary Return for Irregular Migrants (AVRIM), Assisted Voluntary Return for Families and Children (AVRFC) and Voluntary Assisted Return and Reintegration Programme (VARRP).⁶⁸

Since 2006, the Government has prioritised the removal of FNOs while attempting to maintain its removal of all other types of deportable immigrants. The UK Borders Act in 2007, legislated that “all FNOs who have been sentenced to a period of imprisonment of 12 months or more are subject to automatic deportation from the UK unless they fall within one of the Act’s six exceptions.”⁶⁹ Since 2009, “more than 4,000 FNOs have been deported”⁷⁰ every single year. The UK Government declared that it wished to deport “as many Foreign National Offenders as possible” to their home countries. To do so, they produced an ‘Action Plan on FNOs’ in 2013. The aim of the plan was to:

- increase removals from 4,600 to 5,600 a year over three years
- reduce the number of FNOs in the UK by 2,000 over the same period

In 2015, the number of FNOs deported reached 5,602 according to the Home Office (See table below).⁷¹ Most FNOs are deported from the UK’s prisons via the early removal scheme (ERS). In Q1 2016, 501 FNOs were removed under the ERS scheme. However, there is still some concern about the number of FNOs living within society. In the first three months of 2016, there were 5,985 FNOs living in the community, and the Home Affairs Committee expressed concern that the number of FNOs in the community was “so high.”⁷²

⁶⁷ House of Commons, Home Affairs Committee, *Immigration Control*, Fifth Report of Session 2005–06 Volume I HC 775–I, 23 July 2006. 106.

⁶⁸ “Assisted Voluntary Return: Implications for Women and Children.” *Forced Migration Review*, www.fmreview.org/solutions/encinas.html. Accessed 13 June 2017.

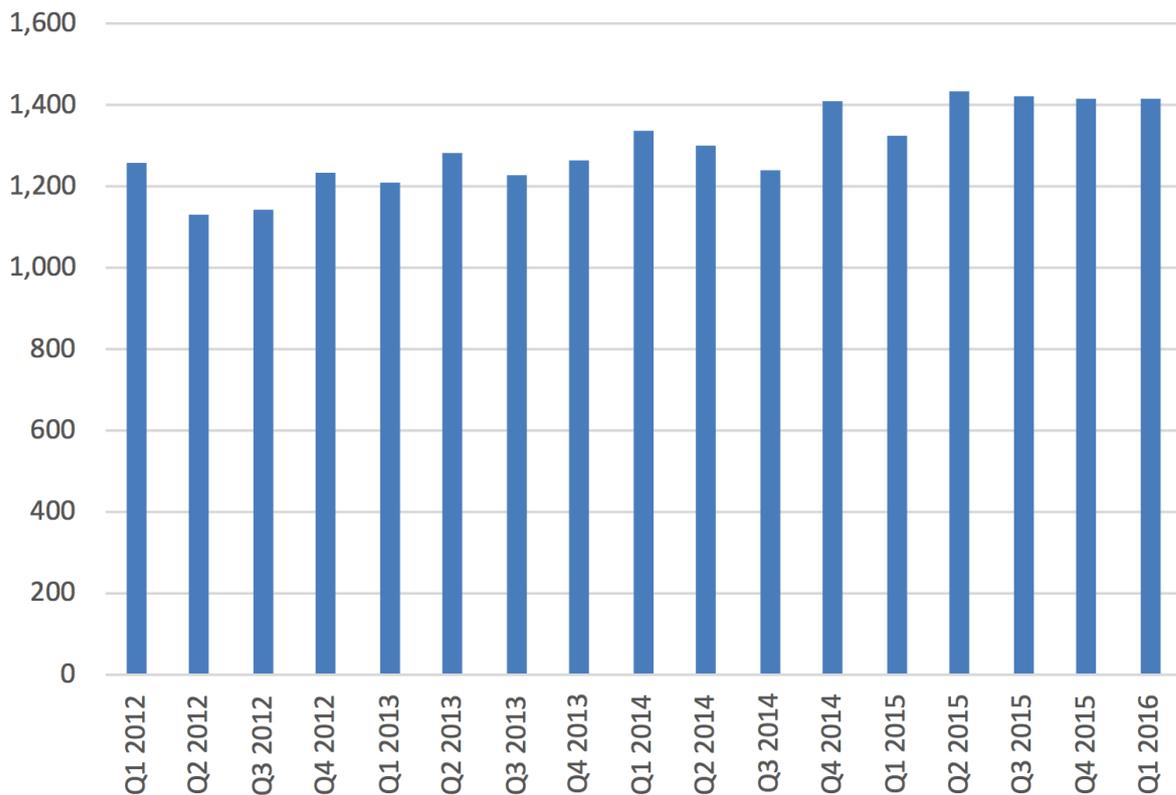
⁶⁹ Stephanie J. Silverman, “Immigration Detention in the UK.” *Migration Observatory*, 1 Sept. 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/. Accessed 17 Oct. 2016. 4.

⁷⁰ *Ibid.*

⁷¹ Scott Blinder, and Alexander Betts. “Deportations, Removals and Voluntary Departures from the UK.” *Migration Observatory*, University of Oxford, 3. 19 July 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/deportations-removals-and-voluntary-departures-from-the-uk/. Accessed 9 Sept. 2016.

⁷² “The Work of the Immigration Directorates (Q1 2016).” *UK Parliament*, House of Commons Library, 27 July 2016, www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/151/151.pdf. Accessed 14 Sept. 2016. 39.

