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Revisiting the punitiveness of deportation

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Abstract

Immigration measures such as deportation are currently not regarded as punitive and there has been little exploration of this from a legal perspective. This paper will consider this issue in depth, covering little discussed case law from the European Court of Human Rights. It will also explore how this legal position on deportation does not reflect the findings of other disciplines such as criminology and sociology on how immigration measures are used and experienced as punitive. This paper will build on existing literature by demonstrating the significance of a recent development in UK law to this debate. Section 47 of the Nationality and Borders Act 2022 (NBA 2022) introduced a 'stop the clock' provision into the Early Removal Scheme for foreign national prisoners. This new provision may prompt the judiciary to revisit the question of whether deportation is punitive in some contexts.

Keywords: immigration; deportation; foreign national offender; foreign national prisoner; *Maaouia*

Introduction

Criminologists and sociologists have been examining the increased trend towards harsh immigration measures for many years now[1] and often use the framework of punishment in attempting to make sense of the use and experience of such measures.[2] However, despite the importance of this question, there has been relatively little legal literature exploring the potential punitiveness of immigration measures in Europe.[3] Although there is more developed legal literature on this point in the US, many of

[1]See for example J Parkin *The Criminalisation of Migration in Europe* (Centre for European Policy Studies, 2013); L Weber 'The detention of asylum seekers: 20 reasons why criminologists should care' (2002) 14(1) Current Issues in Criminal Justice 9.

[2]See for example H Carvalho et al 'Punitiveness beyond criminal justice: punishable and punitive subjects in an era of prevention, anti-migration and austerity' (2020) 60 British Journal of Criminology 265; C Costello 'Immigration detention: the grounds beneath our feet' (2015) 68(1) Current Legal Problems 143; M Bosworth and K Aas (eds) *The Borders of Punishment* (Oxford: Oxford University Press, 2013); A Aliverti *Crimes of Mobility: Criminal Law and the Regulation of Immigration* (London: Taylor and Francis, 2013); A Aliverti 'Making people criminal: the role of criminal law in immigration enforcement' (2012) 16 Theoretical Criminology 417; A Leerkes and D Broeders 'A case of mixed motives? Formal and informal functions of administrative detention' (2010) 50 British Journal of Criminology 830; L Weber 'The detention of asylum seekers as a crime of obedience' (2005) 13 Critical Criminology 89; L Weber and L Gelsthorpe 'Deciding to detain: how decisions to detain asylum seekers are made at ports of entry' (2000) Criminal Justice, Borders and Citizen SSRN Paper Series https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520382.

[3]For some work that does begin to touch on the issue from a legal perspective see A Spalding *The Treatment of Immigrants in the European Court of Human Rights* (Oxford: Hart Publishing, 2022); J Eekelaar and J Collinson 'A fateful legacy of childhood: the deportation of non-citizen offenders from the UK' (2021) 35(3) Journal of Immigration, Asylum and Nationality Law 230; J Collinson 'Deporting EU national offenders from the UK after Brexit: moving from a system that recognises individuals, to one that sees only offenders'(2021) 12 New Journal of European Criminal Law 575; J Hendry 'The hostile environment and crimmigration: blurring the lines between civil and criminal law' (2020) 26 Soundings 76; H O'Nions 'No place called home: the banishment of foreign criminals in the public interest' (2020) 9(4) Laws 26; A Spena 'The double deviant identity of the mass foreigner and the lack of authority of the crimmigrationist state' (2019) 22(3) New Criminal Law Review

these are of limited value as they are heavily grounded in US laws, contexts and practices.[4] This lack of European literature that engages closely with a doctrinal analysis of the issue may be explained by the perception that this legal avenue has remained firmly shut, with courts maintaining that immigration measures are administrative in nature. However, this gap means there is relatively little analysis of relevant case law and the reasoning underpinning this legal position. By contrast, this paper will provide an extensive discussion of the case law of the European Court of Human Rights (ECtHR) and its approach to deportation as punishment to situate a new UK legal development in context.

The UK government recently passed the controversial NBA 2022. One provision, on the early release and removal of foreign national prisoners (FNPs), contained in section 47 of the Act did not attract much debate or controversy but may prove to be legally significant. The provision may prompt the judiciary to re-examine the current legal position that deportation is never a punitive measure. Thus, this paper will examine the current legal position on immigration measures such as deportation and removal and will expand on this literature by approaching the issue from a brand new angle through explaining the significance of section 47 and why the resultant changes to the Early Removal Scheme (ERS) may persuade the courts to revisit the question of whether deportation may be punitive in certain contexts.

The paper will begin by providing a brief overview of the current power of deportation largely focusing on the UK. This will include setting out some of the ways in which deportation powers have shifted over the years. Next the paper will consider why we may want to revisit the question of whether deportation can be punitive. It will set out and critique the rather shaky legal reasoning that currently maintains that deportation is never punitive and bring together the work that criminologists and sociologists have done in examining the use and experience of immigration measures to demonstrate the severity of these measures. An overview of the ERS will be carried out, and the concept of 'FNPs' will be explored, to situate the new UK development in context. This will be followed by a discussion of section 47 of the NBA 2022 and the changes it makes. Finally, the paper will examine the importance of this change and whether the courts are likely to re-examine the issue in light of section 47, including a discussion of a little-known ECtHR case, *Gurguchiani v Spain*,[5] which may prove helpful.

1. A brief overview of deportation and removal

First, it is important to distinguish between deportation and administrative removal as, although these practices seem very similar, they are distinct powers. In the UK, deportation is a particular type of removal which should only occur when specific public policy grounds, normally related to either proven or suspected criminal activity, are shown by the state.[6] Administrative removal, on the other hand,

301; S York, 'Deportation of foreign offenders – a critical look at the consequences of Maaouia and whether recourse to common-law principles might offer a solution' (2017) 31 Journal of Immigration, Asylum and Nationality Law 8.

[4]J Bleichmar 'Deportation as punishment: a historical analysis of the British practice of banishments and its impact on modern constitutional law' (1999) 14 Georgetown Immigration Law Journal 115, R Pauw 'A new look at deportation as punishment: why at least some of the constitution's criminal procedure protections must apply' (2000) 52 Administrative Law Review 305; D Kanstroom 'Deportation, social control, and punishment: some thoughts about why hard laws make bad cases' (2000) 113 Harvard Law Review 1889; D Kanstroom 'Deportation and punishment: a constitutional dialogue' (2000) 41 Boston College Law Review 771; D Kanstroom *Deportation Nation* (Boston: Harvard University Press, 2007); SH Legomsky 'The new path of immigration law: asymmetric incorporation of criminal justice norms' (2007) 64 Washington and Lee Law Review 469; J Stumpf 'Fitting punishment' (2009) 66 Washington and Lee Law Review 1683; P Markowitz 'Deportation is different' (2010) 13 University of Pennsylvania Journal of Constitutional Law 1300; C Herndandez 'Immigration detention as punishment' (2014) 61(5) UCLA Law Review 13; J Chacon 'Immigration detention: no turning back?' (2014) 113 South Atlantic Quarterly 621; I Ealy 'Criminal justice in an era of mass deportation: reforms in California' (2017) 20 (1) New Criminal Law Review 12.

[5]*Gurguchiani v Spain*, App No 16012/06 (ECtHR, 15 December 2009).

