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Special Edition
**Migration, Nationality and
Detention**

Double Punishment:

The treatment of foreign national prisoners

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A foreign national prisoner (FNP) is defined in prison service policy as someone who does not hold a UK passport. It is not easy to generalise about who this term covers as it encompasses people of different nationalities and statuses. Very many will have been in the UK legally at the time of their arrest. Some have lived in the UK for a long time, others are economic migrants looking for a better life, and still others are fleeing persecution from their homeland.

At the end of June 2012, there were 10,861 people classed as foreign national prisoners in England and Wales and 1,949 whose nationality was not recorded.² They came from 160 countries. However, over half were from ten countries — Jamaica, Poland, Republic of Ireland, Nigeria, Romania, Pakistan, Lithuania, India, Somalia and Vietnam.³

The following list is not exhaustive but foreign national prisoners may be:

- Foreign citizens with British partners and children
- People brought into the country as children with their families
- Asylum seekers with indefinite leave to remain
- European and Irish Nationals
- People trafficked as drug carriers or for menial labor or sex work
- People who had legal permission to be in the UK, which expired during time in prison
- People who entered the country on false documentation who were arrested at point of entry

There are significant numbers among this group who have the right to live and work in this country. There are others, such as those trafficked or facing persecution in their country of origin that we have a duty to protect. In addition, there are people in prison who were brought to this country as very young children. Many people come here legally with their

families, who may not have got their status regularised. They therefore have few or no links to other countries. They grow up within the education system and get work here. They may not realise that they are not actually UK citizens until they enter prison and have their status assessed by the immigration authorities. Then, they and their families have to face the prospect of them being deported away from their home and community to a country where they have no connections.

In a fair system, deportation and removal decisions would be made on a case-by-case basis, looking at an individual's situation thoroughly. The pressures on UKBA to deport people and the lack of resources mean this often does not happen. The blanket policies, such as an assumption of deportation for non EEA nationals with a sentence of a year or more and procedures that are driven by an aim to remove as many people as possible from the country, lead to a deeply unfair and biased system.

One reason that the prison system is currently failing to meet the needs of this population is because, all too often, it treats foreign national prisoners as though they are a homogenous group. It is important that UKBA and the prison service have a more accurate understanding of the different circumstances of people in UK prisons and respond accordingly.

The Prison Reform Trust's advice and information service responds to around 6,000 requests for help a year. Through this work, and research with people in prison and prison staff, we are aware of the difficulties many foreign national prisoners encounter when attempting to navigate the dual challenges of the immigration and prison systems. This article looks at the current difficulties that foreign national prisoners are experiencing. It also discusses how the prison service has changed the way it manages and supports foreign national prisoners as a result of the government's proactive agenda of deporting foreign national prisoners.

1. A charity working to create a fair and decent prison system. The PRT receives no government funding in order to maintain independence (www.prisonreformtrust.org.uk).

2. Table 1.6, Ministry of Justice (2012) Offender Management Statistics Quarterly Bulletin, January to March 2012, London: Ministry of Justice

3. Ibid.

Sentencing trends and impact of the prison population

The numbers of foreign national prisoners is increasing and nearly doubled between 2000 and 2012, going up by 93 per cent. This compares to a 24 per cent increase in British nationals. This is due to changes in sentencing and remand practices. As well as the larger numbers of people being sentenced, the numbers of foreign national prisoners held on remand has also increased massively, by 107 per cent since 2000. Remand is supposed to be used only where an offence someone has been charged with is very serious but the majority of people on remand are not being held for violent or other serious offences.

Women are also disproportionately impacted by sentencing practices. The statistics for sentenced foreign national women prisoners show that 25 per cent are in prison for any kind of violent offence, robbery or burglary. This compares with 49 per cent of women prisoners from the UK.

There is a presumption in favour of deportation for any non EEA national sentenced to a year or more. However, sentences have got longer and harsher. Therefore, it is not reasonable to assume that anyone with a sentence of a year or more is dangerous or that it is in the public interest to deport them. Alongside the increase in sentence lengths generally, sentences for immigration matters and using false documents have been enacted in an unsuccessful attempt to curb immigration. This has further impacted on the numbers of people going to prison, and now 7 per cent of foreign national male prisoners and 16 per cent of foreign national women prisoners are in custody for fraud and forgery offences⁴. This is an offence of deception and although it is appropriate for the government to act, it cannot realistically be argued that all these people are dangerous.

The argument for bringing in longer and longer sentences is that it acts as a deterrent to people abroad. However, there is no evidence that people travelling here from other countries have a clear understanding of the UK's laws and policies.

