

Research Paper

2020/01



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

May Robson

www.thegriffinsociety.org

Acknowledgements

First and foremost, thank you to all the research participants who gave time and expertise to this study. I was touched by your kindness, dedication and sense of justice.

Thank you to the Griffins Society for the unique opportunity to pursue this research. In particular, Chris Leeson for her guidance, support and patience whilst driving this scheme forward in what has proved to be an extremely challenging year. I would also like to thank my supervisor Professor Anthea Hucklesby, Head of the School of Social Policy at the University of Birmingham. Without her scrupulous attention to detail, expertise on bail and generosity with her time, this study would not have been possible. I am grateful also to my reviewer for their insightful comments.

I would also like to thank Katy Swaine Williams at the Prison Reform Trust and the various academics that took an interest in my research and steered me in the right direction, as well as sharing their data and contacts with me.

Finally, to my sister Elly, my mum Carol and my partner, James, I could not have done it without your eyes, ears and encouragement.

Contents

	Page
Abstract	5
Chapter 1: Introduction	6
1.1 Foreign national women: the rationale	6
Chapter 2: Literature review	9
2.1 Introduction	9
2.2 An overview of bail law in England and Wales	9
2.3 The prison remand population in England and Wales	10
2.4 Foreign nationals as a suspect population and the policy response	12
2.5 Women on custodial remand	14
2.6 Summary	15
Chapter 3: Methodology	16
3.1 Introduction	16
3.2 Data collection and methods	16
3.3 Limitations of the data and sample	17
3.4 Mode of analysis	17
Chapter 4: Findings	18
4.1 Disparate treatment by the police	18
4.1.1 The Prosecution	18
4.1.2 The Defence	19
4.1.3 Summary	
4.2 'Just so lost in the system': poor participation at bail hearings	20
4.2.1 Alien and alienating court proceedings	20
4.2.2 Relationship with legal representatives	21
4.2.3 Interpreters	22
4.2.4 Remote hearings	24
4.2.5 Summary	24
4.3 'Foreignness' as grounds for suspicion: the content of bail decision-making	25

	Page
4.3.1 Where are you from? The Nationality requirement	25
4.3.2 Community ties	26
4.3.3 'Good' and 'bad' migrant women	27
4.3.4 Summary	30
4.4 'No hope' cases: material disadvantages	30
4.4.1 Alternatives to remand	30
4.4.2 Immigration proceedings and remand	32
4.4.3 Summary	32
Chapter 5: Conclusion and key findings	33
Key findings	33
Bibliography	35
Appendices	41
Appendix 1: Participant information sheet	41
Appendix 2: Participant consent form	43

Abstract

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 and custodial remand imposed, only as an exceptional measure of last resort. Foreign national women are more likely to be remanded in custody than their British counterparts, often for less serious offences. They make up a significant and increasing proportion of prison admissions on remand, raising concerns that national and international standards of justice are being eroded. This study seeks to explain these disparities by focusing on the context and processes in which bail decisions in England and Wales are made. It draws on testimony from support workers, lawyers and prosecutors, as well as court observations, to explore the issues that arise for foreign national women in bail proceedings. Bail decisions are a risk assessment exercise: there are no certainties to a defendant's future behaviour, only predictions. This study argues that the expansion of border control in the criminal justice system has led to the rise of a risk-averse culture that is directed at foreign nationals. Intimately linked to racialised anxieties around immigration and crime, 'foreignness' itself has become grounds for suspicion when assessing criminality and risk. This drives punitive bail decisions for foreign national women, who are treated as a suspect population: perceived not to belong and so at risk of absconding. Widely recognised as a vulnerable and disadvantaged group, they are less equipped to dispute these suspicions and have limited access to the alternatives to custodial remand. This is the only study of its kind and provides insights to illuminate and instigate a wider transformation in the use of custodial remand.

Chapter 1: Introduction

By law in England and Wales, defendants in criminal proceedings have a right to bail while awaiting trial or sentencing. This is a fundamental human right based on the right to liberty and the presumption of innocence enshrined in the Human Rights Act 1998, the European Convention on Human Rights (ECHR), and the International Covenant on the Protection of Civil and Political Rights. If courts decide the risk of releasing a defendant is too great, the right to bail can be overturned and detention in custody imposed, known as custodial remand.

While custodial remand is not legally a punishment, it is experienced as such. The last government review of remand prisoners found that compared to sentenced prisoners many had 'a poorer regime, less support and less preparation for release' (HMIP, 2012: 7). The experience has been shown to have serious and sometimes irreversible impacts on health, livelihoods and families, as well as adverse effects on case outcome. Defendants are more likely to plead guilty, less likely to be acquitted, and more likely to receive a custodial sentence (Hucklesby, 2011). For these reasons, custodial remand should be acceptable only as an exceptional measure 'of last resort' (Fair Trials, 2016).

Foreign national women are more likely to be remanded in custody than British women, often for less serious offences (MOJ, 2020a). They make up a significant and increasing proportion of prison admissions on remand, raising concerns that compliance with national and international standards of justice is being eroded in practice. What's more, recent research suggests that - far from a last resort - custodial remand is over-used for women, whose complex needs and caring responsibilities make this experience particularly devastating (Prison Reform Trust, 2004; Howard League, 2020). Despite this, there has been little research into the experience of bail decision making for foreign national women and official criminal justice data are lacking.

This study seeks to explain these disparities by focusing on the context and processes in which bail decisions are made. It does so by building on empirical research into the experiences of foreign national women in the criminal justice system more broadly (Gelsthorpe and Hales, 2012; PRT, 2012; 2018). As well as, bringing together – for the first time – research and statistics on foreign nationals, women and remand. Interviews with legal professionals and support workers, as well as court observations were conducted to gain insight specifically into their experience of bail proceedings.

Bail decision making is a *subjective* assessment of risk. There are no certainties - only predictions - as to a defendant's future behaviour. As such, this study argues that the expansion of border control within the criminal justice system has led to the rise of a risk-averse culture directed at foreign nationals. Intimately linked to racialised anxieties around immigration and crime, 'foreignness' matters in bail decisions: contributing to suspicion when assessing risk. Multiply disadvantaged, foreign national women emerge as a suspect population: perceived as not belonging and so likely to abscond. As a result, they are subject to stringent suitability requirements and punitive responses.

1.1 Foreign national women: the rationale

Fewer women enter the criminal justice system than men. In a system that is primarily oriented towards male citizens, the political and ethical aims of adopting foreign national women as the focal point of this study are three-fold: firstly, to acknowledge and foreground their distinct experiences and, in doing so, *make them matter* (Butler, 1993; Bosworth and Kaufman, 2012); secondly, to draw attention to the salience of border control in the criminal justice system over the past decade in producing and reinforcing racial inequities; and thirdly, to build a persuasive critique of the bail decision-making process that can illuminate and instigate a wider transformation in the use of custodial remand.

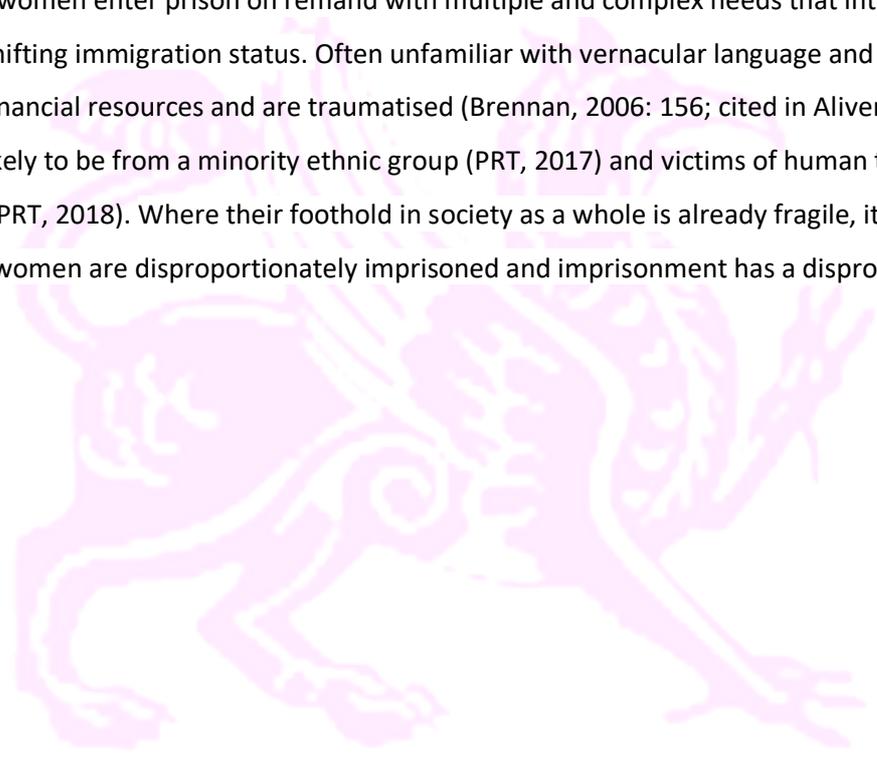
As outlined by The Migration Observatory (2019), there is no consensus on a single definition of 'migrant'. Migrants may be defined by foreign birth, by foreign citizenship, or by long-term or short-term settlement in a new country. From a legal perspective the key distinction between non-citizen and citizen respectively is 'persons of subject to immigration control', who need permission to enter or remain in the UK, and those 'not subject to immigration control', who do not (Anderson & Blinder, 2019: 2). However, in practice this does not reflect the complexities of citizenship and who is a 'migrant' is often unclear.