[6]G Clayton *Immigration and Asylum Law* (Oxford: Oxford University Press, 9th edn, 2021) p 560. On the point of 'suspected' criminal activity and future risk see *Farquharson (removal-proof of conduct)* [2013] UKUT 00146.

is the removal of any person who does not have leave to enter or remain in the country on the basis of their immigration status.[7] This distinction between two sets of powers is not unusual. Although the names may differ, other European countries also have separate sets of immigration measures that differentiate between removal based on status and removal based on public policy reasons.[8]

Deportation and administrative removal are thus separate powers but it is worth noting that their differences are less prominent than they used to be. The consequences of administrative removal used to be different to deportation orders because administrative removal used to create no obstacle to a person returning to the UK in the future. A deportation order, on the other hand, means that the deportee cannot return to the state until the order is revoked (which it may never be).[9] There is now a presumption, however, that those who have been subject to administrative removal will be refused a UK visa.[10] This means that most who have been removed will not be able to return to the UK, at least for a significant period of time. The line between deportation and administrative removal has thus become less clear now that the reality of their consequences – ie long term exclusion – is essentially the same. The line is further blurred by the fact that in many European states use of deportation and removal has become increasingly harsh and tied to restrictive processes.[11] For example, in the UK, deportations used to offer more process rights than administrative removal but since the 1980s the procedure, particularly possibilities for appeal, has been gradually eroded,[12] with the UK Government in 2014 introducing a policy of 'deport first, appeal later', which was ruled unlawful by the UK Supreme Court in June 2017.[13] Administrative removal is a broad power: it does not require any kind of judicial process in the UK prior to removal and the actual power of administrative removal has not changed much since the 1970s but its use has grown significantly.[14] These developments have also occurred in much of the rest of Europe, with many states expanding powers and budgets for both deportation and removal.[15]

Both powers have also become much more intimately related to the criminal justice process. This is especially true for deportation. Although protection of public security has long been a ground for deportation in many European countries, the use of immigration measures after criminal conviction has become increasingly harsh.[16] Since 2000, the UK,[17] Denmark,[18] Germany[19] and Italy[20] have all passed laws making deportation an automatic result of many criminal convictions where the convicted

[7]Immigration and Asylum Act 1999, s 10.

[8]See for example in relation France: C Peyronnet 'France undesirable and unreturnable migrants under French law: between legal uncertainty and legal limbo' (2017) 36(1) Refugee Survey Quarterly 35; Hungary: UNHCR 'Hungary: The deportation process including rights and legal recourse open to a permanent resident; whether marriage to a Hungarian citizen and/or having children who are Hungarian citizens would affect a deportation order' (HUN33377.E, 22 December 1999), available at https://www.refworld.org/docid/3ae6ad5b3c.html; Germany: D Well 'Things to know about deportations in Germany' *InfoMigrants* (June 2017), available at https://www.infomigrants.net/en/post/3528/things-to-know-about-deportations-in-germany; Belgium: Federal Migrant Centre 'Repatriation, detention and deportation' (2021), available at https://www.myria.be/en/fundamental-rights/repatriation-detention-and-deportation.

[9]Immigration Act 1971, s 5(1).

[10]House of Commons 'Statement of changes in immigration rules' HC 321, 6 February 2008 para 47, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/261554/hc321.pdf.

[11]M Savino 'The right to stay as a fundamental freedom: the demise of automatic expulsion in Europe' (2006) 7 Transnational Legal Theory 70; L Fekete and F Webber 'Foreign nationals, enemy penology and the criminal justice system' (2010) 51 Race and Class 1.

[12]Immigration and Asylum Act 1988, s 5; UK Borders Act 2007.

[13]*R (on the application of Kiarie) v Secretary of State for the Home Department, R (on the application of Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42.

[14]G Clayton *Immigration and Asylum Law* (Oxford: Oxford University Press, 6th edn, 2006) p 554.

[15]M Bosworth 'Immigration detention, punishment and the transformation of justice' (2019) 28(1) Social and Legal Studies 81; L Fekete 'The deportation machine: Europe, asylum and human rights' (2005) 47(1) Race and Class 64.

[16]Savino, above n 11; Fekete and Webber, above n 11.

[17]UK Borders Act 2007, s 32.

[18]Aliens (Consolidation) Act 2013, s 26(2).

[19]German Residence Act 2004, s 53.

[20]Law 30 July 2002, no 189 (Bossi-Fini law), amending the 1998 Immigration Act.

person is a foreign national. In Switzerland non-citizens who commit serious crimes can be subject to automatic deportation and there have been attempts to extend this to minor crimes.[21] Even where deportation is not automatic, severe immigration consequences for committing a criminal offence have become the norm. For example, in 2002 the Netherlands passed a law allowing for the deportation of foreign residents who had been sentenced to one month in prison or community work.[22] These developments are not isolated and are part of a wider pattern of the criminalisation of immigration or 'crimmigration' law as will be discussed below.[23]

2. Why revisit the punitiveness of deportation?

In order to understand the potential legal importance of the new section 47 provision, it is necessary to examine how the courts have traditionally conceptualised and dealt with immigration measures like deportation. Despite the increasing overlap between removal, deportation and the criminal justice system, legal interpretations of deportation and removal continue to maintain that such measures are non-punitive. This is not only the case in the UK but is also the position of the ECtHR. The case law on this point has centred on the right to a fair trial, which immigration decisions – including removal and deportation decisions – do not benefit from.

(a) The current legal position of deportation and removal

To determine whether a measure is punitive the ECtHR normally looks at whether the proceedings concern a 'criminal charge'. This is an autonomous concept[24] so its definition is independent of any meaning given to it in domestic legal systems. In *Engel and Others v the Netherlands*[25] the ECtHR laid down three criteria that it would look at when considering whether proceedings amounted to a criminal charge: (1) the classification of the proceedings in national law; (2) the nature of the offence; and (3) the severity of the penalty that the individual may incur. The first element does not generally carry much weight, as that would endanger the autonomy of interpretation, and more weight is usually given to elements 2 and 3 of the *Engel* criteria.[26] The second and third criteria do not have to be considered cumulatively; one may be decisive for the Court.[27] If neither is decisive on its own, however, then the Court may also consider them cumulatively.[28] This seems relatively straightforward, but in the immigration context the Court does not appear to refer to the *Engel* criteria much when it is alleged that an immigration decision really concerns a criminal charge and therefore is punitive. The question of whether deportation or removal measures are punitive was brought to the old European Commission on Human Rights a couple of times[29] but the seminal ECtHR case on this point is *Maaouia v France*.[30]

[21]'Swiss vote for deportation of foreigners who commit serious crimes' (*The Guardian*, 28 November 2010) https://www.theguardian.com/world/2010/nov/28/swiss-vote-deportation-foreigners-crime; J Miller 'Swiss to vote on law aimed at expelling convicted foreigners without appeal' (*Reuters* 17 February 2016), https://www.reuters.com/article/us-swiss-foreigners-idUSKCN0VQ0PG/.

[22]Fekete and Webber, above n 11, at 9.

[23]J Stumpf 'The crimmigration crisis: immigrants, crime and sovereign power' (2006) 56 American University Law Review 367.

[24]*Engel v Netherlands* (1979–80) 1 EHRR 647.

[25]Ibid.

[26]Ibid, para 87. See also *Campbell and Fell v United Kingdom* (1985) 7 EHRR 165 para 72; *Benham v United Kingdom* (1996) 22 EHRR 293 para 56; *Ezeh and Connors v United Kingdom* (2004) 39 EHRR 1 para 120; *Jussila v Finland* [GC] (2007) 45 EHRR 39 para 38.

[27]*Ozturk v Germany* (1984) 6 EHRR 409 para 54; *Lutz v Germany* (1988) 10 EHRR 182 para 55.

[28]*Bendenoun v France* (1994) 18 EHRR 54 para 47.

