

**The Immigration Industry? A Study of the Effect of  
Privatisation on Immigration Detention and Related  
Functions in the United Kingdom.**

MA Understanding and Securing Human Rights  
Institute of Commonwealth Studies, School of Advanced Study,  
University of London

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This dissertation is submitted in partial fulfilment of the requirements for the degree of MA in Understanding and Securing Human Rights of the University of London.

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## Table of Contents

Abstract .....	5
Acknowledgements .....	5
List of Abbreviations .....	6
I. Introduction .....	7
i. Context .....	7
ii. Research Questions .....	8
iii. Methodology .....	8
II. The Academic Literature .....	10
i. Introduction .....	10
ii. The “Corrections-Commercial Complex” Framework .....	11
iii. The United States .....	12
iv. The United Kingdom .....	13
v. International Comparisons .....	17
vi. Conclusion .....	18
III. The Immigration Regime in the United Kingdom .....	20
i. Legal Framework and Non-Statutory Guidelines .....	20
ii. Current Structure of the Immigration Regime .....	24
iii. The Development of the Privatised Immigration Regime .....	24
iv. Contracts and the Freedom of Information Act 2000 .....	27
IV. The Expansion of the Privatised Detention Estate .....	28
V. Privatisation and Human Rights Protection .....	39
i. Conditions of Detention .....	39
ii. Healthcare Provision .....	42
iii. Enforced Removals .....	45
iv. Asylum-Seeker Housing .....	47
v. Alternatives .....	48

VI.	Conclusions and Recommendations .....	52
	Bibliography .....	55
I.	Legal Instruments and Non-Statutory Guidelines .....	55
II.	Case Law .....	56
III.	Secondary Literature .....	56
	i. Academic Articles .....	56
	ii. Books .....	57
	iii. NGO Reports and Submissions .....	58
	iv. Intergovernmental Organisation Reports and Guidelines .....	60
	v. Newspaper and NGO News Articles .....	60
	vi. Government Reports and Research .....	62
	vii. Private Sector Sources .....	63
IV.	Interviews .....	64
V.	Lectures .....	64
	Appendix A: Current Contract-Holders .....	65
	Appendix B: Freedom of Information Act Request Response .....	66
	Appendix C: Interview Consent Forms .....	71

#### Abstract:

This dissertation analyses the effect of private sector involvement on the UK's immigration regime. Drawing on academic literature, NGO and IGO research, government reports and statistics, and personal interviews with key NGO representatives, it traces the history of private involvement in detention and scrutinises the latest trends in the use of detention, enforced removals and asylum-seeker housing. It also provides analysis of the immigration regime as it exists in the UK today and outlines the legal framework and policy guidance in place to regulate it.

The dissertation argues that the private sector has acted as a *facilitator* to detention expansion, and that private involvement in various aspects of detention, removals and housing have caused unique problems for human rights protection, and has exacerbated existing ones. It also concludes that private involvement has adversely affected the UK's performance under international human rights laws and norms, and goes on to make recommendations for the improvement of service provision and human rights protection.

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## List of Abbreviations

- APRSAC Academe and Policy Research Senior Advisory Committee
- AVID Association of Visitors to Immigration Detainees
- BID Bail for Immigration Detainees
- BIHR British Institute of Human Rights
- BRC British Red Cross
- CAP Model Community Assessment and Placement model
- CCA Corrections Corporation of America
- CCC Campaign to Close Campsfield
- CPS Crown Prosecution Service
- DCO Detention Custody Officer
- DFT Detained Fast Track
- ECHR European Convention on Human Rights
- FOI Freedom of Information
- GDP Global Detention Project
- HMIP Her Majesty's Inspectorate of Prisons
- IBAC International Business Advisory Council
- ICCPR International Covenant on Civil and Political Rights
- IDC International Detention Coalition
- IRC Immigration Removal Centre
- LDSG London Detainee Support Group
- NCADC National Coalition of Anti-Deportation Campaigns
- NGO Non-Governmental Organisation
- NHS National Health Service
- PDA Pre-Departure Accommodation Facility
- PFI Private Finance Initiative
- STHF Short-Term Holding Facility
- UKBA UK Border Agency
- UN United Nations
- UNHCR United Nations High Commissioner for Refugees
- UPR Universal Periodic Review

## **I. Introduction**

### **i. Context**

The immigration detention system in the United Kingdom (UK), as well as provision of removal escorts and asylum-seeker housing, is almost entirely privatised. Immigration detention has been referred to as “the next, highly profitable frontier for the growing incarceration sector” (Bacon, 2005, p.3). The Home Office regularly awards contracts to private companies for the construction and operation of immigration removal centres (IRCs)<sup>1</sup> and other immigration holding facilities, and for removal escorting services and other immigration-related functions such as housing for asylum-seekers and visa checks at points of entry. Although rules and guidelines exist to govern the companies’ management of such services, and although there are monitoring mechanisms in place to ensure adherence to these rules, there is concern in the human rights community about whether privatised immigration functions effectively protect the rights of those engaged. There is also concern that the private sector has become increasingly influential regarding the formation of policy in what should fundamentally be a public function of the state, and where this places the UK in terms of its adherence to international human rights law, and its observance of human rights norms and standards.

In response to the limited amount of academic scrutiny of this situation, this dissertation analyses what the development of the current state of play means for the protection of rights of individuals involved. It focuses primarily on privatised detention but also discusses the privatisation of enforced removals and asylum-seeker housing.

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<sup>1</sup> Previously known as ‘immigration detention centres’, the name of these facilities was changed to ‘Immigration Removal Centres’ under section 66.1 of the *Nationality, Immigration and Asylum Act 2002*.

## **ii. Research Questions**

This thesis attempts to answer three main questions:

1. What role does the private sector play in the expansion of the immigration detention estate in the UK?
2. What effect does privatisation of immigration detention and related functions in the UK have on the protection of the rights of those individuals engaged?
3. How does private sector involvement in the immigration regime affect the United Kingdom's performance under international human rights law and norms?

The thesis is that the introduction of private involvement in the UK's immigration functions has contributed to the growth of the detention estate and is problematic for effective human rights protection. The dissertation recommends alternatives to the current system that would better protect the rights of those involved, and that would bring the UK in line with its international obligations.

## **iii. Methodology**

In researching this dissertation, the author has conducted an in-depth analysis of research by the most influential and active NGOs working in the area, as well as relevant academic literature. The dissertation also draws on the findings of monitoring bodies such as the Independent Chief Inspector of the UK Border Agency, and Her Majesty's Inspectorate of Prisons (HMIP). In order to gain detailed NGO perspectives on the topic, interviews have been conducted with representatives from three organisations. The individuals interviewed were:

- Michael Collins, Campaigns Coordinator (North), National Coalition of Anti-Deportation Campaigns (NCADC)
- Jerome Phelps, Director, Detention Action (formerly London Detainee Support Group)

- Dr Adeline Trude, Research and Policy Manager, Bail for Immigration Detainees (BID)

In order to study the most recent developments, statistics were gathered through a combination of *Freedom of Information Act* requests to the UK Border Agency (UKBA), the Home Office agency tasked with protecting the UK's borders, and the consultation of migrations and asylum statistics (Home Office, n.d.; National Archives, 2010). Due to the delay in the publication of such statistics, most of the data gathered goes no further than 2011.

The Home Office does not release extensive statistics detailing the total number of individuals present in detention every year. Rather, quarterly 'snapshot' numbers are given, indicating the number of people present in each detention centre on a specific day each quarter. Unfortunately, these numbers do not currently include individuals being held in prisons for immigration purposes. In order to facilitate a comprehensible overview of trends in immigration detention, the quarterly snapshots have been combined in places to produce an average detention population for a given year.<sup>2</sup>

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<sup>2</sup> The adequacy of published asylum statistics has been subject to criticism from human rights organisations, e.g. Asylum Aid (2010), and scholars, e.g. Cohen (2008).

## **II. The Academic Literature**

### **i. Introduction**

The academic literature on the privatisation of state functions of suspension of liberty has focused overwhelmingly on prison privatisation, with very little attention paid to immigration detention. Contributions by Lilly & Knepper (1993), McDonald (1994), Nathan (2003), Wood (2003), Christie (1993) and Martin & Parker (1997) have nevertheless contributed ideas that prove to be useful in a consideration of how the current immigration detention regime has arisen. Bacon (2005), Molenaar & Neufeld (2003), Flynn & Cannon (2009) and Fernandes (2007) have discussed more fully privatised immigration detention in particular. In general, however, the literature remains relatively scant on this subject. This academic literature review looks at the important contributions to the discussion of private sector involvement in the suspension of liberty and locates a space in which this dissertation is situated.

A central element to the study of privatised imprisonment and immigration detention has been the scrutiny of developments in incarceration or detention rates, alongside other relevant trends, such as crime rates and asylum applications. Christie (1993, p.14) points to “inexplicable” variations in crime and imprisonment rates: “Prison figures may go down in periods where they, according to crime statistics, economic and material conditions, ought to have gone up, and they may go up where they for the same reasons ought to have gone down.” To go some way to explaining such an apparently counterintuitive picture, he emphasises that “[a]n urge for expansion is built into industrial thinking, if for no other reason than to forestall being swallowed up by competitors” and that this urge applies as much to crime control as anywhere else (p.13).

### **ii. The “Corrections-Commercial Complex” Framework**

For Lilly and Knepper (1993), the crucial factor in such trends is described by their influential “corrections-commercial complex” – a model of “subgovernment”,

comprising private contractors, government agencies and professional organisations, which influences and reforms policy on privatised imprisonment – basing the structure on United States (US) President Dwight D. Eisenhower’s popularisation of the term “military-industrial complex” in his farewell address on 17<sup>th</sup> January 1961.<sup>3</sup> The subgovernment has four important characteristics:

1. “First, the participants in a subgovernment share a close working relationship.” The cooperation between each actor involved in the subgovernment leads to a state where no one participant has the power to stop the actions of the whole.
2. “Second, each subgovernment features a distinct overlap between the societal interest and the government bureaucracy in question.” This overlap manifests itself in a flow of personnel between government and industry, and a blurring of formerly distinct interests of public and private actors.
3. “Third, subgovernments operate with a low level of visibility and a high degree of effectiveness from the point of view of those inside the subgovernment.” This effectiveness results in the efficient shaping of policy, without the scrutiny of the public or media.
4. “Fourth, the subgovernment has the tendency to become a fixture within a given policy arena.” This subgovernment becomes embedded to the extent that it is referred to as an “iron triangle”, and becomes the norm to such an extent that “policymakers and private participants come to share the assumption that they are not only acting in their own interests, but in the general public interest as well” (Lilly and Knepper, 1993. pp.153-154).

In this way, Lilly and Knepper construct a useful framework against which to compare certain characteristics of a system in order to ascertain whether the corrections-commercial complex subgovernment may have taken hold.

