

<b>Institution: City University London</b>
<b>Unit of Assessment: 20 Law</b>
<b>Title of case study: Immigration detention law and policy</b>
<p><b>1. Summary of the impact</b>          Immigration detention is a widespread practice in the UK and beyond. Thousands of vulnerable individuals are held for long periods without trial or proper access to justice. Research undertaken at City University London has contributed to improvements in the treatment of detainees through influencing the legal framework and practices that govern detention. As a result, courts and governments have better respected the fundamental rights of detainees.</p>
<p><b>2. Underpinning research</b>          The detention of migrants under administrative powers has become a widespread and costly global practice affecting hundreds of thousands of people each year. It is largely unregulated, giving government officials great power to decide on whom to detain and whom to release. Research undertaken by Dr Daniel Wilsher (Senior Lecturer in Law at City University London since 2004) aimed to develop legal and ethical standards to regulate immigration detention to protect the rule of law. The research proposed standards to inform policy-makers and key actors in the field to improve the balance between migration control and fundamental rights. In particular, arguments were made for the importance of judicial review, time limits on detention and the elimination of detention of vulnerable groups such as children.</p> <p>The work analysed extensively the historical practices and legal framework surrounding the global expansion of immigration detention. The research revealed the vulnerability of the liberty of migrants. It also showed that legal systems had found great difficulty in providing appropriate safeguards for immigrants. The traditional social contract view had remained influential; persons who had not yet been accepted into society found it difficult to claim its protection.</p> <p>The main outputs were a series of academic articles and a book-length study, the first in book form to take a global and historical approach to this important topic of public concern. The book studies the evolution of the practice of detaining immigrants since the days of Ellis Island in the USA to the present development of large-scale facilities around the world. The author was consulted by a wide range of non-governmental organisations (NGOs) and government bodies and sat as an immigration judge deciding detention issues throughout the period.</p>
<p><b>3. References to the research</b></p> <ol style="list-style-type: none"> <li>1. Wilsher D. (2004). The administrative detention of non-nationals pursuant to immigration control: international and constitutional law perspectives. <i>International and Comparative Law Quarterly</i>, 53, 897–934. <a href="https://doi.org/10.1093/iclq/53.4.897">10.1093/iclq/53.4.897</a></li> <li>2. Wilsher D. (2005). Detention of asylum seekers and refugees and international human rights law. In P. Shah (Ed.), <i>The challenge of asylum to legal systems</i>. London: Cavendish Publishing.</li> <li>3. Wilsher D. (2007). The European Union and the detention of asylum seekers. In A. Baldaccini, E. Guild, &amp; H. Toner (Eds.), <i>Whose freedom, security and justice? EU immigration and asylum law and policy</i>. Oxford: Hart.</li> <li>4. Wilsher D. (2012). <i>Immigration detention: law, history, politics</i>. Cambridge: Cambridge University Press.</li> </ol> <p>The work is all published by leading academic publishers or in a leading academic journal and went through rigorous peer review in each case. Shah (2005) is a collection involving a number of leading authors in the field. The arguments in the Wilsher chapter were presented at the prestigious W G Hart workshop in 2005.</p>

#### 4. Details of the impact

By 2011 in the UK, around 27,000 people were being subjected to immigration detention each year, at a cost of £130M. Trends at a global level also suggest increasing use of the practice over the past 30 years. During 2011, for example, the USA detained 429,000 immigrants under such powers, at a cost of \$1.7B. In response, a large number of NGOs worldwide are seeking to improve detention practices. In addition, government officials and judges often have to rule on detention cases. Publication of the research led Wilsher to be approached by external organisations and government bodies in the UK and abroad for advice. The research enabled Wilsher to help create new standards and influence reforms and campaigning to improve the rights of detainees through a number of routes:

