

The Bingham Centre for the Rule of Law

The Rule of Law and Immigration Detention

I. General Background

The decision to detain an individual has the effect of depriving that individual of his or her liberty and should be subjected to rigorous scrutiny according to rule of law principles, such as access to justice, the right to a fair trial, the right to family life, the prohibition of torture and inhuman and degrading treatment and the right to liberty and security. Reputable studies suggest that these standards are now always complied with. Council of Europe (CoE) State governments are traditionally accorded a high level of deference by courts when it comes to the development of their immigration and asylum policy, including the standards and procedures according to which a decision to detain is made. While it is the case that a number of domestic, international and European standards may inform CoE State practice with regard to detention, States develop their own procedures, usually administrative in nature, governing the authority and decision to detain, as well as rules for treatment of detained individuals, and immigration authorities are usually granted wide discretion to detain. The result is considerable discrepancy between domestic rules, regional and international standards, and between individual CoE State practice.¹ This is most recently demonstrated by national case law and case law of the European Court of Human Rights (ECtHR) to the effect that certain aspects of detention policy in various CoE States has been deemed to be in violation of the European Convention on Human Rights (ECHR), despite State participation in the Convention and in several other international and regional instruments providing immigration and asylum standards.²

The United Kingdom (UK), like other states, has been the subject of comment and criticism regarding certain aspects of its use of immigration detention. Most recently, a High Court Judge ruled that an immigration detainee suffered detention constituting inhuman and degrading treatment under Article 3 ECHR.³ In addition, the use of accelerated examination procedures in the context of asylum has attracted criticism relating to concerns that the proceedings are “too fast to be fair” by not allowing a full examination of every claim.⁴ Moreover, there is evidence that the indicative timescales for the fast-track processes are often unmet, leaving immigrants to languish in detention for months and sometimes years.⁵ In recent years, a variety of studies have been undertaken regarding various aspects of immigration detention, which highlight its significance and the pressing need to develop strong principles in this area. Detention Action, a UK-based advocacy body published a study on the detention of asylum-seekers,⁶ which provided an overview and critique of the use of the Detained Fast Track procedure in Harmondsworth Immigration Removal Centre and concluded that the DFT system is structured in such a way so as to disadvantage asylum-seekers at all stages of the process. Similar issues were examined by Human Rights Watch in 2010 as they relate to the detention of female asylum-seekers in the UK.⁷ Medical Justice has published a collection of reports examining various aspects of detention as it relates to the health and medical care of detainees, the most recent

¹ For example, the European Court of Human Rights in *Saadi v United Kingdom* held that Article 5 ECHR does not require a State to prove that detention is necessary, as long as it is not arbitrary. However, the UN Human Rights Committee has held that the meaning of ‘arbitrary’ is to be given a broad definition so as to preclude the practice in Australia of mandatory detention, which did not consider whether detention was necessary in a particular case (*A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997)). Although the latter was decided with reference to the International Covenant on Civil and Political Rights, it is clear that the standards applicable to the detention of immigrants differs.

² See, e.g., Greece: *MSS v Belgium and Greece* [2011] ECHR 108; *Louled Massoud v Malta* [2010] ECHR 1197; UK: *BA (R) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin).

³ *R(HA (Nigeria)) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin).

⁴ See, e.g., Bail for Immigration Detainees, ‘Briefing paper on the detained fast track’, March 2008, p. 2; Refugee Council, ‘Briefing: the New Asylum Model’, August 2007, pp.5-6.

⁵ The indicative timescale for the Detained Non-Suspensive Appeals process is 10-14 days, whereas it is intended that the Detained Fast-Track process should be completed in even less time (UK Border Agency, ‘DFT & DNSA – Intake Selection (AIU Instruction)’, available at

<http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/detention/guidance/dftanddnsaintakeselection?view=Binary> last accessed 7 December 2011. Criticism of these timescales can be found in: London Detainee Support Group, ‘No Return, No Release No Reason: Challenging Indefinite Detention’, September 2010; Bail for Immigration Detainees, ‘A nice judge on a good day: immigration bail and the right to liberty’, July 2010; London Detainee Support Group, ‘Detained Lives: The Real Cost of Indefinite Immigration Detention’, January 2009; Information Centre about Asylum and Refugees (ICAR), ‘Fit for Purpose Yet? The Independent Asylum Commission’s Interim Findings’, 2008, Ch. 4.

⁶ ‘Fast Track to Despair: The Unnecessary Detention of Asylum-Seekers’ (May 2011).

⁷ ‘Fast-Track Unfairness: Detention and Denial of Women Asylum Seekers in the UK’ (2010).

of which explores the care of immigration detainees living with HIV and AIDS.⁸ There is also a problem with costs, not only with regard to the real costs of accommodating detainees,⁹ but also regarding pay-outs to individuals who have been unlawfully detained, and their families.¹⁰ The Economic and Social Research Council has recently funded a seminar series to begin in 2014 on the operation and implications of immigration detention in a national and international context. A myriad amount of litigation over unlawful detention which may have, at its root, an inadequate framework, has serious implications, not least for the rule of law. Concerns may range far and wide, for example, engaging the so-called privatization of detention (with private companies managing immigration detention centres), and the imminent adoption of new bail guidelines in the Asylum and Immigration Tribunal.