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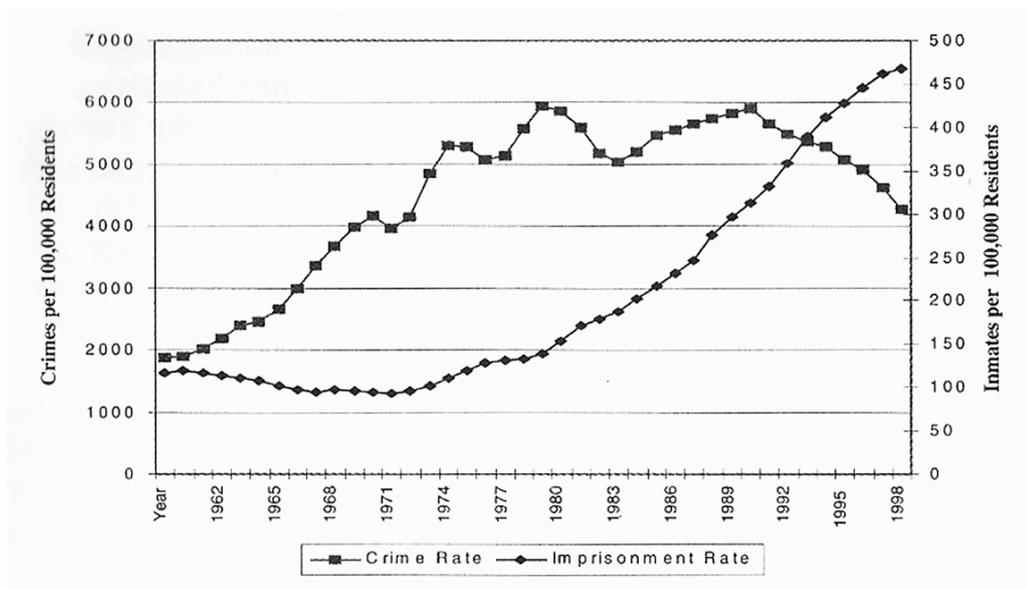
<sup>3</sup> A recording of President Eisenhower’s address is available to view here: <http://video.google.com/videoplay?docid=-2465144342633379864#>

### iii. The United States

Much like Lilly and Knepper's free flow of personnel, Wood (2003, p.16) posits a "revolving door" between government and the private sector, resulting in "relative immunity from democratic accountability" when considering the rise of prison privatisation in the US. Rather than a response to rising crime rates, Wood sees the emergence of the "prison-industrial complex" as "part of a more profound transformation that has restructured both the American pattern of economic development and its characteristic forms of social control" (pp.16-17). In line with Christie's analysis, Wood points out the highly indirect relationship between crime and imprisonment rates in the US between 1960 and 1999 and concludes that the crime rate cannot be the prime influence: "Rather it is the product of almost three decades of criminal justice legislation that have transformed the relationship between crime and punishment in the United States" (p.21).

Wood charts the trends in crime rate and imprisonment rate in the United States between 1960 and 1999 in Figure 1 below.

**Figure 1: Historical Trends in rates of Crime and Imprisonment, United States, 1960-1999** (Wood, 2003, p.21).



There is a clear lack of direct relationship between the crime and incarceration rates and Wood (2003) argues that the development is due to capitalist ideological factors which continue to drive it forward: "The structures and tendencies that have given rise to the

prison industrial complex – the uneven development of American capitalism, global overproduction, privatization, rentierization, flexibilization, neo-liberal restructuring and zero-sum politics at the national level – remain the dominant ones at work in the world today” (p.27).

Fernandes (2007) provides a troubling perspective on the privatisation of immigration detention in the US. Again echoing Lilly and Knepper’s subgovernmental structure, she states that companies involved with public security contracts told her that “the key to standing out in the tight competition for contracts is to get as close to the decision makers as possible. This translates into luring present and former government employees onto staff or management” (p.188). She reports that 82 percent of ex-government private sector lobbyists admit to lobbying the agencies they worked for previously. This model represents a good example of Lilly and Knepper’s subgovernment structure.

#### **iv. The United Kingdom**

McDonald (1994) provides an informative summary of the growth of the private prison industry in the UK, heavily influenced by the experience of the US. McDonald situates the export of the privatised US model to the UK within the ideological frameworks that fostered it. The US and UK had strongly conservative governments at the time who “launched a concerted attack on the institutional structures and ideology of the welfare state” (p.36).<sup>4</sup> McDonald also factors in a rising prison population in the UK, a general dissatisfaction with prison conditions, and the pressure to create more capacity by constructing new facilities or converting old ones. He states that, alongside a growing prison population in the UK and US, both the speed and cost benefits of privatisation were important factors. Lengthy public-sector procurement procedures could be avoided, making the construction of new facilities much quicker. McDonald also cites then-Home Secretary Kenneth Clarke’s claim that a main reason for pursuing privatisation in this area was that it would deliver a cost benefit. However, it is pointed

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<sup>4</sup> The UK was governed by Prime Minister Margaret Thatcher’s Conservative Party government between May 1979 and November 1990, and the US by President Ronald Reagan’s Republican Party between January 1981 and January 1989.

out that, because the contracts between the government and companies involved are commercially confidential in Britain, it is impossible to verify this claim.

Martin and Parker (1997) explain the drive for general privatisation here in the following way: “In the UK, as in many other countries, the political pressure for privatisation came from a combination of disillusionment with the results of state ownership and from a belief that private ownership would bring substantial economic benefits” (p.3). State-run industry was considered wasteful and inefficient, not least because of the interference of trade unions that could be effectively sidestepped through privatisation. Ultimately, the official discourse was dominated with optimism regarding the unmatched competence of privatised industry: “From the beginning, government ministers have stuck tenaciously to the argument that the privatisation programme has been an outstanding success story, especially in terms of increasing efficiency” (Martin and Parker, 1997, p.3).

Nathan (2003) elaborates on the developments in the UK: “There is no question that by 1986/87 the prison system in England and Wales was in need of an overhaul, not least since the prisoner population had reached record levels at nearly 51,000” (p.163). Because privatisation was considered relatively less expensive and less subject to bureaucratic procurement procedures, it quickly became a significant presence in the development of prisons (McDonald, 1994). Today “the UK has developed the most privatized criminal justice system in Europe” (Nathan, 2003, p.165). The Private Finance Initiative (PFI), implemented in 1992 by the Conservative government, incentivises the privatisation of public functions by way of “transferring the risks associated with public service projects to the private sector in part or in full. Where a private sector contractor is judged best able to deal with risk, such as construction risk, then these responsibilities should be transferred to the private contractor” (Allen, 2001, p.7).<sup>5</sup> As Nathan (2003) points out, the PFI subsequently became “the only option for procuring new prisons” (p.166).

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<sup>5</sup> The PFI scheme was launched as a way to save on costs for the public sector. Under the PFI, a private firm bears the cost of the setting-up and management involved in an outsourced public service, and the government then pays for the services provided by the firm in operating that service.

Nathan describes the policy reversal of the Labour government, newly elected in 1997, which acted in a manner completely inconsistent with their previous pledges to return private prisons to the public sector. To the contrary, prison privatisation continued to grow under this government, in line with the Private Finance Initiative scheme, and suggestions by industry players that the privatisation of the prison estate should grow further were broadly incorporated into policy, such as in Carter's *Review of PFI and Market Testing in the Prison Service* (2001), a report for the HM Prison Service on the future of private involvement. This aggressively pro-detention policy has continued to shift the culture of the immigration regime in the UK up to the present, and this culture will be examined later.

Molenaar and Neufeld (2003) analyse the use of privatised detention for asylum-seekers in Australia and the UK. They consider the problematic nature of this development:

The detention of asylum-seekers, a group of people who for the most part have not committed any offence, is in itself a controversial subject. It is not rendered any less controversial by the trend among governments to contract out their responsibilities for refugee protection to private firms, especially since there are but a few multinational firms that have a stranglehold on the industry (p.127).

Molenaar and Neufeld (2003) are highly critical of the neglectful treatment of detainees in several centres including the then-highly troublesome Campsfield House and Yarl's Wood. They refer to the case of *Quaquah and others v Group 4 Falck Global Solutions Ltd*, concerning Campsfield House detainee John Quaquah, who was charged with rioting and violent disorder during a disturbance at the centre. Security officers of Group 4 (the company managing the centre at the time) were found to have fabricated evidence against Mr Quaquah in an effort to mislead that the Secretary of State called "wicked" (p.133). Crucially, the Home Office was struck from the claim when it was deemed by the court that the Secretary of State was not liable for torts of the contracted company and its employees, as the management of the facility had been delegated to that company. Molenaar and Neufeld explain that this "demonstrates how the process of privatization is allowing the government to pass off its responsibilities of caring for asylum-seekers, while maintaining its role to decide who qualifies as a refugee" (p.134).

Bacon (2005) makes a particularly important contribution on the subject. Her quite contemporary analysis draws on the themes of the prison and immigration detention privatisation literature and relates them to immigration detention in the UK, while pointing out the relative lack of attention awarded to privatised immigration detention: “The privatisation of immigration detention centres ... has tended only to receive a cursory glance in relevant debates and scholarly analyses. This omission is puzzling, given that the companies with a large stake in private prisons are the very same as those who have a large stake in privately run immigration detention centres” (2005, p.2) Bacon demonstrates the growth of detention capacity by comparing the 250 spaces available in 1993 to the 2,644 in 2005 (2005, p.2). Indeed, this trend has continued; in June 2011, the UK detention capacity was approximately 3,500 places, with between 2,000 and 3,000 migrants in detention at any given time over the past three years, and with approximately 27,000 entering detention in total in 2011 (Migration Observatory, 2012).

Alongside a lack of academic attention, Bacon (2005) emphasises the relative lack of legislation relating immigration detainees: “Immigration detainees are stripped of many of the legal safeguards suspected criminals are entitled to. At police stations, for example, a strict regime of time limits is imposed on the detention of criminal arrestees, while an immigration detainee can be detained for an indefinite period” (p.3). She argues that this gives government the ability to “resist scrutiny” with regard to immigration detention. The lack of public interest is attributed to the “administrative”, rather than “punitive” nature of immigration detention (p.3). Bacon argues that we must take a deeper look at the structural interests and factors involved in immigration detention in the UK, rather than taking a purely legal, policy or human-rights centred view such as that taken by Amnesty International and the Jesuit Refugee Service, as well as several scholars (p.4). Bacon deems it “necessary to question a system in which private companies have a vested interest in keeping the immigration detention population as high as possible” (p.4). She goes on to argue that private involvement can be “directly linked” to growth of capacity and detention and the move towards “increasingly harsh detention policy and practice” (p.4).

Bacon (2005) presents a system rife with cost-cutting, inadequate healthcare, failures to report problems and with insufficient accountability. It is also a system in which the emergence of alternatives to detention could be precluded by the growth and tenacity of the framework. “Like any industry, the private prison industry needs raw material, in this case, asylum-seekers and undocumented migrants. A detention regime based on presumption of release, or a reductionist ethos, would destroy the alliance of public and private interests inherent in the public industrial complex thesis” (p.26).

#### **v. International Comparisons**

Flynn & Cannon (2009) bring an international perspective into the discussion of immigration detention privatisation, by comparing the relatively lesser-known systems in Australia, Germany, Italy, South Africa and Sweden. They demonstrate that, while some similar issues may exist globally, there is wide variation between the effects of privatisation in each setting. In Australia, there has been a shift from a completely public system in 1998 to a completely privatised system today. The 2005 Palmer Report led to significant reforms on the part of the government, leading to some improvement, with the Australian Human Rights Commission reporting better conditions in 2007. However, advocacy organisations still demand the end of private involvement.

The picture in Germany is more optimistic. Although the detention policy is decentralised to each state, or “Länder”, Flynn and Cannon reported good conditions in the Eisenhüttenstadt centre, run by B.O.S.S. Security and Service GmbH. The company has been praised in a 2007 European Parliament study, and a rights advocate interviewed by Flynn and Cannon claimed that the facility was better run than a police facility in Brandenburg, adding “If it were me, I’d prefer to be in the B.O.S.S. facility” (p.7).

Italy’s system, on the other hand, is subject to a high degree of criticism from human rights NGOs. Its facilities are again managed by local prefectures, with contracts going to a variety of private actors. Flynn and Cannon (2009) report Human Rights Watch’s findings that “human rights organisations have been frequently denied access to the facilities” (p.9). The Italian Red Cross, the principle contractor for the centres, has been

strongly criticised in the media and by NGOs and the Council of Europe's Committee for the Prevention of Torture (CPT) for detention conditions.

The private management of South Africa's sole dedicated immigration detention centre, Lindela Holding Facility, has been criticised for its conditions by scholars, NGOs and the U.S. State Department, with allegations of corruption, abuse of detainees, and a lack of access for human rights groups. The contracted company in this case has "close ties to the government agency that contracts it and supposedly monitors its work" (p.11).