1. The UK Supreme Court cited Wilsher's work in the landmark decision in *A and Others v Secretary of State for the Home Department* (known as the 'Belmarsh decision')<sup>5</sup>, one of the most important cases in recent British and global human rights law. It ruled that immigration powers could not be used to detain foreigners without trial simply on suspicion of them having connections to terrorist groups. This led the UK Government to repeal part of the Anti-terrorism, Crime and Security Act and rethink its counter-terrorism strategy. It is extremely rare for an academic to be cited in the UK courts. The case has been cited by other judges in, for example, the UK, Australia, New Zealand, Hong Kong and India on over 150 occasions when courts have had to decide upon the appropriate limits upon immigration detention. Wilsher's work was also relied upon in submissions by Justice in another recent case before the Supreme Court *R (appn) Lumba and Mighty v Secretary of State* [2011] UKSC 12, which ruled on the long-term detention of foreign national criminals post-sentence when the Court ruled that detention could not be based upon secret unpublished policies.
2. A joint report by HM Inspectorate of Prisons and Independent Chief Inspector of Borders and Immigration – 'The effectiveness and impact of immigration detention casework' (December 2012, pp. 30–35) – drew extensively on Wilsher's work. This report was prepared in order to research and suggest reforms to the detention of foreign national prisoners pending their deportation to reduce cost and needless deprivation of liberty. It argued that non-cooperation by detainees with their removal should be dealt with by criminal law and not administrative detention. This was one of the main arguments of the author's book that was extensively quoted. The Home Office response accepted most of the recommendations of the report, in particular the need to resolve cases during the criminal sentence rather than using administrative detention.<sup>6</sup>
3. In 2010 Wilsher was approached to act as an expert consultant to the Turkish Ministry of Interior to assist in drafting their rule-book for immigration detention facilities. This involved detailed discussion and redrafting of the standards that bind detention centres in Turkey, which is a major transit route for migrants. Its detention centres have been heavily criticised by the European Commissioner for Human Rights, Thomas Hammarberg, for lengthy and unlawful detention. Wilsher noted unlawful areas in current Turkish practice that did not specify time limits to detention. The rules were changed, which led to detainees having stronger legal guarantees against arbitrary detention. The final publication, *Refugees, asylum-seekers and illegal migrants* (2011)<sup>7</sup>, Turkish Ministry of the Interior No. 687, contained an important set of performance criteria requiring detention centres to show that all detentions are justified on an ongoing basis.
4. In 2010–2011, Wilsher was approached to act as a member of an expert committee formed by the Equal Rights Trust (ERT), a leading anti-discrimination charity, in the drafting of their report *Unravelling anomaly: detention, discrimination and the protection needs of stateless persons* and of their follow-up *Guidelines to Protect Stateless Persons from Arbitrary Detention* (June 2012)<sup>8</sup>. According to the lead author and Director of ERT, Dr Wilsher was highly influential in shaping the guidelines to reflect international best practice and contributed to a reconsideration of the way that NGOs promote the rights of detained

stateless persons (those who have no nationality, or no effective nationality, and therefore do not benefit from the protection of any state but are also vulnerable to being detained for long periods as a result of the difficulty in identifying a country that will accept them and cooperate with proceedings). Previously, NGOs had unconvincingly attempted to align this group with refugees and asylum-seekers. Wilsher drew their attention to wider jurisprudence to show that this was not necessary. The launch event involved the ERT President Sir Bob Hepple (a world-renowned discrimination lawyer), Sir Stephen Sedley (a retired Court of Appeal judge) and representatives from United Nations (UN) High Commissioner Refugees. One commentator said, '*These Guidelines fill a significant gap in international law standards, and reflect the weight of expert opinion of how some of the most vulnerable people on earth should be treated under international human rights law*' (Colm O'Cinneide, Ireland; Vice-President, European Committee on Social Rights). The Guidelines have been used as training materials by the International Detention Coalition (the leading NGO in the field, with 300 member groups drawn from 50 countries) at their regional civil society training workshops in Asia, Africa and Europe. They have also been used by the Asia Pacific Refugee Rights Network (the leading NGO in the region, which coordinates 140 member groups).

