
Article:
Spalding, A. orcid.org/0000-0002-7062-2337 (2021) Strip-searching for nationality documents. The Modern Law Review, 84 (3). pp. 456-476. ISSN 0026-7961

https://doi.org/10.1111/1468-2230.12591

Strip-Searching for Nationality Documents•

ABSTRACT

Section 51 of the UK's Immigration Act 2016 introduced a new power to conduct strip-searches for nationality documents on those held in immigration detention or in prisons. Unlike in previous case law, the goal of this new power appears to be administrative efficiency, rather than safety and security. This article describes the wider legal context of the measure and analyses it from a human rights perspective. This includes an in-depth examination of the administrative justification for this new power as well as a critical look at some of the issues with strip-searching in practice.

KEYWORDS: Strip-search, Immigration detention, Immigration Act 2016, European Convention on Human Rights

Introduction

Section 51 of the UK's Immigration Act 2016 introduced a new power to conduct strip-searches for nationality documents. This power can only be carried out on those held in immigration detention or in prisons. The policy has attracted little scholarly attention, but it represents the expansion of an invasive power beyond the criminal justice realm and into the administrative sphere. Unlike previous strip-searching measures, the new power is not related to concerns about safety and security. Rather, it is intended to speed up the administrative process of deportations, although there are reasons to be sceptical that it will be particularly effective at achieving this aim.

This article seeks to provide an overview of this new power and its rationale, as well as to examine its legality and acceptability from a human rights perspective. The article is structured

as follows. The first section provides some context for this new power, demonstrating that this is not an isolated development but rather fits with a wider pattern of introducing criminal law, criminal justice style practices and discourse into the formerly administrative area of immigration law. It also relates the new power to broader the political desire for control over the migrant body. The second section provides a detailed overview of the new power to strip-search for nationality documents contained in section 51 of the Immigration Act 2016, including a discussion of the particulars of what kind of strip-search may be carried out as well as what is meant by the term 'nationality documents'. The third section considers the legality of strip-searches generally under human rights law by examining the case law of the European Court of Human Rights (ECtHR) on this topic. This section identifies the typical factors with which the Court scrutinises the legality of strip-searches. The fourth section considers the application of these principles to the UK government's new strip-searching power. Since this new power is grounded in an administrative efficiency rationale and as little prior case law has considered this as a basis for strip-searching, the Court's prior approach is of limited use. As such, the section provides an in-depth examination of the administrative rationale behind the new power including a discussion of the construction of migrants as non-compliant by the Home Office. The fifth section details some of the other criticisms that can be levied at the new power, as well as strip-searching generally, by considering the relationship between strip-searches and sexual violence, the potential consequences of strip-searching asylum seekers, and the evidence on the effectiveness of strip-searches as a safety and security measure.

Understanding the Wider Context: The Criminalisation of Immigration

While this article focuses exclusively on the new strip-searching powers introduced by the Immigration Act 2016, it is important to understand its wider context. This is not an isolated

piece of legislation but part of a much broader trend of criminalising immigration in Europe, as well as the USA and Australia. The criminalisation of immigration can refer to many aspects of the treatment of immigrants, including the increased use of criminal law to deal with immigration, the broad range of criminal justice style practices associated with immigration control, and media and political discourse framing migrants as criminals.[1] In the UK, there are numerous examples of the criminalisation phenomenon in action. From 1997 to 2016, 89 new immigration offences where introduced,[2] the most significant increase since the inception of the modern British immigration system in the Aliens Act 1905. Similarly, although the power to detain migrants has a long history, recent years have seen a rapid and well-documented expansion in the use of this power.[3] In 2018 24,748 people (including children) entered

[1]J. Stumpf, 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power' (2006) 56 *American University Law Review* 367; J. Parkin, *The Criminalisation of Migration i*n *Europe: A State of the Art of the Academic Literature and Research* ,Centre for European Policy Studies, CEPS Paper in Liberty and Security in Europe No 61, October 2013 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2350119 [9 September 2019]

[2] A. Aliverti, 'Immigration Offences: Trends in Legislation and Criminal and Civil Enforcement' *Migration Observatory*, 12 October 2016, available at https://migrationobservatory.ox.ac.uk/resources/briefings/immigration-offences-trends-in-legislation-and-criminal-and-civil-enforcement/ [6 September 2019]

[3] See for example M. Welch and L. Schuster, 'Detention of Asylum Seekers in the US, UK, France, Germany and Italy: A Critical View of the Globalizing Culture of Control' (2005) 5 *Criminal Justice* 331; E. Guild, *The Criminalisation of Migration in Europe: Human Rights Implications* Commissioner for Human Rights, Council of Europe 4 Feb 2010 at 22 available at https://www.refworld.org/docid/4b6a9fef2.html [29 October 2019]; Silverman, 'Regrettable But Necessary? A Historical and Theoretical of the Rise of the UK Immigration Detention Estate and Its Opposition' (2012) 40 (6) *Politics and Policy* 1131; House of Commons Home Affairs Committee, *Immigration Detention,* HC 913**,** 21 March 2019, at page 6 [29 October 2019]

immigration detention in the UK[4] and they can be held indefinitely, with many migrants being held for over 6 months and some cases where migrants have been held for over 2 years.[5] It is estimated that at least 100 people per year are unlawfully detained in such centres[6] and the Home Affairs Committee recently condemned the Home Office's approach to immigration detention stating it was 'appalled' by the 'shockingly cavalier attitude to the deprivation of liberty and the protection of peoples basic rights.'[7] The conditions in these centres are often on par with, if not worse than prisons.[8] The criminalisation phenomenon is also evident in the rapid expansion of police-like powers for UK immigration officers,[9] including the reasonable use of force when carrying out a detention, arrest, search of premises and when taking fingerprints.[10]

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[4] S. Silverman and M. Griffiths, 'Immigration Detention in the UK' *Migration Observatory*, 29 May 2019, available at https://migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/ [29 October 2019]

[5] T. McGuiness and M. Gower, *Immigration Detention in the UK: An Overview*, House of Commons Library Research Briefing ,CBP-7294, 12 September 2018, at 30 available at https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7294#fullreport [6 September 2019]

[6] House of Commons Home Affairs Committee, *Chapter 3: The Decision to Detain in Immigration Detention Inquiry,* HC 913**,** 21 March 2019, at para 64

[7] Ibid. At para 65

[8] M. Bosworth, *Inside Immigration Detention* (Oxford University Press 2014); I. Hasselburg, 'Coerced to Leave: Punishment and the Surveillance of Foreign National Prisoners in the UK' (2014) 12 *Surveillance and Security* 471

[9] See for example powers introduced by the Immigration and Asylum Act 1999, the Nationality, Immigration and Asylum Act 2002, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, the Immigration, Asylum and Nationality Act 2006 and UK Borders Act 2007

[10] Immigration and Asylum Act 1999, s 146 (as amended by the Nationality,

While the criminalisation of immigration is a broad phenomenon, it is important to scrutinise some of the individual policies that comprise it, particularly from a human rights perspective. While the criminalisation of immigration as a whole cannot be legally challenged, several policies and practices related to the criminalisation phenomenon, such as the Detained Fast Track System (discussed below), have successfully been ruled unlawful.[11] Examining the minutiae of a particular policy can be helpful in understanding the legitimacy of and rationalisation behind that policy which can expose potential legal weaknesses. In this case, a thorough examination of new strip-searching powers introduced in the Immigration Act 2016 demonstrates that their legality from a human rights perspective is dubious.

It is also important to recognise that this new strip-search power sits within not only the 'crimmigration' framework,[12] but a wider trend of seeking control over the migrant body. This tendency has been present throughout the history of modern immigration powers in the UK, with practices such as virginity testing and using x-rays to determine age being used in the

Immigration and Asylum Act 2002); UK Borders Act 2007, s 2(4).