The subject of immigration detention has also attracted the attention of numerous non-governmental bodies and human rights organizations in recent years. The United Nations (UN) and its agencies have been especially active. For example, the UN Human Rights Council discussed immigration detention in two resolutions from October 2010, focusing in particular on the problem of arbitrary detention and the level of human rights protection afforded to migrants.¹¹ Prior to that, the UN Refugee Agency (UNHCR) Executive Committee meeting in June 2010 featured immigration detention on the agenda for the first time and included it in the Committee's Note on International Protection, stating that to 'address unjustified detention, UNHCR advocates strongly for the use of effective alternatives to detention'.¹² Outside the UN, the International Detention Coalition has published a guide aimed at preventing the arbitrary detention of immigrants and supporting the use of alternatives to detention.¹³ Unlawful practice in a variety of CoE States has also been exposed in reports such as that produced by the Global Detention Project in October 2011 on Switzerland¹⁴ or the Human Rights Watch report on the operation of European Union (EU) FRONTEX in relation to ill-treatment of detainees in Greece.¹⁵ In a similar vein, the European Union Agency for Fundamental Rights published a report toward the end of 2010 on the detention of third country nationals in return procedures, which focuses on detention in the context of the EU Returns Directive (Directive 2008/115/EC) and emphasises that detention should only be considered as a final option.¹⁶

The standards currently in place may be said to be seriously questionable, but in any event require careful scrutiny. The report will not be written from the perspective of a particular interest group, nor from a lobbying perspective. It will therefore add considerably to the volume of important literature already available, including research by human rights bodies and non-governmental organizations (NGOs) and policy documents emanating from government. It is clear that there is a profound need to

⁸ Medical Justice, 'Detained and Denied: The clinical care of immigration detainees living with HIV' (2011). Similar condemnations of detention practice have made its way into media coverage which has, of late, underscored the dissatisfaction with the system and has drawn attention to the fact that it is no longer compatible with a liberal democracy. See, e.g., The Guardian, 'Detention centre deaths spark police investigations', 5 August 2011, available at <<http://www.guardian.co.uk/uk/2011/aug/05/detention-centre-deaths-police-investigations>> last accessed 6 December 2011; *ibid*, 'Immigration detainees held for "excessively long" periods – watchdog', 17 June 2011, available at <<http://www.guardian.co.uk/uk/2011/jun/17/immigration-detainees-held-years-harmondsworth>> last accessed 6 December 2011.

⁹ A report from The Migration Observatory (SJ Silverman, 'Briefing: Immigration Detention in the UK', March 2011) cites the average overall cost of one bed per day in an immigration detention estate as £120, making the annual total for just one estate (which generally operates at 90% capacity) nearly £8.5 million. There are currently 13 estates in operation (see UKBA, 'Immigration removal centres', available at <<http://www.ukba.homeoffice.gov.uk/aboutus/organisation/immigrationremovalcentres/>> last accessed 6 December 2011.

¹⁰ UK Border Agency, 'Annual Report and Accounts 2009-10', 26 July 2010, ss. 19, 21; The Independent, '£12 million paid in asylum seeker claims', 15 August 2011, available at <<http://www.independent.co.uk/news/uk/home-news/12m-paid-in-asylum-seeker-claims-2338008.html>> last accessed 6 December 2011.

¹¹ Human Rights Council, Resolutions 15/16, Human rights of migrants, and 15/18 Arbitrary detention, 15th sess, October 2010.

¹² ExCom UNHCR, Note on international protection, 61st sess, 30 June 2010, para 40. This is perhaps a take-off from the decision in November 2009 of the UN Working Group on Arbitrary Detention to focus on the issue of alternatives to detention as one of its main priorities in 2010. See, 'Report of the Working Group on Arbitrary Detention to the Human Rights Council', Geneva, January 2010, p. 2)

¹³ International Detention Coalition, 'There are Alternatives: A handbook for preventing unnecessary immigration detention' (2011).

¹⁴ M Flynn and C Cannon for Global Detention Project, 'Immigration Detention in Switzerland: A Global Detention Project Special Report' (October 2011).

¹⁵ Human Rights Watch, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece', September 2011.

¹⁶ European Union Agency for Fundamental Rights, 'Detention of third-country nationals in return procedures' (November 2010) pp. 21-9. Other examples include: Amnesty International, 'Irregular Migrants and Asylum-Seekers: Alternatives to Immigration Detention', (April 2009); Parliamentary Assembly of the Council of Europe, 'The detention of asylum seekers and irregular migrants in Europe', (January 2010); Institute for Race Relations, 'Accelerated removals: a study of the human cost of EU deportation policies, 2009-2010', Briefing Paper No. 4 (October 2010); Jesuit Refugee Service (JRS), 'Becoming Vulnerable in Detention' (The DEVAS Project), June 2010; Association for the Prevention of Torture, 'Legal Safeguards to Prevent Torture: The Right of Access to Lawyers for Persons Deprived of Liberty' (March 2010); JRS, common position on 'Administrative Detention of Asylum Seekers and Irregular Migrants in Europe' (March 2008); Amnesty International, 'Migration-Related Detention: A research guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees' (November 2007).

identify the standards of immigration detention in the United Kingdom with a view to ensuring that they are in accord with rule of law standards.¹⁷ derived from national, international and European standards. The lack of consistency and clarity is having an obvious detrimental impact on State detention policy and is contrary to the rule of law. The outcome of the research will be a code of practice which will then guide practice not only in the UK but throughout Europe. The Bingham Centre, as a body entirely devoted to rule of law analysis, nationally and internationally, is ideally placed to carry out this research and drafting, and to disseminate its results with the view to providing a common standard across Europe. In that regard, it is important to note that the Bingham Centre is not strictly a legal organization. One of its important purposes is, like Lord Bingham's book, *The Rule of Law*, to speak to a wider public. Consequently, the work of the Bingham Centre is not tackled solely from a legal perspective, but from a general rule of law perspective which combines the strictly 'legal' with broader policy implications and a study of general impact on individuals' lives and the relationship between citizens (and non-citizens) and government.