5. In 2010 Wilsher was approached by Bail for Immigration Detainees, the leading UK charity dedicated to policy reform in the field of detention. It liaises closely with the Home Office and the Asylum and Immigration Tribunal. The author provided guidance on their research study *A nice judge on a good day: immigration bail and the right to liberty*, a large study of immigration bail practice by judges across the UK tribunal system.<sup>9</sup> Wilsher was able to draw upon his research into the working of the UK bail system to help design the bail hearing observation framework that the report relied upon for its findings. The report was used as evidence in discussions with the judiciary and the Home Office. The result was a detailed new set of Bail Guidance for Immigration Judges, issued in 2012.<sup>10</sup> This is binding on judges in the UK courts when they are deciding whether to release immigrants from detention. The new Guidance reflects the fundamental rights contained in UN international standards that require detention to be neither unnecessary nor too lengthy. The author was able to contribute further to the development and application of the new bail guidance in his role as a judge at the Asylum and Immigration Tribunal.
6. In 2011–2012 Wilsher was approached to work extensively with the Global Detention Project (GDP) based at the Graduate Institute in Geneva. This is a unique international research and campaigning body that is funded by the Soros Foundation. Its goal is to monitor detention at a global level and provide information for NGOs to use in campaigning and policy change. It has the most extensive reach of any global research body in this field, with an expanding research base that covers some 50 countries. In 2012 Wilsher presented some of his research findings at the GDP to an invited expert audience, including staff from the UN High Commission for Refugees. He has since helped GDP to design a framework for assessing and comparing detention centres across countries by reference to legal standards. The aim is to produce a map of detention practice. Wilsher used his research findings on the nature of different detention regimes to help compile agreed and relevant indices to measure detention, such as duration, access to judicial review and basic standards of care. The database will help researchers and NGOs worldwide to influence detention policy by giving them the best and most consistent dataset. The data categories have been compiled and the data collection is continuing.<sup>11</sup>

This research helped to provide better access to justice for immigration detainees who are often vulnerable and ostracised. It also led to greater accountability of governments in the UK and Turkey in relation to their detention policies. This was achieved by influencing courts, officials and NGOs to change the legal framework and policies surrounding detention. A broader impact was also felt in a number of courts in Commonwealth, which used the research in deciding cases relating to the detention of immigrants.

**5. Sources to corroborate the impact**

5. [www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm](http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm)
6. <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/thematic-reports-and-research-publications/immigration-detention-casework-2012.pdf> (HM Inspectorate of Prisons report);  
[www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/chief-insp/inspection-detention](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/chief-insp/inspection-detention) (Home Office response)
7. Turkish Ministry of Interior Report available on request
8. Equal Rights Trust:  
[www.equalrightstrust.org/ertdocumentbank/UNRAVELLING%20ANOMALY%20small%20file.pdf](http://www.equalrightstrust.org/ertdocumentbank/UNRAVELLING%20ANOMALY%20small%20file.pdf);  
[www.equalrightstrust.org/ertdocumentbank/guidelines%20complete.pdf](http://www.equalrightstrust.org/ertdocumentbank/guidelines%20complete.pdf)
9. Bail for Immigration Detainees. [www.biduk.org/420/bid-research-reports/a-nice-judge-on-a-good-day-immigration-bail-and-the-right-to-liberty.html](http://www.biduk.org/420/bid-research-reports/a-nice-judge-on-a-good-day-immigration-bail-and-the-right-to-liberty.html).
10. Bail Guidance for Judges Presiding over Asylum and Immigration Hearings – Presidential Guidance Note No.1/2012. [www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/bail-guidance-immigration-judges.pdf](http://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/bail-guidance-immigration-judges.pdf)
11. Global Detention Project.  
[www.globaldetentionproject.org/fileadmin/publications/GDP\\_data\\_introduction\\_v2.pdf](http://www.globaldetentionproject.org/fileadmin/publications/GDP_data_introduction_v2.pdf);  
<http://rsq.oxfordjournals.org/content/early/2012/07/04/rsq.hds008.abstract> (Dr Flynn's published version of the ideas developed at the GDP)

Further information to corroborate claims can be provided by:

Richard Wood, Advisor, Turkish Ministry of the Interior

Amal De Chickera, Equal Rights Trust

Dr Adeline Trude, Bail for Immigration Detainees

Dr Michael Flynn, Global Detention Project

Michael Clements, President of the Asylum and Immigration Chamber of the First-tier Tribunals