[11] *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin); *Detention Action v Secretary of State for the Home Department* [2015] EWHC 1689 (Admin); *Lord Chancellor v Detention Action* [2015] EWCA Civ 840. Although there seems to be interest in bringing a similar system back Ministry of Justice, 'Press Release: New fast-track immigration appeal rules proposed' (18 April 2017) available at: https://www.gov.uk/government/news/new-fast-track-immigration-appeal-rules-proposed [6 September 2019] See A. Spalding 'Leaving Saadi Behind? The Future of the UK's Detained Fast Track Process' (2016) *Journal of Immigration, Asylum and Nationality Law* 30 (2) 159 for an overview of the case law

[12] J. Stumpf, 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power' (2006) 56 *American University Law Review* 367

1970s and 80s.[13] It is manifested in various ways today, including these strip-searching powers, fingerprinting migrants as routine practice,[14] the introduction of biometrics on immigration documents[15] and the still ongoing debate as to whether x-rays and dental x-rays should be routinely used in assessing the age of asylum seekers.[16] These policies are rooted in the idea that migrants cannot be trusted and will attempt to deceive the system, which not only feeds into the criminalisation of immigration by contributing to the idea of migrants as 'untrustworthy' but self-legitimates the need for these power by casting control and invasion of the body as the only way to reveal the truth.[17] As will be discussed in detail below, little information has been provided to demonstrate the need for these new strip-search powers. This is consistent with previous policies such as the 'virginity testing' powers in the 1970s and 1980s that where rooted in stereotypes with little evidence for the need for such policies.[18] It has been argued that such control over the body has an important symbolic and practical function to human rights as it reiterates the state's ability to determine whose life is valuable

[13] See for example E. Smith and M. Marmo, *Race, Gender and the Body in British Immigration Control: Subject to Examination* (Palgrave Macmillan, 2014)

[14] 'Identification of Applicants EURODAC' https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/identification-of-applicants_en

[15] 'Biometric Residence Permits (BRPs)' https://www.gov.uk/biometric-residence-permits

[16] Although such practices are not 'routine' in the UK x-rays are certainly being used in some situations to determine age see for example the case of R (AS) v Kent County Council (age assessment; dental evidence) [2017] UKUT 446 which successfully challenged an age assessment by Kent County Council based primarily on dental x-ray evidence.

[17] E. Smith and M. Marmo *Race, Gender and the Body in British Immigration Control: Subject to Examination* (Palgrave Macmillan, 2014)

[18] Ibid.

and valid and who has merely 'bare life' that can be subjected to more extreme scrutiny and control with fewer safeguards and less regard for human rights.[19] Several academics have pointed out that immigration control is an area where human rights are often given less weight than state sovereignty, both in practice and in law.[20]

The New Power

Section 51 of the Immigration Act 2016 introduced a new power to conduct a strip-search for nationality documents. It allows the Home Secretary to direct a detainee custody officer (a guard in immigration detention), a prison officer or a prisoner custody officer to conduct a 'full search' of a detainee for nationality documents. In order to do this, the Home Secretary needs reasonable grounds to believe that a relevant nationality document will be found. The 2016 Act

[19] See E. Smith and M. Marmo 'The Border as a Filter: Maintaining the Divide in the Post-Imperial Era' in *Race, Gender and the Body in British Immigration Control: Subject to Examination* (Palgrave Macmillan, 2014); J. Lechte and S. Newman *Agamben and the Politics of Human Rights: Statelessness, Images, Violence* (Edinburgh University Press, 2013). Although such an approach may be argued to have limits for understanding the migrant experience see for example N. Johansen, 'Governing the Funnel of Expulsion: Agamben, the Dynamics of Force and Minimalist Biopolitics' in K.F. Aas and M. Bosworth *The Borders of Punishment: Migration, Citizenship and Social Exclusion* (Oxford University Press, 2013)

[20] C. Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016); Dembour, *When Humans Become Migrants: A Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015); G. Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Jihoff Publishers 2010); M. Bosworth 'Border Control and the Limits of the Sovereign State' (2008) *Social and Legal Studies* 17(2) 199; G. Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?' (2004) 6 *European Journal of Migration and Law* 93

allows an officer to use reasonable force to conduct this search and section 53 also makes resisting such a search a criminal offence.

It is important to note that this power extends to young offender institutions as well as adult prisons[21] and does not appear to have any age limitations in immigration detention. Therefore, this power applies to children as well as adults, although the extent to which it may be used against children is unclear. In a debate on the matter the Solicitor General asserted that 'the Government's policy is not to detain children in immigration and removal centres'[22] but children can be detained in exceptional circumstances.[23] Though the number of children detained has fallen dramatically, in 2018 63 children were still held in immigration detention.[24] In relation to young offender institutions, the assurances from the Solicitor General on the use of this strip-search power were based on vague examples and he concluded that there is no 'hard and fast threshold, other than one that would be based on a genuine case-by-case analysis.'[25] There is a risk-based, case-by-case strip-searching policy in effect already in young offender institutions, but a gap seems to exist between this policy and

[21] S. 51 Immigration Act 2016

[22] HC Deb, Vol 601, col 339 (3 November 2015)

[23] S. Shaw, *Review Into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office,* Cm 9186, January 2016 , at 221 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf [30 March 2020]

[24] S. Silverman and M. Griffiths 'Immigration Detention in the UK' *Migration Observatory,* 29 May 2019 available at https://migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/ [30 March 2020]

[25] HC Deb, Vol 601, col 339 (3 November 2015)

its implementation.[26] However, since children under the age of 10 cannot be held criminally responsible (and thus placed in a young offender institution), we know that the power would not be used against children younger than 10 in this setting.[27]

There are several terms in the legislation that require further explanation. The decision to use the term 'full search' rather than 'strip-search' was intentional. The Act did initially refer to a 'strip-search' but this was changed due to concerns that this gave the impression that the person being searched would be stripped completely naked.[28] However, as pointed out during a debate on the matter, 'changing the name of the search from "strip-search" to "full-search" does not in any essential way change the extent of the powers which for all intents and purposes are basically strip-search powers.'[29] This is borne out in the legislation: section 51(15) defines a 'full search' as a search which involves the removal of an item of clothing which (a) is being worn wholly or partly on the trunk and (b) is being so worn next to the skin or next to an article of underwear. This is consistent with the definition of a strip-search. For example, Home Office guidance as to the Police and Criminal Evidence Act 1984 defines a strip-search as 'a search involving the removal of more than outer clothing.'[30] There is another type of strip-search called an 'intimate search' which is where a search includes 'a physical examination of a

[26]The Howard League for Penal Reform, 'The Carlile Inquiry 10 Years On', 2016 available at https://howardleague.org/wp-content/uploads/2016/06/Carlile-Inquiry-10-years-on.pdf [30 March 2020]

[27] HC Deb, Vol 601, col 339 (3 November 2015)

[28] HC Deb, Vol 603 col 232 (1 Dec 2015)

[29] HC Deb, Vol 603 col 244 (1 Dec 2015)

[30] Home Office 'Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers: Police and Criminal Evidence Act 1984 – Code C' (2014) 60

person's body orifices other than the mouth.'[31] Section 51 of the 2016 Act specifically prohibits an intimate search being carried out for nationality documents. Throughout this article, the section 51 power to 'full search' will be referred to as a strip-search to avoid unnecessary confusion.

The other term in the legislation which does not have an immediately clear meaning is 'nationality documents'. Section 51(15) defines nationality documents as a document which might (a) establish a person's identity, nationality or citizenship or (b) indicate the place from which a person has travelled to the United Kingdom or to which a person is proposing to go. This is a very broad definition and means that it will likely encompass a large range of documents beyond the obvious passport or travel documents. It may, for example, include 'birth, marriage or civil partnership certificates; divorce documents; adoption papers; maritime or military discharge certificates; tickets for travel in and out of the UK; stubs of boarding passes; resident status documents; and visas and vignettes.' [32]

Human Rights and Strip-Searches

Strip-searches have been described as 'one of the most demeaning aspects of prison life' by both prisoners and prison staff.[33] It has been reiterated by the European Court of Human Rights (ECtHR) that prisoners do not lose their human rights when they enter prison.[34] Unsurprisingly then, there have been various human rights cases brought against strip-searching practices.