Finally, Flynn and Cannon (2009) comment on the interesting experience in Sweden, now considered a "model country in terms of its treatment of immigration detainees" (p.12). The development of immigration detention in Sweden is unusual in that it shifted back from a privately-run estate to a publicly-run one, following criticism and allegations of bad conditions, abuse and a lack of transparency. The Swedish model will be discussed later in the dissertation.

Flynn and Cannon's conclusion is that, due to the generally non-transparent nature of the privatisation of immigration functions, it remains unclear in many cases why privatisation is pursued, and where it is clearer, the motivations appear to vary greatly between different countries. In some, it appears that "burden-sharing", or diffusing responsibility, is the prime motive (2009, p.14). In others, such as the UK, it appears that immigration detention privatisation has acted as an "initial step" preceding privatisation of the prison estate (p.14). Elsewhere, it appears to have simply been a necessity due to strained systems. Flynn and Cannon's analysis proves to be very useful in helping to consider alternatives to detention for immigration purposes.

## **vi. Conclusion**

A study of the literature makes clear the uncertainty and lack of consensus concerning the motivation behind the privatisation of suspension of liberty. Bacon's contribution to the literature is the most relevant and extensive on the specific issue of the privatisation of immigration detention in the UK and the arguments it posits provide an excellent jumping-off point for analysing the situation as it is today. However, this dissertation

will demonstrate that the picture today is somewhat different than it was in 2005 and will reveal that the current situation is a complex and nuanced one. It will also consider some crucial areas of the discussion that have thus far not been sufficiently analysed in academic literature.

### **III. The Immigration Regime in the United Kingdom**

#### **i. Legal Framework and Non-Statutory Guidelines**

There are several categories of people who may be detained in an immigration detention facility:

1. Asylum-seekers who have claimed asylum and await a decision
2. Asylum-seekers who have claimed asylum and whose claim has been rejected
3. Immigrants who have not entered the country legally (for example, not in possession of a valid passport or visa)
4. Overstayers (individuals who have remained in the country beyond the terms of their visas)
5. Foreign national ex-offenders

The *Immigration Act 1971* permits “the detention of persons pending examination or pending removal from the United Kingdom” for administrative, rather than punitive, reasons (Section 4, 2c). The power to detain is conferred on the Secretary of State, and individuals are detained by Immigration Officers, employed by the UKBA. The *UK Borders Act 2007* extended the power of the UKBA (then the Borders and Immigration Agency) Immigration Officers to also detain individuals at ports. Chapter 55 of the UKBA’s *Enforcement Instructions and Guidance*, a non-statutory document, gives the following direction on the use of detention: “Detention must be used sparingly, and for the shortest period necessary. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process once any rights of appeal have been exhausted” (UKBA, n.d.). However, the *Immigration Act 1971* stipulates no limit in length of detention, and so it can be indefinite under UK law. There is no automatic appeal or bail mechanism for those detained. The UK has chosen not to opt in to the European Union *Returns Directive 2008*, which sets an upper limit of eighteen months on immigration detention (Migration Observatory, 2011).

If an asylum-seeker is not granted refugee status, and is not given permission to remain in the UK, the UKBA issues written notice that he or she will be removed. This

procedure is distinct from that of deportation. A person is generally deported after committing a criminal offence and deportation carries a longer period of time before one can reapply for status in the UK.

A foreign national may be removed from the United Kingdom in the following three situations:

1. Where a criminal court recommends deportation, under Section 3.6 *Immigration Act 1971*
2. Where the Secretary of States considers that that the person's deportation is conducive to the public good, under Section 3.5a *Immigration Act 1971*
3. Where the person is sentenced to at least twelve months imprisonment for a criminal offence, under "automatic deportation" powers in Section 32 *UK Borders Act 2007* or has been sentenced to any term of imprisonment if the offence is one specified by order of the Secretary of State under Section 72.4a *Nationality, Immigration and Asylum Act 2002*.

Assuming that an individual has exhausted all appeals and can no longer legally challenge his or her removal, the removal may still not be possible. If the individual does not have a valid passport, the UKBA issues emergency travel documents. The passport or travel documents are then examined by the receiving country's embassy, who will often also interview the individual. The receiving country then decides whether they will accept the individual's return. If it does not accept, the return cannot be carried out. The return will also be impossible if the country has been deemed as unsafe for return by the Home Secretary, or if the individual belongs to a certain group which is deemed unsuitable for return at that time. In such cases, the individual can apply for support under Section 4 of the *Immigration and Asylum Act 1999*, which grants the individual a form of temporary leave, until such time as return is possible.<sup>6</sup> Unfortunately, in practice, an impediment to removal often does not result in a release from detention

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<sup>6</sup> When Section 4 support is not granted, this often results in the long-term detention of individuals who cannot be returned.

The conditions of detention are regulated by the statutory *Detention Centre Rules 2001* and the non-statutory *Operating Standards for Immigration Removal Centres*. Enforced removal from the UK is regulated by the Home Affairs Committee's non-statutory *Rules Governing Enforced Removals from the UK*. The *Human Rights Act 1998* also affords asylum-seekers and other foreign nationals a range of rights protection in the UK. As of 1 September 2011, private contractors may be prosecuted for deaths occurring in immigration detention facilities under the amended *Corporate Manslaughter and Corporate Homicide Act 2007*, if it can be proved that the death occurred as a result of a breach of the duty of care on the part of the contractor.

The UKBA can select asylum applicants for the Detained Fast Track (DFT) system, which is used "to manage asylum applications that have been identified as ones where a decision to grant or refuse asylum can be made quickly" (Independent Chief Inspector of the UKBA, 2011a, p.2). If deemed suitable for DFT, an asylum applicant is detained immediately and stays in detention while his or her application is processed, and can then be quickly given a removal order and removed if necessary.

HMIP oversees the operation of prisons, immigration detention facilities and juvenile detention facilities. HMIP is conferred this responsibility under the *Prison Act 1952*, carrying a duty to inspect each facility and report to the government on various issues, in particular on the treatment of the detained and the conditions of each facility (MoJ, 2012). HMIP produces reports on conditions in IRCs, STHFs and, more recently, detainee escorting upon removal (MoJ, n.d.).

The UK is party to the 1951 *Convention relating to the Status of Refugees* (Refugee Convention), as well as its 1967 *Protocol relating to the Status of Refugees*, which defines a refugee as any person who:

...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a

result of such events, is unable or, owing to such fear, is unwilling to return to it (Article 1).

If a claim for protection is successful under the Refugee Convention, the individual will be awarded refugee status. If a claim for asylum fails, but a human rights claim succeeds, the individual can be awarded either temporary or permanent leave to remain in the United Kingdom – a status that affords the individual fewer benefits than that of a refugee, such as weaker rights to family reunion and travel documents (BIHR, 2006, p.13).

The UK is also party to the *International Covenant on Civil and Political Rights* (ICCPR) which protects the right of liberty in Article 9 and does not allow for arbitrary arrest or detention. Any use of detention must be prescribed by law and the individual must be entitled to appeal it before a court. The Office of the United Nations High Commissioner for Refugees (UNHCR) is tasked with protecting refugees, and reports on the performance of states in this area. The Working Group on Arbitrary Detention, established by the United Nations Commission on Human Rights, monitors the use of detention, investigates cases of arbitrary detention, and reports to the Human Rights Council on the subject.

The UK is also party to the *European Convention on Human Rights* (ECHR), which prohibits torture and inhumane or degrading treatment (Article 3) and protects the right to respect for private and family life (Article 8). The UK is therefore obliged not to remove a person to a country where that person is at significant risk of torture or inhuman or degrading treatment, and may not interfere with the private and family life of an asylum-seeker or migrant – who may have a familial relationship with someone in the UK – so long as it would not be proportionate to do so in order to protect the rights of others. Article 5 protects the right to liberty and security, which may be limited in order to prevent unauthorised entry to a country or while an asylum application or similar process is being carried out. The detention must not be arbitrary and the detainee must be informed of the reasons for his or her detention, in a language he or she understands, and must be able to appeal against it. His or her case should be dealt with quickly so as to avoid lengthy detention (BIHR, 2006).

## **ii. Current Structure of the Immigration Regime**

The UKBA oversees the management of the UK's immigration detention facilities. Ten of these are IRCs, the operation of seven of which is currently contracted to several private companies. There are four Short-Term Holding Facilities (STHFs), used to hold individuals for short term assessment, all of which are privately managed. The remaining facility is a pre-departure accommodation (PDA) facility called Cedars, where families may be required to stay if they refuse voluntary return. Cedars is managed by G4S and the children's charity Barnardo's. Healthcare is provided in each facility, and is either contracted to the (National Health Service) NHS, as in Prison Service-run centres, or subcontracted to a separate private health care provider by the companies running privately-managed centres. For details of the current contract-holders, see Appendix A.

## **iii. The Development of the Privatised Immigration Regime**

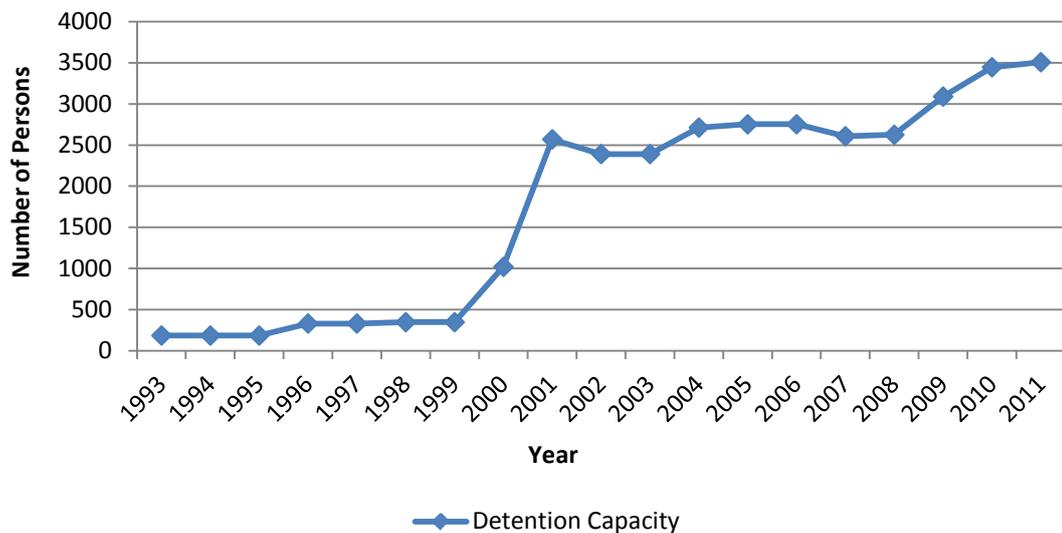
Unusually, when compared to the development of detention privatisation internationally, the private sector's involvement in immigration detention in the UK predates its involvement in the operation of prisons. The management of the original Harmondsworth facility, as well as a small detention facility based at Manchester airport, was contracted out to UK-based security company Securicor in 1970. These were the first dedicated immigration detention facilities in the United Kingdom and the first to be run privately on behalf of the state (Bacon, 2005, p.6).

Initially, immigration detention in the UK was limited to STHFs at airports with very low capacities (Phelps, 2011). To understand the subsequent expansion of the use of detention in the UK, we must consider the influence of the US on the issue of prison privatisation. Increasing costs of prison management and a growing incarceration rate in the UK led to an examination of prisons by the parliamentary Home Affairs Committee in 1986. The Committee's remit during this examination included the possibility of visiting other countries to investigate their experiences. In the end, only one trip was made – to the US, in October of that year, and a year after the publication of McConville and Williams' influential work promoting privatisation in the area, *Crime*

*and Punishment: A Radical Rethink* (1985). As Nathan (2003) explains, the Committee took a lot of inspiration from the Corrections Corporation of America (CCA), and were spurred by research coming from the Adam Smith Institute; a UK-based policy institute promoting ideas of free market economic theory. The Committee recommended the use of prison privatisation in the UK in its fourth report *Contract Provision of Prisons* (1987), and was supported by further papers from the Adam Smith Institute, and from two academics, Maxwell Taylor and Ken Pease. By the end of 1991, the first contracts for a privately-run prison, The Wolds, had been signed (McDonald, 1994, pp.33-34).