Figure 13: Number of FNOs returned (UK)



In 2012, the Home Affairs Committee, in a report on the work of the UK Border Agency gave an update on the state of the backlogs in the immigration system.⁷³ They were happy that there was progress on the issue of “locating and removing ex-FNOs from the 2006 cohort who were released without being considered for deportation.”⁷⁴ They were, however, critical of the overall number of ex-FNOs still living in the UK awaiting deportation and recommended that FNOs should be “considered for deportation earlier in their sentence.”⁷⁵ They also confirmed that the priority was in the “conclusion of legacy casework.”⁷⁶ Indeed at the closure of the controlled archives, there were 33,900 backlog asylum cases and 7,000 backlog immigration cases. They declared that many would have waited years to find receive a decision in their application and that many were integrated into British society and therefore “there is an

⁷³ “The Work of the UK Border Agency (July-September 2012).” *UK Parliament*, House of Commons, 25 Mar. 2013, www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/792/79207.htm. Accessed 13 Nov. 2016.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

argument in favour of granting the applicant leave to remain.”⁷⁷ This returns to the idea mentioned previously of migrants who live within a society will inevitably become part of that society. For some people this could have been years, and any decision to deport would be devastating. This is the reason why governments prefer to use pre-emptive detention during the decision process to avoid the problem. When it comes to detention, generally a precursor of deportation, the UK’s practice of administrative immigration detention is supposedly only used “whilst identity and basis of claim are established, where there is a risk of absconding, as part of fast-track asylum procedures... and in support of the removal of failed asylum seekers.”⁷⁸ However, advocates for immigrants’ rights argue that “decisions to detain under immigration powers are often arbitrary, governed by the availability of space, justified ex post facto, or simply irrational”⁷⁹ In some cases the use of detention does not seem to follow the rules set by the administration itself. One factor in deciding whether to detain is, as ever, available resources.

Beyond the resolving of backlogs and deporting FNOs, in February 2010, the UK border agency published *Protecting Our Border, Protecting The Public*, the agency’s five-year strategy for securing the border, controlling migration, enforcing immigration rules and addressing immigration and cross border crime. Included in this strategy was a certain number of priorities that were to be implemented. These included:

- Detection of Class A drugs
- Combating facilitation of illegal entry and stay in the UK
- Non-compliance with our immigration rules
- Counter-terrorism
- Counter-proliferation
- Effective management of foreign national offenders
- Combating border tax fraud
- Import/export of firearms and other prohibited and restricted goods
- Combating human trafficking
- Working in Partnership

⁷⁷ *Ibid.*

⁷⁸ Axel Klein, and Lucy Williams. “Immigration Detention in the Community: Research on the Experiences of Migrants Released from Detention Centres in the UK.” *Population, Space and Place*, 742. 21 June 2012, onlinelibrary.wiley.com/doi/10.1002/psp.1725/abstract. Accessed 7 Mar. 2017.

⁷⁹ *Ibid.*

- Tackling Non-immigration crimes committed by foreign nationals (level 1-3⁸⁰)
- Safeguarding vulnerable groups

While the UK does have a system of priorities for deportation that tends to focus on criminality, it suffers from the number of backlogged immigration cases. The United States, on the other hand has a specific system to deal with deportation and detention, with specific enforcement priorities.

B. The United States of America

In 2003, under the Bush Administration, the Director of the Office of Detention and Removal (DRO), Anthony S. Tangeman, stated in the DRO strategic plan *ENDGAME*, that

We must endeavour to maintain the integrity of the immigration process and protect our homeland by ensuring that every alien who is ordered removed, and can be, departs the United States as quickly as possible and as effectively as practicable. We must strive for 100 % removal rate.⁸¹

In the 50-page strategic plan, the Department of Homeland Security (DHS) gave a clear roadmap for their intention and objectives over the following 10 years.⁸² The DHS strategic objectives included preventing terrorist attacks within the United States, and reducing American vulnerability to terrorism. There were no actual references to immigration in the DHS strategic objectives. Instead it contained only one point about ensuring that there was no neglect of any function not directly related to homeland security. In practice this meant that tackling illegal immigration must not be hindered by the fight to prevent terrorism in America. To find information related to immigration one must look at the DHS critical mission areas in the document. While this again is focused mainly on terrorism there is also a section dedicated to border and transportation security which includes the creation of “smart borders” and the reform of the immigration services. The critical mission area, border and transportation security, envisions that “federal law enforcement agencies will take swift action against those who violate terms of entry and pose threats to the American people.”⁸³ The main objective in the creation of the Department of Homeland Security was to fight terrorism and this is evident

⁸⁰ Level 1: Local level immigration and cross border crime
 Level 2: Regional immigration and cross border crime
 Level 3: International immigration and cross border crime

⁸¹ United States, Congress, Bureau of Immigration and Customs Enforcement. “ENDGAME Office of Detention and Removal Strategic Plan, 2003 - 2012.” *ENDGAME Office of Detention and Removal Strategic Plan, 2003 - 2012*, American Civil Liberties Union of Massachusetts. Memo. aclum.org/sites/all/files/education/ice/endgame.pdf. Accessed 30 Dec. 2015.

⁸² *Ibid.* 3-1.

⁸³ *Ibid.* 1-2.

in their their strategic plan. Even the mission statement of ICE is less focused on immigration than one would first have thought. The plan states that ICE's mission is to “protect the United States and its people by deterring, interdicting, and investigation threats arising from the movement of people and goods into and out of the United States; and by policing and securing federal facilities across the nation.”⁸⁴ According to the document, ICE had five strategic goals, only one of them was specifically related to immigration. The fourth of these goals stated that ICE had a duty to “protect America from customs and immigration violations not directly linked to terrorism”⁸⁵

The Strategic goals decided by both ICE and the Department of Homeland Security led to the Detention and Removals Operations (DRO) also having five specific goals. Only one of the five goals is related to specific immigration action, the other four concerned technical issues, including technological advances and recruitment of new agents.

DRO goal one titled 'Removals' was aimed to

promote the integrity of the immigration removals process, deter immigration violations, and reduce recidivism through the implementation of cohesive enforcement strategies in conjunction with other programs facilitating the location, apprehension, processing of illegal aliens, and especially criminals, to ultimately effect appropriate action to include prosecution, detention and/or removal⁸⁶

The objective was twofold, firstly to promote public safety and to “combat immigration-related crimes by removing individuals, especially criminals and other threats to public safety, who are unlawfully present in the United States.”⁸⁷ Secondly, the aim was to help DHS in its attempts to deter illegal migration.