In the case of offenders identified as foreign national, non-citizen status makes them vulnerable to deportation. The UK Borders Act 2007 made deportation mandatory for foreign nationals serving sentences of over a year (save for when it violated an asylum or human rights claim). For these individuals, the purpose of punishment is transformed in the name of border control. Deportation rather than rehabilitation, is the goal. The Nationality and Borders Bill, which is moving through parliament, intends to increase the scope to deport foreign national offenders. Crucially for this

research, where the immigration status of a foreign national suspected or charged with an offence is unclear, 'criminal agencies generally proceed on the basis that they are liable for deportation or removal' (PRT, 2018: 7).

Within this category, there is wide recognition by criminal justice policy-makers and practitioners that women are particularly vulnerable. The Corston Report (2007: 28) described foreign national offenders as 'a significant minority who have distinct needs and for whom a distinct strategy is necessary'. This was embraced more recently by the Ministry of Justice's (MOJ) Female Offender Strategy (2018a: 25), which expresses a commitment to address with the 'unique challenges' they face.

Foreign national women enter prison on remand with multiple and complex needs that intersect with precarious and shifting immigration status. Often unfamiliar with vernacular language and culture, they frequently lack financial resources and are traumatised (Brennan, 2006: 156; cited in Aliverti, 2013). They are more likely to be from a minority ethnic group (PRT, 2017) and victims of human trafficking or modern slavery (PRT, 2018). Where their foothold in society as a whole is already fragile, it is clear that foreign national women are disproportionately imprisoned and imprisonment has a disproportionate impact on them.



Chapter 2: Literature Review

2.1 Introduction

Research into foreign national women's experience of the criminal justice system is sparse. To understand to understand the inequities embedded in bail decision making for this group, I begin by briefly outlining the laws governing bail and available statistics collated from Freedom of Information (FOI) requests and official sources to examine whether foreign national women are more likely to be remanded in custody. I then review existing literature on foreign nationals in the criminal justice system to examine the ways in which the growing interdependence of border and crime control shape their pre-trial experiences. Finally, I critically appraise the extent to which existing literature on women in custodial remand is attentive to their ethnicity, socio-economic position and immigration status.

2.2 An overview of bail law in England and Wales

The Bail Act 1976 sets out the legal framework governing bail decisions in England and Wales. It stipulates that a defendant's right to bail can only be overturned – and the defendant remanded in custody – if certain specified exceptions apply. The court must have substantial grounds to believe that – if released on bail (with or without conditions) – the defendant would fail to surrender, commit further offences, interfere with witnesses, or otherwise obstruct the course of justice, whether in relation to themselves or any other person (Bail Act, 1976: s.1, para. 2). A number of other exceptions apply, including insufficient information for the court to make a decision and for the defendant's own protection (Hucklesby, 2011).

Unlike sentencing, which is determined according to the seriousness of the offence, bail decisions are made in relation to a *prediction* of the defendant's future behaviour. Courts have to balance this *perceived* risk to the victim, the public and the course of justice against the defendant's right to liberty. However, what constitutes 'substantial grounds' to believe that the defendant will not comply with bail is not defined, affording the court wide discretion. Consideration is structured by a range of factors outlined in the Bail Act 1976 (s.1, para. 9), including: the nature and seriousness of the offence and likely

sentence; the defendant's past behaviour, including offending and bail history; and their current circumstances, mainly in terms of their community ties (also not defined).

To avoid or minimise risk and so reassure decision-makers of compliance, the court has wide discretionary powers to impose conditions on the grant of bail. There are three types of requirement, which can be combined or used alone: a surety, a security, and conditions. While there are no official statistics recorded on the use of conditional bail, research by Anthea Hucklesby (2011: 13) concluded that 'there is little doubt that the rise of a risk-averse culture in criminal justice has contributed to the increase in the use of conditions'.

Justice depends on courts applying exceptions to bail rigorously and consistently, in compliance with the presumption of innocence and the right to liberty. In the next section, I summarise evidence that suggests that, while seemingly benign and routine, the bail system tends to systematically disadvantage women who are, or are perceived to be, of foreign nationality.

2.3 The prison remand population in England and Wales

England and Wales has one of the highest per capita prison populations in Europe and those on remand comprise a relatively small proportion (circa 15%) (ICPR, 2021).¹ However, unlike the sentenced prison population, the remand population is in constant flux and turnover is high: so many more individuals are incarcerated, albeit for shorter time periods.

Criminal justice data disaggregated by gender, ethnicity and foreign national status and the use of custodial remand are not routinely collected or published. What we do know is that in the last five years, the number of women on remand as a proportion of women in prison has remained stable at around 15% and the majority of these women are untried (Table, 1 – MOJ 2015-2019)

¹ As of 31 December 2020.

Table 1: Female prison remand population: as of 31 December in each year

Year	Total women in prison	Total women in prison on remand	% Total women in prison who are on remand	Total women in prison on remand, untried	% women in prison on remand who are untried
2015	3825	551	14.4%	422	76.5%
2016	3831	552	14.4%	385	69.7%
2017	3919	577	14.7%	429	75.3%
2018	3760	471	12.5%	349	74.0%
2019	3703	568	15.3%	399	70.2%

Data made available through FOI requests submitted by the Prison Reform Trust (PRT) shows that on average 16% of women admitted to prison on remand are foreign nationals (Table 2 –a).² This increased slightly between 2017 and 2019. Furthermore, a higher proportion of these women were remanded for less serious offences than was the case for British national women. (Table 2 – MOJ, 2020a).³

Table 2: Female remand prison admissions by nationality & offence group, England and Wales, 2017- 2019.

Year	A. Total Female Prison Admissions on Remand	B. Foreign national women (as a % column A)	C. Foreign nationals, less serious offences (as a % column B)	British nationals less serious offences (as a % [B-A])
2017	4147	581 (14.0%)	500 (86.0%)	2,563 (72.0%)
2018	3864	659 (17.0%)	551 (84.4%)	2,305 (71.9%)
2019	3764	656 (17.4%)	564 (86.6%)	2,172 (70.0%)
Total	11,773	1,896 (16.1%)	1,613 (85.1%)	7,040 (71.2%)

² An admission counts the number of individuals who either enter custody or who have a change in their custody status in the reporting period (MOJ, 2020b).

³ Where serious offences are defined as violence against the person, sexual offences, robbery and possession of weapons versus less serious offences defined as theft, criminal damage and arson, drug offences, public order offences, miscellaneous crimes against society, fraud, summary non-motoring and summary motoring.

A recent briefing by the Howard League for Penal Reform (2020) has raised concerns that custodial remand is disproportionately used for women who could be managed safely in the community. On average female offenders commit less serious offences than male offenders, with around 9 in 10 women held in prison on remand considered to be at low or medium risk of serious harm (MOJ, 2018a). Those awaiting trial are considered legally innocent and may be subsequently acquitted, while those awaiting sentencing may be given non-custodial sentences, such as a fine or community service. In 2019, 65% and 40% respectively of women dealt with by the magistrates' and the Crown Court who were remanded into prison did not subsequently receive a custodial sentence (Howard League, 2020).

While foreign national status and ethnicity are distinct attributes, they are often conflated at court and it is interesting to note that the majority of women from BAME groups who are remanded into custody do not receive a custodial sentence: 73%, 79% and 78% respectively of women from Black, Asian and 'Chinese and other' groups compared with 59% of women from white groups (Howard League, 2020). This data raises two interrelated questions. First, why are so many women denied bail and remanded in custody, who do not subsequently receive a custodial sentence? Secondly, why is this more pronounced for women from BAME groups?

The 2017 Lammy Review of racial disparities and disproportionality in the criminal justice system called for the government to adopt a principle of 'explain and reform'. However when adopted, this did not apply to women with foreign national status meaning that the intersection of race and foreign national status cannot be explored from published statistics. This has impeded understanding of why they make up a significant minority of the remand prison population (PRT, 2018). This study seeks to address the knowledge gap in bail decision making and explain some of the processes by which this group are disadvantaged and treated unequally in the bail system.

2.4 Foreign nationals as a suspect population and the policy response

The 'Foreign Criminal' occupies an important place in contemporary discourse about citizenship and security, identified as a threat that must be removed from the nation. In April 2006, a political and media-fuelled scandal erupted over the Home Office's failure to consider the deportation of 1,203 foreign national prisoners after serving their prison sentence (Bhui, 2007). Despite the small numbers involved, the incident was framed as a national crisis: tabloids were awash with sensationalist headlines about dangerous foreign criminals, notably 'murderers, rapists and paedophiles', now on the loose (Noronha, 2015: 14). This highly racialised and gendered discourse framed the 'Foreign Criminal' as the

most extreme threat and the inherent risk posed by all migration (Noronha, 2015; Griffiths, 2017). Previously labelled 'the forgotten prisoners' (Cheney, 1993; PRT, 2004), this newfound suspect population has shaped criminal justice policy and practice ever since.