Policy and culture change

*It feels like an offence just to be a foreign national.*⁵

Ten years ago, the prison service's policy was that all foreign national prisoners should be treated as individuals in terms of allocation and services. There was a reluctance to consider allocating them to specific prisons or developing specialist centres. It was believed that all prisons could and should respond to the needs of whomever their population happened to be. There were concerns that having particular establishments holding foreign national prisoners might lead to a two-tier system, build discrimination into the system or lead to tensions between prisoners.

However, this changed as the numbers increased and prisons found that the needs of this population were not being met. Individual prisons began to allocate prisoners they were transferring to prisons they believed had the resources and expertise to support them. Therefore, by 2004 there was an informal policy of grouping female foreign national prisoners in four prisons. In addition, male foreign national prisoners were accumulating at prisons such as The Mount and The Verne.

In 2006, after media reports that 1,013 people who did not hold UK passports had been released from prison without being assessed for deportation, the political interest in this area

increased. The subsequent media attention led to the sacking of Charles Clarke as Home Secretary. Following this, the government's response was to focus on deportation as the 'solution' to a perceived high number of foreign national prisoners. Over time the stated aim of the government to increase the numbers of people deported has trickled down to impact on the attitudes and practices of officers on prison wings.

There is often significant confusion — among both prison staff and prisoners — about the rights and entitlements of this group. The perception of a foreign national prisoner as a deportee, or potential deportee, influences decisions about sentence progression and other opportunities in the prison. Officers have a large amount of discretion over which prisoners can access activities and privileges in prison. In addition, resource-

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4. Table A1.19 Ministry of Justice (2011) Offender Management Caseload Statistics 2012, London: Ministry of Justice.

5. *No Way Out*, Prison Reform Trust 2012:9.

strapped prisons may have fewer incentives to offer opportunities to people who they believe may be deported within a short space of time. The prison service policy, which says it 'does not provide a policy framework for the day-to-day management of foreign national prisoners' does say they should be 'managed in the same way as British nationals while recognising their individual needs.'⁶

One response of the government was to introduce the hub and spoke system for allocating prisoners in May 2009. Previously, people in prison were allocated to a prison primarily by location close to home and sentence progression needs, as much as this is possible in an overcrowded system. However, this system brought in a new allocation process for category B and C male prisoners. The hub and spoke system was brought in to increase the number of people deported from prisons. It is based on a service level agreement between NOMS and UKBA. The six 'hub' prisons⁷ have UKBA staff working in them full time and UKBA also cover other prisons, known as the 'spoke' prisons. People were allocated to these prisons in order to facilitate UKBA working on their immigration cases

There was no consultation before the scheme came in and the usual bodies (Prison Inspectorate and other stakeholders) were unaware that it was being introduced. No equality impact assessment was done before the policy was implemented and therefore the Equalities and Human Rights Commission (EHRC) appealed this. Following the EHRC appeal, it was confirmed that prisoners could keep the right to apply for a transfer to or out of a hub prison. This could be for any number of reasons, such as family visits, court attendance, or the need to do a particular offending behaviour course. Applications must be considered in the normal way and it would be unlawful for a governor to refuse a transfer application on the basis of immigration status alone.

The shift in allocation practice and the process of transferring people meant that prisons were not being used as places of rehabilitation but by default as immigration processing or holding centres. Decisions on

allocating prisoners were taken purely on their assumed immigration status as a potential deportee, overriding the usual prison procedures that look at their closeness to their family home, any health or disability needs and their offending behaviour and sentence progression needs.

However, prisons are not removal centres. The purpose of prison is defined in statute as to encourage and assist prisoners to lead a good and useful life. This should apply to all people in prison and therefore foreign national prisoners should be afforded equivalent rehabilitative and resettlement opportunities to those that British nationals receive.

This leads to the question of whether the purpose of prison has significantly changed when holding this population. Is the prison service acting as an arm of the immigration service and warehousing people who are eligible to be deported rather than fulfilling its primary purpose of rehabilitation? Defining and managing people through the prism of their immigration status leads to discriminatory practice.

It is impossible to predict how this policy change will develop. However, under the payment-by-results agenda, reoffending will be the key assessment of success and the criteria for accessing funding and resources. If people are seen as deportees, there is little interest in whether they will reoffend in another country and no statistics are collected or held on this. Foreign national prisoners are already being excluded from opportunities to reduce reoffending⁸. It is therefore unclear how they will fare and how services to this vulnerable group will be managed under this agenda.

Legal advice

It is like trying to cross a busy road in the rush hour in a foreign country. I do not know whose arm to take to ensure I am not killed by the cars.⁹

Foreign national prisoners are amongst the most vulnerable and in need of protection in prison. They may

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6. Prison Service Instruction 52/2011 1.2.