Bacon (2005) places the development of these trends within the context of Prime Minister Margaret Thatcher's policies in the 1980s, alongside the pressure of a growing prison population and reports of unacceptable conditions in prisons: "When the Thatcher government floated a number of public utilities on the Stock Exchange in the early 1980s, it signalled a commitment to privatisation as a means of reducing public spending" (p.11). Bacon also considers that the experience of prison privatisation was a major influence on the growth of privatised immigration detention. "It is doubtful that the detention estate would have expanded in the same way, if at all, without the development and momentum of this movement, and the experience of prison privatisation in the US as a motivating force" (p.13). Today the majority of the immigration detention estate is managed and operated by private companies, and the capacity has risen dramatically overall. In 1993, Campsfield House was the only dedicated immigration detention centre in the UK, with a capacity of 184. By 2011, the UK's immigration detention capacity (not including prison capacity) was 3508. Figure 2 below provides a visualisation of the growing capacity between those years.

**Figure 2: Total immigration detention capacity between 1993 and 2010, not including spaces used in prisons<sup>7</sup>**



Accompanying the increase in private involvement in immigration detention, Bacon (2005, p.4) notes a “willingness to detain despite clear principles and rules limiting its use” and a “secrecy and lack of accountability inherent in immigration detention, and in some respects, the move towards increasingly harsh detention policy and practice.” These trends have certainly continued to the present day, as shall be discussed later. Serious abuse has also been alleged in the process of detention and removal of asylum-seekers in recent years. Physical assault during detention and removals was reported in the media in 2007, including reference in the *Independent* newspaper to around 200 cases of alleged mistreatment (Verkaik, 2007). The Home Office claimed that the allegations were unsupported, leading a group of solicitors and NGOs to produce the report *Outsourcing Abuse* (2008), outlining almost 300 such cases. The report described many incidents of physical assault against detainees and deportees and did not excuse the privatised nature of the estate for inaction: “While the practice of using private companies for running detention centres and escorting of forced removals may contribute to a certain level of ‘see no evil, hear no evil’, our understanding is that the Home Office is aware of an unacceptable level of alleged abuse through its own complaints procedure” (Birnberg Pierce and Partners, Medical Justice and NCADC,

<sup>7</sup> Source: The author’s own *Freedom of Information Act* requests to the UKBA, as well as migrations and asylum statistics published by the Home Office (Home Office, n.d.; National Archives; 2010).

2008, p.3). The report also expressed serious concerns about the lack of transparency with regard to standards compliance of contracted companies.

#### **iv. Contracts and the Freedom of Information Act 2000**

The involvement of the private sector has led to a situation where contracts between the UKBA and private companies providing services in this area are commercially confidential. Public requests for access to these contracts are routinely denied across the board, as confirmed by Phelps (2012) and Trude (2012). These contracts are exempt from public scrutiny under the *Freedom of Information Act (FOI) 2000*<sup>8</sup> Section 22 (1). The author entered a FOI request to the UKBA for copies of the contracts with each relevant company for the management of several immigration detention facilities. The response is included in Appendix B. The request was denied pursuant to the exemption under section 22 (1) of the Act, which exempts information if it is due to be published at some time in the future.

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<sup>8</sup> The Act gives the public a right of access to information held by the government and public authorities. Information is obtained by means of a FOI request submitted to the relevant agency, and the information requested must be provided unless exempted by the terms of the Act.

#### IV. The Expansion of the Privatised Detention Estate

*“The state still has a legal monopoly on violence, but it is now prepared to auction that monopoly to anyone with a turnover of billions and a jolly branding strategy.” (Penny, 2012).*

**Figure 3: Rates of Asylum Applications and Immigration Detention in the United Kingdom, 2001-2010<sup>9</sup>**

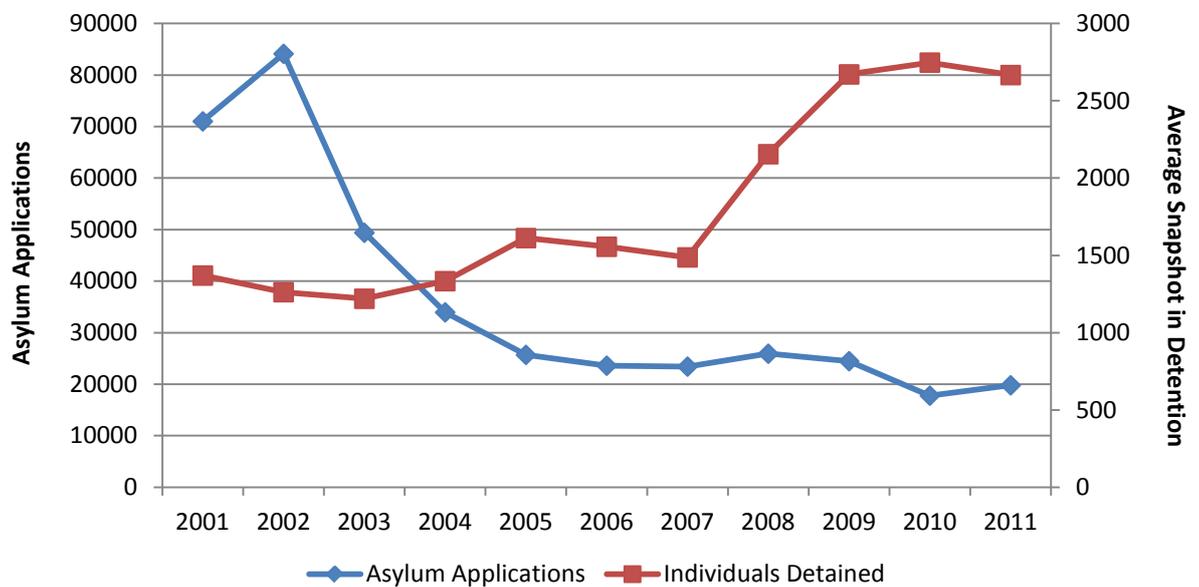


Figure 3 shows the development, between 2001 and 2011, of rates of asylum applications and immigration detention. Although not as dramatically disparate as Wood’s presentation of crime and incarceration rates in Figure 1, there is a clear lack of direct relationship between the two rates. As Figure 3 demonstrates, since a significant peak of asylum applications in the UK in 2002, the number of applications has been falling almost every year since, excluding 2008, with the most dramatic reductions taking place between 2002 and 2005, after which there is broad correlation for two years. Figure 3 also shows that there has been a slightly staggered but definite increase in the average number of detainees across the immigration detention estate at any given

<sup>9</sup> Source: The author’s own *Freedom of Information Act* requests to the UKBA, as well as migrations and asylum statistics published by the Home Office (Home Office, n.d.; National Archives, 2010).

point. The driving force behind this trend is the subject of some considerable discussion.

The Campaign to Close Campsfield (CCC), in its submission to the Universal Periodic Review (UPR) of the UK in 2011, expressed concerns about the dramatic increase in detention capacity over the last few decades and, referring to Bacon (2005, p.26) claimed that private companies “have largely driven this expansion” (CCC, 2011). However, this is a misreading of Bacon’s contribution. She specifically that such an assertion would be an overstatement. We can see, however, that at the time of writing in 2005, Bacon would have seen a very dramatic picture. Between 2003 and 2005, while asylum application rates plummeted, the use of detention was rising at an accelerating rate. Indeed, since her report was published in 2005, asylum application rates have come nowhere near as high as they did in 2002, while the number of those detained has significantly increased, particularly after 2007.

The most dramatic increase in detention, from 2007 onwards, remains to be explained. Two years prior to Bacon, Molenaar and Neufeld (2003, p.131) stated that 1 to 1.5 per cent of asylum-seekers were detained at any given time in the UK. In 2010, the average number of detainees equalled 15.44 per cent of asylum-seekers claiming in that year – an enormous increase. Both Phelps (2012) and Trude (2012) emphasise the importance of the increase in detention of foreign national ex-offenders into considerations of the growth of detention. The 2006 foreign prisoners scandal (Assinder, 2006) was quickly followed by the *UK Borders Act 2007*, which included a provision requiring the issuing of an automatic deportation order to a foreign national who has served a sentence of at least twelve months for a conviction, in most cases, or has amassed twelve months’ worth of sentences over four years (Trude, 2012). Effectively, “the discretion of the Secretary of State over whether to deport them or not was removed ... hence, automatic deportation” (Trude, 2012).

Under heavy political pressure to detain and deport these individuals, the UKBA neglected to give sufficient regard for the practical possibility of their removal. London Detainee Support Group (LDSG, now Detention Action) found that “almost half of people detained for over a year are from four countries: Algeria, Iran, Iraq and Somalia,” where returns are either impossible or incredibly difficult to facilitate (2010,

p.11). In such cases, detainees can end up stuck in detention for very long periods, sometimes up to several years. Furthermore, BID has discovered that only around 33-35 per cent of foreign nationals in prison in the United Kingdom have access to any immigration advice and so cannot usually challenge their deportations (Trude, 2012). Although the UKBA's *Enforcement Instructions and Guidance* only advises detention when "used sparingly, and for the shortest period necessary", detention has become the norm. In 2011, The Independent Chief Inspector of the UKBA found "a culture where the default position is to identify factors that justify detention rather than considering each case in accordance with the published policy" (2011b, p.22).

In the case of *Abdi et al* (2008), the UK's High Court found that the UKBA were operating under a presumption of detention for foreign national ex-offenders, and that this was unlawful. In *The Queen on the application of WL (Congo) 1 and 2 and KM (Jamaica)* (2010), it was revealed that, as per secret UKBA guidelines, foreign national ex-offenders were being detained regardless of whether their return was possible. This was found to be a "blanket policy" (LDSG, 2010. p.15). LDSG reports a "change in atmosphere" as a result of subsequent case law, which has seemed to influence the policy of the UKBA and First-tier Tribunal, resulting in an improvement in the rate of release of detainees with similar cases which provides some optimism for the future (p17).

Collins argues that the proportion of detainees who previously had status and have since lost it because of criminal activity should not be overstated. He emphasises the increased criminalisation of aspects of the asylum process in general. "I don't think the foreign national ex-prisoners have really made that much of a dent in it. It might seem that they're more represented there because of the criminalisation of various parts of seeking asylum and migration. So, back in 2001, you would not have gotten such a big sentence for using things like false documents" (Collins, 2012). Collins points to the oft-observed path to destitution and criminality that results from being refused the chance to work. Many individuals not detained – either because their case is in consideration, they have been found to be practically non-returnable, or they have been granted a form of leave to remain – often find themselves in this position. The British Red Cross described the situation in 2010:

It has been estimated there are up to 500,000 refused asylum-seekers in the UK. These are people who, for a range of reasons, have not returned home, are still living in the UK with very limited or no access to support from the state and who are not allowed to work. They become reliant on the goodwill of friends and support from faith groups and charities. In many cases they experience exploitation, overcrowded living conditions, street homelessness, physical and mental illnesses and malnourishment (BRC, 2010, p.7).

In a recent example, research by CITIZENS Organising Foundation's campaign Citizens for Sanctuary in Nottingham found seventy failed asylum-seekers and three families with children destitute in the city, some of them sleeping rough (BBC News, 2012). Collins explains that often the only way out of destitution for people in this situation is to obtain illegal work. "In order to get illegal work, they need to get false papers, and that carries with it a twelve month sentence ... forcing them into crimes of poverty" (Collins, 2012). As a result, failed asylum-seekers may find themselves criminalised and subject to automatic deportation, inflating the rate of foreign national ex-offenders in detention following their sentences.