Ultimately, Endgame was designed with the intention to create a “cohesive enforcement program” that would permit the timely removal of “all removable aliens” and “eliminate the backlog of unexecuted final order removal cases within the next ten years.”⁸⁸ These objectives were expected to be carried out via the National Fugitive Operations Program⁸⁹ and the

⁸⁴ *Ibid.* p.3-2

⁸⁵ *Ibid.* p.3-2

⁸⁶ *Ibid.* p.3-4

⁸⁷ *Ibid.* p.3-4

⁸⁸ *Ibid.* p.4-1

⁸⁹ (NFOP) - The Absconder Apprehension Initiative (AAI) announced in the Deputy Attorney General's directive of January 25, 2002, indicated that there is a significant backlog of unexecuted final orders of removal. The NFOP will target this backlog by facilitating the apprehension and subsequent removal of those fugitives. The goal over the next ten years will be to eliminate this backlog and to ensure that our efforts in terms of apprehension and removal of fugitive cases equals the number of new cases falling into this category.

Institutional Removal Program.⁹⁰ Under Obama, however, the Department of Homeland Security and the related agencies underwent a change in strategy.

In June 2011, John Morton, then Director of Immigrations and Customs Enforcement (ICE), published a Memorandum on the exercise of prosecutorial discretion. It rescinded two previous memoranda but also built on an array of existing memoranda related to prosecutorial discretion, the earliest dating back to 1976. These included:

- Sam Bernsen, Immigration and Naturalization Service (INS) General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976);
- Bo Cooper, INS General Counsel, INS Exercise of Prosecutorial Discretion (July 11, 2000);
- Doris Meissner, INS Commissioner, Exercising Prosecutorial Discretion (November 17, 2000);
- Bo Cooper, INS General Counsel, Motions to Reopen for Considerations of Adjustment of Status (May 17, 2001);
- William J. Howard, Principal Legal Advisor, Prosecutorial Discretion (October 24, 2005);
- Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion (November 7, 2007);
- John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens (March 2, 2011)

The memorandum's aim was to provide ICE personnel with guidance on the use of prosecutorial discretion to ensure that resources focused on the agency's enforcement priorities. Morton had already expressed the agency's decision to prioritise in an interview a few months prior. In September 2010, he stated that ICE's priorities were criminal offenders, recent border entrants and people who “game the system.”⁹¹ He did however confirm that while these are the agency's priorities, they did not mean that persons outside these categories would be given

⁹⁰ Institutional Removal Program (IRP) Transition - The purpose of the IRP is to ensure that aliens convicted of crimes in the US are deported directly from correctional institutions, precluding their release into the community. To improve the efficiency of the IRP, the mission will be transferred from the ICE Investigations Program to DRO. This transfer will result in more efficient processing and better continuity in case management. These efficiencies will permit more aliens to be processed while incarcerated, thereby reducing the potential demand for ICE detention space. Overall, improved effectiveness of the IRP will increase the public safety, reduce the potential for future crimes, and enhance the welfare of our society.

⁹¹ Marcus Stern. “Director John Morton Explains ICE’s Priorities on Deportation.” *ProPublica*, 10 Sept. 2010, www.propublica.org/article/director-john-morton-explains-ices-priorities-on-deportation. Accessed 3 Aug. 2015.

amnesty and that they would “continue to enforce the law.”⁹² He acknowledged the agency's limited resources:

we are recognizing that, hey, we only have a limited ability to enforce the law in terms of resources and when we go about saying, 'How should we target enforcement resources?', we're going to focus on three areas overall. And those are criminal offenders, recent entrants and people who game the system.⁹³

These priorities were officially put onto paper in March 2011 in another memorandum, *Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens*.⁹⁴ The same year, in June 2011, the Morton Memorandum was published by the head of US Immigration and Customs Enforcement. The official title of the document was *Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*.⁹⁵ It listed the reasons for prioritisation, the agents responsible for it, at what point in a case prosecutorial discretion should be carried out and finally what factors to consider, both negatively and positively when exercising prosecutorial discretion. The memo states that the solution to limited resources is prioritisation via prosecutorial discretion because the agency must deal with more “administrative violations than its resources can address.”⁹⁶ Ultimately, decisions come down to what the agency can afford. This is similar to the UK in that resources are limited but the US takes the more obvious approach of deciding to use those resources in order to tackle first what the government considers to be the biggest problem.

In the case of civil immigration enforcement, prosecutorial discretion can take a multitude of forms, including:⁹⁷

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question, or arrest for an administrative violation;

⁹² *Ibid*

⁹³ *Ibid.*

⁹⁴ John Morton. Department of Homeland Security, Immigrations and Customs Enforcement. “*Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*.” March 2, 2011. <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> Accessed 2 June 2015

⁹⁵ John Morton. Department of Homeland Security, Immigrations and Customs Enforcement. “*Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*.” June 17, 2011. <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> Accessed 2 June 2015

⁹⁶ *Ibid.* 2.

⁹⁷ *Ibid.* 2.

- deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court

Ultimately, at any step during the immigration enforcement process, an agent can decide to put a stop to proceedings. The factors that can influence such decisions are also numerous. Morton's memorandum names several factors that can help ICE officers, agents, and attorneys identify any possible cases that might require the use of prosecutorial discretion. They include both positive and negative factors.

Positive factors include:⁹⁸

- veterans and members of the US armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence; trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.

Negative factors include:⁹⁹

- individuals who pose a clear risk to national security;
- serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- known gang members or other individuals who pose a clear danger to public safety; and
- individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

Therefore, there are many factors that immigration enforcement agents must consider when deciding on cases and can ultimately have a very strong influence on whether a person is deported or not. The memo also stated that in optimal cases, the use of prosecutorial discretion should happen as early as possible in the proceedings to preserve government resources. It can however be used at any time, notably when there are changes in a person's situation (e.g. legitimate marriage to a US citizen). Mary Giovagnoli—who was Deputy Assistant Secretary

⁹⁸ *Ibid.* 5.