The scandal saw the Home Secretary resign and the Home Office restructured to prioritise deportation. Removing judicial discretion and any consideration of individual circumstances or length of residence, the UK Borders Act 2007 introduced the *automatic* deportation for all non-European Economic Area (EEA) offenders sentenced to at least 12 months imprisonment and EEA offenders sentenced to at least 24 months imprisonment. Manifesting in targets and milestones, today the government's strategy is clear: 'we aim to deport all foreign national offenders as the earliest opportunity' (BBC, 2011). Deportations following a criminal conviction increased five-fold, from 1000 in 2005 to around 5,400 in 2008 (Noronha, 2015). Numbers have remained relatively stable, averaging 5,300 a year between 2010 and 2019 (Home Office, 2020a). Deportation – posited as a national matter 'conducive to the public good' – has become the primary purpose of punishment for non-citizens (Borders Act, 2007).

This drive to deport has added ideological cover to the expansion of border control within the criminal justice system. A combination of structural reform and far-reaching legislation designed to enlist police (Parmar, 2019), prisons (Kaufman, 2015) and courts (Commons, 2020) in immigration enforcement has been introduced to expedite the deportation process. These developments sit within a wider portfolio of policies spearheaded by Theresa May as Home Secretary, which as she stated: 'aim to create, here in Britain, a really hostile environment for illegal immigrants' (Hill, 2017).

Alongside more obvious legislative and policy changes, border control also permeates the criminal justice system in more insidious ways. As noted by Mary Bosworth et al (2017, 43) the focus becomes 'the *who* of the offenders rather than on the seriousness of the crime'. Nationality is sanctioned as a filtering mechanism in almost every aspect of criminal proceedings, intensifying the racial discrimination already proven to be inherent to the criminal justice system. As has been recognised in policing (Parmar, 2018; 2019), within prisons (Kaufman, 2012), and in courtrooms (Commons, 2020; Lousley 2020). However, Luke de Noronha (2019) points out that approaches to the study of race in the criminal justice system often exclude immigration status or else overlook the racialised aspects of the immigration system.

Under the guise of efficiency and border security, risk replaces justice as the regulative ideal of crime control coming hand-in-hand with increased punitiveness and exclusionary potential (Zedner, 2003). In practice, those considered deportable – foreigners and those perceived to be foreign - are liable to spend more time locked up than their British counterparts; be that in police custody (Transform Justice, 2020), in prison or in immigration detention awaiting deportation post-sentence (BID, 2014) or - as this study shows - on custodial remand. They emerge as an inherently suspect population to be managed, contained and excluded.

This is reflected in the high incidence of self-harm and suicide among foreign national prisoners. The latter accounted for 17% of all self-inflicted deaths in custody between 2004-2013, with a huge spike in 2007, which the Institute of Race Relations identified correlates with the deportation drive (Webber, 2014). In this light, scholars have argued that ‘cimmigration control’ (Stumpf, 2006) constitutes a *bordered* form of penalty: a two-tier system of justice characterised by diminished standards of justice for those labelled foreign national (Webber & Fekete, 2010; Aas, 2014).

2.5 Women on custodial remand

There is much literature available on the harmfulness of prison for women and their dependents (Bosworth, 1999; Corston, 2007; MOJ, 2018a). Under-resourced and over-crowded, prisons are unable to meet the multiple and complex needs of women entering custody. According to the Female Offender Strategy (MOJ, 2018a: 3) two-thirds of female offenders are survivors of domestic abuse with chaotic lifestyles involving substance misuse. The adverse impact of custody is stark. Women prisoners are twice as likely as men to report anxiety and depression and more likely to report symptoms of psychosis (MOJ, 2018a: 6). In 2019, self-harm was five-times more common in female than in male establishments (MOJ, 2020c).

The MOJ no longer publishes data on the length of time on remand. However, a 2020 parliamentary question revealed that between 2015 and 2019 a quarter of all adult women remanded pre-trial were spending at least 11 to 13 weeks on remand, while half spent at least 4 to 5 weeks (UK Parliament, 2020). Where more female offenders are primary carers than their male counterparts, even short periods in custody on remand lead to a disproportionate impact on children and families (MOJ, 2018a).

Poor conditions on remand are likely to further entrench these gendered disparities. Prisons are not incentivised to work constructively with women they receive on remand for short periods. According to the Howard League (2020), in 2019 there were 1917 instances of self-harm by women on remand, the highest number in a year since 2011. Certain privileges and rights afforded on remand often fail to materialise in practice. HM Inspectorate of Prisons (HMIP, 2012) reported that remand prisoners were often unaware of the support available to them, which may impede their ability to appeal bail decisions.

Outside of the work of a few scholars (Gelsthorpe and Hales, 2012; PRT, 2012, 2018) foreign national women are rarely considered in this literature. The first government review of foreign national prisoners as a group, pointed to systematic failures in their support, care and management (HMIP, 2006). Primary issues identified were: access to independent immigration advice, language barriers, lack of family contact, which was deemed especially problematic for women, as well as racism and discrimination common to BAME prisoners. Despite commitments made by the MOJ to improve outcomes for foreign national women, the PRT (2018) has found that specialist support to address their needs remains limited. In particular, they highlight a continuing failure to identify, support and avoid prosecuting victims of trafficking and modern slavery. As a result, foreign national women report feeling more isolated and less safe in custody than British women (PRT, 2018: 13). Further research is needed to understand the unique challenges they face in custody, particularly whilst on remand.

2.6 Summary

In the emerging system of crimmigration control, the experience and purpose of punishment is shaped at once by ethnicity, gender, socio-economic position and immigration status. As a result, imprisonment on remand has a disproportionate impact on foreign national women. To understand the processes by which this group are disadvantaged and treated unequally in the bail system demands attention to the way in which these factors enmesh and interact to multiply disadvantage women who are, or are perceived to be, of foreign nationality. In the next section, I argue that qualitative research methods are able to create new insights into the many and intersecting injustices they face.

Chapter 3: Methodology

3.1 Introduction

This study explains disparities in treatment of foreign national women by focusing on the context and processes in which bail decisions are made. Previously effaced from academic analysis and criminal justice data, it adopts a reflexive, qualitative approach to capture their experiences.

3.2 Data collection and methods

The Ethics Committee for the Institute of Criminology Cambridge approved this research in May 2020. I used a snowballing sampling method, using my existing network of support workers and criminal lawyers with expertise in this area to recruit other legal professionals, including prosecutors. All participants were given an information sheet (Appendix 2) explaining the purpose of the study and signed a consent form (Appendix 1). Their names of all participants and any identifying characteristics have been changed to avoid disclosure and preserve anonymity.

From June 2020 to September 2020, I conducted a total of eleven interviews: two with support workers who supported foreign national women at a London magistrates' court and in prisons; seven with criminal lawyers; and two with prosecutors employed by the Crown Prosecution Service (CPS). All interviews, bar one, were conducted remotely via password protected zoom calls. They lasted on average an hour, were recorded and transcribed for later analysis.

The purpose of the interviews was to gain insight into the bail process and whether it was considered fair and accessible for foreign national women. I chose semi-structured, narrative, one-to-one interviews to maximise the quality of data. This allowed a degree of flexibility in participant's answers, whilst also guarding against my own pre-conceptions.

I also spent two weeks between January 2020 and March 2020 observing bail hearings at two London magistrates' courts. I witnessed four bail hearings with foreign national women, which provided insight into the structure and speed of bail proceedings.

3.3 Limitations of the data and sample

Conducting this research in the midst of COVID-19 lockdown, interviews with foreign national women were not possible. Due to my existing networks and reticence of prosecutors to engage, the majority of interviews were with lawyers. The legal professionals interviewed had different areas of expertise and levels of experience, as well as their own agendas. While some chose to go into depth about specific cases, because women are a minority in the system, others chose to speak more generally about issues they encountered with foreign nationals at court. My court observations were also limited on this account. While small-scale, this study provides insights that may well be more widely applicable and the subject of further research.

3.4 Mode of analysis

I carried out a thematic analysis on account of its theoretical freedom and flexibility 'which can provide a rich and detailed, yet complex account of data' (Braun and Clarke, 2006: 5). Transcribing the interviews allowed me to familiarise myself with the data. I identified common themes (for example: communication, participation, interpreters) using an inductive approach, which was informed by the literature and my research question. I examined how they interlinked, highlighting patterns and divergences. For example, communication issues due to interpreters/lawyers/video prevent women from participating at their own bail hearings. I refined my themes until I had a thematic map that provided a rich overall description of my data.

Chapter 4: Findings

Four main themes emerged from my data: disparate treatment by the police; poor participation at bail hearings; foreignness as grounds for suspicion; and material disadvantages. It is important to note that these inequities are not unique to foreign national women, who are not a homogenous group, and will also affect some British women. They may be experienced differently however, because of the unique vulnerabilities of this group. Without erasing this complexity and breadth of experience, I hope to highlight the multiple disadvantages they face that collectively raise questions about equity of access to bail.

4.1 Disparate treatment by the police

4.1.1 Prosecution

Once charged with an offence, police decide whether to grant bail or detain defendants in police custody before their first court appearance. Data on the use of police custody is not routinely collected and further research into experiences of foreign nationals is needed, however legal professionals interviewed identified a number of factors that may make detention more likely for this group. Hostile environment measures brought in under the Immigration Act 2014, restrict migrant access to work, housing, health care, public funds, bank accounts and more. As a result, foreign nationals will often not appear on the usual databases used by the police to gather evidence as to whether defendants meet the legal criteria for bail. For example, the electoral register for proof of address. This will make it difficult for foreign nationals to obtain police bail.