Asylum-seekers – or, more strictly, those who have sought asylum at some point during their immigration adjudication processes (not necessarily immediately upon arrival) – continue to comprise the majority of the population of immigration detention. It is also worth noting that some foreign national ex-offenders apply for asylum while in prison and so contribute to the asylum application figures. Also, the use of DFT has significantly increased the number of individuals automatically being sent to detention since 2005, when the government announced its intention to process 30% of new applicants in this way (Migration Observatory, 2012). However, Trude emphasises that foreign national ex-offenders nevertheless do contribute very significantly to the growing use of detention and account for a sizeable contribution to the dramatic growth in detention rates seen since 2007 (Trude, 2012). It has resulted in "a bulge of people who, since 2007, have been filling up detention centres ... So, although immigration detention started off as an asylum thing ... now, the biggest thing about detention is the whole criminality issue" (Trude, 2012).

Considering the correlation between asylum applications and detention rate between 2005 and 2007, and considering also the “hysterical extension of the scope of people who are pursued for detention” (Phelps, 2011) after the foreign national ex-offenders scandal, it would be difficult to argue, as CCC do, that it is direct private sector influence that has effected detention policy in recent years. Instead, perhaps a more nuanced argument of the effect of private sector interests can be made. As Bacon writes:

While it is overstating the case to suggest that private interest drives detention policy or the decision to detain, private interest has nevertheless played an important role in the expansion of the detention estate. Indeed, legislators and policy makers would not be able to commit to increasing detention spaces without the co-operation, capacity and methods of the private sector (2005, p.27).

Phelps posits that the “cultural addiction that we have, particularly in the Anglo-Saxon world, to locking people up is a very long-standing cultural, socio-political neurosis in our modern politics. Privatisation is one element of that, and an important and interesting one to monitor, but I think there is a danger of overstating direct cause” (Phelps, 2012). While it is difficult to frame private companies as the main driving force behind the increase in detention capacity and the use of detention, it is certainly possible to see their significance as facilitators in such developments. Trude states that “the private sector clearly has the capacity, perhaps more easily than the Prison Service, to step in where it is required ... Even to put the bids together I would have thought is easier for them” (2012).

The private sector has arguably come to be in a position from which it can function very effectively in its role as facilitator to the government with regard to the immigration regime in the UK. It is worth considering to what extent Lilly and Knepper’s (1993) “corrections-commercial complex” subgovernment model may apply in a UK-based version of what Fernandes calls an “immigration-industrial complex” (Fernandes, 2007, p.170). The subgovernment necessitates a close working relationship between each party, whereby no one participant can stop the actions of the entire entity. In the case of the UK, while particular security companies or political parties may change over time,

the long-term policy commitments of detention growth and tenacious, if not growing, private sector involvement suggests that certain elements of the expansion of detention may be somewhat beyond control for the time being. Bacon calls the contractual arrangements between industry and state “election-proof” in that they “tie governments into private sector participation in ways that would be difficult to unscramble” (2005, p.18). Bacon sees the Labour Party’s reversal on prison privatisation as explicable on these terms.

Lilly and Knepper’s (1993) subgovernment comprises an overlap of interest, manifesting itself in a flow of personnel between industry and the state. They write: “The line between the public good and private interest becomes blurred as governmental and nongovernmental institutions become harder to distinguish” (p.153). We can see this borne out to a degree in the current circumstances in the UK. Alastair Lyons, chairman of Serco, was the non-executive director of the Department for Work and Pensions and the Department for Transport before his move to the private sector. We also see similar moves between private industry and advisory organisations with policy-level influence in the UK. John Connolly, chairman of security contractor G4S, is also on the boards of TheCityUK, the International Business Advisory Council for London (IBAC London) and the British American Business International Advisory Board. These organisations act to shape policy in the UK by providing advice and representing the private sector. TheCityUK “champions the international competitiveness of the financial services industry ... playing an active role in the regulatory and trade policy debate” (TheCityUK, n.d.) The International Business Advisory Council for London “brings together forty seven distinguished business leaders from multinational giants to advise the Mayor on securing the capital’s position as a top global city” (Greater London Authority, n.d.). Finally, the British American Business International Advisory Board conducts a range of policy work including “direct, formal representations to Government on policy issues that are particularly important to our membership, ranging from taxation and immigration legislation to the UK Bribery Act and aviation policy” (British American Business, n.d.). This type of interest overlap leads to a situation where it becomes difficult to pinpoint where the state starts and ends in terms of its formation of public policy.

To a large extent, such exchange of influence and ideas happens out of the sight of public scrutiny. However, this element of Lilly and Knepper's (1993) subgovernment perhaps does not apply as well as envisioned, in the current example – particularly given the heavy press coverage awarded to various blunders and misdeeds of privately contracted companies acting in public service functions. However, the 'election-proof' nature of much of the immigration regime, along with the novel but continually expanding normative shift towards seeing detention as a default reaction to certain immigration problems, contributes to the final element of Lilly and Knepper's model. That is the formation of their "iron triangle" (p.154) – the development of the subgovernment as a fixture within immigration policy. That is not to say that the subgovernment model negates all other factors influencing the increased use of detention. We do not find in the UK a perfect and advanced example of this model as is arguably observed in the US (Fernandes, 2007). Rather, the UK's immigration-industrial subgovernment acts as a crucial *facilitator* of the solution to a somewhat artificially inflated problem.

Phelps states, "I think it certainly makes it more attractive, for ideological reasons, to governments to open new detention centres if they can contract them out, because it is ideologically compatible," but he is sceptical of the idea that private sector lobbying makes a significant impact: "I am not sure that the industry would need to particularly do anything here" (2012). Trude, on the other hand, posits that the private security firms "are lobbying the government in the same way that the prison service is lobbying and we are lobbying against the use, but they are obviously bigger and uglier and have got more money" (2012). Flynn and Cannon (2009) discuss:

...the impact that private industry arguably can have on national legislative and regulatory frameworks governing immigration detention, which can be closely tied to contractor performance ... Although it can be difficult to observe a direct causal relationship between the lobbying efforts of private contractors and worsening and/or expanding detention practices, the establishment of deeply rooted private incarceration regimes can engender an institutional momentum that takes on a life of its own (p.17).

The use of detention for immigration purposes has gradually gained a level of legitimacy that human rights NGOs and international organisations such as the UNHCR see as highly problematic. Trude states: “We have noticed that there is much less questioning about whether or not people should be detained and we are sitting here thinking, ‘This is *administrative* detention. This is *discretionary* detention. Even where people have a criminal record, they served their sentence’ ... judges are not dealing with the issue of criminal risk” (2012). The Council of Europe has advised that detention be used “only as a last resort” (Council of Europe, 2010). The UNHCR’s *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* state that detention is “inherently undesirable” and should only ever be resorted to “in cases of necessity”. (1999). To interpret the definition of such necessity, the Guidelines point to Conclusion No. 44 of the Executive Committee on the Detention of Refugees, which advises that detention is permissible:

...only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order (UNHCR, 1986).

Crucially, the conclusion emphasises “the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum-seekers from unjustified or unduly prolonged detention” (UNHCR, 1986).

The host state is also advised to avoid arbitrary detention and to comply with Article 31 of the Refugee Convention, which disallows the punishment of asylum-seekers “provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence” and also emphasises that detention must only be used when necessary. Detention “must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist” (UNHCR, 1986).

Guideline 2 exempts asylum-seekers from detention as a general principle. Guideline 3 stipulates that detention must be used only as a last resort, with a presumption against it: “Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose” (UNHCR, 1999). Clearly, detention in the UK falls well outside of these recommendations in practice.

The 2009 Report of the UN Working Group on Arbitrary Detention echoed the UNHCR view that detention should be used only as a last resort and for a short period. The report stresses Article 10 of the ICCPR, to which the UK is party, which states that “[a]ll persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person,” and also Article 9 of the Universal Declaration of Human Rights which recommends that “[n]o one shall be subjected to arbitrary arrest, detention or exile” (UN General Assembly, 2009).

Following from its 2009 inspection of human rights protection for migrants in the UK, the 16 March 2010 Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante gives the following recommendations to the government:

- (a) Consider the recommendations made by the Working Group on Arbitrary Detention in a 2009 report to the Human Rights Council, particularly the call upon States to restrict the use of detention for immigration purposes, ensuring that it is a measure of last resort, only permissible for the shortest period of time and when no less restrictive measure is available and therefore, to use and make available alternative measures to detention both in law and in practice;
- (b) Take measures to review the implementation of national laws applicable to the detention of migrants to ensure that they are harmonized with international human rights norms that prohibit arbitrary detention and inhumane treatment;
- (c) Take all necessary steps to prevent cases of de facto indefinite detention and grant to migrants in detention all judicial guarantees, including keeping them informed of their cases’ status. (UN Human Rights Council, 2010).

The UNHCR's submission to the UPR for the UK expressed concern about the DFT procedure, under which a suitable asylum-seeker can be immediately and automatically detained if it is decided that his or her application can be dealt with quickly.<sup>10</sup> The UNHCR found that the DFT process "does not have adequate safeguards against arbitrariness" and "also leaves open the possibility for an unlimited duration of detention" (2011). Such arbitrariness is not permitted under Article 9 of the ICCPR and Article 5 of the ECHR. The UNHCR also commented on the fact that the provision for the DFT procedure is not prescribed in law, as is required by the Executive Committee on the Detention of Refugees' Conclusion 44 in order to be considered permissible. Furthermore, the reasons for its use are found to be "vague". The UNHCR recommends that the UK not use detention "for administrative convenience" (UNHCR, 2011).

Thus, it is clearly the perspective of the international human rights community that detention for immigration purposes is inherently problematic, and should be avoided wherever possible. Unfortunately, the UK's policy on the matter has not developed according to such norms, and thus the UK has attracted criticism for its lack of observance of the norms and legal obligations outlined above. Detention capacity has increased by 50 per cent since 2007, while the number of removals has actually decreased. With a 2010 analysis reporting only a 34 per cent removal rate after detention (LDSG, 2010, p.8), it appears that the motivation behind immigration detention is no longer simply a matter of removal, but rather is politically and ideologically driven. Bosworth writes, "If earlier debates saw imprisonment as regrettable but sometimes necessary, by 2005 the White Paper *Controlling our Borders* presented detention as an aspiration, effectively erasing the distinction between criminal and asylum-seeker" (Bosworth, 2008 cited in GDP, 2011).

With private involvement, it is now relatively much easier for the government to increase detention capacity by outsourcing its construction and management to contractors, saving it the red tape of procurement and other such factors. It is difficult to point to a direct causal relationship between private sector involvement and the growth

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<sup>10</sup> Concern has been raised about the adequacy of the selection screening process for DTF, as well as the significant delays and prolonged detention (Detention Action, 2011a).

of the detention estate, but it seems pertinent to suggest that private interests at least contribute to the cultural development – the move to legitimise the use of detention as a default response to immigration matters. Private sector contractors make this cultural shift much easier, as facilitators.

## **V. Privatisation and Human Rights Protection**

### **i. Conditions of Detention**

The effect that privatisation has had on the conditions within immigration detention has been the subject of much debate. Phelps warns of overstating the negative influence of private involvement. “Bringing in private security companies has historically led to some particularly poor practices in the UK, but equally probably some of the better practices as well, so I think it is a mixed picture” (2012). In fact, Phelps argues that the very nature of a private company, with its aims of preserving or improving its market value and ultimately winning and maintaining contracts, necessitates good practice. For Phelps, the entire detention estate has been compelled to clean up its act as a result of the lessons learned in the early to mid-2000s. He refers to two major disturbances at the Harmondsworth centre, in 2004 and 2006, which resulted in the company managing the centre losing the contract and accruing a £1 million fine for breaches of that contract and concludes, “I think it has given a lot of momentum to the HMIP narrative that we have got to look after people well” (Phelps, 2012). McDonald (1994) makes a similar point with regard to prison privatisation, writing that, “at least in the early stages of contracting, there appear to be disincentives to diminish services: if performance falls below agreed-upon standards in those ‘showcase’ facilities, firms risk losing contracts and clients” (p.42).