II. Methodology

This project is (a) descriptive (identifying current practice in the UK and selective European countries) (b) normative (seeking to identify common European and international standards); and (c) practical (developing a set of **Guidelines** that will streamline and update existing detention standards within a single document that will be widely distributed to policy-makers, and stakeholders).¹⁸

The study will therefore consist of five distinct phases: (1) the practice of immigration detention in the UK; (2) a survey of existing international, regional and domestic standards; (3) drafting of initial Guidelines and stakeholder consultation; (4) finalization of Guidelines and accompanying explanatory report; and (5) publication and dissemination. The research will be primarily desk-based, with flexibility for some travel, should it prove necessary. The Bingham Centre and BIICL have a proven track record in conducting successful research in this manner.¹⁹

Phase 1: Law and practice in the UK. In the UK, the power to detain is derived from statute,²⁰ although the actual implementation of detention is guided by the UK Border Agency's Enforcement Instructions and Guidance (in particular, Chapter 55) and carried out by immigration officials. Its use of accelerated procedures in relation to asylum applications has been approved by the ECtHR in *Saadi v United Kingdom*²¹ and tolerated as a clear and rational policy to assist in achieving a system that functions speedily and effectively. While the Court accepted the Home Office's submission that seven to ten days in detention was not excessive, a 2011 report by Detention Action indicates that 86% of the detainees interviewed on the fast track procedure at Harmondsworth had to wait longer than a week at the beginning of the process before being allocated a legal representative and undergoing a substantive interview. Of these, over half waited for two weeks and a quarter for three weeks or more.²² No clear reasons were given for the delays. This practice undermines the very purpose of accelerated procedures and calls for a reassessment of the Home Office's justification, as the balance of factors has clearly been upset since *Saadi*. Moreover, subsequent UK case law demonstrates that, in practice, the detention period may fall short of or exceed seven to ten days. For example in *S (Jamaica) v Secretary of State for the Home Department*²³ the High Court ruled that detention for a period of 14 days was nonetheless valid and necessary in order to process applicants under the fast-track procedure. This indicates not only that the *Saadi* principle can be successfully applied to justify longer periods of detention, but also that the condition of necessity, in terms of arbitrary detention, may be fulfilled by reference to the need to fast-track applications, rather than the

¹⁷ It is acknowledged that relevant guidelines currently exist, e.g., the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (1999) and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988). However, these suffer a variety of inadequacies, such as being out of date with current standards imposed by the European Court of Human Rights, being limited to specific situations, e.g., asylum detention, and employing differing levels of standards which can lead to confusion and a lack of clarity in respect of minimum standards of treatment. Moreover, there is little evidence that either is considered in current State practice. Research suggests that the issue of the correct application of the UNHCR Guidelines was discussed in the deliberations over the European Commission's proposals to recast the Directive laying down minimum standards for the reception of asylum seekers. See: Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), COM(2008) 815, p 6. Note, however, that although the UNCHR was cited in the 2011 version of the same directive, the Guidelines were not (Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast), COM (2011) 320 final). On the UNHCR Body of Principles – it appears that the UN Working Group on Arbitrary Detention considers the Principles in its evaluation of member State practice, see, e.g., the 2011 Annual Report of the Working Group, A/HRC/16/47/Add.1.

¹⁸ The scope of the Guidelines will not include review or recommendation of detention conditions, as the subject is adequately covered elsewhere by a variety of NGOs, such as those discussed above.

¹⁹ For details regarding the research programme of the Bingham Centre and BIICL, please see <http://www.biicl.org/research>.

²⁰ Immigration Act 1971, Chapter 77, Schedules 2 and 3; Nationality, Immigration and Asylum Act 2002, Chapter 41, Part 4, Section 62.

²¹ [2006] ECHR 732.

²² Detention Action, 'Fast Track to Despair: The Unnecessary Detention of Asylum-Seekers' (May 2011), p.22.

²³ [2007] EWHC 1654.

facts underlying each individual case. The *Saadi* principle will therefore be explored with a view toward assessing the appropriateness of its continued application. Similarly, the study will consider the extent to which the *Hardial Singh* principles²⁴ comply with European and international human rights standards, and whether their continued application is in the best interest of detainees. The *Hardial Singh* principles rely on a determination of whether the detention was reasonable in the circumstances of the particular case. They were recently reaffirmed by the UK Supreme Court in the *Walumba Lumba* case.²⁵ Given the amount of litigation concerning the duration and appropriateness of detention, there is a clear argument to be made that the UK should move away from this arbitrary test and establish concrete guidelines to be followed, thus affording better protection to detainees and saving the public expense currently spent on litigation.

Phase 2: Desk-based survey of applicable legal standards. The Guidelines will draw on existing standards applicable to the detention of immigrants and asylum-seekers within the jurisdictions of the CoE States. These standards will be derived from the principled standards of accountability under the rule of law, domestic, European, international and comparative jurisprudence, international and regional instruments and case law of the ECtHR and the Court of Justice of the EU.

There is no single source setting out the legal standards for detention of migrants. Relevant standards regarding freedom of movement and restrictions of liberty are found within a variety of **binding international and regional instruments** such as the: European Charter of Fundamental Rights;²⁶ Convention relating to the Status of Refugees (1951);²⁷ International Covenant on Civil and Political Rights (1966);²⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms (1950);²⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984);³⁰ Convention on the Rights of the Child (1989);³¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990).³² A number of standards can be also derived from EU directives on asylum procedures (2005/85/EC), reception conditions (2003/9/EC), qualification for international protection (2004/83/EC), the return of illegally staying third country nationals (2008/115/EC), the Schengen Border Code (562/2006/EC) and from current initiatives at EU level aimed at providing a higher standard of human rights protection to asylum-seekers claiming international protection in the EU Member States through specific regulation of the decision to detain, detention itself and the appeals process.³³ In particular, EU proposals on asylum procedures and asylum reception conditions elevate the level of protection of asylum seekers' rights in the EU from the minimum standards that currently derive from the instruments in force. The proposals are aimed at improving asylum procedures and conditions by making them more fair and efficient. If and when adopted, these instruments will significantly alter the landscape relating to detention practice in the EU Member States, and possibly inspire the ECtHR to raise standards under the ECHR. In that regard, it is interesting to note the special relationship between the Court of Justice of the EU and the ECtHR, and the two courts' mutual respect for each other's judgments and interpretation of human rights standards. The recent judgment of the ECtHR in *Sufi v Elmi* ([2011] ECHR 1045) illustrates this relationship. In that case, the Strasbourg considered that EU standards under the Qualification Directive (2004/83/EC), which arguably provide a higher level of protection than that afforded by Article 3 of the ECHR, in fact offer comparable levels of protection. This demonstrates willingness on the part of the Strasbourg Court to ensure that standards between the two regional bodies are consistent, and perhaps suggests that as standards are raised in the EU, the ECtHR will follow.³⁴