[29]*Agee v United Kingdom* App No 7729/76 (Commission Decision, 17 December 1976); *Zamir v United Kingdom* (1983) 5 EHRR CD274. For an in depth look at this case law see Spalding, above n 3.

[30]*Maaouia v France* (2001) 33 EHRR 42.

The case of *Maaouia*[31] concerned a Tunisian national who was living in France and convicted of armed robbery and armed assault with intent. He was released from prison in April 1990 and a deportation order was made. This was not served on him until October 1992 and he refused to comply with it, resulting in prosecution. For the refusal to comply he was given a one-year prison sentence and a ten-year ban from French territory. The initial deportation order was later quashed, however. As the deportation order was invalid, the applicant successfully sought the rescission of the ten-year ban but this took four years. The applicant argued that the length of time taken to make this decision violated his rights under Article 6 of the ECHR. The French Government argued that this claim was invalid, as deportation and exclusion orders do not concern criminal charges, so Article 6 did not apply – in other words, they argued that it was not a punitive measure.

In its judgment the Court emphasised that 'criminal charges' are autonomous concepts and cannot be interpreted only with reference to national classification. Yet, in its consideration of whether the proceedings could be said to involve the determination of a criminal charge – remember the ban from France for ten years was a result of a criminal conviction for refusing to comply with a deportation order – the Court appeared to rely exclusively on national classifications. It noted that such orders are not classed as criminal in France or in the Contracting Parties to the ECHR generally. The Court focused on the fact that such orders are often made by administrative authorities as well as by criminal courts and therefore that such measures constitute a special preventive measure for immigration control.[32] The Court thus concluded 'The fact that [the immigration measure] are imposed in the context of criminal proceedings cannot alter their essentially preventive nature. It follows that proceedings for rescission of such measures cannot be regarded as being in the criminal sphere either.'[33]

Thus, the Court based its opinion that immigration decisions do not concern criminal charges on the fact that states usually do not classify exclusion orders as criminal. This seems to contradict the idea that the way in which states classify proceedings carries very little weight in determining whether a criminal charge is at stake. The fact that administrative authorities decide such proceedings is also dependent on state classification. This reasoning has been criticised as a 'reversal of the ECtHR's long-established independence regarding the autonomous concepts within Article 6'.[34] The Court neglected to touch on other evident issues in this case. For example, throughout its submission the French Government explicitly said that the purpose of the measure was to act as a deterrent but the Court did not even address this point.[35] This is odd because the Court has found on several occasions that a measure which has the purpose of deterrence indicates a criminal charge.[36] The Court also did not examine the severity of the measure at hand, which again seems unusual given the importance of the third *Engel*[37] criterion.

The Court's decision in *Maaouia*[38] still stands and deportation and removal remain classed as non-punitive. However, *Maaouia* is not the only case which considered this problem; another case touched on the issue of immigration measures as punitive in more depth. The case of *Uner v the Netherlands*[39] focused on a Turkish national who had been living in the Netherlands since he was a child. He and his Dutch partner had two children. He had committed several violent offences and in 1994 was convicted of manslaughter and assault resulting in seven years in prison. In 1997, in light of his criminal record,

[31] Ibid.

[32] Ibid, para 39.

[33] Ibid.

[34] I Bryan and P Langford 'Impediments to the expulsion of non-nationals: substance and coherence in procedural protection under the European Convention on Human Rights' (2010) 79 Nordic Journal of International Law 457 at 468.

[35] *Maaouia v France*, above n 30, para 29.

[36] *Ozturk v Germany*, above n 27, para 53; *Bendenoun v France*, above n 28, para 47; *Ezeh and Connors v United Kingdom*, above n 26, para 102.

[37] *Engel v Netherlands*, above n 24.

[38] *Maaouia v France*, above n 30, para 38.

[39] *Uner v the Netherlands* (2007) 45 EHRR 14.

the authorities rescinded his Dutch residence and gave him a ten-year exclusion order prohibiting him from returning. This case primarily focused on Article 8 of the ECtHR (the right to private and family life), with the Grand Chamber ultimately deciding that there was no violation. However, the case also touched on the issue of immigration measures as punitive. The applicant argued that rescinding his residence and imposing an exclusion order were a 'second punishment' and complained that this violated Article 6 and Article 4 of Protocol No 7 to the Convention (the right not to be tried or punished twice). These arguments were declared inadmissible by the Chamber[40] with the court simply stating that Article 6 does not apply to immigration decisions, citing *Maaouia* and dismissing the Protocol 7 complaint on the grounds that the Netherlands had not ratified it. Despite this, several judges and parties to the Grand Chamber judgment did consider this argument. For example, the German government, intervening as a third party, emphasised that expulsion orders are not punishments because they are 'aimed at guaranteeing public safety in the future without the intention of inflicting a punishment'.[41] The Grand Chamber judgment likewise stated that immigration measures such as removing a residence permit or imposing an exclusion order after a migrant has been convicted of a criminal offence does not constitute a double punishment generally.[42] It reiterated the idea that these measures are preventive 'rather than punitive in nature'.[43] However there was a significant dissenting opinion on this point, with Judges Costa, Zupancic and Turmen strongly disagreeing with the view of the majority:

> … we believe a question of principle to be at stake, one which we would like to conclude. The principle is that of 'double punishment' or rather the discriminatory punishment imposed on a foreign national in addition to what would have been imposed on a national for the same offence. We do not agree with the assertion in paragraph 56 that the applicant's expulsion was to be seen as preventative rather than punitive in nature. Whether the decision is taken by means of an administrative measure, as is this case or by a criminal court, it is our view that measures of this kind which can shatter a life or lives – even where, as in this case, it is valid at least in theory, for only ten years (quite a long time incidentally) – constitutes as severe a penalty as a term of imprisonment, if not more severe.[44]

Again, in this case there was no in-depth consideration of the *Engel* criteria: both the Grand Chamber and the Chamber judgment were generally content to cite *Maaouia.* The idea that immigration measures were preventive in nature was reiterated but with little discussion or explanation of what that meant. The Dissenting Opinion of several judges on this point demonstrates that the decision was not uncontroversial.

In the UK policy developments and judicial and political rhetoric have likewise demonstrated the controversy and confusion around the use of removal and deportation and their increased intertwining with criminal justice. UK judges have found that recommending deportation orders does not constitute part of the punishment for the offender[45] but noted that the need for the judge to consider whether the offence was serious enough to merit deportation did point towards deportation being part of the punishment.[46] This is reflected in the actual use of deportation orders by judges in criminal trials in the UK: Home Office guidance describes how judges are reluctant to recommend a deportation order unless a particularly serious offence has been committed.[47] This relationship between

[40] Admissibility Decision *Uner v the Netherlands* App No 46410/99, 26 November 2002 Court (Second Section).
[41] *Uner v the Netherlands*, above n 39, para 53.
[42] Ibid, para 56.
[43] Ibid.
[44] *Uner v the Netherlands*, above n 39, Dissenting Judgment of Judges Costa, Zupancic and Turmen, paras 16–18.
[45] *R v Carmona* [2006] EWCA Crim 508. See *AT (Pakistan) v Secretary of State for the Home Department* [2010] EWCA Civ 567.
[46] Ibid, para 6.
[47] Chapter 33 'Working with the Police' in Home Office Instructions and Guidance *Operational Enforcement Activity* para 33.5.