However, echoing elements of Lilly and Knepper’s subgovernment model, Collins (2012) argues that the tenacious relationships between such companies and the Home Office often appear to be able to weather the storm of scandal. For example, G4S lost its contract to manage removals from the UK, after Jimmy Mubenga, a 46-year-old Angolan deportee, died in 2010 while forcibly restrained by G4S employees on a removal flight (Taylor and Lewis, 2012a). In 2012, however, G4S won a £203 million contract to provide housing for asylum-seekers in the UK. Collins observes that companies like G4S seem to win contracts “no matter what they do, no matter how many people die ... something is wrong here” (Collins, 2012). Flynn and Cannon (2009, p.16) warn of the tenacity of such relationships as resulting from a monopolisation effect in prison privatisation: “[T]he consolidation of large parts of a market under one or a few companies, which has occurred in the United Kingdom and

in the United States, can eliminate the impact of competition.” McDonald (1994) is then quoted:

Where governments have to be careful is to avoid becoming too dependent upon private provision. Strategies to minimize the risks of this include government retaining ownership of existing correctional facilities, and contracting only for management of new ones – because firms that establish themselves with physical assets in a particular jurisdiction may develop an unbeatable edge over potential competitors in future contract competitions (McDonald, 1994 cited in Flynn and Cannon, 2009, p.16).

Sadly, in the UK, it has become common practice for both existing public prisons and immigration detention facilities to be “re-rolled” and contracted out to private companies. This has resulted in the UK having the most privatised prison system in Europe (Prison Reform Trust, 2011) as well as a heavily privatised immigration regime.

Flynn and Cannon (2009, pp.16-17) present three mitigating circumstances that may override a contractor’s motivation to act properly. Firstly, there can exist very close ties between contracted industry players and government that tend to protect the deals done between them. Secondly, the estate is often found to be consolidated under a small number of companies, leading to a situation where competition is no longer a significant factor. This can result in a degree of dependence upon these few companies and can in turn remove the incentive to act properly. This, they claim, has occurred in the UK. Thirdly, Flynn and Cannon point out that contractors will often only improve their performance to a significant degree when faced with “high degrees of surveillance and oversight” (2009, p.16).

There is a concern that private sector involvement inherently affects priorities of service management, leading to an emphasis on increasing profit, and reducing spending. In 2011, Liberty reported that G4S and the UKBA had, without consultation, confiscated the mobile phones of all detainees and replaced them with their own phone system, reporting that the cost of calls were “exorbitant ... One gentleman we interviewed saw prices soar by a staggering 1,152 per cent” in a centre where detainees receive an allowance of 71p per day (Norton, 2011). Furthermore, it was reported that the network

could be “shut down in the event of what the authorities called a ‘serious disturbance’” (Norton, 2011). This scheme was reversed when Liberty and other organisations threatened legal action. Immigration detainees are also often employed by centre management to work on menial jobs around the centre for very low pay – as low as 50 pence per hour, lower than the already humble £1 per hour recommended by the UKBA (McVeigh, 2011). McVeigh reported that detainees at Yarl’s Wood IRC described the work as “modern-day slavery” and accused Serco of exploitation. The Refugee Council called this a “cruel irony” due to the fact that asylum-seekers are not permitted to work in the UK (McVeigh, 2011).

The *Detention Centre Rules*, according to Trude (2012), are “drawn incredibly loosely”, with much of the interpretation left up to the entity – whether public or private – managing a facility, echoing the concerns of Bacon that, compared to the level of regulation regarding the treatment of prisoners, immigration detention is very weakly regulated (2005, p.3).<sup>11</sup> Trude (2012) also describes Prison Service staff as being much more extensively trained and regulated, with a lot more guidance, than private security staff. This has resulted from a wealth of case law on prison conditions over the years. This historical development has resulted in more rights protection for prisoners, who are, for example, afforded the right to argue against allegations made against them through an adjudication system.

In BID’s experience, Detention Custody Officers (DCOs) working for private security companies are neither accustomed to, nor trained in, that way of working. Instead of considering mitigating factors in an incident, “they go straight to writing a report. They go straight to the use of segregation or removal from association” (Trude, 2012). At present, UKBA’s record-keeping of such reporting does not distinguish between victim and aggressor in incidents of aggression or bullying. Rather, “if your name is on the list, then whether you were the victim or the aggressor, you are there and that is brought up later on if you are trying to apply for release on bail” (Trude, 2012). It is also argued that private security staff are less incentivised to provide their services to a high standard. As an employee, “you are not working for a government service where paying

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<sup>11</sup> Phelps (2011) notes with interest the variation in the incredibly minimal response to the issue of indefinite immigration detention and the public outcry over the proposals for 42-day police detention of terror suspects.

conditions are being fought for by generations of trade unionists. That is all out the window because you are working for this private company that just hires and fires” (Collins, 2012).

Phelps (2012) is more positive about the relative standard of conditions in immigration detention in the United Kingdom: “I do think that the way in which at least some of [the centres] are run is probably, by international comparison, among the best.” He reports that Colnbrook IRC, for example, is providing a wide range of facilities for detainees, such as kitchen facilities, detainee radio, and even beekeeping facilities, which one would not necessarily expect. “While ethically, in all sorts of ways, having the private security guard rather than the public servant in charge of your freedom and every aspect of your life is enormously problematic in practice, if I had to be detained somewhere, probably the top three centres I would choose, none of them are run by the Prison Service” (Phelps, 2012). Privately-run centres do generally feature at the bottom of the scale in terms of conditions at any given time, Phelps claims, but only because there are more of them. He states that the publicly-run centres tend to be around the middle. It seems not to be the case that privately-run facilities are clearly and demonstrably worse in terms of human rights protection than the publicly-run facilities, on the face of it. That is not to say that they are without issues particular to privatisation, however, the most pressing of which is that of privatised healthcare.

## **ii. Healthcare Provision**

All interviewees agreed that healthcare provision in immigration detention is an area where private involvement has had a negative impact. In publicly run centres, the healthcare is provided by the NHS. In privately run centres, however, healthcare is subcontracted by the company managing the centre, to a second private entity. For example, the two Serco-run IRCs, Yarl’s Wood and Colnbrook, have their healthcare services provided by Serco Health, a subsidiary of Serco Group PLC.

The UN Committee on Economic, Social and Cultural Rights has expressed concern about what it calls “the low level of support and difficult access to health care for rejected asylum-seekers” (2009, par.27). Phelps (2012) agrees that this subject is

problematic: “that is one area where there are potentially adverse incentives around contracting ... It does not seem to be a good arrangement. The potential is there to save money by giving out aspirin rather than expensive medication.” He reports a tension for contractors between duties to patients and not wanting to upset the UKBA. Trude refers to three separate findings of Article 3 ECHR breaches for severely mentally ill detainees over the last year.<sup>12</sup>

In practice, private subcontracting often means that the healthcare providers are “completely untouched” by the consequences of inadequate provision (Trude, 2012). Trude explains the consequence of this structure:

It is impossible to get at the details of the contracts ... If you want to find out about practices, it is so fragmented that you cannot find out across the estate what is happening with anything at all. You are forced to go to each contractor separately, so those who are working to improve conditions in detention want to find out what is happening in detention and you are kind of divided into as many parts as there are centres, so it multiplies the effort that you have to put into finding out and dealing with, and then negotiating with, each contractor and the UKBA jointly, on a separate basis. It is quite handy, if I can put it that way, for the Border Agency, because we are all kept much busier than we would be if we were just negotiating directly with them and one contractor or the Prison Service or whoever was running it. (2012).

Indeed, the effects are felt more widely than only in the human rights advocacy sector: “The Inspectorate [HMIP] as well has a huge issue because it is looking at the way things are delivered in a very non-standard way” (Trude, 2012). Cohen’s detailed study of self harm and suicide in asylum-seekers in the UK shows that available data on such incidents are also markedly lacking (2008).

Arnold (2011) has called access to healthcare in immigration detention “unavailable or dangerously slow” and has expressed concern that the UKBA is not experienced

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<sup>12</sup> These cases are: *R (HA (Nigeria)) v Secretary of State for the Home Department*, [2012] EWHC 979 (Admin); *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin); and *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin).

enough in commissioning healthcare provision. He notes that, “since [the Home Office] was relieved the responsibility for prison healthcare – which was transferred to the Department of Health – improvements in standards and incomes have been substantial” (2011).

Of particular concern is the detention of vulnerable individuals with particular health requirements. This practice is reported to be common, despite the UKBA’s own guidelines prohibiting the detention of vulnerable groups. The Association of Visitors to Immigration Detainees (AVID) reported on “the devastating impact that detention can have on the mental health of detainees who are held for long periods and with no idea of the outcome of their cases. Many are then released back into the community without adequate levels of preparation and support for this process” (2011, p.1). Chapter 55 of the UKBA’s *Enforcement Instructions and Guidance* states that “those suffering serious mental illness which cannot be satisfactorily managed within detention” cannot be detained other than in exceptional circumstances, although there exists no stringent guidance to determine what is manageable (AVID, 2011, p.3). Rule 35 of the *Detention Centre Rules 2001* confers an obligation on the facility healthcare practitioner to “report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.” The management must then inform the Secretary of State immediately if this is the case. The continued detention of vulnerable individuals poses a massive problem in terms of human rights protection. AVID (p.7) state that “[t]he experience of being detained indefinitely has a very serious impact on the mental health of detainees. Prolonged detention is linked to psychological deterioration of those with pre-existing mental health conditions.”

Mental health charity Mind investigated mental health provision in the UK for those in the immigration detention estate, as well as for refugees, in 2009 and produced the report *A Civilised Society*. They found a considerable lack of foreign language provision in healthcare, with a common reliance on friends and family to act as interpreters. There was a lack of awareness among medical staff of cultural differences. Legal restrictions on entitlements to mental healthcare prevented detainees from accessing it. The investigation found important gaps in service, including specialist help for torture victims and children. Voluntary sector carers often had to fill gaps in

services. GP services were inconsistent and access was often difficult. Individuals with mental health problems were being detained, where healthcare provision was insufficient. Finally, voluntary sector providers were often unable to meet demands for their service and co-operation with refugee organisations was insufficient (Mind, 2009).

Immigration detainees are a population with a particularly high incidence of mental health issues resulting from trauma and a lack of social support (Mental Health in Immigration Detention Project, 2012). It has been demonstrated that they also have a higher rate of suicide and self-harm than prisoners (Cohen, 2008). Where privatisation exacerbates the problem is in the resulting lack of centralised standards. It is reported that the “provision for the identification and treatment of mental illness and distress varies enormously between IRCs, as do the type of facilities available in each centre” (Mental Health in Immigration Detention, 2012, p.6). With the contracts for healthcare provision remaining confidential, there is no available information on the process commissioning healthcare systems in privately-run immigration detention facilities. The only regulation concerning healthcare provision is in Rule 24 of the *Detention Centre Rules*, which obliges the centre to provide it, and to take particular care with regard to individuals with serious mental health needs.

Healthcare provision is due to be moved to the NHS in the near future, but AVID and BID report that this transfer is now unlikely to occur until after April 2014. In the meantime, a change to the *Enforcement Instructions and Guidance* in Aug 2010 has effectively reduced number of people who would be defined as unfit for detention, by stipulating that an individual “must be ‘suffering from’ mental illness (i.e. symptomatic), and would need to have a ‘serious’ mental illness, before they could be considered possible unsuitable for detention” and one that could not be “satisfactorily managed” in detention (Mental Health in Immigration Detention Project, 2012, p.9).

### **iii. Enforced Removals**

The enforced removal of failed asylum-seekers or deportees is another area of particular concern with regard to its privatisation. Amnesty International has reported “serious failings” in training for private security staff on the process of enforced removal; in

particular, inadequate training for use on aircraft, a lack of mandatory training on restraint techniques, and an absence of a stringent system for ensuring that those carrying out such duties have received adequate training (2011). In fact it was revealed in a secret communication in 2010 that G4S, who provided all removal escort services until 2011, had been permitting its staff to use restraint techniques that the government had advised should be avoided, and that the Prison Service was to phase out of use (Kenbar, 2010).