[31] Ibid 59

[32] HC Deb Vol 600 Col 341 (3 Nov 2015)

[33] D. Van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford University Press, 2009) at 285

[34] Application No 37452/02 *Stummer v Austria* Judgment of 7 July 2011 para 99

The first high-profile human rights case concerning strip-searches, *McFeeley and others v the United Kingdom,* did not reach the European Court of Human Rights in the 1980s because the Commission, which used to rule on the admissibility of cases before they reached the Court, declared it inadmissible.[35] The applicants, convicted of terrorism offences under the Northern Ireland (Emergency Provisions) Act 1978, were serving their sentence in the HM Prison Maze and were subjected to strip searches, including intimate searches, approximately every nine days as well as before and after any visits. The prisoners argued this was a violation of the Article 3 ECHR prohibition on torture, inhuman or degrading treatment or punishment. The UK argued that these searches where necessary for prison safety. This case established that the procedure surrounding the search is crucial to the decision of whether a strip-search is compatible with human rights. The Commission found that the procedural safeguards showed that the searches were designed to reduce humiliation and had prison safety as their objective. As such, they did not amount to degrading or inhuman treatment.

The Court has applied this principle that strip-searches do not necessarily violate the Convention in subsequent cases.[36] But not all strip-searches are compatible with the Convention: it depends on the circumstances of the case. In order to comply with the Convention, case law indicates that strip-searches must not be systematic or arbitrary but must instead be motivated by the person's individual behaviour, and that those who carry out the strip-search must be respectful of the detainee and must not engage in inappropriate behaviour. In *Iwanczuk v Poland,*[37] a prisoner was required to submit to a strip-search before he was

[35] Application No 8317/78 *McFeeley and others v the United Kingdom* Commission Decision 15 May 1980

[36] Application No 70204/01 *Frerot v France* Judgment of 12 September 2007 para 38

[37] Application No 25196/94 *Iwanczuk v Poland* Judgment of 15 February 2002. See also Application No 44558/98 *Valasinas v Lithuania* Judgment of 24 July 2001; Application No 20071/07 *Piechowicz v Poland* Judgment of 17 April 2012

allowed to vote, and when the applicant was stripped to his underwear the prison guards ridiculed and verbally abused him. The Court found a violation of Article 3, citing not only the guards' inappropriate behaviour but also the fact that nothing in the prisoner's history indicated that he would behave violently, so it had not been shown that a search was reasonable and necessary. Even if the Court accepts that the regime was not intended to humiliate the prisoner, it has reiterated many times that a practice of routine strip-searches without concrete grounds that the individual is a security risk is not compatible with Article 3.[38]

Is Strip-Searching for Nationality Documents a Legitimate Measure?

It is notable that in every strip-searching case, the Court has focused on whether or not the search was justified on prison security or safety grounds. The new strip-search power in section 51 is not a security measure. This means that it is possible that the Court will find it to be in violation of the Convention. The fact that the new strip-search power is not based on a safety or security risk is explicitly acknowledged in the explanation for the rationale for this new power in the Overarching Impact Assessment for the Immigration Bill, where it states that the power to search for and seize nationality document is necessary because, before the Act, '[d]etainee custody officers or prison officers who find nationality documents during the course of routine security searches have no powers to seize such documents as they do not present a security risk to the removal centre/prison or detained person.'[39] Thus the Home Office has publicly acknowledged that the grounds for this new power are not security or safety and thus they are explicitly stating that there is no security or safety risk.

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[38] Application No 50901/99 *Van der Ven v the Netherlands* Judgment of 4 February 2003; Application No 57250/99 *Lorse and others v the Netherlands* Judgment of 4 February 2003; Application No 13621/08 *Horych v Poland* Judgment of 17 April 2012; Application No 8384/08 *Chyla v Poland* Judgment of 3 November 2003 2015; Application No 36140/11 *Michal Korgul v Poland* Judgment of 21 March 2017

[39] Home Office 'Overarching Impact Assessment- Immigration Bill', IA No: HO0214, 17 September 2015, at 6 available at http://www.parliament.uk/documents/impact-assessments/IA15-008.pdf [6 September 2019]

Instead, the rationale for this new power to strip-search for nationality documents is administrative convenience and efficiency. In a debate on the Bill, the Solicitor General gave a vague explanation: 'The Home Office requests nearly 1,000 emergency travel documents a month where no passport is held or can be used for removal. A proportion of these requests is not agreed because the individual we are seeking to remove provides incomplete or inaccurate information or their claimed nationality is disputed.'[40]

It seems doubtful the courts will accept this aim - speeding up the administrative process of removing foreign nationals - as a legitimate justification for strip-searching. In the case of *Wainwright v the United Kingdom*[41] the ECtHR appears to imply that there will be a violation of the prohibition on torture, inhuman or degrading treatment or punishment 'where the search has no established connection with the preservation of prison security and prevention of crime or disorder, issues [under Article 3] may arise.'[42] The Court's wording here is rather vague and does leave the issue open but the prior case law on strip-searches (see above) demonstrates a relatively robust approach by the Court.

Previous case law on strip-searches in Belgium also implies that the new UK power could be incompatible with the ECHR. In 2013, a similar issue arose before the Belgian Constitutional Court when the Belgian authorities used vague explanations of 'inefficiency' and 'multiple

[40] HC Deb Vol 600 Col 341 (3 Nov 2015)
[41] Application No 12350/04 *Wainwright v the United Kingdom* Judgement of 26 September 2006

[42] Ibid para 42; see also N. Moreham 'Violating Article 8' (2007) *Cambridge Law Journal* 66 (1) 35

problems' to justify routine strip-searches in prisons.[43] This provision was challenged on the basis that it violated Article 3 of the ECHR as no threat to prison safety or security was established before these searches were carried out. The Constitutional Court found that the strip-searching powers were not sufficiently justified and went beyond what was necessary for security.[44] This case is particularly interesting as like the new UK strip-searching powers, the Belgian authorities called the searches by a different name, a 'search of inmates clothes', to distance the process from the idea of strip-searching even though the substance was the same. Daems argues that such an approach resembles Cohen's idea of 'interpretive denial' in which the state neutralizes and reclassifies what it is doing to avoid safeguards, minimise outrage and deny responsibility.[45] Similar 'interpretive denials' have occurred historically in immigration control, such as the UK government response to its practices of virginity testing in the 1970s where it initially and falsely claimed this was an isolated incident and was part of a normal medical examination.[46] Primarily though, the Belgian case is another precedent which implies that strip-searches that are not justified on the grounds of safety and security are a violation of the Convention.

[43] Constitutional Court Decision No 143/2013 of 30 October 2013. See T. Daems 'Between Human Standards and Institutional Efficiency: The Regulation and Deregulation of Strip-Searches in Belgium' (2015) *Prison Service Journal*, 222, 40 for a full discussion of the case.

[44] Constitutional Court Decision No 20/2014 of 29 January 2014, para B13

[45] T. Daems 'Between Human Standards and Institutional Efficiency: The Regulation and Deregulation of Strip-Searches in Belgium' (2015) *Prison Service Journal*, 222, 40, at 45

[46] E. Smith and M. Marmo 'Deny, Normalise and Obfuscate: The Government Response to the Virginity Testing Practice and Other Physical Abuses' in *Race, Gender and the Body in British Immigration Control: Subject to Examination* (Palgrave Macmillan, 2014)

While the case law indicates that the ECtHR tends to view invasive strip-searching measures as unjustifiable on administrative grounds, the Court has in the past been willing to consider such arguments when it comes to issues of immigration control. In the case of *Saadi v the United Kingdom,*[47] an Iraqi Kurd who was detained as part of the UK's fast track asylum process (an accelerated asylum procedure which takes place entirely in detention) argued that his detention had been unlawful because it violated the requirement that the detention be necessary under Article 5 ECHR.[48] The Court found that it was not necessary for Mr Saadi to be detained to prevent him absconding or because he presented a public safety risk. However, the court agreed with the UK's argument which focused on the 'need for speed'[49] in the asylum process and that a tightly structured timetable was required for it to operate effectively. The ECtHR has been criticised for this departure from the typical necessity test used in Article 5 cases and for accepting administrative convenience as a justification for the deprivation of liberty in an immigration context.[50] But it remains the case that administrative convenience

[47] Application No 13229/03 *Saadi v the United Kingdom* GC Judgment of 29 January 2008

[48] Article 5(1)(f) European Convention on Human Rights and Fundamental Freedoms

[49] *R v Secretary of State for the Home Department Ex Parte Saadi and Others* [2002] UKHL 41 para 24 ; cited approvingly by the ECtHR in Application No 13229/03 *Saadi v the United Kingdom* GC Judgment of 29 January 2008 para 76 -80

[50] Amnesty International, *Saadi Asylum Detention Ruling: Detention Must Be a Last Resort, Not a First Response,* 31 January 2008 available at https://www.amnesty.org.uk/press-releases/saadi-asylum-detention-ruling-detention-must-be-last-resort-not-first-response [29 October 2019]; H. O'Nions 'No Right to Liberty: The Detention of Administrative of Asylum Seekers for Administrative Convenience' (2008) *European Journal of Migration and Law* 10, at 149; V. Moreno-Lax, 'Beyond Saadi v UK: Why the Unnecessary Detention of Asylum Seekers is Inadmissible Under EU Law' (2011) 2 *Human Rights and International Legal Discourse* 166 at 168; A. Gundogdu *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggle of* Migrants (Oxford University Press, 2015) at 120. These critics included five ECtHR judges who wrote a

might be considered by the Court to be an acceptable legitimate aim for the UK government's new strip-search power because it occurs in an immigration context.