A number of **declarations, resolutions and other soft law instruments** currently relate to the issue of detention, including the: Committee for the Prevention of Torture Standards; UN Standard Minimum

²⁴ Derived from *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704.

²⁵ *Walumba Lumba & Kadian Mighty v Secretary of State for the Home Department* [2011] UKSC 12.

²⁶ Signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000; legally binding with the entry into force of the Treaty of Lisbon in 2009.

²⁷ UN General Assembly resolution 429 (V), 28 July 1951, Articles 26, 31.

²⁸ UN General Assembly resolution 2200A (XXI), 16 December 1966. Articles 9, 10, 14.

²⁹ Council of Europe, 4 November 1950, Articles 3, 5, 6.

³⁰ UN General Assembly resolution 39/46, 10 December 1984, Article 11.

³¹ UN General Assembly resolution 44/25, 20 November 1989, Article 37.

³² UN General Assembly resolution 45/158, 18 December 1990, Articles 16, 17, 18.

³³ Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast), COM (2011) 320 final; Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), COM(2011) 319 final; Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM(2009) 551 final.

³⁴ As a further example of elevated standards in the EU, see Case C-357/09 *Said Shamilovich Kadzoev*, which involved an interpretation of Article 15 of the EU Returns Directive 2008/115/EC. In confirming that the 18-month maximum period of detention for the purpose of removal, the Court further stated that the exceptions in the Directive regarding public order or safety are not applicable once the 18-month period has expired.

Rules for the Treatment of Prisoners (1977);³⁵ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988);³⁶ Council of Europe's Twenty Guidelines on Forced Return (2005);³⁷ European Prison Rules (2006);³⁸ UN Rules for the Protection of Juveniles Deprived of their Liberty (1990);³⁹ UN Basic Principles for the Treatment of Prisoners (1990);⁴⁰ UN Standard Minimum Rules for the Administration of Juvenile Justice (1985)⁴¹. The study will also give specific attention to the UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (1999) with a view toward examining the extent to which they may be updated and applied outside the context of asylum detention. The study will also consider reports and recommendations issued by international and national human rights bodies, such as those cited in Part I, above. In particular, it will assess the work of the UN Working Group on Arbitrary Detention.

Considerable attention will be given to the **case law of the ECtHR**. The ECtHR has routinely specified that when contemplating interference of the Article 5 right to liberty, strict observation of the rule of law is necessary.⁴² Several recent judgments, such as *Rahimi v Greece*;⁴³ *Lokpo and Touré v Hungary*;⁴⁴ *M.S.S. v Belgium and Greece*;⁴⁵ and *Khaydarov v Russia*,⁴⁶ are of particular relevance. The appropriateness of the continued application of the principles derived from *Saadi* will also be assessed, especially in relation to its impact on asylum practice in the UK (discussed below). The study will also examine the **case law of the Court of Justice of the EU**, especially as regards provisions of the EU Charter of Fundamental Rights which correspond to the ECHR, but also with regard to case law under EU immigration and asylum legislation.

The study will also examine **law and practice in a selection of CoE States** in order to ascertain the existence of any relevant guidelines, case law or good practice that might inform the study. In particular, the study will consider the nine CoE States which receive the largest influx of foreign nationals annually, plus Greece, in view of its recent trouble before the ECtHR.⁴⁷ For example, in Spain, the detention of an individual must be authorised by a judicial authority after a maximum of 72 hours.⁴⁸ In Germany, asylum-seekers are generally not detained during asylum procedures.⁴⁹ Case law at the ECtHR involving CoE states (see above) will also be invaluable in identifying good and bad practice. This review will likely demonstrate the differences that exist between CoE States in terms of detention practice. At a fundamental level, differences in State practice will arise owing to varying levels of membership in regional organisations. For example, taking into consideration the fact that not all CoE States are EU Member States, practice can be divided into two main categories according to whether a CoE State is also an EU Member State. However, a third sub-category is also revealed: although the UK, Ireland and Denmark are each CoE States and EU Member States, not all of the relevant EU legislation is applicable to them because of individually-negotiated legislative opt-outs. These discrepancies add to an overall lack of clarity and consistency in the standards applicable to immigration detention.

A brief overview of practice in some **jurisdictions outside the CoE** will also be considered. For example, the Australian Human Rights and Equal Opportunity Commission adopted a set of Immigration Detention Guidelines in March 2000 that are applicable to conditions of and treatment in detention centres. In Canada, the decision to detain is automatically reviewed within 48 hours of

³⁵ Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955, and approved by Economic and Social Council resolutions 663 C(XXIV) of 31 July 1957 and 2076(LXII) of 13 May 1977) in *Human Rights: A Compilation of International Instruments Volume 1 (First Part) Universal Instruments* (United Nations, New York and Geneva 2002) 273.

³⁶ Adopted by General Assembly resolution 43/173 of 9 December 1988) UN GAOR 43rd Session Supp No 49 UN Doc A/43/49, 298.

³⁷ Council of Europe, 4 May 2005.

³⁸ Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, Council of Europe, 11 January 2006.

³⁹ UN General Assembly resolution 45/113, 14 December 1990.

⁴⁰ Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990.