After the death of Jimmy Mubenga during his removal flight in 2010, Gammeltoft-Hansen predicted that the investigation would be unlikely to “address whether the UK Border Agency should face criminal liability for Mr Mubenga’s death because of its decision to outsource deportations in the first place” (2012). These predictions were proven correct when the Crown Prosecution Service decided to strike the Home Office from the case, thereby absolving the government of any responsibility for the tragedy. Furthermore, in July 2012, it was decided that the G4S guards involved in the incident would not face charges. Deborah Coles, co-director of Inquest, described this as

...a shameful decision that flies in the face of the evidence about the dangerous use of force used against people being forcibly removed and the knowledge base that existed within G4S and the Home Office about the dangers of restraint techniques. It once again raises concerns about the quality of the investigations into deaths following the use of force by state agents and the decision-making process of the CPS [Crown Prosecution Service] (Inquest, 2012).

Following the revelations presented in *Outsourcing Abuse*, two reports were commissioned by the government on the subject of enforced removals. The first was the HMIP’s 2009 report *Detainee Escorts and Removals: A Thematic Review*, which found “considerable gaps and weaknesses in the systems for monitoring, investigating and complaining about incidents where force had been used or where abuse was alleged” (p.5) The inexperience the private security guards carrying out the escorts was clearly demonstrated by the inappropriate behaviour of some, who employed the use of force in an inconsistent manner, increasing the risk of ill-treatment. The second report came from an investigation by Baroness Nuala O’Loan DBE (2010) at the request of the Home Secretary and found “inadequate management of the use of force by the private

sector companies” and “confusion as to responsibilities, some lack of training and of understanding of the complaints procedures which applied, and management deficiencies in identifying these problems and addressing them” (p.5). O’Loan did report that improvements had been made in these areas, but extensive recommendations were still made (pp.10-11).

Amnesty International also reported on the state of enforced removals in 2011 calling for “[a] complete and radical overhaul and reform of the current system” and arguing that “[r]eforms must drastically improve the training, monitoring, accountability and techniques employed during enforced removals” (2011, p.2). After the death of Jimmy Mubenga, G4S whistleblowers told Amnesty that managers had been repeatedly informed of the use of “carpet karaoke”, a restraint technique which involved “forcing an individual’s face down towards the carpet with such force that they were only able to scream inarticulately like a bad karaoke singer” (p.6). It is claimed by these whistleblowers that G4S management allowed this practice to continue by failing to act on the information provided to them.

Amnesty (2011, p.7) reports that many Detainee Custody Officers carrying out removals had not received the minimum level of Control & Restraint and First Aid training required by the Home Office for accreditation. It is claimed that G4S had also been subcontracting to cover for staff shortages on escort flights and Amnesty points out that this dramatically exacerbates issues of inadequate training and lack of accountability (p.14). Unfortunately, despite the transfer of the escort contract from G4S to Reliance in 2011, it is reported that unacceptable practices by some staff on removal flights have continued. However an up-to-date HMIP inspection of escorting has yet to be made (Taylor and Lewis, 2012b).

#### **iv. Asylum-Seeker Housing**

There are concerns that security companies are unsuitable candidates for the provision of asylum-seeker housing contracts, and that this may result in a reduced quality of service (Plimmer and Warrell, 2012). Again, a lack of transparency appears to be an issue here. Collins recalls working with the Scottish Refugee Council before housing

for asylum-seekers was provided by the private sector. At the time, Glasgow City Council provided 95 per cent of the accommodation in the city, with the remaining 5% provided by the voluntary sector. “From that, we could get on the phone to the council and ask, ‘How many Zimbabwean families are in the North-West of the city?’ and they would tell you. And ‘What streets are they living in?’ and they would tell you, and then you could get a letter sent out to them” (Collins, 2012). This made providing health visitors with necessary information much easier. Collins also explains how the open sharing of information was facilitated through meeting with the council, social services, education services, health services, police, voluntary sector and housing association. Today, in stark contrast, such information is “a commercial secret ... So all these forums that we set up from 2000 onwards for planning of services to support people, it is all gone” (Collins, 2012).

Again, the lack of available information makes it very difficult to be sure about the adequacy of provision. “Through privatisation, you fragment the scrutiny of the delivery of [the] contracts, so that makes it more difficult to get inspection, other stakeholders’ scrutiny, and any sort of standardisation, as well as to challenge the delivery of services” (Trude, 2012). Grayson (2012) calls the privatisation of asylum-seeker housing in the UK “the latest evidence of asylum-seekers being used as ‘guinea pigs’ to test unsavoury policies in such areas as welfare reform, legal aid and now housing.” He claims that campaigners perceive this as a transformation of housing into a form of “house arrest.”

#### **v. Alternatives**

Flynn and Cannon’s (2009) analysis of immigration detention internationally proves to be very useful in helping to consider alternatives to detention for immigration purposes. Their findings with regard to Sweden, considered a “model country” in this area, are particularly optimistic. In the mid-1990s, Sweden’s immigration detention estate was subject to harsh criticism by the national media and domestic human rights organisations. The government responded by carrying out an inquiry, resulting in the decision to reverse privatisation in 1997, along with several other changes developed in

consultation with domestic NGOs. The head of the Migration Board at the time, Anna Wessel, is quoted as saying:

It was an ambition from the government that the treatment of the detainees should also reflect the fact that they were not criminals so that we could not enforce limitations on their civil rights more than was necessary to obtain the purpose of detention. Apart from the fact that they cannot leave the premises they are entitled to the same rights as any other person would be” (Mares, 2000 cited in Flynn and Cannon, 2009, pp.12-13).

Flynn and Cannon also report a drop in self-harm rates and an improvement in staff-detainee relations as a result of these developments.

Phelps (2012) goes further in his view of alternative: “The concept of a well-run detention centre is a hugely problematic one to start with. I am not sure that it is possible.” The UNHCR has recommended not a better-run detention regime, but alternatives *to* the detention regime. Their *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* call of observance of the principle that detention should be a last resort, in cases of necessity, and so should never be automatic, or prolonged. Guideline 4 outlines four alternatives to detention, which should be considered before resorting to detention, and recommend that each asylum-seeker be assessed in order to find which would work best for him or her. These alternatives are:

1. Monitoring requirements: These can be either reporting requirements, where the asylum-seeker would be in a position of liberty and would be required to report regularly to the authorities, or residency requirements, where the asylum-seeker would agree to reside at a particular address or within a particular region.
2. Provision of a guarantor/surety: The guarantor would be responsible for the asylum-seeker’s attendance at appointments and hearings. A fine could then apply in the case of non-attendance.
3. Release on bail: The asylum-seeker is informed of his or her right to apply for bail and the bail amount must be fair. This is available in the UK but

obtaining legal advice is often difficult and bail applications often need to be made by the detainee personally, with assistance from non-profit organisations such as BID (Trude, 2011).

4. Open centres: This is where the asylum-seeker is effectively released but must reside at a specific centre within set times. (UNHCR, 1999).

Amnesty International (2011) examined the enforced removal system in Germany and presented its model as a favourable alternative to that of the UK. They refer to a system in place in several German airports whereby forums made up of representatives from the government, NGOs and churches are responsible for monitoring removals and reporting on any problems that occur. This independent monitoring model produces an ongoing and transparent dialogue between the participating sectors and, in Amnesty's view, "protects the rights of everyone involved in such procedures" (2011, p.13).

The International Detention Coalition (IDC) responded to the rise in immigration detention globally with its report *There are Alternatives* (2011a). Drawing on the most effective mechanisms for preventing the use of detention currently used in various countries, this investigation produced the Community Assessment and Placement model (CAP model) a five-step approach for states wanting to reduce the use of unnecessary detention. These steps are as follows:

1. Presume detention is not necessary: This allows alternative options the chance to be considered by immigration officers before the resort to detention. It is helpful to prescribe this presumption in law and policy guidance.
2. Screen and assess the individual case: A thorough assessment can identify vulnerability in individuals – we have seen a lack of effectiveness in this type of screening in the UK.
3. Assess the community setting: It helps to match the individual with the appropriate program of response by ensuring that the relevant community can support the individual's compliance.
4. Apply conditions in the community if necessary: These can include monitoring and supervision, or negative consequences for non-compliance.
5. Detain only as the last resort in exceptional circumstances: Detention is inherently undesirable because of its associated adverse effects on health and

rights enjoyment. It also cannot be employed for vulnerable individuals. (IDC, 2011a).

The IDC concludes that not only is detention undesirable for various reasons, but it is also not effective: “It does not deter new arrivals and is costly to government and the individual. Furthermore, alternatives to detention promote better integration outcomes and better cooperation with return requirements” (IDC, 2011b). Phelps (2012) considers such alternatives promising: “There is growing evidence that that actually delivers governments’ objectives better than these very expensive detention centres that actually just entrench an adversarial relationship between migrants and governments.”

## VI. Conclusions and Recommendations

In answering the three questions set out in the introduction, this dissertation has revealed a complex relationship between state and industry. First, it has considered the role of the private sector in the expansion of the immigration detention estate in the UK. The direct causal relationship claimed by some has not been found, but it can be seen that private involvement plays a 'supporting role' in detention expansion. Privatisation's role has been demonstrated as being that of a *facilitator* of expansion. Certainly, without the involvement of the private sector, the dramatic increase in capacity over the last five years would have posed a significant challenge to the UK government financially and practically. Certain elements of Lilly and Knepper's (1993) model of subgovernment have been seen to apply in the UK, and the comparison to their conception of such a system in the US proves helpful in predicting the worst-case consequences of continued growth here. However, the relationship between state and industry has not yet become sufficiently impervious to critical influence to allow for direct comparison with the picture painted of the US system by Lilly & Knepper and Fernandes (2007).

Secondly, the dissertation has considered the effect of the privatisation of immigration detention and related functions on the rights protection of individuals engaged. Overall, privatisation has had a mixed influence on the human rights protection of immigration detainees, improving conditions in some respects, and requiring improvement in others. The right to protection from arbitrary detention does pose a serious problem, however. Human rights norms and the UKBA's own guidelines recommend that detention is used sparingly and for the least possible amount of time. In the detention of foreign national ex-offenders and those deemed subject to DFT, however, we have seen that detention is being used as a default response in the UK. It is a firmly established international norm that detention is a last resort. Although the UK's policy may conform to this idea in its published policy, it is clear that the actual practice does not.

The subcontracting of healthcare provision is also highly troublesome in that it makes scrutiny difficult and is therefore subject to relatively little pressure to perform well. There are also very serious problems regarding the detention of vulnerable individuals who should not be detained, and with the way that such individuals are treated once in

detention. We have also see the effect of a lack of transparency in private provision of asylum-seeker housing, making it difficult for human rights organisations to reach out to the population they try to support.

Finally, the dissertation has considered the effect of private involvement on the UK's performance under international human rights laws and norms. As a result of the issues presented above, the UK finds itself the subject of criticism from domestic human rights organisations and international bodies. The criticism it has received from international authorities such as the UNHCR and the Special Rapporteur on the Human Rights of Migrants has demonstrated that the UK is falling short of its commitments to international human rights law and norms in its treatment of individuals engaged in its immigration regime. The state is becoming more and more disconnected from its traditional public functions, while the private sector increasingly steps in to take its place, not only in terms of management but also responsibility, as we have seen in the recent case law discussed above. Thus, the state finds it increasingly difficult to control its international performance.

The Council of Europe's Committee on Migration, Refugees and Population stressed, in *The Detention of Asylum-seekers and Irregular Migrants in Europe*, that "where the member state 'outsources' the running of immigration detention centres (open or closed) to private contractors, it nonetheless retains its human rights responsibilities" (Council of Europe, 2010, 2,16). In fact, there has been a shift in the nature of contracting, with the private sector delivering the government a helpful way to remove itself from many problems associated with poor human rights protection. Thus, private involvement has exacerbated the aforementioned issues with the UK's performance in human rights terms.