The approach by the Court in *Saadi* also raises the question as to whether the new strip-searching power might be construed as beneficial to the migrant. In *Saadi*, the Court indicated that it believed the detained fast track system to be for the benefit of migrants as it led to a speedy decision.[51] In the case of strip-searching, it might likewise be argued that speeding up the process of removal is in the interests of the migrant detained. However, there is reason to doubt that the Court would take such an approach. The ECtHR itself was divided on the issue in the *Saadi* case with five judges offering a forceful dissent on this issue[52] and the argument has been less successful in subsequent case law where UK courts have found that the Home Office had failed to provide any evidence to demonstrate the benefit for asylum seekers.[53] Construing strip-searching as being for the benefit of migrants requires careful consideration of how to weigh the introduction of an invasive and often humiliating measure against the possibility of realising an administrative efficiency goal. While there may be some benefit in individual cases, as a whole when assessing the proportionality of the measure against the

dissenting opinion in *Saadi* see Application No 13229/03 *Saadi v the United Kingdom* GC Judgment of 29 January 2008, Joint Partly Dissenting Opinion of Judge Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvela

[51] Ibid. para 77

[52] Ibid. Joint Partly Dissenting Opinion of Judge Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvela.

[53] *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin); *Detention Action v Secretary of State for the Home Department* [2015] EWHC 1689 (Admin); *Lord Chancellor v Detention Action* [2015] EWCA Civ 840.

possible outcome it seems unlikely that the correct balance will have been struck, especially given the dangers in expanding strip-searching powers and their likely effectiveness.

It is crucial, then, to understand whether the administrative efficiency justification used by the government is sufficiently made out and based on robust evidence. Although the Court has shown itself to be open to the argument of administrative convenience in the past, it has also begun to take a more robust line on immigration arrangements which are not based on sound evidence.[54] There are some reasons to doubt that the UK government's approach can be defended as sufficiently evidence-based.

The rationale for introducing this new strip-searching measure appears to be to speed up the process by which the UK government can remove the individual to another state. This is done using emergency travel documents (ETDs), which allow people to travel without the normal requisite documentation such as a passport and are issued by the country that the UK wishes to remove the individual to. However, as stated by the Solicitor General, a 'proportion' of the requests that the UK makes for emergency travel documents are not approved because there is a dispute over the nationality of the individual or there is not enough evidence that the individual is a national of the receiving country.

There is little evidence though, that this is the main cause of the delays in the emergency travel document process. A 2014 Report by the Independent Chief Inspector of Borders and Immigration found that non-compliance with the re-documentation process was an issue with some detainees, but its main finding was that the Home Office was very poor at managing the

[54] *Biao v Denmark* [GC] (2017) 64 EHRR 1

emergency travel documentation process appropriately and effectively. In fact, the Independent Chief Inspector of Borders and Immigration stated: 'The Home Office claims that non-compliance by individuals with the ETD process is a major source of delay. I was concerned to find, however, that it did not have a clear picture of the scale of the problem, other than in criminal cases, and had no effective strategy for tackling it.'[55] The Home Office did not collect data on non-compliance in the documentation process generally and only had some data available for non-compliance which focused on Foreign National Prisoners. The only published information available on the scale of non-compliance is the number of prosecutions under section 35 of the Asylum and Immigration (Treatment of Claimants) Act 2004 which allows for prosecution where a person fails to comply with the re-documentation process. A Freedom of Information request made by Bail for Immigration Detainees shows that the number of prosecutions under section 35 between 2004 to 2013 was very low, peaking at 33 prosecutions with 25 convictions in 2008, but with normally fewer than 10 convictions per year.[56] The reluctance of the Home Office to pursue prosecution under section 35 has also been noted by the Independent Inspector of the Immigration and Borders.[57]

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[55] Independent Chief Inspector of Borders and Immigration John Vine, *An Inspection of the Emergency Travel Document Process May –September 2013*, 2014 at 2 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/300818/Emergency_Travel_Document_Print.pdf [6 September 2019]

[56] Bail for Immigration Detainees, *Only 2 convictions for non-cooperation with the Home Office re-documentation process during 2013*, 29 August 2014 available at http://www.biduk.org/posts/107-only-2-convictions-for-non-cooperation-with-the-home-office-re-documentation-process-during-2013

[57] Independent Chief Inspector of Borders and Immigration, *The effectiveness and impact of immigration detention casework,* December 2012 p 35; Independent Chief Inspector of Borders and Immigration John Vine, *An Inspection of the Emergency Travel Document Process May –September 2013*, 2014

Shortly after the publication of the 2014 Report, the Home Office redacted the column 'unused ETD [Emergency Travel Document] pool' from the Country Returns Documentation Guide alongside other information such as the likelihood of obtaining an ETD for each country, current country information, and constraints on the ETD process. In 2016, a legal challenge brought by Bail for Immigration Detainees[58] meant that around 95% of the redacted data had to be published but the number of unused ETDs remains redacted. Thus, both the scale of non-compliance and the number of unused ETDs are not currently known.

Without clear data as to the scale of the non-compliance issue it is difficult to ascertain whether the introduction of strip-searching powers is proportionate. Even if data were available, there would be reasons to be sceptical of its use to justify such an invasive measure as strip-searching. 'Non-compliance' is a complicated metric to use because what counts as non-compliance is rarely independently scrutinised by the judiciary given the low number of prosecutions under section 35. Thus, there is uncertainty as to whether the category 'non-compliant' is being applied fairly, accurately or in line with valid criteria. Staff and managers in immigration detention have communicated to the Independent Chief Inspector of Borders and Immigration that one of the main reasons for the low level of section 35 prosecutions is that it is difficult to

p. 25; Independent Chief Inspector of Borders and Immigration, *An Inspection of Removals October 2014 – March 2015*, December 2015, at 37

[58] Bail for Immigration Detainees, *BID secures release of Home Office country returns guidance,* 6 January 2016 http://www.biduk.org/posts/84-bid-secures-release-of-home-office-country-returns-guidance [9 September 2019]

prove non-compliance to the criminal standard of proof.[59] If the Home Office struggles to prove non-compliance this indicates that its definition of non-compliance is too broad. Official inspections and case law have also previously revealed problematic practices in how non-compliance is defined in this context. For example, there is evidence that migrants who are seriously mentally ill are being labelled non-compliant due to complications associated with their illness. In 2012, the Independent Chief Inspector of Borders and Immigration found an instance where a clearly mentally unwell detainee was classed as non-compliant but was subsequently sectioned under the Mental Health Act.[60] The case of *HA (Nigeria) v SSHD* in 2012 also concerned the classification of someone who was clearly mentally unwell as 'non-compliant' but who was subsequently diagnosed with schizophrenia.[61]

The label of non-compliance may also not reflect a lack of cooperation but rather errors or genuine uncertainty. Many migrants may have complicated migration histories and/or their histories may be made (further) complicated by the mistakes or requirements of bureaucracy. This can mean that genuine identity disputes are being framed as non-cooperation. For example, Melanie Griffiths records the case of Nasih who the British immigration authorities refused to record as Eritrean in 1990 as and instead put his nationality as Ethiopian. This caused

[59] Independent Chief Inspector of Borders and Immigration John Vine, *An Inspection of the Emergency Travel Document Process May –September 2013*, 2014 , at 26

[60] Independent Chief Inspector of Borders and Immigration, *The effectiveness and impact of immigration detention casework*, December 2012, at 14

