

Research Paper

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A suspect population? An examination of bail decision making for foreign national women in criminal courts in England and Wales

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Executive Summary

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Background

By law in England and Wales, defendants in criminal proceedings have a right to bail while awaiting trial or sentencing. The right to bail can be overturned only as an exceptional measure of last resort. In these instances, detention in custody known as custodial remand, may be imposed. Foreign national women are more likely to be remanded in custody while awaiting trial or sentencing than British women, often for less serious offences. This group makes up a significant and increasing proportion of prison admissions on remand, raising concerns that national and international standards of justice are being eroded. What's more, research shows that - far from a last resort - custodial remand is *overused* for women, whose complex needs and caring responsibilities make this experience particularly devastating.

Widely recognised as a vulnerable and disadvantaged group in the criminal justice system, foreign national women are almost entirely absent in research and official data are lacking. This study seeks to explain the disparity in treatment of foreign national women by focusing on the context and processes in which bail decisions in England and Wales are made. The findings are based on eleven interviews with stakeholders including: support workers, defence lawyers, prosecutors and four cases involving foreign national women observed in two London courts. It is the only study of its kind and provides insights to illuminate and instigate a wider transformation in the use of custodial remand.

Key findings:

This study found systematic failures to respect the right to bail for foreign national women in practice. Four main themes emerged:

1. **Disparate treatment by the police:** Custodial remand is much more likely if police detain defendants or recommend custodial remand. Both are common for foreign nationals and those perceived to be foreign. Due to difficulties gathering information and immigration duties, they are treated as a greater bail risk.
2. **Poor participation at bail hearings:** Measures introduced to cut costs and enhance efficiency - including cuts to legal aid, privatised translation services and remote hearings - discriminate against foreign national women. As a disadvantaged and vulnerable group they are less equipped to dispute suspicions and claim their rights. They are reduced to spectators rather than participants to the detriment of their case.
3. **Foreignness as grounds for suspicion:** With the expansion of border control in the criminal justice system, foreignness has become grounds for suspicion in bail cases. There is an assumed lack of community ties and a risk of absconding overseas. While more likely to be the victims of trafficking and modern slavery, foreign national women are perceived as doubly deviant: transgressors of the law and gendered expectations of women. Even when recognised, victims without a safe address can be remanded in custody for their own protection.
4. **Material disadvantages:** Material factors including no recourse to public funds, the ban placed on work and study and lack of legal status, place foreign national women at a significant disadvantage to access alternatives to custodial remand. On-going immigration proceedings or deportation orders make custodial remand more likely.

Collectively, these findings raise questions about whether the bail system – while seemingly benign and routine - can be described as procedurally fair.

Conclusion and recommendations

Bail decisions are a subjective assessment of risk: there are no certainties to a defendant's future behaviour, only predictions. Foreignness has become a key criterion through which risk of absconding is assessed. Racialised anxieties around immigration and crime have led to a rise in a risk-averse culture that is directed at foreign nationals. In this framework, ideas about "good" and "bad" migrants skew risk assessment and drive punitive responses. These biases place a disproportionate burden on foreign national women in a system geared around cuts and efficiency. They emerge as a suspect population to be contained and excluded through custodial remand.

Following Brexit and the coronavirus pandemic, this systematic discrimination is only likely to become more prevalent and entrenched. Further qualitative research is needed to monitor bias and disproportionate outcomes for foreign nationals and the impact of remand decisions. There is an urgent need for criminal justice data disaggregated by gender, ethnicity and nationality to be collected and regularly published, to understand the inequities embedded in bail decision making.

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