⁹⁹ *Ibid.* 5.

for Immigration Policy from 2015 to 2017 under Obama—commented on the memorandum in 2011 and declared that

Morton reminds ICE officers and attorneys that they should never assume that they are powerless to affect the outcome of a case—instead, that authority rests with individual officers and attorneys to determine whether or not the positive factors in a given case outweigh the value of prosecuting that case. [...] The memo reiterates the need to triage cases based on ICE priorities, emphasizing the goal of putting limited resources into cases and activities that protect the country by going after those who seek to do it harm.¹⁰⁰

John Morton was not the only director of ICE during the Obama Administration. While the director of ICE changed multiple times, the United States Secretary of Homeland Security was a position that stayed more stable. In January 2009, Janet Napolitano was appointed to the position. She was succeeded by Jeh Charles Johnson in 2013.¹⁰¹ A year after his appointment, Johnson wrote a memorandum to the heads of the agencies that compose the DHS: ICE, CBP & USCIS. His memorandum was titled *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*¹⁰² and aimed to give directives about “enforcement and removal activity, detention decisions, budget requests and execution, and strategic planning.” It also rescinded and superseded the two previous John Morton memoranda from March 2, 2011 and June 17, 2011 but also several other documents relevant to priorities and prosecutorial discretion.

The document itself goes into detail about a multitude of issues:

- Civil Immigration Enforcement Priorities
- Apprehension, Detention, and Removal of Other Aliens Unlawfully in the United States
- Detention
- Exercising Prosecutorial Discretion
- Implementation

Johnson confirmed that the DHS was to continue prioritizing the fight against “threats to national security, public safety, and border security.”¹⁰³ The memorandum gives three levels of

¹⁰⁰ Mary Giovagnoli. “What ICE’s Latest Memo on Prosecutorial Discretion Means for Future Immigration Cases.” *Immigration Impact*, American Immigration Council, 21 June 2011, immigrationimpact.com/2011/06/21/what-ice%E2%80%99s-latest-memo-on-prosecutorial-discretion-means-for-future-immigration-cases/. Accessed 23 Sept. 2016.

¹⁰¹ Rand Beers served as acting Secretary of Homeland Security following the resignation of Secretary Janet Napolitano on September 6, 2013 until Jeh Johnson assumed that office on December 23, 2013.

¹⁰² Jeh Johnson. Department of Homeland Security. “*Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*”. Nov. 20, 2014. https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf Accessed 2 June 2015

¹⁰³ *Ibid.* 1.

priority: priority level one, two, and three. People who fall under level one, have the highest chance of being put into removal proceedings and deported. Those who have fall under level three have the lowest chance of being removed while remaining a priority. People who fall under none of these priorities have a relatively low, but not inexistent, chance of being deported. Priority one, the highest, concerns people who have a criminal history, and are considered threats to “national security, border security, and public safety.” This priority is divided into five subsets, which are the following:

- **Item One:** People convicted of or accused of Terrorism, Espionage or pose a danger to National Security
- **Item Two:** People apprehended trying to illegally enter the country
- **Item Three:** People who are actively participating in a criminal street gang
- **Item Four:** People convicted of a felony for which an essential element was the alien's immigration status
- **Item Five:** People who have been convicted of an aggravated felony at the time of the conviction

Priority two, concerns people who have committed misdemeanors and new immigration violations. This second priority level is then divided into four subsets, which are the following:

- **Item One:** People convicted of three or more minor misdemeanors for which a major element was the immigration status.
- **Item Two:** People convicted of a "significant misdemeanor," which for these purposes is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence)
- **Item Three:** People apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014
- **Item Four:** People who in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.

Priority three, the lowest level, deals with people who have been issued a final order of removal on or after January 1, 2014. This signifies those who don't fall under the previous two priorities but had recently been issued a removal order. The memorandum repeated the Departments previous instructions about implementing prosecutorial discretion as early as possible in the

decision process.¹⁰⁴ The document did, however, confirm that non-priority aliens were not off-limit, and that nothing stated should be “construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities”¹⁰⁵ Ultimately the general rule was to use resources to support the enforcement priorities. In continuation with the previous John Morton memo the factors that should be considered when deciding whether to exercise prosecutorial discretion in the Jeh Johnson memo were the following:

extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative. These factors are not intended to be dispositive nor is this list intended to be exhaustive. Decisions should be based on the totality of the circumstances.¹⁰⁶

One year later, in December 2015, ICE Director Sarah Saldaña gave a written testimony to a Senate Committee on the Judiciary hearing titled “Oversight of the Administration’s Criminal Alien Removal Policies”.¹⁰⁷ In her testimony, she stated that the “the Department is focused on the smart and effective enforcement of our immigration laws.” This includes deporting those who fall under the three priorities set out by the head of the DHS. She explained how “ICE [was] allocating enforcement resources” according to those priorities and “continue to inform our decisions to arrest, detain, prosecute, and remove individuals from the United States.”¹⁰⁸ While referring to prosecutorial discretion, Saldaña stated that it was a “long-established, widely-used practice in every area of law enforcement”. She declared that its use was a vital part of immigration enforcement and that

that the ability to use good judgment on a case-by-case basis is one of our most important tools for ensuring that our laws are enforced fairly, humanely, and with the understanding that each decision will affect the lives of many individuals. ICE will continue to do the best job we can, within the bounds of existing law, to accomplish our mission, make strategic use of our resources, and improve efficiency and reporting.¹⁰⁹

Saldaña believed that the strategy implemented by ICE and the DHS, as a whole, was making communities safer by refining its priorities to “focus on the most serious public safety and