61 *HA (Nigeria), R (on the application of) v Secretary of State for the Home Department* (Rev 1) [2012] EWHC 979 (Admin)

him significant difficulties in proving his identity later on and led to him being considered non-compliant. He pointed out the injustice of this: 'Is it a crime to be an Eritrean? I am Eritrean... How am I going to cooperate if I'm not Ethiopian?'[62] Non-compliance may be implied from discrepancies in the migrant's past but these may arise from the fact that they come from countries which do not register births or celebrate birthdays.[63] Discrepancies may also be caused by migrants or authorities becoming confused due to issues such as 'calculating dates from different calendars and cultural variations in naming systems, including in the order and number of names, the inheritance of surnames, and inconsistent spelling for names translated from non-Roman alphabets'.[64]

A migrant may also be labelled as non-compliant due to decisions taken by embassies. Some embassies interview those applying for ETDs and may conclude, despite cooperation from the applicant, that they are not a national of their country. This sometimes results in the applicants being labelled as non-compliant by the Home Office.[65] Patrycja Pinkowska has also found that migrants labelled non-compliant are often confused as to why they have been labelled as such and often only find out they are being accused of non-compliance in bail hearings where 50% are unrepresented and thus unable to challenge the accusation. She likewise noted that some who were considered non-compliant were those who had spent a significant amount of time in

[62] M. Griffiths, 'Anonymous Aliens? Questions of Identification in the Detention and Deportation of Failed Asylum Seekers' (2012) *Population, Space and Place* 18, 715, p 721

[63] ibid

[64] Ibid at 719

[65] Ibid at 721

the UK and struggled to provide the level of comprehensiveness necessary for the authorities due to the fact that detailed memories of places and people had long faded. [66]

The UK government appears to have justified its new power to strip-search for nationality documents on the grounds that this power is necessary to deal with delays in the removal process as a 'proportion' of applicants do not comply with the re-documentation process. The lack of data available on the scale of non-compliance, and the fact that the Independent Chief Inspector of Borders and Immigration has identified various other issues such as the Home Offices poor management of the ETD process as important, mean that it is difficult to conclude that a measure as invasive as strip-searching could be considered a legitimate or proportionate response to an issue of administrative convenience. Even if data on the rate of non-compliance does become available, it should be treated with caution as the definition and application of this category is problematic.

Strip-searching in Practice

The previous section discussed issues particular to this new power but there are also reasons to be cautious about extending strip-searching powers more generally. There have been numerous reports detailing how the use of such powers is often problematic and incompatible with human rights. Academics and NGOs have long been sceptical of the effectiveness of strip-searching,

[66]P. Pinkowska, 'Complying with what? Problematising the notion of non-compliance in UK immigration detention, *Border Criminologies Blog*, University of Oxford, 2 December 2017, available at https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/12/complying-what [9 September 2019]

and there is substantial evidence that it is a practice which is open to abuse by prison staff and that it can have a severe and traumatic effect on the inmates subjected to them.

A. Sexual Violence

Strip-searching has a long history of being associated with sexual violence, and some academics consider a strip-search as a form of state sanctioned sexual assault.[67] Much of the literature that documents experiences of strip-searching comes from interviews with former political prisoners who were held during the conflict in Northern Ireland and many of these former prisoners recount the strip-searches they endured as tantamount to rape and sexual assault.[68] Although many of the interviewees on this subject are women, male former prisoners have similarly described the experience as 'no less than sexual assault.'[69] In practice, strip-searching powers can also be used as a means through which guards and officers sexually abuse

[67]A. Davis, *Are Prisons Obsolete* (Seven Stories Press, 2003) at 81; A. George, 'Strip Searches: Sexual Assault by the State – The humiliation of women in Victoria's Prisons' In P. Weiser Easteal (ed), *Without consent: confronting adult sexual violence: proceedings of a conference, Canberra, 27-29 October,* (Australian Institute of Criminology, 1992); P. Shuldiner, 'Visual Rape: A Look at the Dubious Legality of Strip Searches' (1979) 13 (2) *The John Marshall Law Review* 273

[68] See for example A. Wahidin, 'Menstruation as a Weapon of War: The Politics of the Bleeding Body for Women on Political Protest at Armagh Prison, Norther Ireland' (2019) *The Prison Journal* 99 (1) 112; S. Tate and A. Wahidin, 'Extraneare: Pain, Loneliness and the Incarcerated Female Body' (2013) *Illness, Crisis and Loss* 21(3) 203; L. Moore, '"Nobody's Pretending That It's Ideal": Conflict, Women and Imprisonment in Northern Ireland' (2011) *The Prison Journal* 91 (1) 103.

[69] B. Campbell, L. McKeown and F. O'Hagan, 'Nor Meekly Serve My Time: The H-Block Struggle, 1976-1981' (Belfast: Beyond the Pale, 1994) cited in A. Wahidin 'Menstruation as a Weapon of War: The Politics of the Bleeding Body for Women on Political Protest at Armagh Prison, Norther Ireland' (2019) *The Prison Journal* 99 (1) 112 at 121

prisoners. This is already known to be an issue with strip-searching powers for safety and security in immigration detention, a matter raised by Labour MP Paul Bloomfield in debate on the Immigration Act 2016.[70]

The only response to this concern from the Solicitor General was to reiterate that the 2016 Act specifies that searches should not be conducted by or in the presence of a member of the opposite sex.[71] However, as MP Keir Starmer pointed out 'there is sometimes…a gap between the words that go into *Hansard* as a result of this exchange and what happens on the ground. That is the real cause for concern'.[72] Women for Refugee Women has documented a culture of sexual abuse at the women's immigration detention centre Yarl's Wood with unnecessary and non-procedural strip-searching often cited as an integral aspect of this.[73]

[70] HC Deb, Vol 600 Col 338 (13 October 2015)
[71] HC Deb Vol 600 Col 337 (3 Nov 2015)

[72] HC Deb Vol 600 Col 338 (3 Nov 2015)

[73] M. Girma et al, *I Am Human: Refugee Women's Experiences of Detention in the UK*, Women for Refugee Women, January 2015 available at http://www.thebromleytrust.org.uk/files/wrw_iamhuman.pdf [29 August 2019]; Women for Refugee Women, *Written submission to the review into the welfare in detention of vulnerable persons,* 8 April 2015 available at https://www.refugeewomen.co.uk/wp-content/uploads/2019/01/women-for-refugee-women-submission-to-review-of-welfare-in-immigration-detention.pdf [29 August 2019]; M. Girma et al, *Detained: Women Asylum Seekers Locked Up in the UK,* Women for Refugee Women, January 2014 available at https://www.refugeewomen.co.uk/wp-content/uploads/2019/01/women-for-refugee-women-reports-detained.pdf [29 August 2019].. The *Observer* also reported leaked documentation from Yarl's Wood in 2014: M. Townsend, *Serco, the Observer and a hunt for the truth about Yarl's Wood asylum centre,* The Guardian, 17 May 2014 available at https://www.theguardian.com/uk-news/2014/may/17/serco-yarls-wood-asylum-centre [29 August 2019]

A report by Women for Refugee Women from 2015[74] contains many allegations of detainee custody officers engaging in inappropriate behaviour and searches including male guards searching women or being present while a female guard strip-searched a female detainee. Both the Home Office and the company which runs Yarl's Wood, Serco, dismissed these reports as 'uncorroborated',[75] but in 2014 Serco revealed that it had dismissed 10 members of staff for sexual abuse between 2007 and 2014.[76] The Shaw Review in 2016 did not find examples of male guards searching female detainees at Yarl's Wood but did find that staff at Yarl's Wood had been 'operating outside the *spirit* of the [searching] policy.'[77] The Shaw Review also found that across the immigration detention estate there were issues with detainees of both sexes being searched in view of others. As of 2018, these issues had still not been properly resolved according to the follow-up report.[78] The most recent Inspectorate of Prisons report on Yarl's

[74] M. Girma et al, *I Am Human: Refugee Women's Experiences of Detention in the UK*, Women for Refugee Women, January 2015 available at http://www.thebromleytrust.org.uk/files/wrw_iamhuman.pdf [29 August 2019

[75] Channel 4 News, *'"Four Men Watched Me": Women's Stories from Yarl's Wood',* 14 January 2015 available at https://www.channel4.com/news/yarls-wood-women-watched-male-guards-immigration-detention [29 August 2019]