criminal conviction and deportation has been further emphasised by the fact that deportation is now an automatic result of certain criminal convictions,[48] regardless of whether the judge recommended it or not. When deportation is explicitly considered by a judge, the rationale is often expressed in terms that seem very difficult to separate from punitive aims. For example, Lord Justice Rix stated that 'The public interest in deportation for those who commit serious crimes goes well beyond depriving the offender in question from the chance to re-offend in this country: it extends to deterring and preventing serious crime generally and to upholding public abhorrence of such offending.'[49]

Another more recent judgment in the UK demonstrates the continued confusion over the purposes of deportation. The case concerned whether a Jamaican man (SC) could be deported.[50] He had lived in the UK since the age of 10 and been recognised as a refugee because his mother is a lesbian and both he and his mother had been violently persecuted by a gang in Jamaica because of her sexuality. In June 2012 SC had been sentenced to two years in a young offender institution, triggering the automatic deportation process. As a refugee, it was accepted that he could not be returned to his home area in Jamaica, but the question was whether he could be required to internally relocate in Jamaica. The usual test for this is whether this would be 'unduly harsh'; the First-Tier Tribunal found that it would, as he would face destitution, homelessness and be in need of psychological treatment. The Court of Appeal, however, took a different approach and suggested that this 'unduly harsh' test should apply differently to someone who has been convicted of a crime. This was rationalised by stating that '[t]he phrase "unduly harsh" imports a value judgment of what is "due" to the person'.[51] In other words, criminal conviction would justify imposing greater hardship on the person because they deserve it, which indicates some retributive aims associated with punitiveness. This point was overturned in the UK Supreme Court as incorrect but demonstrates the difficulties of understanding these measures outside of a punitive lens. These are not the only examples and others such as Sheona York and Jonathan Collinson have also noted similar punitive language and justifications in UK deportation cases.[52] This confusion is not limited to UK judges either; others, such as the US Supreme Court, have struggled – stating that deportation is 'uniquely difficult to classify'[53] as it is 'intimately related to the criminal process'.[54]

Thus, the legal reasoning that underpins the idea that deportation and removal are never punitive is a shaky foundation. The rationales often seem confused or weak and circular. This is particularly problematic given the extensive study of 'crimmigration' by other disciplines such as criminology and sociology which suggest that the reality behind the use of these measures is often severe and difficult to conceptualise without a punitive framework.

(b) 'Crimmigration' and the punitiveness of immigration measures

Although how to define and identify punishment is hardly a settled matter in academic debate,[55] many criminologists have turned to this prism as a tool for understanding immigration measures. These comparisons, especially in terms of their individual impact, often seek to demonstrate that such measures are punishment in all but name.[56] Immigration detention, where most migrants are held prior to removal or deportation, has been widely compared to prison by criminologists and is considered to

[48]UK Borders Act 2007, ss 32–39.

[49]*DS (India) v Secretary of State for the Home Department* [2009] EWCA Civ 544 para 37.

[50]*SC (Jamaica) v Secretary of State of the Home Department* [2022] UKSC 15.

[51]Ibid, para 88.

[52]Eekelaar and Collinson, above n 3; Collinson, above n 3; York, above n 3.

[53]*Padilla v Kentucky* 130 S Ct 1473 (2010) 8.

[54]Ibid, at 8.

[55]See L Zedner 'Penal subversions: when is a punishment not punishment, who decides and on what grounds?' (2015) 20 Theoretical Criminology 1.

[56]S Demetriou *Indirect Criminalisation: The True Limits of Criminal Punishment* (Oxford: Hart Publishing, 2023); Hendry, above n 3.

have punitive elements. If we look to the use of immigration detention in the UK, it is clear why. In the UK most immigration detention takes place in Immigration Removal Centres (IRCs). Many of the IRCs (current and former) had a previous life as a prison or were designed to have a prison-like appearance and feel.[57] Morton Hall IRC, a former prison, was run by HM Prison and Probation Service on behalf of the Home Office, despite the fact that it held immigration detainees rather than prisoners, and was surrounded by large quantities of razor wire. At the end of 2021 it was quickly converted back into use as a prison, further demonstrating the similarity.[58] Throughout many IRCs, HM Inspectorate of Prisons (who also inspect IRCs) has continued to find disproportionate restrictions on movement for detainees as well as widespread handcuffing and routine room searches.[59] In the most recent HMIP inspection of Dungavel IRC the need for the use of patrol dogs[60] was questioned, as was the carrying of batons by staff in Morton Hall.[61] In recent years IRCs such as Yarls Wood and Brook House have been the subject of exposé documentaries showing a culture of violence and degradation by IRC staff against detainees.[62]

Empirical criminological and sociological work examining how detainees experience immigration detention have found it to be punitive.[63] In the UK, detainees who have experienced both prison and IRCs report their overall experience in IRCs to be worse than prison.[64] Those who were FNPs and held beyond their sentence release date under immigration powers were angry and confused as to why they continued to be detained, if it was not to punish them again.[65] The fact that immigration detention may be indefinite in the UK also compares unfavourably with prison as the detainees had no release date and so lived with constant uncertainty.[66] This lack of certainty creates widespread fear, not just for FNPs but all immigration detainees, as noted by HM Inspectorate of Prisons in many of its reports.[67]

[57]For example, IRCs Dungavel and Morton Hall were previously prisons whereas IRCs Harmondsworth, Brook House and Colnbrook were all designed to look and feel like prisons. See HMIP *Report on an unannounced inspection of Dungavel Immigration Removal Centre 19–21 July and 2–5 August 2021* (2021), available at https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2021/11/Dungavel-web-2021.pdf; HMIP *Report on an unannounced inspection of Morton Hall Immigration Removal Centre 28 October–15 November 2019* (2019A), available at https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2020/03/Morton-Hall-IRC-web-2019.pdf; HMIP *Report on an unannounced inspection of Heathrow Immigration Removal Centre -Handsworth Site 2–20 October 2017* (2017), available at https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2018/03/Harmondsworth-Web-2017.pdf; HMIP *Report on an unannounced inspection of Brook House Immigration Removal Centre 20 May–7 June 2019* (2019B), available at https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2019/09/Brook-House-web-2019.pdf; HMIP *Report on an unannounced inspection of Colnbrook Immigration Removal Centre 28 February–18 March 2022* (2022), available at https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2022/06/Colnbrook-web-2022.pdf.

[58]HMIP (2019A), above n 57.

[59]Ibid. See HMIP *Report on an unannounced inspection of Tinsley House Immigration Removal Centre 3–5, 9–11 and 16–19 April 2018* (2018), available at https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2018/08/Tinsley-House-Web-2018.pdf. See HMIP (2017), above n 57.

[60]See HMIP (2021), above n 57.

[61]HMIP (2019A), above n 57.

[62]HMIP (2019B), above n 57; HMIP *Report on an unannounced inspection of Yarl's Wood Immigration Removal Centre 5–7, 12–16 June 2017* (2017), available at https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2017/11/Yarls-Wood-Web-2017.pdf. Yarl's Wood is no longer a female-only IRC.

[63]M Bosworth 'Border criminologies: assessing the changing architecture of crime and punishment' Global Detention Project Working Paper 10 (2016) 5; M Bosworth *Inside Immigration Detention* (Oxford University Press: Oxford, 2014); I Hasselburg 'Coerced to leave: punishment and the surveillance of foreign national prisoners in the UK' (2014) 12 Surveillance and Security 471.

[64]Hasselburg, above n 63; I Hasselburg *Enduring Uncertainty: Deportation, Punishment and Everyday Life* (Oxford: Berghahn, 2016).

[65]Ibid, p 478.