¹⁰⁴ *Ibid.* p.2

¹⁰⁵ *Ibid.* p.5

¹⁰⁶ *Ibid.* p.6

¹⁰⁷ Sarah Saldaña. “Written Testimony of ICE Director Sarah Saldaña for a Senate Committee on the Judiciary Hearing Titled ‘Oversight of the Administration’s Criminal Alien Removal Policies.’” *Department of Homeland Security*, 2 Dec. 2015, www.dhs.gov/news/2015/12/02/written-testimony-ice-director-senate-committee-judiciary-hearing-titled-%E2%80%9Coversight. Accessed 2 June 2016.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

national security threats as well as recent border crossers.”¹¹⁰ Whether that is the case is still unclear, and research on the topic has come to opposing conclusions. While some argue it discourages illegal immigration, others argue that

the removal policy is not an effective means of deterring or preventing criminal noncitizens from returning to the United States after deportation. The United States remains a desirable place for gang activity because deportation does not increase the cost of conducting crime. As a result, gang members freely reenter the country and reoffend without consequence.¹¹¹

In November 2016, Secretary Johnson released a statement on the state of Southwest Border Security. He declared that the United States borders “cannot be open to illegal migration. We must, therefore, enforce the immigration laws consistent with our priorities.”¹¹² He repeated that those priorities were public safety and border security and went into detail about the aims of the agency:

we prioritize the deportation of undocumented immigrants who are convicted of serious crimes and those apprehended at the border attempting to enter the country illegally. Recently, I have reiterated to our Enforcement and Removal personnel that they must continue to pursue these enforcement activities. Those who attempt to enter our country without authorization should know that, consistent with our laws and our values, we must and we will send you back.¹¹³

According to the statement, in October, 46,195 individuals were apprehended on the southwest border, up from 39,501 in September and 37,048 in August. These numbers, included an increasing number of “unaccompanied children” as well as people presenting themselves at ports of entry “along the southwest border seeking asylum.”¹¹⁴ While the topic shall not be developed here, it is important to note that in June 2012, the Obama administration introduced the Deferred Action for Childhood Arrivals (DACA) program.¹¹⁵ The program granted deferred action to “those under 31 as of June 15, 2012, who entered the US before their sixteenth birthday and continuously resided in the U.S without lawful status since at least June 15,

¹¹⁰ *Ibid.*

¹¹¹ Jonah M. Temple. “The Merry-Go-Round of Youth Gangs: The Failure of the U.S. Immigration Removal Policy and the False Outsourcing of Crime.” *Boston College Third World Law Journal*, vol. 31, no. 1, 1 Jan. 2011, pp. 193–215., lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1007&context=twlj.

¹¹² Jeh Johnson. “Statement by Secretary Johnson On Southwest Border Security.” Department of Homeland Security, 10 Nov. 2016, www.dhs.gov/news/2016/11/10/statement-secretary-johnson-southwest-border-security. Accessed 24 Nov. 2016.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Jeh Johnson. “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents”, 20 Nov. 2014, http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf. Accessed 24 Nov. 2016.

2007.”¹¹⁶ The idea behind the program was to prevent deportation of “young adults and children, who grew up as Americans yet did not voluntarily enter the US without lawful status.”¹¹⁷ While the DHS grants deferred action on a case-by-case basis, this ultimately led to a whole group of undocumented immigrants being provided with relief from removal and enabled ICE and the DHS to focus on other immigrants. DACA recipients were also allowed to “apply for employment authorization for the duration of the temporary stay.”¹¹⁸ In November 2014, President Obama expanded DACA through executive orders as well as introduced the new Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program permitting “parents of US citizens or legal permanent residents (LPR) to apply for deferred action if they have continuously resided in the US since January 1, 2010 and had a US citizen or LPR child as of November 20, 2014.”¹¹⁹ However both DAPA and the expanded form of DACA are on hold due to a pending Supreme Court case, *United States v. Texas*¹²⁰

Under the Obama administration, the United States had set out clear priorities in deportation procedures. Focusing on immigrants who pose a threat to national security, have committed crimes and those who have been issued a removal order since January 2014. The priorities were implemented because of a limit on available resources and in order to best serve the interests of the nation. How this will ultimately evolve under the Trump administration, is yet to be seen.

C. Limits of Deportation and Detention

The concepts of deportation and detention have long been criticised at both practical and ideological levels. But at a deeper level, the prioritisation of certain cases of immigrants, has come under criticism for the problems it generates and reveals.

¹¹⁶ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

¹¹⁷ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

¹¹⁸ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

¹¹⁹ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

¹²⁰ Henry Han. “Immigration Law: An Overview.” *Legal Information Institute*, 6 Aug. 2007, www.law.cornell.edu/wex/immigration. Accessed 19 Apr. 2017.

In 2006, the Home Affairs Committee investigation concluded that “the Government’s decision to prioritise asylum cases had led to a build-up of 7,000 entry clearance appeals.”¹²¹ Originally the reason beyond this prioritisation was asylum cases outnumbering immigration cases, but this was no longer true and failure to adapt priorities had nefarious consequences. Furthermore, the focus on asylum was detrimental to tackling “illegal working, sham marriages and abuse of the student route.”¹²² Accompanying this focus on asylum, was the failure to remove those who saw their applications refused. Indeed, in 2006, Amnesty International condemned the UK in a report that lamented the “huge disparity between the number of people refused asylum and the number who are either removed by the Immigration Service or make a voluntary departure”¹²³ According to the National Audit Office: “between 1994 and May 2004, a maximum of 363,000 applications for asylum were unsuccessful. Yet over the same period the Home Office reported that it had removed 79,500 failed asylum applicants”¹²⁴ This can be compared to the discrepancy between those considered deportable in the US and those who undergo the process of deportation. Indeed in 2009, ICE had set a goal of 400,000 deportations and ultimately fell short of that by almost 100’000, deporting approximately 310,000 people that year.¹²⁵

In the UK, since 2002, data prevents further analysis. Indeed, while the number of asylum applications, acceptances, and refusals is available, the number of deportation orders has not been made available by the Home Office. All that is available in the UK is the number of removals enforced. The number of people liable to deportation but whom the state cannot remove is thus missing. Data prior to 2002, does show, however, that there was a significant gap between initiation of enforcement action and subsequent leaving the territory. Ultimately, the lack of removals undermines the efforts made by those who try to ensure that the right people are allowed to enter or stay in the country. Indeed, integrity of the system requires a just and adequate response to demands for immigration enforcement.