[76] The Guardian, *Serco apologises after dismissals related to Yarl's Wood allegations,* 24 June 2015 available at https://www.theguardian.com/business/2014/jun/24/serco-apologises-dismissals-yarls-wood-allegations [29 August 2019]

[77]S. Shaw, *Review Into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office,* Cm 9186, January 2016 , at 142 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf [9 September 2019]

[78] S. Shaw, *Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons: a follow-up report to the Home Office,* Cm 9661, July 2018 at 135 available at

Wood in 2017 found several instances of unreported strip-searches and at least one instance of an unnecessary and unjustified strip-search.[79]

It is important to note that a significant number of female detainees have previously been victims of sexual abuse.[80] In their sample of 31 women in immigration detention, Women for Refugee Women found that 71% had experienced sexual violence or rape and a significant proportion of those were abused by state figures such as prison guards, police officers or soldiers. This is significant since, though the literature on strip-searching is limited, it consistently finds that prisoners, particularly women prisoners, experience strip-searching as a form of sexual violence.[81] Unsurprisingly, this means strip-searching can have a particularly

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728376/Shaw_report_2018_Final_web_accessible.pdf [29 August 2019]

[79] HM Chief Inspector of Prisons, *Report on an unannounced inspection of Yarl's W lood Immigration Removal Centre, 5-7, 12-16 June 2017,* 15 November 2017, at 14 available at https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2017/11/Yarls-Wood-Web-2017.pdf [9 September 2019]

[80] Women for Refugee Women, *Written submission to the review into the welfare in detention of vulnerable persons,* 8 April 2015 available at https://www.refugeewomen.co.uk/wp-content/uploads/2019/01/women-for-refugee-women-submission-to-review-of-welfare-in-immigration-detention.pdf [29 August 2019

[81] See for example A. Wahidin, 'Menstruation as a Weapon of War: The Politics of the Bleeding Body for Women on Political Protest at Armagh Prison, Norther Ireland' (2019) *The Prison Journal* 99 (1) 112; S. Tate and A. Wahidin 'Extraneare: Pain, Loneliness and the Incarcerated Female Body' (2013) *Illness, Crisis and Loss* 21(3) 203; L. Moore '"Nobody's Pretending That It's Ideal": Conflict, Women and Imprisonment in Northern Ireland' (2011) *The Prison Journal* 91 (1) 103; B. Aretxaga, 'The Sexual Games of the Body Politic: Fantasy and State Violence in Northern Ireland' (2001) *Culture, Medicine and Psychiatry* 25(1) 1; P. Carlen, *Sledgehammer: women's imprisonment at the millennium.* (1998 Basingstoke)

pronounced traumatic effect on those who have been subjected to sexual abuse and/or rape in the past.[82] In this context it is especially troubling that the new power to strip-search for nationality documents includes the power to use force to conduct the search where the detainee resists[83] – the issue of survivors of abuse simply shutting down when asked to strip and this being construed as resistance has been documented in prisons.[84]

Women for Refugee Women has recently criticised the current Home Office approach to survivors of sexual and physical abuse,[85] pointing out that the process for identifying vulnerable people does not occur *before* detention, that the current screening processes are not geared towards identifying victims of sexual violence, and that obtaining evidence of sexual violence that satisfies the Home Office is very difficult. This is a significant issue as Women for Refugee Women has found that there is a common misconception amongst women detainees that they cannot claim asylum on the basis of sexual or gender-based violence making it vital for the Home Office to be proactive in their identification.[86]

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[82] J. McCulloch and A. George 'Naked Power: Strip-searching in Women's Prisons' in Phil Scranton (ed) *The Violence of Incarceration (*Routledge, 2009); Bogdanic *Strip-searching of Women in Queensland Prison* Women Justice Network, October 2007 available at https://womensjusticenetwork.net.au/publications/bogdanic2qld.pdf [9 September 2019],

[83] S. 51(10) Immigration Act 2016

[84] M. Welch 'Quiet Constructions in the War on Terror: Subjecting Asylum Seekers to Unnecessary Confinement as Punishment' (2004) Social Justice 31 (1) 113, at 118; P. Easteal 'Women in Australian Prisons: The Cycle of Abuse and Dysfunctional Environments' (2001) *The Prison Journal* 81 (1) 87, at 106.

[85] G. Lousley and S. Cope, *We are still here: The continued detention of women seeking asylum at Yarl's Wood,* Women for Refugee Women, October 2017 available at https://www.refugeewomen.co.uk/wp-content/uploads/2019/01/women-for-refugee-women-reports-we-are-still-here.pdf [29 August 2019]

[86] Ibid at 10

Strip-searching powers have also been linked to child sexual abuse. The Independent Inquiry into Child Sexual Abuse has found that 11% of complaints of child sexual abuse incidents in young offender institutions took place during search or restraint.[87] There is also concern that a large number of children in custody will have already experienced abuse, neglect or gang membership and that practices such as strip-searching may replicate problematic power dynamics, leaving the children feeling powerless and vulnerable, putting them at greater risk of further abuse.[88] Moreover, evidence presented by Her Majesty's Inspectorate of Prisons to the Inquiry indicated that in practice strip-searches in young offender institutions were sometimes not recorded properly and that safeguarding mechanisms in place for children who have been previously sexually abused were an unrealistic aspiration.[89]

The practice of requiring a strip-search to be conducted only by and in front of members of the same-sex is common - though not always followed in practice. It is meant to act as a safeguard

[87] A. Jay, M. Evans, I. Frank and D. Sharpling 'Sexual Abuse of Children in Custodial Institutions 2009-2017' *Independent Inquiry into Child Sexual Abuse,* February 2019 at 31. Available at https://www.iicsa.org.uk/key-documents/9560/view/sexual-abuse-children-custodial-institutions-investigation-report-february-2019.pdf [30 March 2020]

[88] A. Jay, M. Evans, I. Frank and D. Sharpling 'Sexual Abuse of Children in Custodial Institutions 2009-2017' *Independent Inquiry into Child Sexual Abuse,* February 2019 at 40. Available at https://www.iicsa.org.uk/key-documents/9560/view/sexual-abuse-children-custodial-institutions-investigation-report-february-2019.pdf [30 March 2020]

[89] Evidence from Angus Mulready-Jones, Lead Inspector for Children in Detention for HMIP, to the Independent Inquiry into Child Sexual Abuse, 16 July 2018, at 23-25 available at https://www.iicsa.org.uk/key-documents/5692/view/public-hearing-transcript-16-july-2018.pdf [30 March 2020]

against sexual threat and violence but has been criticised for failing adequately to consider the issue from the perspective of LGBT inmates or officers.[90] Policies and practice have regularly failed to account for the experience of those inmates who identify as transgender.[91] Moreover, female inmates have sometimes stated that in some situations they would actually prefer a male officer search them compared to certain female officers who they perceive as having sexual intent in the search.[92] There have also been allegations from female detainees of sexual abuse by female guards.[93] Such policies are not a guarantee against abuse. Anne Bogdanic has speculated that the gender of the officer conducting the search is not particularly important in the construction of strip-searching as sexual violence. Rather it is the control and domination

[90] S. Lamble 'Unknowable Bodies, Unthinkable Sexualities: Lesbian and Transgender Legal Invisibility in the Toronto Women's Bathhouse Raid' (2009) *Social and Legal Studies* 18 (1) 111; A. Bain and C. Nash, 'The Toronto Women's Bathhouse Raid: Querying Queer Identities in the Courtroom' (2007) *Antipode* 39(1) 17

[91] Ibid. See also European Union Agency for Fundamental Rights, *Fundamental rights at airports: border checks at five international airports in the European Union,* (2014) at 39 available at https://fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-airport-border-checks_en.pdf [29 August 2019]; K. Kirkup, 'Indocile Bodies: Gender Identity and Strip Searches in Canadian Criminal Law' (2009) *Canadian Journal of Law and Society* 24 (1) 107. For a recent UK example see *LW, KT, MC and Faulder v Sodexo Limited and Secretary of State for Justice* [2019] EWHC 367 (Admin)

[92] P. Easteal, 'Women in Australian Prisons: The Cycle of Abuse and Dysfunctional Environments' (2001) *The Prison Journal* 81 (1) 87, at 106