Additionally, research by Alpa Parmar (2019: 29) has shown that under Operation Nexus: ‘the mandate that the police have to act on “reasonable suspicion” of those they suspect to be in breach of the law (be that immigration or criminal) forges a mutually reinforcing relationship between non-belonging and suspicion’. Lawyers reported that police immigration duties, including: advance checks on immigration status, enhanced criminal records checks as foreign convictions won’t show up on the Police National Computer (PNC) and liaising with immigration officers, make detention more likely. While claiming to be about nationality (and thus race-neutral) Parmar (2019) reveals the policing of migration to have racially discriminatory consequences, targeting British citizens who appear ‘foreign’ on the basis of visible difference.

This raises concerns for foreign nationals and those suspected to be foreign, as research has found that custodial remand is much more likely if police detain defendants (Hucklesby, 1996; 2011). Hucklesby (2011) suggests this is in part because the CPS relies heavily on the police package for information. The police package contains explicit recommendations for the CPS about whether defendants should be remanded in custody or what, if any, conditions are appropriate (Home Office, 2020b). Prosecutors interviewed reported that ‘police tend to over-egg and over-charge, giving an opposition to bail form in most cases’. While they maintained they were able to make independent decisions in line with the Bail Act 1976, lawyers interviewed expressed concern that discriminatory attitudes by the police might influence the CPS.

4.1.2 Defence

In contrast to the CPS, lawyers interviewed universally complained about the poor quality and timeliness of the police package. Rachel, a solicitor, expressed her dissatisfaction:

‘Either deliberately or accidentally - it’s full of errors or important documents are missing but you’re pressurised by the court to get on with it.’

Indeed, magistrates’ courts are legally required to have bail decisions made within 24 hours from charge. Inadequate information can mean that informed decisions are not always made and hearings are often adjourned for information to be collected and verified, which is a particular issue for foreign national defendants. In these circumstances, short periods of remand are the default.

Police custody is alienating, particularly when you don’t speak the language. Lawyers complained that inaccurate or incomplete evidence was often because the police had failed to provide a translator, particularly when the defendant has adequate but not fluent English. Omar, a barrister, described one case where body-worn footage of the police interview made it clear the Algerian defendants’ English was not good enough. He recalled: ‘they used Google translate instead of an interpreter’ and this poor-quality evidence hindered his ability to prepare the case effectively.

4.1.3 Summary

Issues with evidence gathering mean that foreign national women are already at a disadvantage to be considered for bail before they arrive at court. The consequence of enlisting the police to perform

immigration duties and difficulties in gathering information is that foreign nationals and racialised groups are treated as a greater bail risk. They are more likely to be detained at police custody or recommended for custodial remand than British women. Information in the police package - minimal, inaccurate (particularly with non-English speakers) or missing – dictates CPS decision making, and may delay or weaken bail applications by the defence.

4.2. 'Just so lost in the system': Poor participation of foreign national women at bail hearings

4.2.1 Alien and alienating court proceedings

Criminal courts in England and Wales are under immense pressure, which has prompted widespread concern about the quality of justice dispensed (Institute of Government, 2019). The court system was described by those interviewed as a 'meat grinder', 'factory farm', and 'recipe for post-traumatic stress disorder'. Defendants are moved through the various stages of the criminal process with great speed and bail hearings normally last no more than 10 minutes (Cape and Smith, 2010). As research by Susanne Dell (1971) has highlighted, hearings proceed regardless of the structural ability of defendants to understand what is happening. Rachel, a solicitor, presented this as the norm: 'I mean hardly anybody understands court proceedings'.

Where the courts have been forced to make cuts and efficiencies, specialist support for foreign national women is variable and often poor. There is no formal requirement or procedure in advance of hearings for explaining to defendants: the structure of the court and how it functions, what to expect on appearance, or the formal language and legal jargon used. Interviews made clear that this was dependent on the investment or availability of legal representatives, interpreters or support workers (who are far and few between). This poses a challenge for this group who - disadvantaged and vulnerable - are unable to effectively participate and claim their rights. Support worker, Alex, explains:

'The court environment is strict and this has the effect of disciplining people into silence. Even with interpreters, many foreign national women haven't understood court processes or outcomes.'

The failure to accommodate this fast-paced environment to the needs of non-English speakers or those unfamiliar with the culture or legal system reinforces hierarchies between British and foreign national defendants. The resulting exclusion is even more acute for the latter: reduced to spectators rather than

participants in their own case. Marissa, a support worker, summed this up: 'they just feel so lost in the system'.

4.2.2 Relationship with legal representatives

Although defendants have a right to be represented by a private or publicly funded lawyer at a bail hearing, this is not mandatory. Interviews raised language barriers, financial barriers and an unfamiliar legal system as factors that might prevent foreign national women from organising appropriate legal support compared to British women. Free legal representation is provided by the duty solicitor scheme at the magistrates' court, however severe cuts to legal aid have undermined the quality of service provided. Simon, a solicitor, complained 'we can no longer do a proper job', which was echoed by all lawyers interviewed.

Overwork and time pressure from the court, particularly when acting as duty solicitor, have been shown to result in poor experiences of legal representation in bail cases (Cape and Smith, 2016). Bail hearings are often the first time lawyers meet the defendant. Lawyers reported that on average they have 10 minutes together prior to and rarely any time post hearings. While not unique to foreign national women, their particular vulnerabilities mean time-constraints are felt more acutely when taking instructions and building relationships. Language and cultural barriers hinder communication. For example, the presence of an interpreter slows things down, as Aurelia, a barrister, pointed out: 'you only have 10 minutes but there are three people in the conversation now.' In addition, prior experiences of poor treatment by authorities, histories of trauma – for instance with refugees or victims of trafficking and modern slavery – and immigration issues typical of this group, may feed mistrust and lack of engagement with the system.

According to lawyers interviewed, catering for these additional vulnerabilities at court was unrealistic. A lack of privacy, time and training were reported across the board. Rachel, a solicitor, described the situation:

'You meet for the first time and there's no private place to sit and speak. There are some rooms, but they are usually full or they are not very nice.'

This environment may inhibit disclosure of abuse, trafficking or mitigating factors around the offence that inform bail decisions. Only one lawyer (at another job) had received training on dealing with

vulnerability and trauma. In these circumstances, lawyers may be ill equipped to prepare a successful case for bail.

4.2.3 Interpreters

The defendant's unqualified right to an interpreter at court is enshrined within Article 6 of the ECHR. While intended to ensure the right of defence for non-native English speaking defendants, interviews suggested interpreters could also have disempowering effects. Since January 2012, interpretation services have been privatised and, as of October 2016, supplied under a contract with 'The Big Word'. In 2020, a record high in the number of requests for language services was registered with the greatest demand in criminal courts (MOJ, 2020d).⁴ It is important to note that not all defendants that require an interpreter are foreign nationals and not all foreign nationals require an interpreter. However, interviews made clear that issues with interpreters disproportionately impact this group at bail hearings, rendering them vulnerable to time on custodial remand.

The late or non-attendance of interpreters was raised as a systemic problem under the new contract. Responsibility for arranging an interpreter generally rests with the police, however those interviewed reported this frequently this failed to happen. As a result, Alex, a support worker, complained:

'Even vulnerable people – like pregnant women that are foreign nationals – are kept in custody until the last moment... These cases are often rushed because courts have to close.'

Severe delays – particularly with less common languages - can result in lengthy remands and adversely impact on the quality and outcome of bail hearings.

Rachel, a solicitor, illustrated this through the case of her client: an Indian woman charged with shoplifting £40 worth of clothing, who was remanded in custody for five days. On each occasion she came to court they could not find a Gujarati interpreter. Rachel reflected:

'They were inept and inefficient in finding interpreter but she was discriminated against because nothing suggested she would abscond – other than the fact she was foreign national and it was a shoplifting issue.'

⁴ In the first quarter of 2020, 44,184 language requests were registered, an increase in 5% from the same period in 2019. Criminal court requests continue to account for the largest proportion of completed language service requests (42% in Q1 2020).

The court-usher at Westminster acted as a de-facto interpreter: 'because we couldn't bear to remand her again. She had a child and young baby at home'. This woman's right to proper translation was denied to the detriment of her case.

Poor quality translation was another major issue raised by those interviewed. Amelia, a solicitor, noted: 'interpreters are underpaid and overstretched, often arriving late or leaving early, with little oversight or accountability.' Courts rarely check defendants understand interpreters, instead 'they rely on them to speak up' explained Phoebe, a barrister. Limited English and power disparities in the courtroom however, make this an unrealistic expectation.

Ali Aliverti and Rachel Seoighe (2017) have shown that, against a backdrop of heightened concern about migration, court interpreters may contribute to marginalisation and discrimination for foreign national defendants. In this context, they note that 'the inability to speak English becomes blameworthy and a tangible marker of difference' (135). Interviewees suggested that the presence of interpreters invites prejudice both from the court and from the interpreters themselves, with no safeguards in place.

The Code of Professional Conduct for Public Service Interpreters dictates that they act solely as a mouthpiece for the defendant, limited to translating word-by-word (NRPSI 2016: para.5.4). However lawyers complained that court interpreters 'won't interpret everything', 'conduct their own question and answer session with defendants' and 'express doubts about the veracity of defendants'. It is clear that interpreters may wield considerable influence over bail proceedings.

This is particularly concerning for BAME and foreign national defendants who already experience widespread racism and discrimination in the criminal justice system. Alex, a support worker, explained that prejudice against Roma women in their countries of origin affect interpreting:

'We've seen interpreters shushing them if they cry, asking questions in court, not interpreting everything or patronising them. You would understand this only if you speak the language and understand the culture.'