There must be a serious public discussion on the effect of private sector involvement in the UK. This discussion would be of great utility if it were to take seriously the prospect of alternatives to the current immigration regime. The IDC's (2011a) CAP model provides an excellent context for such a discussion, in-keeping as it is with the tone of the UKBA's own guidelines. The lack of transparency inherent in private involvement would be incredibly difficult to address, due to the historically embedded nature of such traditions of commercial secrecy in British legal culture. However, there are practical

steps that could be taken to improve the situation. The following examples are not exhaustive:

- Healthcare provision in immigration detention facilities should be transferred to the NHS.
- More thorough consideration should be given, on a case-by case basis, to the practical removability of foreign national ex-offenders before employing detention.
- Independent monitoring should be employed in enforced removals, drawing on the experience of the German model.
- Recording and publication of more complete data on detention, in order to allow for scrutiny of human rights protection of detainees.
- Recording and publication of data on individuals in asylum-seeker housing, in order to allow NGOs to assist more effectively in providing voluntary services to that population.
- Urgent government intervention regarding contractors' training procedures in detention and removals services, in consultation with relevant NGOs.
- Urgent revision of UKBA training procedures with regard to selection for Detained Fast Track of individuals by Immigration Officers, in consultation with relevant NGOs.
- Active government consultation with UK NGOs and international organisations such as the IDC on exploring paths to implementation of alternatives to detention.

Although privatisation can have its place, and has resulted in some reasonably well-run operations in comparison to some publicly-run functions, there are issues particular to private sector involvement that must be addressed and effectively monitored as the UK moves towards having a more just immigration regime.

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## Appendix A

### The Current Contract-Holders in Immigration Detention, Removals Escorting and Asylum-Seeker Housing.

The following are the current contract-holders for immigration detention in the UK:

Facility Name	Centre Management	Health Care Provider
Brook House IRC	G4S	Saxonbrook
Campsfield House IRC	MITIE	The Practice PLC
Dover IRC	HM Prison Service	NHS
Dungavel IRC	GEO	Primecare
Harmondsworth IRC	GEO	Primecare
Haslar IRC	HM Prison Service	NHS
Morton Hall IRC	HM Prison Service & UKBA	G4S Medical
Tinsley House IRC	G4S	Saxonbrook
Yarl's Wood IRC & STHF	Serco	Serco Health
Colnbrook IRC & STHF	Serco	Serco Health
Larne House STHF	Reliance	Reliance Medical Services
Pennine House STHF	Reliance	<i>Information Unavailable</i>
Cedars PDA	G4S & Barnardo's	G4S Medical

Enforced removals are currently carried out by Reliance Security, who took over the contract from G4S on 1<sup>st</sup> May 2011 (Parliament, 2012).

Housing for asylum-seekers is managed by G4S, Serco and Reliance. G4S's contract covers the Midlands & East England and North East Yorkshire & Humber; Reliance's contract covers Wales and London & the South; and Serco's two contracts cover the North West and Scotland & Northern Ireland (Corporate Watch, 2010).

## **Appendix B**

### ***Freedom of Information Act Request Denial***

Dave Shortland

By email

4 July 2012

REF: FOI 22981

Dear Mr Shortland,

Thank you for your email of 6 June 2012 about the contracts for the immigration removal centres (IRCs) and short term holding facilities (STHF). Your request falls to be dealt with under the Freedom of Information Act 2000. You have asked for the following:

“Digital copies of the contracts with each relevant company, for the management of each of the following immigration removal and holding facilities: Brook House, Campsfield House, Cedars, Colnbrook, Dungavel, Harmondsworth, Larne, Oakington, Pennine House, Tinsley House, Yarl's Wood.

I can confirm that UKBA holds the information you have requested. However, I have decided not to communicate this information to you pursuant to the exemption under section 22 (1) of the Freedom of Information Act 2000. This allows us to exempt information if it is intended for future publication.

The use of this exemption requires consideration of whether it is:

- Reasonable in all the circumstances to withhold the information until the intended publication date, and
- Whether in all the circumstances of the case the public interest in maintaining the exemption stated above outweighs the public interest in disclosing the information.

The central issue is whether in all the circumstances it is reasonable and in accordance with the public interest to require you to wait for publication.

We recognise there may be a public interest in disclosing this information to you now and that this may also weigh in favour of it being unreasonable to

make you wait for publication to see the redacted copies of the contracts. We have considered the following:

- It is important that the public have access to information to ensure there is full transparency in the Home Office's use of public funds and to maintain the Department's accountability to taxpayers.

But there are also public interest reasons for maintaining the exemption to the duty to communicate which weigh in favour of it being reasonable to require you to wait for publication. We have considered the following:

- There is a public interest in permitting UKBA to publish redacted copies of the contracts in a manner and form of its own choosing which could be undermined by immediate disclosure.
- There is also the cost to the taxpayer because the documents are too large to be sent out electronically so we would have to print each one which would amount to thousands of pages so this is not cost effective. In addition this would not be the best use of staff resources.
- Publishing the redacted contracts on the UKBA Website would enable all interested parties to be able to view each one which in turn would reduce the number of requests for the contracts rather than printing them off when requested.

After balancing these conflicting arguments around publication, we have concluded not only that it is reasonable to require you to wait for publication but also that the balance of the public interests identified favours maintaining the exemption. This is not least because we believe that in this case the overall public interest lies in favour of ensuring that UKBA is able to plan its publication of information in a managed and cost effective way, and this would not be possible if immediate disclosure were made. I will write you once the contracts are available to advise you where they can be located.

I must also advise you that certain parts of the contracts and associated documentation will be redacted. This is due to the fact that various exemptions to the requirement to disclose are applicable. The exemptions that apply in this instance are section 31(1)(f) (Law Enforcement), Section 40 (Personal Information), Section 41 (information Provided in Confidence) and Section 43(2) (Commercial Interests).

The exemptions contained in sections 40 and 41 are absolute; however the exemptions contained in sections 31(1) (f) and 43(2) are qualified. In relation to these sections we have had to balance the public interest in withholding the information against the public interest in disclosure.

We intend to redact some information pursuant to Section 31(1) (f), where it relates to active removal centres because of the need for certain safety and security operational matters to remain highly confidential. The use of this exemption also requires us to consider whether in all the circumstances of the

case the public interest in maintaining the exemption stated above outweighs the public interest in disclosing the information.

We have considered the public interest there may be in the circumstances of this case in disclosing the information. There may be a public interest in disclosure of this information as it would allow the public to assess what security measures are in place on a site and make an evaluation of the robustness of these provisions.

We have also considered the public interest there may be in maintaining the exemption to the duty to communicate. The UK Border Agency requires the ability to maintain the integrity of its security measures and disclosure of this information into the public domain may allow people to circumvent such measures. This would prove detrimental to the maintenance of good order within the immigration removal centres covered within the scope of this request. This is not in the public interest.

We have considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. We have concluded that the balance of the public interests identified lies in favour of maintaining the exemption. This is because The UK Border Agency requires the ability to maintain the integrity of certain operational and security matters in order to preserve good order within its IRCs.

With regard to section 43(2), some of the information falls to be exempted from disclosure as it relates to contractual values and technical information. The use of this exemption also requires us to consider whether in all the circumstances of the case the public interest in maintaining the exemption stated above outweighs the public interest in disclosing the information.

We have considered the public interest in disclosing the information. There will be a public interest in the disclosure of this information to ensure that there is full transparency in the Home Office's use of public funds and in particular to maintain the Department's accountability to taxpayers. Disclosure of this information would also enable the public to assess whether or not Home Office is getting best value for money in terms of its contracts with those who manage its immigration detention facilities.

We have also considered the public interest in maintaining the exemption to communicate. There is a public interest in Government department's being able to secure contracts that represent value for money and anything that would undermine this is not in the public interest. Value for money can be best obtained where there is a healthy competitive environment, coupled with the protection of Government's commercial relationships with industry, were this not the case, there would be a risk that:

- Companies would be discouraged from dealing with the public sector, fearing disclosure of information that may damage them commercially, or

- Companies would withhold information where possible, making the choice of the best contractor more uncertain as it would be based on limited and censored data.

We have therefore concluded that the balance of the public interests identified lies in favour of maintaining the exemption. This is because the overall public interest lies in ensuring that the Home Office's ability to protect its commercial competitiveness is not prejudiced.

If you are dissatisfied with this response you may request an independent internal review of our handling of your request. Internal review request should be submitted within two months of the UK Border Agency sending a substantive reply to your original request and should be addressed to:

Information Access Team  
Home Office  
Ground Floor, Seacole Building  
2 Marsham Street  
London SW1P 4DF  
[e-mail: FOIRequests@homeoffice.gsi.gov.uk](mailto:FOIRequests@homeoffice.gsi.gov.uk)

During the independent review the department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. Should you remain dissatisfied after this internal review, you will have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely

David Goggin  
Return Directorate  
UK Border Agency

## **Appendix C**

### **Interview Consent Forms**

- i. Michael Collins, NCADC**
- ii. Jerome Phelps, Detention Action**
- iii. Dr Adeline Trude, BID**



### **Informed Interviewee Consent Form**

1. I hereby agree to participate in an interview in connection with research being conducted by David Shortland for his MA dissertation.
2. I understand that the interview will take up to 45 minutes and that I can withdraw at any stage. In the event that I withdraw from the interview, any tape or notes made of the interview will be either given to me or destroyed, and no transcript will be made of the interview.
3. Please tick as appropriate:
  - I am happy for the interview to be audio recorded
  - I am NOT happy for the interview to be audio recorded and only give my consent for the researcher to take written notes
4. Please tick as appropriate:
  - I am happy for the name of the organisation I work for to be mentioned in this dissertation
  - I am NOT happy for the name of the organisation I work for to be mentioned in this dissertation
5. I may request that portions of the interview are edited out of the final copy of the transcript.
6. I understand that at the conclusion of this particular study the tape and transcript of the interview will be kept on David Shortland's computer and that the completed MA dissertation will be kept in the University of London, Senate House Library. However, the dissertation will not be published elsewhere.
7. I understand that if I have any further questions about the research I am participating in I can ask the interviewer at any time.
8. In addition, if I have questions about the research project or procedures, I know I can contact Dr David Cantor ([David.Cantor@sas.ac.uk](mailto:David.Cantor@sas.ac.uk); Tel: 020 7862 8827), or Professor Phillip Murphy, the Institute of Commonwealth Studies School of Advanced Study, University of London, 2nd Floor, South Block, Senate House, Malet Street, London, WC1E 7HU, Tel.: (0)20 7862 8844.

Interviewer signature: \_\_\_\_\_

Interviewee signature:           M. Quinn          

Consent date: 21 / 08 / 2012

Address

          NCAD at GCIN . PEARCE INSTITUTE            
          840 GROVAN ROAD GLASGOW G51 3UU          

Phone number: 07745009834



Institute of Commonwealth Studies

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Interviewer signature: D.T. Shortland

Interviewee signature: 

Consent date: 6/8/12

Address

RETENTION ACTON, UNIT 3R, 436 ESSEX RD, LONDON N1 3AP

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Phone number: 020 72263114



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5. I may request that portions of the interview are edited out of the final copy of the transcript.
6. I understand that at the conclusion of this particular study the tape and transcript of the interview will be kept on David Shortland's computer and that the completed MA dissertation will be kept in the University of London, Senate House Library. However, the dissertation will not be published elsewhere.
7. I understand that if I have any further questions about the research I am participating in I can ask the interviewer at any time.
8. In addition, if I have questions about the research project or procedures, I know I can contact Dr David Cantor ([David.Cantor@sas.ac.uk](mailto:David.Cantor@sas.ac.uk); Tel: 020 7862 8827), or Professor Phillip Murphy, the Institute of Commonwealth Studies School of Advanced Study, University of London, 2nd Floor, South Block, Senate House, Malet Street, London, WC1E 7HU, Tel.: (0)20 7862 8844.

Interviewer signature: D.T. Shortland

Interviewee signature: Ashme Thre

Consent date:   /  /  

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