[93] G. Lousley and S. Cope, *We are still here: The continued detention of women seeking asylum at Yarl's Wood,* Women for Refugee Women, October 2017, at 28 available at https://www.refugeewomen.co.uk/wp-content/uploads/2019/01/women-for-refugee-women-reports-we-are-still-here.pdf [29 August 2019]

over the detainee's body that invokes the feelings of powerlessness that echo rape and sexual assault.[94]

B. Strip-Searching Asylum Seekers

Given the potential for trauma, the impact of strip-searching in the immigration context may be particularly problematic for those who are seeking asylum. There is considerable literature and case law establishing that the detention of vulnerable people such as those who have experienced torture has significant negative effects and can result in re-traumatisation.[95] The Home Office policy is that there is a strong presumption against the detention of vulnerable adults for immigration purposes.[96] But as various case law and NGO reports have demonstrated, policy and practice do not always coalesce, and the Home Office has a poor record of adequately safeguarding against the detention of certain vulnerable groups such as those who have been subjected to torture or sexual abuse.[97] This means there is a significant

[94]A. Bogdanic, *Strip-searching of Women in Queensland Prison* , Women Justice Network, October 2007 available at https://womensjusticenetwork.net.au/publications/bogdanic2qld.pdf [9 September 2019]

[95] See for example *R. (on the application of Medical Justice) v Secretary of State for the Home Department* [2017] EWHC 2461 (Admin); M. von Wethern et al, 'The impact of immigration detention on mental health: a systematic review' (2018) BMC Psychiatry 18 382; F. Arnold, 'PTSD and retraumatisation in asylum seekers' (2007) *British Medical Journal* 334 789

[96]Home Office, *Adults at Risk in Immigration Detention Version 5.0,* 6 March 2019

[97] See for example *R (JM) v. Secretary of State for the Home Department* [2015] EWHC 2331; *R. (on the application of Medical Justice) v Secretary of State for the Home Department* [2017] EWHC 2461 (Admin). See also K. Harris, *Death in immigration Detention 2000 -2015,* Medical Justice (2016) at 21; G. Lousley and S. Cope, *We are still here: The continued detention of women seeking asylum at Yarl's Wood,* Women for Refugee Women, October 2017

risk that such persons will be strip-searched, a practice which might exacerbate the already profoundly negative effects of detention.

The risk of distress and re-traumatisation from strip-searching is particularly grave for those who have previously been subjected to sexual violence. This means that strip-searching is a significant issue for torture victims as sexual violence which includes forced nudity is a common and well-documented form of torture experienced by both women and men.[98] In a study of 154 asylum applicants in Denmark, 78% of female participants and 25% of male participants reported being subjected to sexual violence as a form of torture in their country of origin.[99] Despite this there is very little literature which considers the effect of strip-searching on asylum seekers. Monish Bhatia conducted interviews with asylum seekers about their experience of the immigration system in the UK.[100] When asked about strip-searching, many of her participants felt unable to discuss the experience in detail due to the distress and shame

[98] Reports of sexual violence torture are more prevalent among women though it is speculated that there is significant under-reporting of this from men: J. Busch, S. Hansen and H. Hougen 'Geographical distribution of torture: An epidemiological study of torture reported by asylum applicants examined at the Department of Forensic Medicine, University of Copenhagen.' (2015) Torture 25 (2) 12; J. Sanders, M. Wagner Schuman and A. Marbella 'The epidemiology of torture: A case series of 58 survivors of torture (2009) *Forensic Science International* 189 (1) 1; P. Oosterhoff, P. Zwanikken and E. Ketting, 'Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret' (2004) *Reproductive Health Matters*, 12 (23) 68.

[99] J. Busch, S. Hansen and H. Hougen, 'Geographical distribution of torture: An epidemiological study of torture reported by asylum applicants examined at the Department of Forensic Medicine, University of Copenhagen.' (2015) *Torture* 25 (2) 12

[100] M. Bhatia 'Turning Asylum Seekers into Dangerous Criminal: Experiences of the Criminal Justice System of Those Seeking Sanctuary' (2015) *Crime and Justice Journal* 4(5) 97

it had caused them. She did find that most of the Middle Eastern participants who were willing to discuss it briefly described the experience of being strip-searched as tantamount to torture. One attempted to explain why the practice of strip-searching was so harmful:

> In Iran if they make you naked, it is like the worst punishment. It is worse than death penalty ... I was given a punishment worst than a death penalty 5 times. In my country and because of our culture, when you want to torture someone, you kidnap or arrest that person and make that person naked. That's it – he will carry it for rest of his life.[101]

Other asylum seekers have noted the re-traumatising effect that practices like strip-searching can have. For example, Marie Jocelyn Ocean, a refugee in the US who fled political persecution in Haiti has said that practices in detention such as strip-searches and guards banging flashlights on doors at night caused her to relive the trauma she had experienced in Haiti.[102] The EU Fundamental Rights Agency has also warned that strip-searching may be particularly distressing for those who have had negative experiences with the police in their country of origin[103] and that therefore it should only be used as a last resort, done incrementally, outside of public view and a full explanation for the necessity of the search should be provided.[104] Given that being detained can have a severe effect on the mental health of asylum seekers and

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[101] Ibid at 105

[102] K. Jarvis-Johnson 'Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers' (2007) *Administrative Law Review* 3, 589 at 602

[103]European Union Agency for Fundamental Rights, *Fundamental rights at airports: border checks at five international airports in the European Union,* (2014) at 37 available at https://fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-airport-border-checks_en.pdf [29 August 2019]

[104] Ibid. at 38

can cause re-traumatisation,[105] it seems likely that strip-searches could exacerbate this harm for those with a history of trauma.

C. The Legitimacy of Strip-Searching as a Practice

In addition to the potential effects of strip-searching on detainees, there are reasons to doubt whether the expansion of strip-searching powers is a legitimate step. Academic and NGO research has long been critical of the official rationale that strip-searching is a safety and security measure. Many have argued that strip-searching is not a particularly effective safety or security measure by demonstrating the low levels of contraband uncovered by strip-searching.[106] In the UK in 2012 there was significant criticism of strip-searching in young offender institutions along the same lines. Her Majesty's Inspectorate of Prisons stated that the strip-searching of vulnerable children was 'pointless' and 'worse than useless' citing figures showing that 729 searches only resulted 2 discoveries.[107] That same year a Freedom of

[105] See for example *R. (on the application of Medical Justice) v Secretary of State for the Home Department* [2017] EWHC 2461 (Admin); M. von Wethern et al, 'The impact of immigration detention on mental health: a systematic review' (2018) BMC Psychiatry 18 382; F. Arnold, 'PTSD and retraumatisation in asylum seekers' (2007) *British Medical Journal* 334 789

[106] G. Balfour 'Searching Prison Cells and Prisoner Bodies: Redacting carceral power and glimpsing gendered resistance in women's power' (2017) *Criminology and Criminal Justice* 18(2) 139; J. McCulloch and A. George 'Naked Power: Strip-searching in Women's Prisons' in P. Scranton (ed) *The Violence of Incarceration (*Routledge, 2009) ,at 117-118; A. Bogdanic *Strip-searching of Women in Queensland Prison* , Women Justice Network, October 2007;P. Easteal, 'Women in Australian Prisons: The Cycle of Abuse and Dysfunctional Environments' (2001) *The Prison Journal* 18(1) 87.

[107] HM Chief Inspector of Prisons' *Annual Report 2012–2013*, 23 October 2013, at 12 available at: https://www.justice.gov.uk/downloads/publications/corporate-reports/hmi-prisons/hm-inspectorate-prisons-annual-report-2012-13.pdf [9 September 2019]

Information Request showed that 43,960 strip-searches in 21 months only discovered 275 illicit items, mostly tobacco, with no knives or drugs found.[108]

Academics and activists have argued that strip-searching is not a particularly effective strategy for safety and security but rather is better conceived as a method through which the state controls and dominates prisoners.[109] Prisoners who have been strip-searched have reported finding the process dehumanizing,[110] and some of the academic literature contends that this is precisely the point - to strip the person of their confidence and sense of identity in order to make them easier to control.[111] It may be considered a deliberate strategy to 'break' prisoners.[112] Feminist scholars such as Pat Carlen and Begona Aretxaga have suggested that strip-searching has a particularly profound impact on women prisoners because it essentially uses the spectre of sexual violence to create similar feelings of powerlessness and

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[108] T. Bateman 'Routine Strip-searching of Children in Young Offenders Institution in England and Wales Comes to an End' (2014) *Youth Justice News* 14(2) 192, 200

[109] G. Balfour 'Searching Prison Cells and Prisoner Bodies: Redacting carceral power and glimpsing gendered resistance in women's power' (2017) *Criminology and Criminal Justice* 18(2) 139; S. Tate and A. Wahidin 'Extraneare: Pain, Loneliness and the Incarcerated Female Body' (2013) *Illness, Crisis and Loss* 21(3) 203; J. McCulloch and A. George 'Naked Power: Strip-searching in Women's Prisons' in P. Scranton (ed) *The Violence of Incarceration (*Routledge, 2009).