⁴¹ UN General Assembly resolution 40/33, 29 November 1985.

⁴² See, e.g., *Nasri v France* [1995] ECHR 24.

⁴³ [2011] ECHR 751, where the Court found a violation of article 5(1), (2) and (4) ECHR due to the length of detention imposed on the claimant and the lack of judicial review.

⁴⁴ [2011] ECHR 1348, finding a violation of Article 5(1) resulting from the unlawful nature of detention during deportation proceedings.

⁴⁵ [2011] ECHR 108, relating to a violation of Article 3 ECHR in relation to detention conditions in Greece.

⁴⁶ [2010] ECHR 685, finding a violation of Article 5(1) ECHR because the applicants had been detained beyond the nationally-prescribed six-month period, and a breach of Article 5(4) because the applicant was unable to have the lawfulness of his detention reviewed).

⁴⁷ According to statistics from the OECD, these States are: Germany, UK, Spain, Italy, Russian Federation, Turkey, Switzerland, France and the Netherlands. However, as the study is already focussing on the UK, the next State in the list (Belgium) will also be included. The OECD statistics are available at <<http://www.oecd.org/dataoecd/30/5/48333589.xls>> (accessed 18 April 2012).

⁴⁸ Global Detention Project, 'Spain Country Profile', available at <<http://www.globaldetentionproject.org/countries/europe/spain/introduction.html>> last accessed 7 December 2011.

⁴⁹ O Field et al, the United Nations High Commissioner for Refugees, 'Alternatives to Detention of Asylum Seekers and Refugees', POLAS/2006/03, Apr 2006, p. 108.

detention, after seven days and then every 30 days thereafter.⁵⁰ The study will also evaluate regional instruments applicable outside the CoE States, such as Resolution 1/08 on Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.⁵¹

In assessing practice at the national, European and international levels, the role and importance of **alternatives to detention** will also be considered. Where possible, methods other than detention should be identified and employed. Alternatives such as bail, bond, sureties, reporting requirements or accommodation in open centres or directed residences would allow migrants (especially asylum-seekers) a greater level of freedom of movement, and be less of a restriction on their liberty. Alternatives have been formally acknowledged as playing a key role in State immigration frameworks by the UNHCR⁵² and the UN Working Group on Arbitrary Detention,⁵³ among others. Encouragement of their use underscores the policy objective of using detention only as a last resort.

Finally, the study will consider the **writings of scholars** who are experts in this field, such as Professor Elspeth Guild,⁵⁴ Professor Kay Hailbronner,⁵⁵ Professor Steve Peers,⁵⁶ Professor Robert Thomas⁵⁷ and the extremely useful handbook on immigration and asylum in the UK by Ian A Macdonald QC and Ronan Toal.⁵⁸

Phase 3: Consultation with stakeholders. Following the desk-based research, views and comments will be sought so that the preparation of the Guidelines is well-informed and well-directed. To that end, those whose views and comments can be invited will be identified. In order to make this stage focussed and informed, the Bingham Centre will circulate a preliminary draft of the guidelines to those whose input is being invited. Included within this important stage, the Bingham Centre plans to organize a one-day workshop in London to which it will invite practitioners, judges, civil servants, representatives from NGOs, and academics from the UK and from the focus CoE States described above in Phase 2. The main purpose of the workshop will be to obtain advice and critique of the preliminary Guidelines by relevant stakeholders in Europe with a view toward ensuring that the Guidelines are practical, of value and have thoroughly considered the relevant issues. Inviting policy-makers, officials and administrators working in the immigration system will ensure that (1) the Bingham Centre receives the viewpoints of those in a better position to inform us of the implications of the research, and (2) the study takes into account legitimate policy concerns. The success of the workshop will depend on the Bingham Centre having the necessary funds to cover the costs of attendees coming from relevant CoE States. The preliminary Guidelines will also be sent electronically or by post to reach legal and policy stakeholders (including regional and international bodies) who are unable to travel to London for the workshop. Moreover, individual meetings with such stakeholders will be organized where possible.

It may also prove beneficial to travel to relevant organizations with a European-wide remit, such as the Council of Europe in Strasbourg, the European Commission in Brussels and the UNHCR in Geneva/Brussels. These research visits would be used as a method in which to further consult with legal and non-legal stakeholders, and will assist in providing a greater understanding of the law and practice uncovered during the desk-based survey in Phase 2 (above), and as Any relationship established with these organizations would also serve as a means of widely publicizing the Guidelines after their completion. The necessity of travel during this phase will be determined toward the end of Phase 1.

Phase 4: The information gained from the public consultation process will be fed into the **finalized Guidelines** and an accompanying **Explanatory Report**. In the main, the report will: (1) consider whether these standards adequately address the problems experienced by detainees and by States in the implementation of domestic and international standards, (2) identify any breaches of the rule of

⁵⁰ Asylum Seeker Resource Centre, 'There Are Alternatives to Australia's system of mandatory detention', based on the findings of the International Detention Coalition 'There Are Alternatives: A handbook for preventing unnecessary immigration detention', (2011).

⁵¹ Inter-American Commission on Human Rights, 13 March 2008, especially Principles VIII, XXVI.

⁵² O Field, *supra* note 49.

⁵³ UN Working Group on Arbitrary Detention, 'Report of the Working Group on Arbitrary Detention', February 2009, paras 67, 75. See also, International Detention Coalition, *supra* note 13.

⁵⁴ See, e.g., 'Asymmetrical sovereignty and the refugee: diplomatic assurances and the failure of due process: Agiza v Sweden and Alzery v Sweden' in J Simeon, *Critical Issues in International Refugee Law: Strategies Towards Interpretative Harmony*, 119-142. (Cambridge: Cambridge University Press, 2010); Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy (Oxford: Hart, 2007); 'The Europeanisation of Europe's Asylum Policy' *International Journal of Refugee Law* 18 (2006): 630-651.