7. HMPs Risley, Hewell, Morton Hall, The Mount, The Verne and Wormwood Scrubs. Morton Hall has subsequently been re-designated as an immigration removal centre.

8. e.g. see HMIP's Report of an announced inspection of HMP Canterbury, 16-20 July 2012.

9. Prisoner quoted in *No Way Out*, Prison Reform Trust 2012:11.

be people with the least opportunity to understand the system and may not have any form of outside help in this country. They may be experiencing language barriers, cultural difference and isolation and need access to proper legal advice so that they can make informed decisions about their situation. Prison Service Instruction 52/2011, paragraph 2.75, states that it is a mandatory output that prisoners are able to access independent immigration advice, which cannot be provided by UKBA but may come from a solicitor or an organisation such as the Detention Advice Service.

Despite the obvious needs, and the mandatory requirement, in practice it can be difficult for foreign national prisoners to access legal advice and access their rights. Along with cuts in legal aid, prisons are not always located in areas where immigration solicitors have their offices. Prison managers do not always understand that the UKBA does not provide independent advice and do not always commission other organisations to provide this service.

Although it is fundamentally important that people who wish to appeal a decision about deportation get legal advice, there is no automatic process by which this can happen. Immigration matters (asylum deportation, detention and bail) are often inter-related and complex and the immigration tribunal process is not easy to understand. Prison staff are not trained in immigration law and will not have the expertise needed to answer questions prisoners may have. In addition, since 1999 it is illegal for anyone to provide unregulated immigration advice.

Isolation and Language

The main problem we all face in this prison is lack of information from prison staff. Cannot understand them when these speak to you.¹⁰

Many foreign national prisoners speak and read English but for those that don't, prison can be an

overwhelming and isolating experience. Research from the prisons inspectorate has consistently shown that the national language service has been underused. Staff rely too much on using other prisoners to interpret where professional services would be more appropriate. Over a third of foreign national prisoners who were experiencing isolation said this related to communication and language difficulties.¹¹ The interpreting service will not be effective in prisons unless it is properly resourced and staff are actively encouraged to use it.

Additionally, there are particular examples of situations in prison where people should have automatic access to an interpreter to explain what is happening to them. These include (but are not limited to) any time in segregation, ACCT reviews, health care appointments, safer custody reviews, adjudications, categorisation and any internal prison meetings that impact on sentence progression.

Providing information for people in prisons is a constant challenge. Rules and policies change rapidly and it is difficult for prison staff, especially in remand prisons, with a high turnover of prisoners, to predict what languages their population will speak. However, the current situation is that many prison staff individually spend time putting together standard information that could be centrally provided and 'tweaked' for individual

establishments. In particular, easy read information both in English and other languages could be centrally commissioned for induction and reception.

It is also not clear that all prisoners understand the immigration or deportation process. Documents advising on removal (served by prison staff) are still sent in English, irrespective of the language of the recipient. There are 10 days to appeal, and the additional difficulties of accessing external support and advice and accessing documentation and paperwork in prison are not currently taken account of by UKBA. This means that people may not have access to justice.

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10. Prisoner quoted in *Going the Distance*, Prison Reform Trust 2004:9.

11. HMCIP Foreign National Prisoners: A Thematic 2006:15.

Detention of foreign national prisoners post-sentence

*I was told that I would be leaving today, but after I had packed up my cell and walked to the gate I was brought back in and told there is now an immigration hold on me.*¹²

Currently, people who have finished their criminal sentence but who are being considered for deportation can be kept in prison under immigration powers. The Prison Reform Trust believes that the practice of detaining anybody who is post-sentence in prison is unacceptable. There are a number of alternative options that could be explored including increased use of bail, tagging, curfew and other supervision measures. Conditions in prison are often harsher than in immigration detention centres with people being locked up for longer. UKBA can refuse to take people applying to move from prison to a detention centre. Therefore, holding immigration detainees in prison provides a 'free good' for UKBA whilst creating a number of challenges and strain on staff and resources for the prison service. Subjecting someone to indefinite detention is an extreme form of punishment and should be used only in exceptional circumstances. Research from PRT and others clearly shows that indefinite detention is a profound and extremely distressing experience both for the people detained and their loved ones.¹³

In theory, anyone post-sentence (held under immigration act powers not criminal justice powers) should be held with the same status as a 'remand' prisoner. In practice, remand prisoners are often locked in their cells for longest, sometimes up to 23 hours a day, have less access to work and education and are held in B category — almost high security conditions. In reality, for people post-sentence, access to courses, education and work is more limited. Again this may be because these opportunities are given to prisoners who are not under threat of deportation.

