Ana Aliverti

‘The consul banged the table and said:
"If you've got no passport you're officially dead"…’

These lines from *Refugee Blues* by W H Auden¹ express official bureaucratic indifference and apathy towards undocumented migrants as well as emphasise their lack of ‘voice’. *Crimes of Mobility* focuses on the broad area of the ‘criminalisation of undocumented migration’ by analysing the legislative historical background in Britain, the intensity and breadth of criminal immigration offences created in the years 1997-2010, when the British Labour Party was in power, and illustrating the arguments with the undocumented, who, although silent and ‘spectators in their own case’,² provide a rich seam of case law which Aliverti has studied in the Uxbridge Magistrates’ Court and Isleworth Crown Court, the courts nearest to London’s Heathrow Airport. The lines from the above poem are echoed in the words of a lawyer representing a person charged with the offence of arriving in Britain without a passport, ‘It is straightforward: you don’t have a passport, you destroyed it; that in this country is a crime.’³ Aliverti demonstrates how immigration defendants are dealt with bureaucratically, cursorily and mechanically.

*Crimes of Mobility* consists of six chapters and a conclusion plus an appendix discussing the methodology used. The first chapter clarifies the meaning of key concepts, such as ‘immigration’ and traces the way in which

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² Aliverti, p. 101.
³ Aliverti, p. 90.
immigrants in general, and undocumented migrants in particular, have become a main target of Western liberal democratic state control both in public rhetoric and policy; how the control of outsiders and the marginalised within states is increasingly applied to immigrants through the criminal law; and outlines how the criminalisation of immigration can be seen in three forms of contemporary practice: limited legalisation schemes, expanded border control and mass deportation. One of Aliverti’s central conclusions is that despite the prevalence of criminal legislation in this area, relatively few of these offences are actually enforced in the courts; and that the use of the criminal law against non-citizens is usually confined to specific cases, often involving asylum seekers, for whom the option of removal from the country is not available. For Aliverti, criminalisation is an ‘accidental, mundane, erratic and discretionary phenomenon rather than a planned strategy.…’

In chapter 2, Aliverti concludes that the criminalisation of migration in Britain is not new, having existed in some form since at least the first Aliens Act in 1793. Nevertheless, despite the ‘criminalisation of migration’ identified by Aliverti in a series of Acts from the Aliens Act 1793 to the Aliens Act 1905 and further legislation from 1905 to the 1980s, there is little empirical evidence for the actual use of the criminal law against migrants at this time. In the 1990s, the Asylum and Immigration Appeals Act 1993 and Asylum and Immigration Act 1996 expanded the catalogue of immigration crimes. Aliverti notes that the UK’s ‘legal tradition’ of relying on criminal law to enforce immigration rules has in turn influenced the recent drive to criminalisation at the European level and this in turn has reinforced the continuation and expansion of the system in Britain.

Chapter 3 concentrates on three features, the effect of which was to create what Aliverti describes as a hybrid system between administrative and

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4 Aliverti, pp. 2 and 34.
5 Aliverti, p. 3.
6 Aliverti, p. 35.
7 Aliverti, p. 35.
criminal law: the ‘hyper-activity’ of immigration legislation and immigration crime and the multiple reforms of the system from 1997-2010, a period which saw the creation of 84 immigration related offences (compared to 70 offences for the period 1905-1996)\(^8\) together with the more systematic enforcement of this legislation; the increased use of criminal law directed at undocumented migrants, many of whom were asylum seekers; and the convergence of criminal and immigration enforcement agencies in the new ‘police-like immigration enforcement bureau’, the United Kingdom Border Agency (UKBA) set up in 2008\(^9\) to tackle ‘abuses’ in the asylum system and address ‘loopholes’ in the enforcement of immigration controls. The first aim of the new Immigration and Asylum Act 1999 was to introduce and strengthen the number of measures aimed at ‘deterring’ asylum seekers and ‘economic migrants’ from coming to Britain;\(^10\) it enacted 35 different immigration related offences. Further criminal offences were created by the Nationality Immigration and Asylum Act 2002 which linked unlawful immigration to different forms of organised crime and fraud where foreigners were involved as perpetrators or victims, with a focus on smuggling. In fact, as Aliverti observes from the ‘facilitation of illegal entry’ cases she has researched, most cases concerned British nationals who were prosecuted for offences of assisting the arrival of their asylum seeker relatives, regarded as illegal entrants. The Asylum and Immigration (Treatment of Claimants etc.) Act 2004 added further offences addressing the failure to produce a passport under Section 2, one of the most frequently used immigration-related offences,\(^11\) and the failure to cooperate with immigration authorities under Section 35. The 1999 and 2004 Acts also provide for defences. The latter contains a defence of ‘reasonable

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\(^8\) Aliverti, Fig. 6.1, p. 122 and p. 58.

\(^9\) Aliverti, p. 37.

\(^10\) Aliverti, p. 39.

\(^11\) Aliverti notes that there was an increase of 54% in immigration-related offences at magistrate courts in 2004-2005, largely due to the introduction of this offence, p. 50.
excuse’ in Section 2. The former contains Section 31 a defence for refugees which aims to give effect to Article 31 of the 1951 Refugee Convention. This exempts from penalisation refugees who have committed offences relating to entry to or presence in a state party, provided that certain criteria are met. Aliverti argues that Section 31 restricts the scope of Article 31, for example, it adds two further requirements under Section 31(1)(c) and Section 31(2); and it was made a defence rather than a ‘ban on or suspension of prosecution’ which means that prosecutions can be brought before refugee status is verified. Aliverti observes that there are problems with the defence as she notes that immigration officials consider that people who have not come directly to Britain are not covered by the defence.