⁵⁵ See, e.g., *European Immigration and Asylum Law*, (Beck/Hart, 2010).

⁵⁶ See, e.g., *EU Immigration and Asylum Law: Text and Commentary* (Martinus Nijhoff, 2006), ed., with Nicola Rogers.

⁵⁷ See, e.g., *Administrative Justice and Asylum Appeals*, Oxford: (Hart Publishing, 2011); R Thomas. "Refugee Roulette: A UK Perspective." In *Refugee Roulette*, 164-186. (New York: New York University Press, 2009); 'Consistency in asylum adjudication: country guidance and the asylum process in the United Kingdom', *International Journal of Refugee Law* 20 (2008): 489-532; 'Judicial review challenges to removal decision', *Immigration Law Digest* 14 (1) (2008): 2-6.

⁵⁸ *Macdonald's Immigration Law & Practice*, 8th ed, (LexisNexis Butterworths, 2010).

law by these standards and (3) make suggestions regarding how the situation might be improved and what standards would be more appropriate. The Guidelines will incorporate best practice as derived from the above survey of standards and may, in some cases, include standards going beyond those provided under existing sources, in order to ensure the maximum level of protection possible. The standards in the Guidelines must be principled, consistent, transparent and clear, and should be adopted by CoE States in their own detention practice.

In order to accurately assess the compatibility of the standards with the rule of law, they will be analysed according to their (1) justification; (2) practical reality; (3) Compatibility with the protection of the rights of individuals (particularly those subjected to detention, not on the basis of any crime); and (4) clarity. In particular, due regard to the Venice Commission's 2011 Report on the Rule of Law and its 'Checklist for evaluating the state of the rule of law in single states' will be made where relevant.⁵⁹

In drafting the Guidelines, it is of the utmost importance to ensure that they adequately protect the human rights of the individuals concerned. States must have clear guidelines on which to base their detention policy. Only then can State practice be viewed as adequately protecting the human rights and fundamental freedoms of migrants and individuals seeking international protection. CoE States must remember that immigrants are not automatically criminals, and as such, should not be treated as prisoners on remand. In view of the fact that the most common category of immigration detainees is people seeking asylum,⁶⁰ it is vital that CoE States employ a legal and political framework that offers the highest level of protection for individual human rights as possible.

In order to ensure that our research and the proposed guidelines are of practical application, the study has engaged a small **Advisory Panel** of experts with practical experience with the subject of immigration detention. The Advisory Panel consists of the Rt Hon Sir Nicholas Blake, President, Upper Tribunal, Immigration and Asylum Chamber and Justice of The High Court of England & Wales, Professor Elspeth Guild,⁶¹ and Professor Robert Thomas.⁶² They will be engaged at all stages of the research, and serve to ensure that the report and Guidelines are practical in nature, and also as a resource in relation to our evaluation of other CoE States, European and international law and policy. The Advisory Panel will be consulted at various stages throughout the research to ensure the quality and integrity of the research, to help maintain its practical character and to assist in making sure that the Guidelines are easy to follow for non-lawyers. The Advisory Panel will also review any ethical issues that may arise from the interviews undertaken in Phase 2. It is not expected that any ethical issues will arise, as the persons being interviewed will be professionals who can be given anonymity (if needed), and who will be made fully aware of the research project's aims and objectives. If there are any ethical concerns raised by the Advisory Panel that cannot be resolved easily, the Board of Trustees of BIICL will be advised and their decision sought.

Phase 5: The finalized Guidelines and Explanatory Report will be **published and disseminated** first, at a conference hosted by the Bingham Centre, especially as Bingham Centre events typically attract a wide audience from across Europe.⁶³ The conference will explore some of the main issues concerning detention practice and human rights and will be the main means of communicating the results of the report and the Guidelines to the public. The Guidelines will then be disseminated to as wide an audience as possible, using the contacts made during Phase 2, but also through research into appropriate government departments in CoE States, as well as immigration and asylum NGOs and human rights bodies. Effort will also be made by the Bingham Centre to ensure that the Guidelines and Report are disseminated in the widest possible manner through online and print news media, through the publication of academic articles and on the websites of stakeholders. It will also make use of its extensive network of contacts, in the UK and abroad, e.g., the CoE Venice Commission, in order to increase dissemination. Finally, the Bingham Centre will consult with relevant UK Government departments in order to determine how best to connect with foreign States.

⁵⁹ The Report is available online at <[http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)003rev-e.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)003rev-e.pdf)> (accessed 3 April 2012).

⁶⁰ Migration Observatory (SJ Silverman), 'Briefing: Immigration Detention in the UK' 08/03/2011, p. 4.

⁶¹ Elspeth Guild is the Jean Monnet Professor of European Immigration Law at the University of Nijmegen, Netherlands and Queen Mary, and is also a practitioner at Kingsley Napley in London. In addition to her wide breadth of publication on European asylum and immigration, Elspeth acts as an advisor for the European Commission and the Council of Europe on an occasional basis. Most recently she assisted the Council of Europe's Human Rights Commissioner with a study on the Criminalization of Migration in Europe (2010). Her most recent monography is *Migration and Security in the 21st Century* (Polity 2009).

⁶² Robert Thomas is Professor of Public Law at the University of Manchester and is a recent recipient of a Nuffield Foundation Grant for his empirical research on the subject of administrative justice and asylum appeals, which was published in a book of the same name by Hart in 2011, and was awarded first place in the Society of Legal Scholar's Peter Birks Prize for Outstanding Legal Scholarship in 2011.

⁶³ Bingham Centre events are publicized through BIICL membership in over 40 States, 25 of which are Council of Europe States.