[110] See for example R. Casey 'Hard Time: A Content Analysis of Incarcerated Women's Personal Accounts' (2018) *Affilia: Journal of Women and Social Work* 33 (1) 126

[111] J. McCulloch and A.George 'Naked Power: Strip-searching in Women's Prisons' in P. Scranton (ed) *The Violence of Incarceration (*Routledge, 2009)

[112] Martina Anderson quoted in Stop the Strip-Searches Campaign, 'Stop Strip-searching' (1987 Dublin) 2 in J. McCulloch and A. George 'Naked Power: Strip-searching in Women's Prisons' in P. Scranton(ed) *The Violence of Incarceration (*Routledge, 2009) at 108

subordination that makes inmates easier to control.[113] The rationale for the new power to strip-search for nationality documents is to speed up administrative efficiency, but there is little available evidence to demonstrate that it will be particularly effective at fulfilling that aim. It seems entirely possible that the new strip-search power may be used coercively to try to force co-operation from detainees or indeed as a sort of 'punishment' for those who are termed 'non-compliant' which is in itself a problematic practice.

There does not appear to be any litigation on the section 51 strip-searching power. It is possible that awareness of the new power is quite low. Although the Immigration Law Practitioners Association did note the new power in its report on the Immigration Act 2016,[114] the introduction of so many other controversial powers at the same time such as the criminalisation of landlords and employers, the extension of the deport first, appeal later policy, and the power to seize driving licenses and freeze bank accounts of suspected irregular migrants might have resulted in the strip-searching power going under the radar. An examination of NGO reports[115],

[113]B. Aretxaga 'The Sexual Games of the Body Politic: Fantasy and State Violence in Northern Ireland' (2001) Culture, Medicine and Psychiatry 25(1) 1; P. Carlen *Sledgehammer: women's imprisonment at the millennium.* (1998 Basingstoke)

[114] A. Harvey *The Immigration Act 2016*, The Immigration Law Practitioners Association, 13 November 2016

[115] G. Lousley and S. Cope, *We are still here: The continued detention of women seeking asylum at Yarl's Wood,* Women for Refugee Women, October 2017; Bail for Immigration Detainees, *Nothing Good Comes From Detention: Voices From Detention*, April 2019; C. Sullivan and R. Schulkind, *Adults at Risk: the ongoing struggle of vulnerable adults in detention*, Bail for Immigration Detainees, July 2018.

the follow-up to the Shaw Review[116], the Home Affairs Committee Report[117] and the HM Inspectorate of Prisons reports[118] which have been published since the Immigration Act came into force reveals no explicit mention of this power. Where any form strip-searching is briefly discussed, the justification for a search is either not referenced or is implied to be safety and security. It is possible that these powers are not mentioned because they are not being used on detainees - which begs the question of why they were introduced in the first place. If they are not being used, one could argue that these powers are another extension of the criminalisation

[116] S. Shaw, *Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons: a follow-up report to the Home Office,* Cm 9661, July 2018 at 135 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728376/Shaw_report_2018_Final_web_accessible.pdf [29 August 2019]

[117] House of Commons Home Affairs Committee, *Immigration Detention,* HC 913**,** 21 March 2019, at page 6 [29 October 2019]

[118] HM Chief Inspector of Prisons: *Report on an unannounced inspection of Brook House Immigration Removal Centre 20 May 7 June 2019*; *Report on an independent review of progress at HMP Channing Wood 1-3 July 2019*; *Report on an unannounced inspection of Colnbrook Immigration Removal Centre 19 November – 7 December 2018*; *Report on an unannounced inspection of Campsfield House Immigration Removal Centre 10 - 21 September 2018*; *Report on an unannounced inspection of Dungavel House Immigration Removal Centre 2-5,9-11,16-19 July 2018*; *Report on an unannounced inspection of Tinsley House Immigration Removal Centre 3–5, 9–11 & 16–19 April 2018*; *Report on an unannounced inspection of Family detention, Tinsley House Immigration Removal Centre 3–5, 9–12 & 16–20 April 2018*; *Report on an unannounced inspection of Heathrow Immigration Removal Centre Harmondsworth site 2-20 October 2017*; *Report on an unannounced inspection of Yarl's Wood Immigration Removal Centre, 5-7, 12-16 June 2017*; *Report on an unannounced inspection of Morton Hall Immigration Removal Centre 21-25 November 2016*; *Report on an unannounced inspection of Brook House Immigration Removal Centre 31 October-11 November 2016*.

of immigration generally in that often the true function of the power is to impart the stigma of criminal law and criminal justice measures and to act as coercive threat.[119]

In February 2018, the High Court ruled that inmates in HMP Peterborough, a women's prison, were subjected to unlawful and humiliating strip-searches.[120] There were systemic failures in the practice and procedure of strip-searching at HMP Peterborough, with searches being conducted without proper reasoning or justification and with no or very poor records being kept. This case came after a report released in 2018 by the Inspectorate of Prisons which detailed the excessive and poorly monitored use of strip-searches in HMP Peterborough.[121] This case demonstrates that the usage of strip-searching powers continues to be problematic and the incidents in immigration detention detailed above are not isolated. It reiterates that strip-searching is a particularly invasive practice which requires serious caution and monitoring. Thus regardless of whether strip-searching is effective or not, given this case and the repeated issues in immigration detention, particularly Yarl's Wood, it is clear that there are unresolved problematic practices on the ground which means there is a significant risk the powers such as those introduced by section 51 of the Immigration Act 2016 will be open to abuse.

Conclusion

[119] A. Aliverti, 'Making People Criminal: The Role of Criminal Law in Immigration Enforcement' (2012) 16 *Theoretical Criminology* 417

[120] *LW, KT, MC and Faulder v Sodexo Limited and Secretary of State for Justice* [2019] EWHC 367 (Admin)

[121] HM Chief Inspector of Prisons, *Report on an unannounced inspection of HMP and YOI Peterborough (Women)11-21 September 2017,* 23 January 2018 available at https://www.justiceinspectorates.gov.uk/hmiprisons/inspections/hmp-yoi-peterborough-women-2/ [29 August 2019]

The introduction of the new power to strip-search for nationality documents by the UK government represents another facet of the trend towards criminalising immigration. There are reasons to doubt that this ability to strip-search for nationality documents is compatible with the ECHR as the goal of this new measure is administrative efficiency, not safety and security. Even if the ECHR accepts this goal as legitimate, there is little evidence that this new power would be a particularly effective strategy for achieving greater administrative efficiency. There are numerous difficulties with it, such as the various problems associated with terming migrants 'non-compliant' and the fact that the Inspectorate of Borders has focused much more on the Home Office's management of the emergency travel document process rather than non-compliant detainees as an administrative barrier. Moreover, an examination of the issues with strip-searching in practice reveals that the expansion of these powers seems unwise. The significant psychological and re-traumatisation effects on those who are survivors of sexual violence, torture and other trauma demonstrates the severe impact such measures can have and the disproportionality of expanding them for an administrative efficiency goal. There are also reasons to doubt that strip-searching powers are particularly effective for safety and security goals given the low number of contraband they turn-up and there is academic speculation that such measures are truly aimed at increasing control over detainees. Therefore, if the power to strip-search for nationality documents was to come before a court, the rationale for this new power and its use in practice should be rigorously scrutinised. Strip-searching is an invasive power which is open to abuse, and so its use and expansion into the administrative realm should treated with extreme caution.

•I would like to thank Mr Aveek Bhattacharya and the reviewers for their helpful and constructive feedback on earlier drafts of this article.