The relationship between interpreter and defendant is also shaped by gender as a relevant dimension of power. Lawyers recalled female clients visibly 'clamming up' with male interpreters. There is no requirement to provide a female interpreter, even when requested, which may deter women from making vital disclosures that would inform bail decisions.

4.2.4 Remote hearings

If detained in police custody or remanded in prison, defendants increasingly appear at bail hearings remotely via video link. While presented as cost effective and efficient there is evidence that remote hearings may increase the likelihood of custodial remand, particularly for marginalised groups (MOJ, 2010; Transform Justice, 2018). As a result, Transform Justice (2018) maintains that it should be prevented until further research is conducted on how it affects the bail process.

Lawyers and support workers interviewed expressed concerns that remote hearings risk the defendants' right to a fair trial, in particular: effective participation in one's defence and the presumption of innocence. Their main concerns were that technical issues caused delays and inhibited communication particularly for non-English speakers. Support worker Marissa observed: 'you are isolated and unable to participate in the hearing because it's difficult to understand or consult with your solicitor or interpreter.' Several lawyers felt remote hearings not only affected the bail decision-making process but also potentially prejudiced outcomes, particularly for BAME and foreign national defendants. Omar, a barrister, maintained: 'If all you can see is a silhouette, the suspect is robbed of their humanity... it invites jaded people to be more jaded.' By adding another layer of distance and depersonalisation for defendants already in custody, remote hearings may subconsciously contribute to differential treatment.

Combined these factors led Simon, a solicitor, to conclude: 'we should not do virtual hearings for anything that impacts on liberty.' Two lawyers interviewed felt that video link *was* useful for securing face-to-face conferences with clients in custody prior to hearings. However, they emphasised that it was not suitable for vulnerable clients. Phoebe, a barrister, explained: 'I can't even check basic stuff like self-harm wounds and it makes it difficult to disclose.'

4.2.4 Summary

In a service primarily geared to cut costs and increase efficiency, the speed of process, high caseloads and move toward remote hearings can lead to poor quality interpreting and legal assistance. This places a disproportionate burden on foreign national women, a vulnerable and disadvantaged group who are less equipped to navigate complex legal processes and effectively claim their rights. It may also

negatively impact bail outcomes, contributing to the exclusion of, and intensifying discrimination against, this already marginalised group.

4.3 'Foreignness' as grounds for suspicion: the content of bail decision-making

According to the legal professionals interviewed, the clear structure of the Bail Act 1976 made it a straightforward piece of legislation to understand and apply in practice. Weaknesses, it was universally felt, lay in the consistency of application or interpretation of the law. In her examination of sentence hearings with foreign national defendants, Gemma Lousley (2020: 211) considers the accounts delivered by legal professionals as narratives: 'not factual or representational but plotted, purposeful tellings of the case being dealt with by the court'. In this way, she maps how dominant racialised narratives about migrants are mobilised in the courtroom to 'construct and negotiate unwanted migrants' punishability' (Lousley, 2020: 209). Adopting this lens to examine the content of bail hearings, suggests that legal arguments around risk are tied up with visible difference and heightened anxieties about immigration and crime. This can drive punitive responses toward foreign national women, who are already a suspect population: perceived not to belong and so underserving of bail.

4.3.1 Where are you from? The Nationality Requirement

The nationality requirement outlined in Section 162 of the Policing and Crime Act 2017 compelled all defendants in criminal proceedings to declare their nationality at first appearance before criminal courts. Failure to comply was a separate criminal offence, punishable with up to 51 weeks imprisonment and/or a fine. This legislation was widely criticised following a report produced by the law firm Commons (2020), who advocated for its removal after showing substantial evidence that the requirement racialised courtrooms and undermined impartiality.

As of February 2021, the requirement has been removed in an amendment to the Criminal Procedure Rules 2021. The Criminal Procedure Rule Committee agreed that it did not comply with the Data Protection Act 2018, as the collection of such personal information was neither necessary nor justified at such an early stage in criminal proceedings. Instead, only those *convicted* of a criminal offence will have their nationality recorded at the sentencing hearing (Criminal Procedure rules, 2021: S.24.15 and 25.18).

The Government's stated purpose for the policy is to 'remove as many Foreign National Offenders as quickly as possible' (Commons, 2020). At bail hearings, foreign national defendants are awaiting trial or sentencing and therefore not necessarily an offender nor liable for deportation. Collecting data on nationality at this point in the criminal proceedings is entirely superfluous to these aims. All interviewees felt that the nationality requirement disadvantaged those who are - or are perceived to be - foreign nationals in their bail applications.

They reported that the requirement racialised courtrooms, as the majority of defendants stated race or ethnicity instead of nationality. According to Daniel, a prosecutor, the Clerk often asks 'what kind of passport do you have' as a way of clarifying the question; but it is of course possible to have another passport and also have British citizenship. They also reported inconsistencies in application at court due to racial profiling based on foreign sounding names or skin colour, as also evidenced by Commons (2020).

Aurelia, a barrister, illustrated how the requirement could harm bail applications. Her client, a British woman born in Turkey, incorrectly gave her nationality as Turkish:

'The prosecution kept saying she was Turkish and that she lacks community ties in the UK. But she's British. She's been here since she was a baby and her entire family is here. I was like stop looking at her name...it was so racist.'

The defendant's confusion over the question, alongside her foreign-sounding name, was used to present her as not belonging to the UK and likely to abscond overseas. Aurelia recalled that this racialised narrative was used at both the magistrates' and the Crown Court, because: 'when they can, prosecutors try to make nationality a big deal'. The label 'foreign national' appears to be central to bail determination, in this case used to frame ethnic minority citizens as a flight risk.

While nationality is foregrounded by the nationality requirement, its removal does not remove racism from the courtroom. As I consider next, there are a myriad of ways foreign national women are flagged as undeserving of bail.

4.3.2. Community ties

Legal professionals identified failure to surrender to court – absconding - as the most commonly used ground for withholding bail for foreign nationals. While for British defendants this translates as not

turning up to court, for foreign nationals the perceived risk is that they would flee the country to avoid justice. Ill-defined community ties, which might include - length of time or family in the country, employment and a National Insurance number, fixed abode, education, bank account and so on – are used to assess risk of absconding. These factors reassure the court that defendants have reason to comply and are traceable, while ties to another country are perceived as indication of a flight risk.

As a result, community ties or lack thereof, take on an increased significance for foreign nationals at bail hearings compared to British women. Sam, a prosecutor, acknowledged: ‘when I’m opposing bail with foreign national defendants, lack of community ties will always be raised.’ The additional hurdle of proving community ties, lawyers and support workers felt, places a disproportionate burden on this group. Alex, a support worker, summed this up:

‘You have to prove that you have community ties; the onus is on you. If you are a British national, it is a given that you have these ties.’

As a result, lawyers felt that they had to ‘work harder’ with this group compared to British nationals with similar convictions.

Rather than evidence of not belonging or community ties overseas, weak or lacking community ties may be the direct result of immigration restrictions on work, housing, bank accounts and public services. For which, foreign nationals are unfairly penalised. Moreover, nationality does not dictate the length of residence nor the connections in the UK. Aurelia, a barrister, explained:

‘Being “non-British” is complicated. You might have no connection to your home country, all of your family might be in the UK or you might have grown up here.’

Nonetheless foreign nationality has become a proxy for lack of community ties and so the likelihood of absconding. Lawyers reported that decision-makers justify custodial remands simply as: ‘because you are a foreign national and so have no community ties.’ Failure to provide adequate reasoning for bail decisions has been shown to be a long-standing problem (Cape and Smith, 2016).

4.3.3 ‘Good’ and ‘bad’ migrant women

Lawyers interviewed deployed narratives about integration and hyper-productivity to construct foreign national defendants as suitable candidates for bail and to counter the argument that they are inherently likely to abscond. They recalled listing family members living the UK and emphasising contributions to

society, desires to stay in the UK, level of English or willingness to learn. This evidence was necessary 'just because they are not British', explained Aurelia, a barrister.

Unsurprisingly, bids to legitimise clients' connections in the UK are couched in the terms of a dominant discourse, where only migrants that 'work hard' and 'contribute' are deserving of belonging and therefore of bail. Alex, a support worker, recognised the premium placed on this evidence:

'They prefer migrants that would want to integrate and speak the language. These are the so-called good migrants.'

Gathering this evidence to build lawyers' case for bail forms a key part of her role at court. As the substance of these bail applications reveal, the burden of proof falls on this group to prove that they have the right values. Otherwise they may be automatically identified as the bad migrant (illegal, lazy, deportable) who must be punished. Rachel, a solicitor, reflected: 'so in a very reformist way you are pandering to their prejudices.'

Critically for foreign national women, categories of 'good' or 'bad' migrant rest upon a profoundly gendered, classed and racialised victim-villain binary (Anderson, 2008). Within this paradigm, the 'good' migrant woman includes the victim of trafficking and the refugee who are deemed deserving of protection, while the 'bad' migrant woman includes the benefit cheat and the drug mule who are deemed undeserving. Foreign national women charged with an offence are generally grouped as the latter. High numbers are prosecuted for drug importation or immigration offences, when offending is often due to barriers to legal migration that create grounds for illegality and therefore vulnerability to exploitation, abuse or trafficking (Aliverti, 2013). They are not seen as victims to be protected but perpetrators to be punished and excluded, which is particularly evident in the practice custodial remand.