III. Expected Outcomes, Evaluation and Timetable

Expected Outcomes and Evaluation

The Guidelines will be easy to follow and consulted by people who make decisions relating to detention on a daily basis. Moreover, individuals currently in detention, or facing detention proceedings, and their advisors, will be able to look to them in order to understand their rights, and any limitations thereof. Guidelines can be an important tool in gaining consensus on a subject that would otherwise require lengthy negotiations should the aim be to adopt legislative measures. Guidelines have already proven to be useful in a number of areas. For example, in 2000, the Asylum and Immigration Tribunal (then the Immigration Appellate Authority) adopted the Asylum Gender Guidelines which have been instrumental in its full consideration of all aspects to asylum-seekers' claims for international protection.⁶⁴ Similarly, in 2004 the UK Home Office adopted a set of gender guidelines that has since become part of its asylum assessment policy.⁶⁵ At the EU level, guidelines are typically employed as a way of implementing policies for which it lacks exclusive competence.⁶⁶

Although a UK-based project, the Guidelines and Report will be broader in focus and intended impact. The intention is that principles and clear guidelines should properly be capable of adoption wherever immigration detention is practiced. This includes CoE States, but would, in principle, extend even wider. This will be achieved largely through Phase 3 (consultation) and Phase 5 (dissemination). The Guidelines will provide stakeholders with clear standards and procedures to adequately and consistently protect the fundamental rights of detained individuals or individuals liable to detention in the exercise of State detention policy. They will be used by practitioners, policy-makers and individuals who are detained or who are the subject of detention proceedings. In particular, it is envisioned that the Guidelines will: (1) be considered by State government departments responsible for immigration (e.g., those analogous to the UK Border Agency) in enacting and carrying out their detention policy; (2) assist the judiciary and tribunal systems in the CoE States in their full consideration of these issues; (3) assist immigration officials in the implementation of their policy, either by replacing relevant provisions of current policy, e.g., policy similar to the UK Enforcement Instructions and Guidance, or acting as a companion in the execution of such policy (e.g., in a way similar to the asylum gender guidelines in the UK⁶⁷); and (4) be consulted by individuals liable to detention or currently in detention in order to ascertain the rights applicable to them. In the long-term, it is hoped that the Guidelines would assist the ECtHR in its interpretation of the ECHR and the Court of Justice of the EU with regard to the EU Charter of Fundamental Rights.

The purpose of The Bingham Centre in all cases is not merely to produce research for its own sake; rather, our research is conducted with a practical end in view. Therefore, if we discover violations of the rule of law or injustices of any kind, we shall seek not only to draw attention to them through our research, but actively to promote their resolution and their continued monitoring. One method of achieving this might be to conduct a follow-up study two to three years after this study is completed in order to reflect on the Guidelines and evaluate the extent to which they have achieved the goals intended for them. We would also hope to include the Guidelines in our growing training programme.⁶⁸

Timetable

The project can be completed within nine (9) months of its start date. Months 1-7 will comprise Phases 1-3; months 8 and 9 will consist of the launch and dissemination of the Guidelines.

⁶⁴ Asylum Appellate Authority, 'Asylum Gender Guidelines' November 2000, available at <http://www.unhcr.org/refworld/category.POLICY_GBR_AIT_3ae6b3414_0.html> last accessed 6 December 2011.

⁶⁵ UKBA, 'Gender Identity Issues in the Asylum Claim', available at <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/genderissueintheasylum.pdf?view=Binary>> last accessed 7 December 2011.

⁶⁶ They are frequently used, e.g., in international humanitarian law: European Union Guidelines on promoting compliance with international humanitarian law (updated), OJ C-303, 15/12/2009, p 12; European Union Guidelines on Human Rights Defenders 8 December 2008 (unpublished) available at <http://www.consilium.europa.eu/uedocs/cmsUpload/16332-re02_en08.pdf> last accessed 6 December 2011.

⁶⁷ See Part II, above.

⁶⁸ The Bingham Centre has recently appointed barrister Jonathan Cooper QC as its Director of Training and Education, and is in the advance stages of planning such training in the UK and elsewhere in Europe.

Information pertaining to the Applicant Organization

The Bingham Centre for the Rule of Law

The Bingham Centre for the Rule of Law was launched in December 2010 and is devoted to the study and promotion of the rule of law through comparative research, discussion and training. It aims to be the foremost institution of its kind specifically devoted to this vitally important issue worldwide. The Centre is named after The Rt Hon Lord Bingham of Cornhill KG, a man of outstanding professional and human qualities, and the first judge to hold all three of the most senior posts in the British judiciary – Lord Chief Justice, Master of the Rolls and Senior Law Lord. He was President and Chair of the **British Institute of International and Comparative Law**, in which the Bingham Centre is located.

The Bingham Centre aims to provide a clear and strong influence on the implementation of the rule of law worldwide in the following ways by:

- Carrying out original research, analysis and discussion of rule of law issues of practical relevance to practitioners, judges, government, business, individuals, groups and organizations in the United Kingdom and other countries;
- Organizing high quality seminars, conferences and other events to ensure effective communication about contemporary issues concerning the rule of law;
- Collaborating with those who have expertise and experience in this area;
- Providing support for qualified researchers, interns and visiting fellows from around the world to work in the Centre;
- Being a primary reference point about rule of law issues;
- Presenting a Rule of Law Award for an outstanding contribution to the rule of law;
- Holding an annual Bingham Lecture;
- Providing and facilitating training on rule of law matters world-wide;
- Creating an effective global network of people and institutions, building upon the British Institute of International and Comparative Law's wide network of membership and contacts.

Professor Sir Jeffrey Jowell KCMG QC is the inaugural Director of the Bingham Centre for the Rule of Law, in London and will be overseeing the project. He is also a practising barrister at Blackstone Chambers and Emeritus Professor of Public Law at University College London (where he was twice Dean of the Law Faculty and a Vice Provost). He was knighted (KCMG) in the Queen's Honours List 2011 "for services to human rights, democracy and the rule of law". Educated at the Universities of Cape Town, Oxford and Harvard, he is one of the UK's leading public law scholars, and has authored numerous publications in the area of constitutional and administrative law including, with Lord Woolf, the former Chief Justice of England and Wales, the classic text, *de Smith's Judicial Review* (sixth edition, 2007) and, with Professor Dawn Oliver, *The Changing Constitution* (7th ed. 2011).