Chapters 4 and 5 address the way in which the criminal-immigration system works in practice, drawing on empirical data from records and hearings at courts and interviews with government officials and practitioners, and describe the general features of immigration crimes resulting in prosecution. Aliverti concludes that the data reveals that many of the numerous immigration-related crimes are rarely enforced with offenders being administratively removed rather than criminally prosecuted. Her research reveals that the most important reason for the prosecution of documentation offences is where removal from the country is not an option. The prosecution of these crimes contrasts with policy statements which emphasise that the criminal law should be reserved for the most harmful and serious crimes according to the government’s ‘harm matrix’. Paradoxically, magistrates and judges, when sentencing these offenders, consider crimes, viewed by UKBA as low level crimes, as so serious that only imprisonment can be justified in order

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12 This was inserted in part to meet the UK’s obligations under Article 31 of the 1951 Refugee Convention. The courts have interpreted it as applying to persons who are unable to obtain a passport in their home country: see Soe Thet v Director of Public Prosecutions [2006] EWHC Admin 2701.
13 However, it is not clear from the case law that these are restrictive in practice: R v H [2008] EWCA Crim 3117 and R v Mateta and others [2013] EWCA Crim 1372.
14 Aliverti, p. 46.
15 In fact, in many cases, the defence is probably applicable: see, for example, R v Mateta and others [2013] EWCA Crim 1372.
16 Aliverti, pp. 76-78.
to deter others. Aliverti argues that deterrence alone is a weak justification for punishment in the absence of empirical evidence to prove the effectiveness of sentencing in reducing immigration crimes; that the principles of harm and proportionality are compromised by the penalisation of conduct which has no direct victims and which could in any case be dealt with in ‘less intrusive and burdensome interventions’; and that the deprivation of liberty which invariably results is disproportionate. Aliverti also finds that it is rarely those who take advantage of the ‘illegality’ of immigrants who are prosecuted, a finding which goes against official rhetoric announcing tough action against the most harmful offenders. For example, the few trafficking convictions contrast with the position of ‘victims’ proceeded against for document fraud when trying to exit the country to escape from their traffickers or working illegally. Aliverti concludes that the labelling of these offences as crimes is contentious and that policy objectives may be contradicted by implementation on the ground for reasons relating to prosecution targets in enforcement teams, scarce resources leading to a focus on documentary rather than more complex offending as well as inconsistencies between policies and regulations. Defences, which are invariably connected to the asylum or immigration background of the defendant, are poorly understood by prosecutors and defence lawyers, are rarely raised and defendants are usually advised to plead guilty. The cases are characterised by speed, a lack of concern with issues of proportionality, a general perception amongst those involved that these cases are ‘unproblematic’, with traumatised defendants facing language barriers, a lack of knowledge of the criminal process and a lack of financial resources with the result that ‘foreignness plays a crucial role in the decision to plead guilty’. Aliverti describes immigration crimes as being treated like any other in the

17 Aliverti, p. 78.
18 See for example, R v L, HVN, THN and T (Children’s Commissioner for England and the Equality and Human Rights Commission intervening) [2013] EWCA Crim 991.
19 Aliverti found that 95% of defendants in immigration cases at Uxbridge Magistrates’ Court between 2008 and 2009 pleaded guilty, p. 99; and defences were mentioned in 7 out of 229 cases at Uxbridge Magistrates’ Court and in ten out of 99 cases at Isleworth Crown Court, p. 93.
20 Aliverti, p. 90.
criminal justice system and that ‘this formal equality may … in itself [be] a cause for concern’ resulting in ‘erasing … the suffering of the accused’.²²

In her concluding chapters, Aliverti argues that criminalisation is motivated by an instrumental logic which conceives of criminal law as an additional tool with which to enforce compliance with administrative norms. While criminal offences have historically in Britain been seen as a necessary partner to immigration enforcement, Aliverti states that the sanctions attached to immigration breaches are not only regulatory but effectively have, as an ultimate goal, the expulsion of immigrants. If the aim is to expel a person in these circumstances, criminal punishment becomes ‘redundant and unfit to deal with immigration offenders’.²³ She concludes that immigration crimes ‘create’ crime; they permit the use of state power with few procedural safeguards; are disproportionate to the harm done; and the normative justification of punishment for immigration crime remains weak. She concludes that criminal law has no role to play in the regulation of immigration.

This is a well-researched book which does much to shed light on the under-researched area of criminalisation of immigration breaches and their enforcement. Aliverti’s focus is a broad and sweeping analysis. She notes that the distinctive features of trafficking offences ‘show the difficulties in grouping together different ‘immigration crimes’ and analysing them as a homogenous category’.²⁴ There is scope for further research in relation to these different ‘immigration crimes’; the intensification of immigration crime in Europe; as well as research which gives a voice to immigrants, including the undocumented.

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²² Aliverti, p. 115.
²³ Aliverti, p. 138.
²⁴ Aliverti, p. 127.