Both prosecutors interviewed associated foreign national women with organised crime. Sam, a prosecutor, acknowledged: 'my mind immediately jumps to organised criminals and those are the ones where I'd usually agree with the police [remand decisions] because it's a very serious offending.' Daniel agreed: 'they tend to be in for theft offences and often operate with more than one of them. Not to make generalised sweeping statements.' These racialising stereotypes fix this group as criminal on account of their foreignness irrespective of individual background. Equally, there is a range of gendered assumptions at play when a woman appears before the court. Foreign national women face additional stigma, Rachel, a solicitor, explained: 'you to overcome the double whammy: the deviant women trope and then the fact that you're not British.' Not only have these women broken the law in a country that is

not their own but they have also breached gendered assumptions about how a mother, wife or daughter should behave.

This will harm their chances of bail, as Omar, a barrister, illustrated with the case of his client: a Romanian woman from the Roma community who had one previous conviction for burglary. He emphasised: 'not the sort of person who has lots of previous convictions for petty theft across the country.' However he reported that, based on assertions from the police and unsupported by evidence, the prosecutor's objections were:

'She lives a transient life and commits crime to support herself. But that's not supported by her previous convictions. She lives at a shared address used as a network to escape police detection. But that's just an assertion from a police officer. There's no witness statement or formal evidence.'

Despite resting on weak factual bases, bail was not granted. Omar felt these claims appeared plausible as they matched well-established stereotypes and fears about the criminal nature of the Roma community, an ethnic minority group against which there is widespread prejudice in the UK (Leggio, 2019).

Racialised and gendered ideas about 'good' and 'bad' migrants can drive punitive responses and skew risk assessments. Legal professionals interviewed reported prejudicial and racist comments about foreign nationals made by judges and magistrates. Sam, a prosecutor, referred to 'a very respected and intelligent judge' who, when withholding bail, made statements including: 'you and your people'; 'you are a blight to this legal system and this country'; 'I will recommend your deportation once sentenced.' Sam felt that the nationality of the defendant 'fuelled these political statements', which he felt were inappropriate. Race, gender and immigration status all work together in the courtroom to position foreign national women as particularly deviant and undeserving of bail.

Even when foreign national women meet the narrow definition of the ideal victim, this can count against them at bail hearings. A controversial provision within the Bail Act 1976 allows courts to remand someone for their own protection (Schedule 1, Pt 1 and Pt 2 s.3). Due to a lack of alternative accommodation, vulnerable victims of trafficking and modern slavery without a safe address can be remanded in custody for their own protection. Amelia, a solicitor, explained:

‘They are supposed to get accommodation through the National Referral Mechanism but if that is not available – and it often isn’t - the court will withhold bail for their own safety, because there is a risk they will be re-trafficked.’

Lawyers disputed the notion prison is safe for these women, often with complex histories of trauma, understanding the experience to be in itself traumatising. Research by Tamara Pattinson (2016) into the use of prison as safety for women with complex mental health needs found that prisons are ill equipped to cope. She concludes that the Bail Act 1976 should be reformed as: ‘it is questionable if detention *in a prison* can ever provide protection that would ensure a defendant would not suffer harm’.

4.3.4 Summary

The growing interdependence of crime and border control, facilitated by the recently over-turned nationality requirement, has meant that the label of foreign national precedes defendants at bail hearings. Lousley (2020: 6) explains that because categories like foreign national ‘have been tied repeatedly to negative traits and essentialised deviance (or inherent deviance), they have come to form, on their own, a novel and euphemistic language of race – one that connotes racial inferiority and “otherness”’. In other words, foreignness matters in bail decisions: contributing to suspicion when assessing criminality and risk. Foreign national women are perceived as doubly deviant: transgressors of the law and societal expectations of women. Even when recognised as victims in trafficking cases, this can work against them. As a result, they are subject to stringent suitability requirements and weak community ties are routinely invoked to deny bail.

4.4 ‘No hope cases’: material disadvantages

4.4.1 Alternatives to custodial remands

An alternative to remand is to grant bail with conditions that minimise risk. There are no official statistics recorded on the use of bail conditions. However, legal professionals interviewed maintained that foreign nationals are more likely to be subject to conditional bail than British women. Rachel, a solicitor, explained:

‘You’d always be asking for conditions if you think bail is going to be difficult and absolutely you think its going to be difficult with foreign national women; because the court is always thinking in their head, this person is going to abscond.’

The perception that custodial remand is the default for foreign nationals, often translates into requests for conditional bail to alleviate concerns of the court.

Legal professionals reported that common conditions for foreign nationals, as opposed to British nationals, are surrendering a passport or other travel documents to mitigate flight risk. While conditional bail can be an effective alternative to remand, lawyers expressed concern about restrictions on private lives and freedom of movement. Other bail conditions include the requirement of a surety (a promise by a third party to forfeit money or a valuable item) or security (a deposit of money or a valuable item by the defendant or third party). In other words, the defendant needs to know someone with money or have money themselves, which may be an issue for foreign nationals due to their immigration status.

Aurelia, a barrister, gave an example of how this manifests in practice. Her client was a European woman who was a well-educated professional with no previous convictions and accused of a minor offence - she was 'the perfect candidate for bail'. However, she was remanded at the magistrates' court. To make bail, the Crown Court judge then asked her family to pay a surety, 'because she was from X country'. Aurelia felt:

'She would not have been given a custodial sentence and it was clear the case would be dropped as there was no evidence. Yet, just because she was a foreign national and because she was a *brown* European and so ethnically different, she had to provide a surety'.

Her client had no previous convictions and was of good character, however unable provide a surety she was remanded for 14 days while more information was gathered. The case was subsequently dropped, as predicted, due to lack of evidence.

Other bail conditions available include Bail Accommodation and Bail Support Services (BASS). Since 2007, BASS has provided accommodation and support for defendants on bail, reassuring courts that defendants will be monitored. Supported accommodation can be a solution for defendants with no appropriate address, a common issue for foreign nationals who are particularly vulnerable to homelessness due to immigration restrictions. Lawyers are responsible for making the BASS application, however of those interviewed, several complained there is few approved premises for women and most did not know it existed or rarely used it. While guidance states that foreign nationals are not technically excluded from access to this service, many have no recourse to public funds due to their immigration status and therefore are excluded in practice (MOJ, 2018c).

4.4.2 Immigration proceedings and remand

Despite a formal and legal separation between decisions on bail during a criminal process and under immigration powers, foreign national defendant's under immigration detention or liable for deportation are likely to be subject to custodial remand. There are no statutory obligations excluding defendants without legal status from bail, however courts often consider that, on principle, they should be refused bail (Aliverti, 2013: 107). As Sam, a prosecutor, acknowledged: 'there is an automatic assumption that a person who is here illegally is someone who belongs in custody'. Defendants can be granted bail in criminal courts while also subject to administrative detention and the two are determined according to different criteria (Aliverti, 2013). Interviews made clear that this is poorly understood in practice.

Deportation orders were raised by those interviewed as a primary reason given by decision-makers to refuse foreign national defendants bail. Phoebe, a barrister, explained:

'The magistrates' court will always ask what's happening about deportation and almost be relying on this feature to deny bail.'

Omar, a barrister, recalled that 'failing to comply with a deportation order' was given as the reason for denying bail for his client, a foreign national woman. She was detained in police custody at the time, so physically unable to comply. However, when Omar raised this, the judge responded: 'well I think the inference that the prosecution are inviting us to draw is that she had no right to be here anyway.'

The case suggests custodial remand is considered an extension of immigration control, with assumptions about immigration case or deportability justifying decisions without subjecting them to objective scrutiny.

4.4.3 Summary

A lack of housing, no recourse to public funds, the ban placed on work and study, and a lack of legal status all count against foreign national women in consideration for alternatives to remand. On-going immigration proceedings or deportation orders make custodial remand more likely. In combination these material factors mean these women are at a significant disadvantage to make bail compared to British women. In fact, lawyers already consider them 'no hope cases'.

Chapter 5: Conclusion and key findings

This study finds that bail determination is shaped by immigration status, socio-economic position and ethnicity, which has a disproportionate impact on foreign national women. Based on a small sample of practitioners working across the criminal justice system, it suggests some of the processes by which foreign national women are at a disadvantage when being considered for bail. With the expansion of border control in the criminal justice system, foreignness has become a key criterion through which risk of absconding is assessed. Racialised and gendered ideas about 'good' and 'bad' migrants skew risk assessment and drive punitive responses. These biases place a disproportionate burden on an already disadvantaged and vulnerable group, who are more likely to be the victims of trafficking and modern slavery. In a system geared to cut costs and increase efficiency, they have less access to justice and are consequently less equipped to dispute these suspicions and effectively claim their rights. Foreign national women emerge as a suspect population to be contained and excluded through custodial remand. In a climate of policy uncertainty following Brexit and the coronavirus pandemic, this systematic discrimination is only likely to become more prevalent and entrenched. At the conclusion of this study, a fundamental question is raised about whether the bail system – while seemingly benign and routine – can be described as procedurally fair.

Key findings

1. Foreignness has become grounds for suspicion in bail cases, used as a proxy to assess lack of community ties and the risk of absconding overseas. As a result, foreign national women are subject to more stringent suitability requirements and punitive responses.
2. Custodial remand is considered default for defendants who are liable, or assumed to be liable, for deportation or removal. Proposals to lower the sentence length required for deportation will aggravate this issue. It is poorly understood that there are no statutory obligations excluding defendants without legal status or subject to administrative detention from criminal bail.
3. Likelihood of custodial remand is much greater if police detain defendants or recommend custodial remand. Both are a common occurrence for foreign nationals – or those perceived to be foreign - due to inadequate information and immigration duties.