Another problem caused by this non-enforcement, known as deportation-gap, is also that it creates a legal limbo in which foreign nationals are neither official members of their host

¹²¹ House of Commons, Home Affairs Committee, *Immigration Control*, Fifth Report of Session 2005–06 Volume I HC 775–I, 23 July 2006. 134.

¹²² *Ibid.* 134-5.

¹²³ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 3. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

¹²⁴ *Ibid.* 15.

¹²⁵ *Ibid.* 3.

country, nor authorized to reside in said country but are not able to be deported.¹²⁶ In his article *Rights of immigrants in voluntary and involuntary return procedures in national law*, Edwards states that “[p]ersons who cannot be removed but who are not detained are left in legal limbo, with only the status of temporary admission with very few correlative rights attached.”¹²⁷ The fact is that the majority of failed asylum seekers who are considered non-deportable are from “countries which they cannot be returned to, such as Iraq, Iran, Zimbabwe and Eritrea”¹²⁸ However, this then begs the question of why asylum applications are refused in the first place if the migrants cannot be returned to their countries. In many cases where return would be possible, failure to enforce deportation originates in a lack of cooperation or agreement between countries over the removal of citizens. Paoletti stated that

attempts by European countries to deport either irregular migrants or “failed” asylum seekers have regularly been frustrated by the refusal of foreign governments to issue the necessary repatriation documents (Ellermann, 2008). One clear example is represented by China that has often not accepted the return of its country nationals from either the UK or the US (Hansard, 29 April 2004; Sutherland, 2009).¹²⁹

This ultimately leads to the rise of the aforementioned legal limbo for some undeportable migrants.

There is also proof that a strictly enforced immigration system that increases the difficulty for those trying to enter the country has a perverse effect on migration:

by making it more costly and difficult to gain entry illegally, the US government has strengthened the incentives for permanent settlement in the United States. Thus it is entirely possible that the current strategy of border enforcement is keeping more unauthorised migrants *in* the United States than it is keeping out.¹³⁰

Though there may be a certain dissuasive aspect to the practice for people entering, it has a similar impact on those already in the country. Indeed, Professor Nigel Harris declared that “the migration system itself has the perverse, paradoxical effect of forcing settlement because if it is so difficult to get in and if the costs of getting in mean that you borrow so heavily and

¹²⁶ A. Edwards, (2009), *Rights of immigrants in voluntary and involuntary return procedures in national law*, Thematic Legal Study on rights of irregular immigrants in voluntary and involuntary return procedures, Nottingham, United Kingdom, 17. 1 June 2009.

¹²⁷ *Ibid.*

¹²⁸ Asylum Support Partnership, (2009), *The second destitution tally - An indication of the extent of destitution among asylum seekers, refused asylum seekers and refugees*, http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/policy_responses/Second_Destitution_Tally.pdf. Accessed 31 Oct. .2015

¹²⁹ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 18. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

¹³⁰ Wayne A. Cornelius. “Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy.” *Population and Development Review*, vol. 27, no. 4, Dec. 2001, pp. 661–685., doi:10.1111/j.1728-4457.2001.00661.x. Accessed 26 Feb. 2016.

that you have to work for such a long period of time to pay off your debts, all this forces settlement.”¹³¹ Strong borders means lower immigration, it also means more permanent migration.

As already stated in this study, questions about length of detention for immigrants have often been raised. In 2001, the Supreme Court of the United States heard *Zadvydas v. Davis*¹³² in which the government argued that indefinite detention was sometimes justified for deportable aliens. The court concluded that serious constitutional questions would be raised if the immigration law interpreted to authorize indefinite detention of aliens.¹³³ The court added that there should be a presumptive six-month limit on detention of deportable aliens. After that time, the alien must be released if there is no “significant likelihood of removal in the foreseeable future.”¹³⁴ However, that same year, Congress passed the US PATRIOT Act. It contained specific statutory powers to provide for indefinite detention in the case of ‘terrorist’. It has, however, been used to detain indefinitely people who have not been found guilty of terrorism or terrorist-related acts. In the UK on the other hand, the general lack of detention limit is a problem. While being criticised strongly by human rights advocates and politicians on both side of the political spectrum, there is no serious move currently towards ending the procedure. Adding to this the fact that child detention is legal, suggests that the UK should make legislative changes.

In the US, the government has argued that in order to avoid criminal aliens absconding in order to avoid deportation, all criminal aliens should be detained. In his 2002 article *In Aid of Removal: Due Process Limits on Immigration Detention*, David Cole cited a study that showed that “the INS failed to deport eighty-nine percent of non-detained aliens ordered deported, while the INS was able to remove almost ninety-four percent of detained aliens who were ordered deported.”¹³⁵ But a US court argued that a ninety percent failure to appear cannot be used to justify imprisoning the ten percent who would dutifully appear. There was also criticism in the post 9-11 US of the FBI’s handling of deportable aliens. Indeed, claims of deportable aliens being held well beyond the time necessary to effectuate their departure simply because the FBI has not yet completed its investigation of them.” Indeed, it was shown that at

¹³¹ House of Commons, Home Affairs Committee, *Immigration Control*, Fifth Report of Session 2005–06 Volume I HC 775–I, 23 July 2006. 98.