[66]S Turnbull 'Stuck in the middle: waiting and uncertainty in immigration detention' (2016) 25 Time and Society 61; J Warr 'The deprivation of certitude, legitimacy and hope: foreign national prisoners and the pains of imprisonment (2016) 16(3) Criminology and Criminal Justice 301.

[67]See HMIP (2022), above n 57. See HMIP (2021), above n 57; HMIP (2019A), above n 57; HMIP (2019B), above n 57. See HMIP (2017), above n 57.

Deportation has received somewhat less attention than immigration detention. Perhaps this state power is less controversial than immigration detention, or lacks a clear comparator, unlike immigration detention and prison. Or maybe it is due to the very practical difficulty of keeping track of and in touch with deported participants. Nevertheless, there have been studies demonstrating the potential physical severity of deportation and administrative removal practices.[68] Moreover, the potentially severe and profound effects it has on those subject to it have also been well documented. Deportation 'disrupts the whole tenor of life'[69] and can 'shatter a life or lives'.[70] In popular discourse, deportation is seen as returning a person to their 'home' and therefore issues of reintegration on return are rarely discussed. This is misleading. Deportees, even those who have maintained ties to the receiving country, suffer a range of problems on return to their 'home' state, including economic, psychological and social trouble and general issues of reintegration.[71] The problem is considered to be particularly acute for those who left their country of origin as children and some scholars have shown increased interest in recent years for legal reform to protect this particular group from deportation.[72]

Beyond the 'hard treatment' that such measures entail,[73] the use of such detention and deportation is often bound up with aims of criminal justice. As mentioned above, this can be seen in the legal rationales for deportation[74] and some studies have found immigration detention is used in a similar manner – punitively for retribution or to act as deterrent.[75] Likewise, there have been comparisons made between historical forms of punishment, such as banishment and transportation, and the modern practice of deportation.[76] There is also greater awareness of the importance that immigration status has for determining an individual's experience of the criminal justice system and that it is increasingly difficult to separate out immigration measures and the criminal justice system.[77]

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[68]Bosworth (2014), above n 63, p 196; L Fekete *A Suitable Enemy* (London: Pluto Press, 2009); Fekete, above n 15; L Fekete *Europe's Shame: A Report on 105 Deaths Linked to Racism or Government Migration or Asylum Policies* (Institute of Race Relations, 2009).

[69]L Schuster and N Majidi 'Deportation stigma and re-migration' (2015) 41 Journal of Ethnic and Migrant Studies 635; Fekete and Webber, above n 11.

[70]*Uner v the Netherlands*, above n 39, Dissenting Judgment, para O-II17.

[71]See L De Noronha *Deporting Black Britons: Portraits of Deportation to Jamaica* (Manchester: Manchester University Press, 2020); Schuster and Majidi, above n 69; L Schuster and N Majidi 'What happens post-deportation? The experience of deported Afghans' (2013) 1 Migration Studies 221; D Brotherton and L Barrios *Banished to the Homeland* (New York: Columbia University Press, 2011); N Majidi *An Evaluation of the UK Return and Reintegration Programme* (Department for International Development, 2009) 27; S Khosravi 'Sweden: detention and deportation of asylum seekers' (2009) 50 Race and Class 38 at 52; D Brotherton and L Barrios 'Displacement and stigma: the social and psychological crisis of the deportee' (2009) 5 Crime Media Culture 29.

[72]Eekelaar and Collinson, above n 3.

[73]For a discussion of the importance of 'hard treatment' see for example T Brooks *Punishment* (London: Routledge, 2012) p 5; J Tasioulas 'Punishment and repentance' (2006) 81 Philosophy 279 at 283; RA Duff *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001) pp xiv–xv.

[74]*DS (India) v Secretary of State for the Home Department*, above n 49, para 37.

[75]Bosworth (2014), above n 63; LWeber 'The detention of asylum seekers as a crime of obedience' (2005) 13 Critical Criminology 89; Weber and Gelsthorpe, above n 2.

[76]M Gibney 'Banishment and the pre-history of legitimate expulsion power' (2020) 24(3) Citizenship Studies 277; D Moffette and S Benslimane 'The double punishment of criminal inadmissibility for immigrants' (2019) 28(1) Journal of Prisoners on Prison 44;G Cornelisse *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Leiden: Martinus Jihoff Publishers, 2010); D Kanstroom *Deportation Nation* (Harvard University Press, 2007); W Walters 'Deportation, expulsion and the international police of aliens' (2002) 6 Citizenship Studies 265; J Bleichmar 'Deportation as punishment: a historical analysis of the British practice of banishments and its impact on modern constitutional law' (1999) 14 Georgetown Immigration Law Journal 115.

[77]Eekelaar and Collinson, above n 3; Moffette and Benslimane, above n 76; S Turnbull and I Hasselberg 'From prison to detention: the carceral trajectories of foreign-national prisoners in the United Kingdom' (2017) 19(2) Punishment & Society 135; F Pakes and K Holt 'Crimmigration and the prison: comparing trends in prison policy and practices in England and Wales and Norway' (2017) 14(1) European Journal of Criminology 63; M Bosworth 'Deportation, detention and foreign-national prisoners in England and Wales' (2011) 15 Citizenship Studies 583.

It is worth noting that reconceptualising certain immigration measures as punitive and determining which do and do not fall within that categorisation is not straightforward. There is already much debate and internal critique in the field as criminologists struggle to conceptualise these measures that do not fit neatly into either criminal or administrative frameworks.[78] The levels of discretion and 'asymmetric incorporations of criminal justice norms'[79] make it difficult to see many immigration measures as purely criminal and the stigma, use and intermeshing of the criminal law and practices drawn from the criminal justice system make it hard to see them as administrative. Moreover, this phenomenon is not isolated to immigration measures: the increased relevance and use of 'preventive measures' in other areas also suffers from similar complications in conceptualisation.[80] Yet, despite the conceptual uncertainty it is worth bearing in mind the similarities to punishment. It is important that human rights act as proper check on state power, especially when it comes to vulnerable groups such as migrants. The ECtHR must make good on its 'motto … that the Convention must be interpreted in a manner which renders its rights "practical and effective, not theoretical and illusory"'.[81]

3. Foreign national prisoners and the early removal scheme

Recent changes to UK law should re-open the debate on the punitive power of deportations. Section 47 of the NBA 2022 changes the way FNPs are dealt with. Before examining the provision itself, the ERS and the concept of the FNP must be explained. FNPs are persons without an absolute right to remain in the UK (ie those without British citizenship[82]) who are remanded or sentenced to a UK prison. For a measure which is non-punitive, the introduction of automatic deportations mentioned above certainly had a significant effect on the prison architecture of the UK and made a prisoner's nationality or citizenship status increasingly salient. As criminal convictions and immigration consequences have become more closely related to one another, this has been followed by changes which separate prisoners into different institutions dependent on their (actual or suspected) nationality. Automatic deportation prompted changes to the structure of the UK's prison estate where non-citizen offenders are placed in certain prisons: dedicated 'foreign national offender only' prisons.[83] These prisons are set up to deal with the immigration system with full-time immigration staff onsite. There is evidence, however, that they are lacking in many other respects such as facilities and rehabilitation support.[84] This concept of FNP-only prisons and the perception that they provide a lesser service than typical prisons is not unique to the UK – there is a similar system in Norway.[85]

[78]See for example D Moffette 'The jurisdictional games of immigration policing: Barcelona's fight against unauthorized street vending' (2020) 24(2) Theoretical Criminology 258.

[79]SH Legomsky 'The new path of immigration law: asymmetric incorporation of criminal justice norms' (2007) 64 Washington and Lee Law Review 469.