4. Measures introduced to cut costs and enhance efficiency, including cuts to legal aid, privatised translation services and remote hearings, discriminate against foreign national women who are a disadvantaged and vulnerable group.
5. Inadequate translation services disproportionately impact foreign national defendants. Delays or non-attendance of interpreters and poor quality translation render this group vulnerable to time on remand, poor defence or miscarriages of justice.
6. Interpreters and video contribute to marginalisation and discrimination for foreign national defendants, against whom there is already widespread prejudice.
7. Immigration status, socio-economic status and gender all restrict access to alternatives to remand. Material disadvantages for foreign national women include restrictions to work, housing and public funds; limited supported accommodation for women; lack of legal status; and deportation/immigration proceedings.
8. Foreign national women are more likely than British women to be victims of trafficking and modern slavery. Due to prejudice or barriers to disclosure they are not often recognised as such, which may negatively impact bail decisions.
9. Due to a lack of alternative accommodation, vulnerable victims of trafficking and modern slavery without a safe address can be remanded in custody for their own protection. Further research is needed into whether prison is equipped to support the complex needs of this group.
10. 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.
11. Further qualitative research is needed to monitor bias or disproportionate outcomes for foreign nationals and the impact of remand decisions for foreign national women.

Bibliography

Aas, K.F. (2014) 'Bordered penalty: Precarious membership and abnormal justice', *Punishment and Society* 15(5): 520-541.

Anderson, B. (2008) *"Illegal Immigrant": Victim or Villain?*, Working Paper Series No. 64, COMPAS: University of Oxford.

Anderson, B. (2013) *Us and Them*, Oxford: Oxford University Press.

Anderson, B. & Blinder, S. (2019) 'Who counts as a migrant? Definitions and their consequences', *Migration Observatory briefing*, COMPAS: University of Oxford.

Aliverti, A. (2013) *Crimes of Mobility: Criminal law and the regulation of immigration*, London & New York: Routledge.

Aliverti, A. and Seoighe, R. (2017) 'Lost in translation? Examining the role of court interpreters in case involving foreign national defendants in England and Wales', *New Criminal Law Review* 20(1): 130-156.

Bail Act (1976).

Bail for Immigration Detainees. (2014) *Denial of justice: the hidden use of UK prisons for immigration detention*. Available from:

http://www.aviddetention.org.uk/sites/default/files/images/Denial_of_Justice.pdf [Accessed 27 October 2020].

Bhui, H. (2007) 'Alien experience: foreign national prisoners after the deportation crisis', *Probation Journal* 54(4): 368-382.

Bosworth, M. (1999) *Engendering Resistance: Agency and Power in Women's Prisons*, London: Routledge.

Bosworth, M., Hoyle, C. and Dempsey, M., (2011) 'Researching Trafficked Women', *Qualitative Inquiry* 17(9), 769-779.

Bosworth, M., Franko, K. and Pickering, S. (2017) 'Punishment, globalisation and migration control: 'Get them the hell out of here'', *Punishment & Society* 20(1) 34-53.

Bosworth, M. and Kaufman, E. (2012) 'Gender and Punishment', in J. Simon and R. Sparks (eds.) *Handbook of Punishment and Society*. London: Sage.

Bowling, B. and Westenra, S. (2017) 'Racism, immigration and policing', in M. Bosworth, A. Parmar and Y. Vasquez (eds.) *Race, Criminal Justice and Migration Control: Enforcing the Boundaries of Belonging*, Oxford: Oxford University Press, (pp. 61-77).

Butler, J. (1993) *Bodies That Matter: On the discursive limits of 'sex'*, New York: Routledge.

Braun, V. and Clarke, L. (2006) 'Using thematic analysis in psychology', *Qualitative Research in Psychology* (3)2 77-101.

Brennan, R. (2006) *Immigration Advice at the Police Station*, London: The Law Society.

Cape, E. and Smith, T. (2016) *The practice of pre-trial detention in England and Wales: Research Report*, University of the West of England, Bristol. Available from: <https://uwe-repository.worktribe.com/output/917566> [Accessed 21 October 2020].

Cheney, D. (1993) *Into the Dark Tunnel: Foreign Prisoners in the British Prison System*, London: Prison Reform Trust.

Commons. (2020) *The state of innocence: How the requirement to declare nationality is undermining equality before the law*. Available from: https://67290a8d-f373-4db0-b2b3-de2d9d77375f.filesusr.com/ugd/70b06a_babc887b0d284931abfb62d4d4dfd435.pdf [Accessed 8 June 2021].

Corston, J. (2007) *The Corston Report: A report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System*, London: The Home Office.

Council of Europe. (2017) *26th GENERAL REPORT OF THE CPT: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Strasbourg: Council of Europe.

Crenshaw, Kimberlé. (1989) 'Demarginalizing the intersection of race and sex: a Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', *University of Chicago Legal Form* 139-167. Available at: <https://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8> [Accessed 30 October 2020].

de Noronha, L. (2015) 'Unpacking the figure of the 'foreign criminal': race, gender and the victim-villain binary', *COMPAS Working Paper 121*. Oxford: COMPAS.

Dell, S. (1971) *Silent in Court: The legal representation of women who went to prison (Occasional papers on social administration)*, London: Bell.

European Court of Human Rights. (1953) *European Convention on Human Rights*, Strasbourg: Council of Europe.

Fair Trials. (2016) *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU*. Available from: <https://www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf> [Accessed 21 October 2020].

Fekete, L., & Webber, F. (2010) 'Foreign nationals, enemy penology and the criminal justice system', *Race & Class* 51(4), 1-25.

'Foreign criminals deported 'at earliest opportunity'' (18 December, 2011), *The BBC*. Available from: <https://www.bbc.co.uk/news/uk-politics-16234590> [Accessed 5 March 2021].

- Gelsthorpe, L. and Hales, L. (2012) *The criminalisation of migrant women*, Cambridge: The Institute of Criminology, University of Cambridge, UK. Available from: https://domide.colmex.mx/Archivos/Doc_5136.pdf [Accessed 21 October 2020].
- Griffiths, M. (2017) 'Foreign, criminal: a doubly damned modern British folk-devil', *Citizenship Studies* 12(5): 527-546.
- Griffiths, M. (2019) 'My passport is just my way out of here': Mixed-immigration status families, immigration enforcement and the citizenship implications', *Identities* 1-19.
- Hill, A. (2017) 'Hostile environment': the hardline Home Office policy tearing families apart. *The Guardian* (28 November). Available at: <https://www.theguardian.com/uk-news/2017/nov/28/hostile-environment-the-hardline-home-office-policy-tearing-families-apart> [Accessed 27 October 2020]
- HM Inspectorate of Prisons. (2006) *Foreign National Prisoners: A Thematic Review*, London: Home Office. Available from: <https://www.justiceinspectors.gov.uk/hmiprisons/wp-content/uploads/sites/4/2014/06/Foreign-National-Prisoners-2005.pdf> [Accessed 30 October 2020].
- HM Inspectorate of Prisons. (2012) *Remand prisoners: A thematic review*, London: HM Prison Inspectorate. Available from: <https://www.justiceinspectors.gov.uk/hmiprisons/wp-content/uploads/sites/4/2012/08/remand-thematic.pdf> [Accessed 21 October 2020].
- Home Office. (2020a) *Immigration Statistics, year ending March 2020: How many people are detained or returned?*, London: Home Office. Available from: <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-march-2020/how-many-people-are-detained-or-returned> [Accessed 23 June 2021].
- Home Office. (2020b) *Manual of Guidance and MG forms Version 11*, London: Home Office. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891370/Manual-of-guidance-MG-forms-v11ext.pdf [Accessed 2 November 2020].
- Howard League for Penal Reform. (2020) *Rethinking remand for women*. Available from: <https://howardleague.org/wp-content/uploads/2020/07/Rethinking-remand-for-women.pdf> [Accessed 21 October 2020].
- Hucklesby, A. (2011) *Bail support scheme for adults*, Bristol: Policy Press.
- Human Rights Act (1998).
- Institute of Crime and Justice Policy Research. (2021) *World Prison Brief*, London: Birkbeck. Available from: https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=14 [Accessed 3 April 2021].
- Institute of Government. (2019) *Performance Tracker 2019: A data-driven analysis of the performance of public services*. Available from: https://www.instituteforgovernment.org.uk/sites/default/files/publications/performance-tracker-2019_0.pdf [Accessed 2 November 2020].

International Covenant on the Protection of Civil and Political Rights. (1966) United Nations.

Kaufman, E. (2012) Finding Foreigners: Race and the Politics of Memory in British Prisons, *Population, Space And Place* 18(6), 701-714.

Kaufman, E. (2015) *Punish and Expel: Border control, nationalism and the new purpose of the prison*, Oxford: Oxford University Press.

Lammy, D. (2017) *The Lammy Review An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*, Government of the United Kingdom (Her Majesty's Government). Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf [Accessed 27 October 2020]

Leggio, V.D. (2019) 'Modern-Day Fagins', 'Gaudy Mansions' and 'Increasing Numbers': Narratives on Roma Migrants in the Build-Up to the British EU Referendum', in Magazzini, T., Piemontese, S., (eds.) *Constructing Roma Migrants*, IMISCOE Research Series: Springer, Cham.