As noted above, The Bingham Centre for the Rule of Law operates under the umbrella of the British Institute of International and Comparative Law, which is a **registered charity**. The British Institute continues to pursue a mission established in 1895 to clarify and influence the development of the rule of law on a supranational rather than merely national basis. The Institute promotes the international rule of law and human rights by its activities in the fields of comparative law, international law, conflict of laws, and European law. The Institute's unique contribution is in moving freely over the boundaries that divide these fields of law and bringing out the underlying unities. Its individual projects involve researchers, practitioners and leading academics as advisers, who report to the Institute's Board of Trustees.

Brief Curriculum Vitae of Primary Applicants

Michael Fordham QC, Blackstone Chambers

The Bingham Centre is very fortunate to have as its prime researcher on this project and author of the report and Guidelines, Michael Fordham QC of Blackstone Chambers, one of the UK's leading authorities on immigration, civil liberties and public law. He regularly appears in leading human rights cases and has established a reputation for his arguments in leading cases in asylum and immigration cases, such as the recent *MS (Jamaica) v Secretary of State for the Home Department* [2011] EWCA Civ 938 (Court of Appeal 29.7.11) concerning the legality of fast-track immigration detention, *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 [2011] 2 WLR 671 (Supreme Court 23.3.11), concerning the legality of immigration detention pursuant to an unpublished policy, *R (CJ (Dominica)) v Secretary of State for the Home Department* [2011] EWCA Civ 1238, which concerns the legality of immigration detention of individuals with HIV, and the absence of continuity of retroviral treatment, *Shepherd Masimba Kambadzi v Secretary of State for the Home Department* [2011] UKSC 23 (which applied the judgment in *Lumba*). Mr Fordham also appeared on behalf of the UK Government in the leading Strasbourg case on Article 5, *Saadi v UK* [2006] ECHR 732.

Mr Fordham was appointed a Bencher of Gray's Inn in 2009, and as a Recorder (Civil) in 2010. He has written legal opinions which have been relied on by the Constitutional Affairs Committee in 2003 (legal aid reform) and 2004 (asylum and judicial review); the Work and Pensions Committee in 2004 (health and safety enforcement policy); and the All-Party Working Group on Rendition in 2008 (extraordinary rendition). The Law Commission's working and consultation papers from 2006-2009 on monetary remedies against public authorities arose out of a groundbreaking article Mike had written in 2003.

Mr Fordham is author of the acclaimed *Judicial Review Handbook* (6th edition, 2012). It has been cited with approval at all levels of the Courts including, in the House of Lords/Privy Council: *Boddington* [1999] 2 AC 143, 170E; *Burkett* [2002] UKHL 23 at [38]; *ProLife* [2003] UKHL 23 at [138]; *Cullen* [2003] UKHL 39 at [5]; *Tweed* [2006] UKHL 53 at [36]; *Sharma* [2006] UKPC 57 at [14]; *Bahamas Hotel Maintenance* [2011] UKPC 4 at [23]. He co-edits the quarterly practitioners' journal *Judicial Review* (since 1996) and wrote or co-wrote chapters for the books *Administrative Law, Facing the Future and Understanding Human Rights Principles*. He has written more than 50 published articles in legal journals.

Justine Stefanelli, Maurice Wohl Fellow in European Law, Bingham Centre for the Rule of Law

The other principal researcher on the project will be Justine Stefanelli. Justine has been with the Institute since 2006, and the Bingham Centre since its inception in 2010. At present, she manages the Institute's EU law programme and since her appointment in the Bingham Centre has focused her research on EU rule of law issues. During her time at the Institute, she has performed research on a variety of European law issues, and some public law issues as well. In the latter part of 2007, Justine acted as co-Director on the "Rights and Responsibilities of Citizenship" project which was led by former Attorney General Lord Goldsmith and formed part of a wider review of Governance in Britain conducted by the United Kingdom's Ministry of Justice. In 2008, Justine began work on the Institute's ATLAS project concerning EU humanitarian and human rights law policy. She was also researcher in a study on the Institutional Scope of National Human Rights and the concept of 'public authorities' under the European Convention on Human Rights, specifically looking at the UK's position in this regard (also for the Ministry of Justice). Most recently, Justine has been involved in a Bingham Centre study on the rule of law implications of the UK's decision not to participate in two EU legislative proposals regarding asylum procedures and reception conditions.

Recent publications include: 'Who's Rule of Law? An Analysis of the UK's Decision not to Opt-in to the EU Asylum Procedures and Reception Conditions Directives', *International and Comparative Law Quarterly* (forthcoming); 'Disaster Strikes: Overcoming barriers to the effective delivery of international disaster assistance within the EU', *Journal of International Humanitarian Law* (with Dr Sarah Williams) (forthcoming); 'The Negative Implications of EU Privilege Law Under *Akzo Nobel* at Home and Abroad', *International and Comparative Law Quarterly*, Vol. 60, No. 2, (April 2011) pp. 545-56.

Justine holds a B.A. in Psychology from Duquesne University (US) and a Juris Doctor (LLB) from the University of Pittsburgh (US) with a specialisation in international and comparative law where she was awarded an International Fellowship to study European Law in Brussels. Justine also holds an honours certificate in European Law studies from the Vrije Universiteit Brussel (Belgium), and an LLM in European Law studies from Queen Mary, University of London, specifically focused on the European Internal Market and Justice and Home Affairs. She is licensed lawyer in the US, having passed the bar in the state of Pennsylvania in November of 2005.