[80]H Carvalho et al 'Punitiveness beyond criminal justice: punishable and punitive subjects in an era of prevention, anti-migration and austerity' (2020) 60 British Journal of Criminology 265; A Ashworth and L Zedner *Preventive Justice* (Oxford: Oxford University Press, 2014).

[81]G Letsas 'Strasbourg's interpretive ethic: lessons for the international lawyer' (2010) 21 European Journal of International Law 509 at 520.

[82]Though citizenship may increasingly be deprived to enable deportability: see C Yeo 'The rise of modern banishment: deprivation and nullification of British citizenship' in D Prabhat *Citizenship in Times of Turmoil? Theory, Practice and Policy* (Edward Elgar, 2019).

[83]UK Border Agency and Ministry of Justice *Service Level Agreement to Support the Effective and Speedy Removal of Foreign National Prisoners* (1 May 2009) p 20.

[84]E Kaufman *Punish and Expel: Border Control, Nationalism and the New Purpose of Prison* (Oxford: Oxford University Press, 2015).

[85]T Uglevik and D Damsa 'The pains of crimmigration imprisonment: perspectives from a Norweigan all-foreign prison' (2017) 58 British Journal of Criminology 1025; F Pakes and K Holt 'Crimmigration and the prison: comparing trends in prison policy and practice in England &Wales and Norway' (2017) 14(1) European Journal of Criminology 63.

What section 47 of the NBA 2022 does is shift the way in which the ERS for FNPs works. To facilitate their deportation, FNPs may be released early from prison and deported to their country of origin through the ERS. This scheme allows for the removal of FNPs up to 12 months prior to their earliest release point, so long as they have served a certain portion of their sentence; for many this will be a quarter of their sentence.[86] For example, someone with a two-year sentence would typically have to spend 12 months in prison before being considered for release. ERS means that if that person is an FNP, they need to spend six months in prison (a quarter of their sentence) before being considered for early removal. In other words, they can be removed six months earlier than they would have been considered for release from prison if they were a British national.[87]

The ERS has very few limitations on who is included with little restriction on offence type.[88] All FNPS with a determinate sentence must be considered under this scheme except those convicted of certain offences connected with terrorism.[89] The ERS includes those in young offender institutions,[90] but those who are serving indeterminate sentences for public protection and life sentences are not eligible under this scheme and instead will be considered for removal after their tariff has expired under the Tariff Expired Removal Scheme (see below). Prison governors can refuse permission for the ERS in any of the following situations: (1) there is clear evidence that the prisoner in question is planning another crime (including immigration crimes); (2) there is evidence that, while in prison, the prisoner engaged in violence or threats of violence numerous times; (3) the prisoner has been dealing class A drugs while in custody; and (4) the prisoner is serving a sentence for a terrorism or terrorism-connected offence (this is broader than the exclusion above as it includes any terrorist offence and the Joint Extremist Unit will be involved in any final decision). They may also refuse due to other matters of similar gravity relating to public safety or where early removal under the ERS would undermine public confidence in the criminal justice system. Guidance provides that the latter is anticipated to be used very sparingly and only for 'notorious' offenders in cases of national profile.[91] Prisoners are informed, in writing, of their early removal once the prison governor has approved it.[92]

The numbers potentially involved in the scheme are significant. FNPs currently make up 12% of the prison population.[93] According to the immigration statistics for the year ending June 2023, foreign national offenders (FNOs) make up the biggest proportion of enforced returns (72%), though this has fallen from pre-Covid levels, when they were far and away the vast majority of enforced returns.[94] Enforced return numbers are steadily increasing compared to the pandemic years but are yet to get

[86]The NBA 2022, s 47 increased the availability of FNPs for early removal to 12 months before release date whereas it had previously been 9 months. There is some political discussion about whether to increase this further to deal with overcrowding in UK prisons: H Pidd 'MOJ to free up cells by deporting more foreign prisoners and axing short terms' (*The Guardian*, 16 October 2023), available at https://www.theguardian.com/society/2023/oct/16/moj-to-free-up-cells-by-deporting-more-foreign-prisoners-and-axing-short-terms.

[87]National Offender Management Service 'The Early Removal Scheme and release of foreign national prisoners' PSI 04/2013 (15 June 2022) para 3.25, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1083184/psi-04-2013-early-removal-scheme-release-foreign-national-prisoners.pdf.

[88]When it was first introduced there were more exceptions based on offence/sentence type but these were largely removed on 3 November 2008 following the Criminal Justice and Immigration Act 2008.

[89]This applies when there is at least one conviction for a terrorism offence in the Criminal Justice Act 2003, Sch 19ZA, Part 1 or 2 or there is a sentence of more than two years and the courts have found the offence to have a terrorism connection under s 69 of the Sentencing Act 2020.

[90]Note that this does not include those serving a Detention and Training Order, as this is considered a 'term' of imprisonment rather than a 'sentence' and is thus excluded from the ERS: National Offender Management Service, above n 87, para 2.24.

[91]Ibid, pp 7–9.

[92]Ibid, pp 15–17.

[93]G Sturge 'UK prison population statistics' Briefing Paper CBP-04334 (House of Commons), available at https://researchbriefings.files.parliament.uk/documents/SN04334/SN04334.pdf.

[94]Home Office 'National statistics: how many people are detained or returned' (24 August 2023), available at https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-june-2023/how-many-people-are-detained-or-returned.

close to pre-pandemic levels. The numbers removed may increase in the future as the number of total (whether released early or not) FNP deportations appeared to be increasing prior to the pandemic, with 4,700 deported between 2019 and 2020.[95] It is worth pointing out that references to FNO removals in statistics do not automatically mean that they were all removed through the ERS – an FNO is defined as 'someone who: (a) is not a British citizen; and (b) has been remanded in custody, convicted and given a custodial sentence in the UK for any offence. An FNO can be convicted and have served their sentence while on remand, so would not necessarily have been sent to prison.'[96] The majority of returned FNOs are EU nationals (58% in 2023) though Albanian is by far the single most prominent nationality of returned FNOs.[97]

Brexit might also increase the number of FNP deportations as it changed the process of deportation of EU nationals. Its impact is difficult to assess and might turn out to be a major or minor shift. It is potentially major because prior to 31 December 2020 EU nationals who committed an offence benefited from stricter proportionality rules surrounding their deportation that focused on their personal conduct and length of residency.[98] Now any EU national who commits an offence after 31 December 2020 will be subject to the same rules as any other FNO,[99] where it is assumed that their deportation is in the public interest, and this generally results in a less generous proportionality test with less regard to their personal conduct and length of residence.[100] Thus EU nationals will now be worse off if they offend and in theory easier to deport. On the other hand, the impact is arguably somewhat minor as EU nationals made up a significant proportion of all deported FNPs prior to Brexit anyway[101] and it is debateable how much the old test really constrained the UK's ability to deport EU FNOs.[102] Nevertheless, we may see an increase in the number of total FNOs deported because of the less strict test for EU nationals.

Turning to the ERS specifically, according to a parliamentary question asked and answered in 2023: from January 2010 to June 2022, the Home Office apparently removed 22,707 FNPs through the ERS, with 1,322 of those being in the year ending June 2022.[103] A further 571 FNPs serving indeterminate sentences have been removed since 2012 under the similar Tariff Expired Removal Scheme, but due to the fact that their sentence was indeterminate (ie without a set end date) their situation is somewhat different to the typical FNP.[104] If we take all the developments mentioned above and couple it with the general expectation that the whole prison population is projected to grow significantly and increasing FNP deportations is being touted as a solution for overcrowding, then it is clear that the changes brought by section 47 could affect a large number of people.[105]

[95]I Majeed Sheikh 'Aliens behind bars: the punishment and human rights of foreign national prisoners in England & Wales' (*Border Criminologies*, 2022), available at https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2022/05/aliens-behind.