¹³² Supreme Court. *ZADVYDAS v. DAVIS*. 28 June 2001. *Legal Information Institute*. <https://www.law.cornell.edu/supct/html/99-7791.ZS.html>

¹³³ Cole, David, "In Aid of Removal: Due Process Limits on Immigration Detention" (2002). *Georgetown Law Faculty Publications and Other Works*. 68. <http://scholarship.law.georgetown.edu/facpub/68>

¹³⁴ *Ibid.* 1018.

¹³⁵ *Ibid.* 1023.

times, “[a]liens who have agreed to leave and have been granted voluntary departure or a final order of removal, and who are fully ready to leave, have been detained for months longer, until the FBI has “cleared” them.”¹³⁶

In the UK, much criticism aimed at the government is due to the lack of data collection or at least failure to make that data available to the public. The Migration Observatory give the example of the difficulty in tracking individual trajectories of detention, release and re-detention. Indeed, for each of these cases, they are given as separate numbers of occurrences regardless of if it is the same individual. For example, a person who is detained then released three times will count triple in statistics. They recommend supplementing Home Office data with information from NGOs.¹³⁷ There also a lack of transparency over “the nature of discretionary decision making by Home Office officials and judicial actors on when to arrest and detain, and when to release persons from detention”¹³⁸ The availability of this information is necessary to fully understand the reality of the official statistics. In the United Kingdom, much criticism has been directed towards a system that leads to individual judgement on whether or not a person meets the criteria to be given asylum. Indeed, the UK has a “complex system of national migration laws, policies, regulations and guidelines.”¹³⁹ These rules are considered to allow considerable scope for individual judgement and as rules evolve and change, there is increased “confusion and [a] lack of accountability.”¹⁴⁰ This issue is unlikely to be resolved without a systemic reform of immigration control.

This list of critiques contains only the issues this research has encountered and noticed. There are surely many other problems with both deportation and detention as well as with the asylum process which could be the subject of further research.

¹³⁶ *Ibid.* 1029.

¹³⁷ Stephanie J. Silverman. “Immigration Detention in the UK.” *Migration Observatory*, 2. 1 Sept. 2016, www.migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/. Accessed 17 Oct. 2016.

¹³⁸ *Ibid.*

¹³⁹ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 15. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

¹⁴⁰ Emanuela Paoletti. *Deportation, Non-Deportability and Ideas of Membership*. Refugee Studies Centre, 15. 2010, *Deportation, Non-Deportability and Ideas of Membership*, www.rsc.ox.ac.uk/files/publications/working-paper-series/wp65-deportation-non-deportability-ideas-membership-2010.pdf.

CONCLUSION

The study of American and British policies on deportation and detention as well as the implementation of priorities in the 21st century sheds a light on the varying influencers of policy. This research has shown the workings of the deportation process in a comparative perspective. Deportation is a vital process in most governments' immigration arsenal. Immigration detention is an inherent part of deportation as it is often a mandatory step of the deportation process. These two procedures must be carried out as part of an immigration system that is firm but fair, a system that prioritises those who pose a threat to the community over those who do not. Both the United Kingdom and the United States have tried to do so and have enforced their policies according to these principles. Nevertheless, priorities in deportation are also the result of one major factor: finance. If they had the resources to, both countries would be able to deport more people, especially lower-priority and non-priority unwanted immigrants.

Deportation is also a symbolic power, as it demonstrates the power of the state. Both nations have shown their struggle influencing major issues, such as crime rates, immigration and securing borders. To hide these struggles, governments use deportation to show their strength. Wilsher argues that detention has an equally important symbolic value:

alien detention is of great symbolic value. Governments can be seen to be taking executive action against a threat without waiting for the slow and uncertain workings of the criminal justice system. They can also take such action without facing the legal constraints and *political* damage that imposing internment and other emergency measures on citizens would bring.¹

Mary Bosworth stated that “harsh policies about foreigners may, like punitiveness, ‘pose as a symbol of strength but . . . should be interpreted as a symbol of weak authority and inadequate controls’.”² However it is a symbolic power of vital importance despite this suggestion of weakness. Deportation serves several purposes. It satisfies public opinion. It serves as a disincentive for migrants. It encourages people to return voluntarily to their home countries to avoid unwanted and unprepared deportation.³

¹ Daniel Wilsher. “Immigration Detention: Law, History, Politics.” *Immigration Detention: Law, History, Politics*, Cambridge University Press, Cambridge, 2014, p. 255.

² Mary Bosworth. “Border Control and the Limits of the Sovereign State.” *Sage Journals, Social & Legal Studies*, 1 June 2008, 210. journals.sagepub.com/doi/abs/10.1177/0964663908089611. Accessed 21 July 2016.

³ Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations,

This research argues in addition that deportation is a necessary tool in the asylum process. If applicants who are refused asylum are not deported then the asylum procedure is pointless. For if a person is not removed, there is no justification for deciding on an asylum case and governments are weakening their capacity to help those in need.

Public perception on the issue is divided and, according to Gibney and Hansen, paradoxical:

Many people are uncomfortable with the idea of removing people from national soil, even when they gained access to that soil in violation of state laws. (...) we support immigration control, but we don't like deporting migrants. More broadly, people have nothing good to say about immigration, but much good to say about actual immigrants.⁴

Whether it be in the United Kingdom or the United States, the general public is not in favour of unfettered immigration and in general prefer limited immigration. This mindset heavily influenced two major votes in 2016: the Brexit referendum, and the 2016 Presidential Elections. The 2010 UK Coalition Government declared that it would reduce net migration “from the hundreds of thousands back down to the tens of thousands” by the end of the 2010 Parliament. They failed. Following the Brexit vote in June 2016, the new Prime Minister Theresa May said she remained firm in her belief “that we need to bring net migration down to sustainable levels, and the Government believe that that means tens of thousands”.⁵ Whether that is possible will depend on the result of the Brexit negotiations which are due to start in June 2017. In both the US and the UK, there is huge uncertainty about the future of immigration policy and the deportation process that goes with it. The outcome of the Brexit negotiations is completely uncertain. It is not known whether the UK will leave the single market and end the free movement of people, or what immigration policy will be after that. In the United States, the election of Donald Trump has also caused great uncertainty. During the campaign, Trump surfed on an anti-immigrant rhetorical wave with comments on illegal immigration and vows to deport millions of people while promising that any enforcement plan would have “a lot of heart.”⁶ Since coming to power, he has already made vast changes to immigration policy and

15. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

⁴ Matthew J. Gibney, and Randall Hansen. “Deportation and the Liberal State: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom.” *UNHCR*, United Nations, 13. 2003, www.unhcr.org/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html. Accessed 15 Sept. 2016.