Lousley, G. (2020) Sentencing "Unwanted" Migrants: the Border, Racism, and Narrating Punishability, *Critical Criminology*, 28(2) 209-224.

National Register of Public Service Interpreters. (2016) Code of Professional Conduct for Public Service Interpreters. Available at: <https://www.nrpsi.org.uk/for-clients-of-interpreters/code-of-professional-conduct.html> [Accessed 2 November 2020].

Ministry of Justice. (2010) Virtual Court pilot: Outcome evaluation, London: Ministry of Justice. Available at: <https://www.gov.uk/government/publications/virtual-courts-pilot-outcome-evaluation-report> [Accessed 5 March 2021].

Ministry of Justice. (2015) Offender management statistics quarterly: October to December 2015, Ministry of Justice: London.

Ministry of Justice. (2016) Offender management statistics quarterly: October to December 2016, Ministry of Justice: London.

Ministry of Justice. (2017) Offender management statistics quarterly: October to December 2017, Ministry of Justice: London.

Ministry of Justice. (2018a) *Female Offender Strategy*, London: Ministry of Justice. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719819/female-offender-strategy.pdf [Accessed 21 October 2020].

Ministry of Justice. (2018b) Offender management statistics quarterly: October to December 2018, Ministry of Justice: London.

Ministry of Justice. (2018c) *Annex a: BASS stakeholder user guidance*, London: Ministry of Justice.

Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767316/bass-stakeholder-user-guidance-annex-a.pdf [Accessed 3 November 2020].

Ministry of Justice. (2019) *Offender management statistics quarterly: October to December 2019*, Ministry of Justice: London.

Ministry of Justice. (2020a) FOI Response 200305033, 31 March 2020. Available here:

<https://www.gov.uk/government/publications/foi-releases-for-march-2020> [Accessed 27 October 2020].

Ministry of Justice. (2020b) *Guide to Offender Management Statistics: England and Wales*. Ministry of Justice: London: Available here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882182/Guide_to_Offender_Management_Statistics.pdf

[Accessed 23 June 2021].

Ministry of Justice. (2020c) *Safety in custody: quarterly update to December 2019*, published 30 April 2020. Ministry of Justice: London.

Ministry of Justice. (2020d) *Statistics on the use of language services in courts and tribunals: Quarterly update*, Ministry of Justice: London.

Ministry of Justice. (2021) *Criminal Procedure Rules*, London: Ministry of Justice.

Parmar, A. (2018) 'Policing belonging: Race and nation in the UK', in M. Bosworth, A. Parmar, and Y. Vasquez (eds.) *Race, criminal justice, and migration control: Enforcing the boundaries of belonging*. Oxford: Oxford University Press (pp.108-124).

Parmar, A. (2019) Arresting (non)Citizenship: The Policing Migration Nexus of Nationality, Race and Criminalization, *Theoretical Criminology* 24(1), 28-49. [Accessed 27 October 2020].

Pattinson, T. (2016) *Prison as a place of safety for women with complex mental health needs*, London: The Griffins Society. Available from:

https://www.thegriffinssociety.org/system/files/papers/fullreport/griffins_research_paper_2015-01.pdf [Accessed 2 March 2021].

Policing and Crime Act (2017).

Prison Reform Trust. (2004) *Forgotten Prisoners: The Plight of Foreign National Prisoners in England and Wales (Briefing Paper)*, London: Prison Reform Trust. Available from: <https://tinyurl.com/ba744p56> [Accessed 21 June 2021].

Prison Reform Trust. (2012) *No Way Out: A briefing paper on foreign national women in prison in England and Wales*. Available from: <https://www.antislaverycommissioner.co.uk/media/1256/no-way-out.pdf> [Accessed 21 October 2020].

Prison Reform Trust. (2018) *Still No Way Out: Foreign national women and trafficked women in the criminal justice system*. Available from:

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Still%20No%20Way%20Out%20full%20report.pdf> [Accessed 21 October 2020].

Stumpf, J. (2006) 'The crimmigration crisis: Immigrations, crime and sovereign power', *American University Law Review* 56: 367-419.

Transform Justice. (2018) *Presumed Innocent but behind bars – is remand overused in England and Wales?* Available from:

https://www.transformjustice.org.uk/wp-content/uploads/2018/03/TJ_March2018report.pdf [Accessed 21 October 2020].

Transform Justice. (2020) *24 hours in police custody – is police detention overused?* Available from:

https://www.transformjustice.org.uk/wp-content/uploads/2020/06/TJ_Police_Custody_Report_041.pdf [Accessed 27 October 2020].

UK Borders Act (2007).

UK Parliament (2020) *Written questions, answers and statements*. Available from: <https://questions-statements.parliament.uk/written-questions/detail/2020-12-11/128641> [Accessed 3 April 2021].

Webber, F. (2014) *Hidden Despair: The deaths of foreign national prisoners*, Institute of Race Relations: Briefing Paper, no. 9. Available at:

https://irr.org.uk/app/uploads/2014/12/UKBP_9_Hidden_despair_FNPs.pdf [Accessed 30 October 2020].

Zedner, L. (2003) 'Too much security?', *International Journal of the Sociology of Law* 31: 155-184.

Appendix 1: Participant Information Sheet

Study Title

What are the barriers to accessing bail for foreign national women in England and Wales?

Study aim and background

You have been invited to take part in this research project funded and supported by The Griffins Society, promoting research into improving the lives of women who are affected by the criminal justice system. My project will shine a light on the reality experienced by women without evidence of UK citizenship in bail hearings in criminal courts, in order to promote better responses that will improve outcomes for women, and reduce the use of custodial remand. In order to achieve this, the project aims to:

1. Identify rates of custodial remand before trial and sentencing for foreign national women using secondary analysis of publically available statistics on bail and remand.
2. Interview lawyers, support service staff and court interpreters to better understand the bail decision-making process in cases involving foreign national women in comparison with British women.
3. Evaluate modifiable barriers to improving bail decision-making and the experience of bail hearings for foreign national women, and to develop practical recommendations to overcome them.

The project outputs will be a 10,000 word written report to be published with support of The Griffins Society which will be shared on The Griffins Society website and other media platforms, as well as presented at an event with external stake-holders in Autumn 2020.

Interview format

The interview will be informal and semi-structured lasting approximately one hour. We will discuss your experiences of working with foreign national women in bail proceedings, what you understand the main challenges to be, and any suggestions for areas of change and improvement.

Voluntary nature and confidentiality

Being part of this research is voluntary; you do not have to take part, and it is okay to change your mind. You can withdraw from the research at any time during the interview and up to one month afterwards without any consequences. If you wish to take part, your participation will be completely anonymous; I will change your name and keep confidential any information that could identify you.

Use of data

Audio recordings of the interview will only be used by me, the researcher, for analysis in order to write my report. It will not be used for any other purpose, and no one outside the research will be allowed access to the recording. Audio recordings and transcripts will be destroyed on completion of research.

Contact details of the researcher and supervisor

If you have any questions or concerns about any aspect of the study, or your participation in it, please contact:

Researcher:

May Robson, xxxxx, xxxxxx

Research supervisor:

Professor Anthea Hucklesby, xxxxx, xxxxxx



Appendix 2: Consent form

Study Title

What are the barriers to accessing bail for foreign national women in England and Wales?

Consent to take part in research

1. I have read and understood the Participant Information Sheet
2. I have been given the opportunity to ask questions and have had them answered to my satisfaction.
3. I agree to participate in this research study.
4. I understand that my participation is voluntary and that I am free to withdraw such participation at any time during the interview and up to one month afterwards without giving a reason.
5. I understand that I will not benefit directly from participating in this research.
6. I agree to my interview being audio-recorded.
7. I understand that all information I provide for this study will be treated confidentially unless you say something that would be of risk to you or others.
8. I understand that in any report on the results of this research my identity will remain anonymous. This will be done by changing my name and disguising any details of the interview that may reveal my identity or the identity of the people I speak about.
9. I understand that disguised extracts from my interview may be quoted in: the published research paper, policy papers or news articles; on the Griffins society website and in other media such as spoken presentations; on other feedback events.
10. I understand that signed consent forms, original audio recordings and a transcript of my interview in which all identifying information has been removed will be held in accordance with GDPR: on an encrypted USB stored in a locked drawer to which only the researcher has access.
11. I understand that signed consent forms, original audio recordings and a transcript of my interview in which all identifying information has been removed will be destroyed at the conclusion of the research.
12. I understand that under freedom of information legislation I am entitled to access the information I have provided at any time while it is in storage as specified above.
13. I understand that I am free to contact any of the people involved in the research to seek further clarification and information.

Signature of research participant:

Full Name (printed) of participant:

Date:

I believe the participant is giving informed consent to participate in this study

Signature of researcher:

Full name (printed) of researcher: May Robson

Date:

Contact information:

This research has been reviewed and approved by the Cambridge Institute for Criminology Ethics Committee. If you have any further questions or concerns about this study, please contact the researcher:

May Robson, xxxx, xxxx.

You can also contact research supervisor:

Professor Anthea Hucklesby, xxxxx, xxxxxx.

What if I have concerns about this research?

If you are worried about this research, or if you are concerned about how it is being conducted, the Pro-Vice-Chancellor for Research, Professor Chris Abell, through the Research Strategy Office (researchintegrity@admin.cam.ac.uk)

ENDS