[96]Home Office 'Official Statistics: Foreign National Offenders in detention and leaving detention' (28 February 2013), available at https://www.gov.uk/government/statistics/foreign-national-offenders-in-detention-and-leaving-detention/foreign-national-offenders-in-detention-and-leaving-detention. The definition is still in use in most up to date guidance, Home Office 'User guide to Immigration System Statistics' (24 August 2023), available at https://www.gov.uk/government/publications/user-guide-to-home-office-immigration-statistics--9/user-guide-to-immigration-statistics.

[97]Home Office, above n 94.

[98]Part 4 of the Immigration (European Economic Area) Regulations 2016 implementing Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member State.

[99]Immigration Act 2014.

[100]For an in-depth discussion of this change see Collinson, above n 3.

[101]69% of returned FNOs in 2019 were EU nationals, for example: Home Office, above n 94.

[102]Collinson, above n 3.

[103]'Prisoners' Release: Foreign Nationals, Question for Ministry of Justice by Lord Swire' UIN HL6427, tabled on 13 March 2023, available at https://questions-statements.parliament.uk/written-questions/detail/2023-03-13/HL6427/#.

[104]Ibid.

[105]Majeed Sheikh, above n 95; Pidd, above n 86.

4. Section 47 of the Nationality and Borders Act 2022

So, what did section 47 of the NBA 2022 change? Previously, if a FNP was deported through the ERS and then returned to the UK *before their original criminal sentence end date expired*, they could then be detained in prison again for the remainder of time until their original sentence end date.[106] Section 47 changes this so that the original sentence end date is no longer relevant. Now if an FNP is deported and returns to the UK after their original sentence end date they can still be detained for the remainder of time left on their sentence at the point they were deported. This means that when a foreign national is removed as part of the ERS, the threat of recall to prison does not expire when their original sentence time expires: instead it goes on indefinitely. In other words, the sentence is 'paused' while the foreign national is in their country of origin. This is confirmed by the government's own explanatory notes:

> this clause introduces a 'stop the clock' provision, which will apply to FNPs removed under ERS. The new provision will, in effect, pause the sentence at the point a person is removed from prison under ERS. If the removed FNP returns to the UK at any point in the future, they would be liable to be detained and returned to custody to serve the balance of their sentence, 'ignoring' any days after they were removed from prison…[107]

Thus, a FNP who is released early for deportation will never be able to return to the UK without incurring imprisonment for the remainder of their sentence. This is an important shift. It makes the consequences of offending for foreign nationals more severe with longer term consequences than a British citizen would face. Most importantly, it opens up the possibility that the deportation is intended to *replace* the prison sentence and is therefore a punitive decision.

This argument can seem counterintuitive. It would be understandable to see deportation under the old system, where the deportation formed part of a sentence, as more punitive than the new system, where it separated from the sentence. Yet this is not how punitiveness is typically conceptualised. Under the old system, the early release of FNPs to their country of origin was analogous to the early release of other offenders who may also be required to stay within or away from certain areas or be limited in their movement at certain times of day for the remainder of their sentence. These early release and recall to prison decisions for all prisoners are not generally classed as punitive but administrative.[108] The reasoning behind this focuses on the fact that this is not a 'fresh' decision on punishment but rather an administrative decision on the implementation of the punishment from the original sentence and is aimed at preventing further reoffending.[109] Lady Hale has made clear her discomfort on this point[110] and some academics have pointed out that these decisions seem like 'back-door' sentencing which determine the extent and character of punishment in important ways.[111] Nevertheless, the legal position remains that in that context, these decisions are not punitive but administrative. Section 47, however, shifts this context quite significantly. Deportation is no longer part of the sentence in the same way, if the sentence does not carry on counting down while it happens. Deportation is now what happens *instead of the sentence* – this is made clear by the fact that once deportation occurs, the sentence is paused and only resumes when the deportation is no longer effective – ie when the person returns to the UK. Pausing the sentence makes it seems

[106]Criminal Justice Act 2003, s 260.

[107]NBA 2022, s 47; Explanatory Notes to the Bill for this Act.

[108]R v Parole Board, ex p West [2005] UKHL 1. This case has received mixed judicial treatment since but not on this ground that the decision is administrative and does not attract the right to a fair trial which has been accepted in subsequent decisions: see R (Whiston) v Secretary of State for Justice [2014] QB 306.

[109]R v Parole Board, ex p West, ibid, paras 38–40 and 56–58.

[110]R v Parole Board, ex p West [2003] 1 WLR 705.

[111]N Padfield 'Back door sentencing: is recall to prison a penal process' (2005) Cambridge Law Review 276; B Weaver et al 'The failure of recall to prison: early release, front door and back door sentencing and the revolving prison door in Scotland' (2012) 4(1) European Journal of Probation 85.

more likely that the deportation measure is now divorced from the implementation of the original sentencing decision and thus may be a 'fresh' punitive decision.

5. Section 47 and re-evaluating deportation

If the courts, including the ECtHR were to examine the deportation provisions in section 47 of the NBA 2022 it is possible that they might shift their interpretation of this measure as non-punitive.

First, as discussed at length above, the deportation measure seems much harder to see as part of the original sentence decision when the original sentencing decision is paused and does not resume unless the deportation is rendered ineffective. This seems likely to undermine much of the judicial reasoning as to why such decisions in that context are not punitive. Secondly, it is difficult to see how this does not fundamentally alter the criminal punishment of non-nationals versus the punishment of nationals. Non-nationals subject to this measure will indefinitely have a sentence hanging over their heads. Despite being sentenced by a criminal court, it is unlikely in many cases that their sentence will ever be spent, as even if they return to the UK after being deported, the process will likely start again and the sentence will again be paused and so on and so forth. An analogy may be drawn with those under a life sentence. Only life sentence prisoners currently exist with the threat of recall to prison hanging over their lives indefinitely and, given that FNPs only need a sentence of a year to qualify for automatic deportation, the extension of that to other categories of offender seems potentially very disproportionate to the offence. This is especially true now that section 40 of the NBA 2022 criminalises all irregular entry and stay with a punishment of up to 12 months in prison, meaning anyone with that status may be subject to these provisions.

The proportionality of this response by the state to a crime is particularly open to question given the approach of the ECtHR on the issue of life sentences without prospect of rehabilitation and release.[112] While not directly analogous (because in our case the FNP is released) the Court's reasoning that such life sentence are incompatible with the ECHR was partly underpinned by the fact that the offender lacked the possibility to be recognised as having been rehabilitated and suitably atoned for his offence.[113] A criminal sentence that can never be spent does not seem to fit well with that reasoning. The power of this reasoning has been somewhat diluted, however, by the more deferential approach taken by the ECtHR in subsequent case law such as *Hutchinson*.[114] Nevertheless, the potential severity of this measure should not be quickly dismissed; as mentioned briefly above, the pains of constant uncertainty in the immigration system are well-documented.[115] Many migrants who have experienced both prison and immigration detention find that the latter compares unfavourably, and the lack of a clear date to work towards is a frequent source of psychological pain. As stated by Melanie Griffiths it removes a sense of purpose '… And without a maximum threshold or date of release, the waiting of immigration detention has no cumulative purpose. There is no goal that one is working towards or end point to which the clock is ticking down.'[116] Although of course, the FNP will be released back into their country of origin, further work will be needed on how having this unspent sentence hanging over them will impact both their time in UK prison and their life afterwards.