⁵ Oliver Hawkins. “Migration Statistics.” *UK Parliament*, House of Commons Library, 20 June 2017, researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06077. Accessed 20 June 2017.

⁶ Camila Domonoske, and Joel Rose. “What's New In Those DHS Memos On Immigration Enforcement?” *NPR*, 22 Feb. 2017, www.npr.org/sections/thetwo-way/2017/02/22/516649344/whats-new-in-those-dhs-memos-on-immigration-enforcement. Accessed 27 Feb. 2017.

may continue to do so. He signed an executive order on January 25, 2017 entitled “Border Security and Immigration Enforcement Improvements” and included several controversial provisions. Indeed, the order

plans for the construction of a contiguous wall along the nearly 2,000-mile southern border; provides additional resources to Border Patrol agents; drastically increases detention along and beyond the southern border; expands the use of expedited removal to the entire nation while limiting the use of discretion in deciding whom to deport; and outlines enforcement changes, including authorizing more state and local officials to enforce federal immigration laws.⁷

While the executive order has been highly criticised, three important provisions in the document relate to this research: massive expansion of the use of detention, expansion of expedited removal and the suspension of prioritisation. According to the American Immigration Council, with the expansion of detention comes huge difficulty for immigrants:

individuals merely suspected of violating immigration law can now be apprehended and detained, pending further proceedings

(...)

In addition, the order directs DHS to detain all individuals in removal proceedings to the maximum extent of the law, regardless of whether they are merely awaiting their court hearing or have a final order of deportation.

(...)

This dramatic shift in the use of detention would impose tremendous due process and humanitarian costs on immigrant families and communities, not only at the border, but throughout the country.⁸

Detention therefore could become an even larger factor for immigrants in the future, whether they are ultimately deported or not. But more importantly than the increase in detention is the expansion of expedited removal. This process permits immigration officers to quickly deport certain non-citizens without seeing an immigration judge within approximately 24 hours. It also permits officers to apply this process throughout the country whereas previously it was only within 100 miles of the border. Furthermore, the order essentially eliminated targeted priorities for removal and rescinded most guidelines on the use of prosecutorial discretion. Immigration officers are therefore left able to deport as many unauthorized immigrants as possible with little regard to any of the positive or negative factors this research presented.

According to Mary Giovagnoli

many officers will continue to make their decisions to arrest and detain based on a belief that exercising favorable discretion is part of their job. But some, especially those who didn't like the idea that they were being told how to prioritize their work,

⁷ “Summary of Executive Order ‘Border Security and Immigration Enforcement Improvements.’” *American Immigration Council*, 27 Feb. 2017, www.americanimmigrationcouncil.org/research/border-security-and-immigration-enforcement-improvements-executive-order. Accessed 13 Apr. 2017.

⁸ “Summary of Executive Order ‘Border Security and Immigration Enforcement Improvements.’” *American Immigration Council*, 27 Feb. 2017, www.americanimmigrationcouncil.org/research/border-security-and-immigration-enforcement-improvements-executive-order. Accessed 13 Apr. 2017.

may not do so. In fact, some will see it as their duty and obligation to arrest everyone, no matter the compelling circumstances. And that is what can lead to chaos.⁹

This idea of immigration enforcement cannot be sustainable. The limited resources available to the Department of Homeland Security and its agencies mean that deportation of all immigrants is not viable. Trump has created a situation in which he risks, law-abiding non-dangerous immigrants being deported while dangerous ones are left in the country simply because they are harder to find.

Ultimately, the immigration systems need reforming. On the one hand, the United States Congress should pass bi-partisan immigration reform that will solve many of the presented problems with the current immigration system. On the other hand, the UK government must negotiate with the EU, decide what kind of immigration system it wants and deliver a system that is both firm and fair, and respects the principle of due process and the human rights of immigrants. In both cases a smartly-implemented, and thoroughly researched points-based system would be workable possibilities. The UK especially in a post-Brexit world—assuming they have more control over their immigration policy than now—would be able to have immigration quotas that allow them to have people with the skills they need. The USA, would also benefit from the transfer from a family-based immigration system to a points-based system that would be more beneficial for America.

Financial resources are the biggest problem governments face. Detention and deportation are both costly. Solutions are not simple to find. One could increase resources, or decide that as not all undocumented immigrants can be deported, we should not deport any. Open borders are not a sensible nor viable option. Neither are closed borders. A healthy balance of skilled migration and humanitarian aid to refugees is needed. Ultimately, immigration control finds itself in a balance somewhere between liberal and non-liberal ideas. On one hand, the people's right to freedom and safety. On the other, the need for nations to have control over their borders and filter those coming in. For now, both the UK and the US are leaning in the non-liberal direction. The use of detention and deportation, with limited human rights and due process, as well as cases of indefinite imprisonment are a sign of this illiberalism and are a challenge for both countries, both now and for the future.

This paper concludes that both deportation and detention are necessary tools in the immigration apparatus. They must nevertheless be used wisely, being prioritised to deal with

⁹ Mary Giovagnoli. "Abandoning Priorities Just Made Immigration Enforcement Work Much Harder." *Immigration Impact*, American Immigration Council, 23 Feb. 2017, immigrationimpact.com/2017/02/23/immigration-enforcement-priority-issues/. Accessed 24 Feb. 2017.

the most dangerous people first and that more must be done to ensure the right to a fair process for all immigrants.

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