[112] *Vinter and Others v United Kingdom* (2016) 63 EHRR 1.

[113] Ibid, para 112.

[114] *Hutchinson v United Kingdom* [2016] ECHR 021.

[115] N De Genova 'Doin' hard time on planet earth: migrant detainability, disciplinary power and the disposability of life' in C Jacobsen et al (eds) *Waiting and the Temporalities of Irregular Migration* (Oxford: Routledge, 2020); Hasselberg, above n 64; Turnbull, above n 66; Warr, above n 66; M Griffiths 'Out of time: the temporal uncertainties of refused asylum seekers and immigration detainees' (2014) 40(12) Journal of Ethnic and Migration Studies 1991; M Griffiths 'Living with uncertainty: indefinite immigration detention' (2013) 1(3) Journal of Legal Anthropology 263; M Griffiths et al *Migration, Time and Temporalities: Review and Prospect* COMPAS Research Resources Paper (2013), available at https://www.compas.ox.ac.uk/wp-content/uploads/RR-2013-Migration_Time_Temporalities.pdf.

[116] Griffiths (2014), above n 115, at 2002.

Although the case law outlined near the beginning of this paper points towards deportation remaining characterised as a non-punitive measure, the case of *Gurguchiani* indicates a different route. The little-known ECtHR case, *Gurguchiani v Spain*,[117] concerned an applicant who was sentenced to 18 months' imprisonment for attempted burglary. The police requested that the judge responsible issue directions for the applicant's removal from the country and this request was accompanied by a government decision ordering the administrative removal of the applicant. The judge decided not to issue removal directions, however, as he thought that the enforcement of the initial sentence imposed by the judgment would be more appropriate. The state appealed and was successful; the applicant was deported and excluded from Spain for ten years. This deportation and exclusion order were based on a new law which provided that when an illegal immigrant in Spain was given a prison sentence of up to six years, there was an obligation to replace that sentence with deportation, save in exceptional cases. This legislation was not in force until a year after the applicant's initial trial. The applicant argued that this was retroactively applying a harsher penalty, in breach of Article 7 of the ECHR (which prohibits the retrospective application of criminal penalties). He was successful and the Court found that there had been a violation of Article 7. The Court considered the fact that the almost automatic application of the replacement of a prison sentence with a deportation order which took away judicial discretion and the imposition of a ten-year exclusion ban when the original penalty was an 18-month prison sentence, indicated that a harsher criminal penalty was being retrospectively applied. Interestingly, the applicant also argued that his rights under Article 6 had been breached. The Court found that Article 6 did apply here but, as it had already found a violation of Article 7, it decided not to examine the complaint under Article 6. Yet by saying that Article 6 applied, and by finding a violation of Article 7, the Court found that an immigration measure – deportation and exclusion – was tantamount to a criminal penalty. The rationale appeared to be that where the law provides for a deportation order to replace a prison sentence following a criminal conviction, the deportation will be considered a criminal punishment. Judge Zupancic dissented but only on the matter of compensation rather than any finding in principle,[118] whereas Judges Myjer and Fura dissented on the ground that the prior cases of *Maaouia* and *Uner* should have been followed and no violation of Article 7 found.[119]

Is it likely that such an interpretation will be applied to the new section 47 provisions of the NBA 2022? There are some indications that, despite the clear overlap between the logic behind the *Gurguchiani* decision and what section 47 does, the courts will be reluctant to go down this route. It has been well-documented that the ECtHR is reluctant to interfere in this area – two significant studies of the migration case law of the ECtHR have found that the Court tends to give primacy to the legal principle that states have the right to control immigration over human rights considerations.[120] Marie Dembour refers to this as the 'Strasbourg reversal' or 'state control principle'[121] while Costello calls it the 'statist assumption'.[122] Some recent case law on migrants' rights has emphasised this stance.[123]

Secondly, the Court may be unlikely to take particular note of this issue because, as mentioned above, the *Gurguchiani* decision is not well-known. It is notable that the *Gurguchiani* case is in

[117] *Gurguchiani v Spain*, above n 5, paras 40 and 47–48. This judgment is not available in English; for an English summary see Press Release 'Gurguchiani v Spain, App No 16012/06: Harsher Sentence Imposed Retroactively on Convicted Illegal Immigrant' 15.12.09 (https://hudoc.echr.coe.int/eng-press?i=003-2970011-3270809).

[118] *Gurguchiani v Spain*, above n 5, dissenting judgment of Judge Zupancic.

[119] Ibid, dissenting judgment of Judges Myjer and Fura, paras 1–2.

[120] MB Dembour *When Humans Become Migrants: A Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford: Oxford University Press, 2015) and C Costello *The Human Rights of Migrants and Refugees in European Law* (Oxford: Oxford University Press, 2016).

[121] Dembour, above n 120, pp 1, 3–5.

[122] Costello, above n 120, pp 9–12.

[123] App No 16483/12 *Khlaifia v Italy* [GC] Judgment of 15 December 2016; App Nos 8675/15 and 8695/15 *NT and ND v Spain* [GC] Judgment of 13 February 2020; *Ilias and Ahmed v Hungary* (2020) 71 EHRR 6.

only available in French and Russian, 'signifying that the Court does not attribute much importance to [it]';[124] a lack of academic interest and subsequent citation has meant this case has been largely unnoticed despite its potentially transformative importance for the criminalisation of immigration. Thus, there is no guarantee that section 47 will create the impetus for re-evaluating the punitiveness of deportation and removal.

There are, however, indications that the Court would take a more robust stance. Although not a well-known or much discussed decision, the *Gurguchiani* case is included in the Guide on Article 6 (criminal limb) of the ECHR prepared by the Registry for the Court, which indicates that it may be regarded as important for this issue.[125] As mentioned above, not recognising the potential punitiveness of deportation has not been without controversy within the Court itself. Some judges strongly dissented with the majority judgment that the right to a fair trial did not apply to certain deportation cases[126] and there is some evidence that a few judges in the Court think that it is high time for this approach to be revisited.[127] Given that in recent years we have seen the ECtHR revisit controversial immigration judgments such as the *N v United Kingdom*[128] decision, which was revised to provide much greater protection for seriously ill migrants facing deportation in *Paposhvili v Belgium*,[129] there is certainly a possibility that the ECtHR might shift its stance on this issue.

Conclusion

In conclusion, the current legal conception of deportation orders as non-punitive may be revisited in light of section 47 of the NBA 2022. This paper has demonstrated that the current legal interpretation rests on reasoning which seems circular, as it focuses on state classification of proceedings which seems incompatible with the *Engel* criteria. It has also shown that this legal position is already out of step with the findings of other disciplines such as criminology and sociology on how deportation is used and experienced. Section 47 represents a new chance to revisit this interpretation for at least some deportation orders. By pausing a prison sentence, it is difficult to see how a deportation remains part of the implementation of the original sentence and not a distinct punitive order which replaces a prison sentence. Yet, given the judiciary's historical deference on immigration issues, it remains to be seen whether this opportunity will be grasped, and the issue revisited.

[124]Dembour, above n 120, p 396.

[125]European Court of Human Rights 'Guide on Article 6: Right to a fair trial (criminal limb)' (Council of Europe, 2022) p 15, available at https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf.

[126]*Uner v the Netherlands*, above n 39, Dissenting Judgment, para O-II17.

[127]Dembour, above n 120.

[128]*N v United Kingdom* (2008) 47 EHRR 39.

[129]App No 41738/10 *Paposhvili v Belgium* Judgment [GC] 13 December 2016.

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