Sentence progression

*'Why is it so hard to get anyone's attention, every day my pleas have been totally disregarded'.*¹⁴

The lack of understanding about foreign national prisoners' needs and the prison service's duty of care and responsibilities towards them impacts on every aspect of the regime. They should be assessed for resettlement opportunities and open conditions on their individual circumstances, as a British national would be. The prison service's own policies support this, as the blanket ban on foreign national prisoners

going to open conditions was lifted and new guidance was issued in 2011. However, there is still confusion about this. Anecdotally we hear from prisoners and officers that foreign national prisoners are not eligible for open conditions.

There is also still a myth in prisons that foreign national prisoners cannot get day release (release on temporary licence). Although these decisions have to be ratified by UKBA, there is nothing in law or policy to stop people getting day release or going to open conditions. Once in open conditions, only British and EEA prisoners are allowed to work but foreign national prisoners, once security cleared, may be able to volunteer.

Some of the difficulties that people in prison experience in making progress are due to an ongoing lack of communication between UKBA and NOMS. Currently, there are a number of situations where prison staff cannot facilitate a decision on someone's progress without input from immigration staff. These include, (but are not limited to) release on temporary licence (ROTL) and access to D category (open prison).

Foreign national prisoners are systematically excluded from offending behaviour courses and other sentence progression opportunities, as there is often an assumption that they will not be released into the UK. Foreign national prisoners often have a limited level of contact with community-based offender managers, who work on the same assumption. This limited contact means that offender managers

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12. Prisoner quoted in *No Way Out*, Prison Reform Trust 2012:10.

13. *Unjust Deserts*, Prison Reform Trust 2010.

14. Quote from a letter to PRT's advice and information service.

cannot always supply detailed information about risk and reoffending. This in turn impacts on decisions about sentence progression and release.

Sometimes, people are excluded from offending behaviour work or resettlement programmes because of their lack of language skills, and because facilitating interpreters is expensive. If it is believed that they will be deported they may not be a priority for a course where there are already large waiting lists. This can be a disadvantage if they have to go to the parole board or for categorisation as they cannot demonstrate that they have reduced risk.

Furthermore, despite efforts by many people and considerable political pressure, the joint working systems and information sharing between the UKBA and MOJ remain inadequate. There are a number of people in prison who have finished their sentence and who would welcome repatriation.

Paradoxically, although the government has said it is committed to exploring ways of removing foreign national prisoners even earlier, the delays receiving information for risk assessments from UKBA continue to impact on people making progress in their sentence. This increases the time people spend unnecessarily in prison.

Welfare and family

Staff are not communicate with us properly. Some of these people should not be working in prison; they stress us out too much. That's the reason some of us hang our self.....We need help.¹⁵

There are prison staff and community-based organisations that are trying to assist foreign national prisoners and support their welfare needs. However, these efforts are hampered, not just by lack of resources and pressure to treat people as potential deportees, but by the lack of prison service policy and strategy. There are prison service instructions that detail immigration processes and the prison officers have the responsibility to facilitate these. However, there is little information for prison staff about the welfare or cultural needs of foreign national

prisoners, and there is a lack of accessible information for staff and prisoners. Some prisons have developed their own local policies and organised their own community support, or commission voluntary sector organisations to provide advice and support. This enables a much better level of service. Since November 2011, it is no longer mandatory for prisons to allocate a dedicated member of staff as a foreign national coordinator.

Recent figures show that for foreign nationals in prison, self-inflicted deaths more than doubled, rising from 6 in 2010 to 13 in 2011. The figure is the highest since 2007, and means that foreign nationals made up 23 per cent of self-inflicted deaths in prison in 2011. Although there are not greater levels of suicide amongst the foreign national population at the moment, uncertainty about deportation, indefinite detention and lack of contact with family are known as risk factors. Paradoxically because foreign national prisoners are perceived as presenting few discipline or control concerns for prison staff, they can be neglected. This population does not have enough contact with their communities in the UK and abroad.

The cost of phone calls to family members in other countries for people in prison is very high and much more than people would pay for calls in the community. The prison service has made a concession to people whose family live abroad and who don't get any visits, which is a free five minutes phone call per month. However, this is small consolation to someone whose is separated from their family. The prison service could do much more to take advantage of technology such as Skype and email to enable prisoners to maintain more meaningful contact with their families abroad.

Conclusion: Legal Aid Sentencing and Punishment of Offenders Act and the future

We are cautiously optimistic that the changes to the remand test, which should means that defendants will not be remanded unless their offences are such that they

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15. Prisoner quoted in *Going the Distance* Prison Reform Trust 2004: 11

are likely to receive a custodial sentence, and the potential for using remand less, will (in time) benefit this population. However, it will be even more difficult for foreign national prisoners to access legal advice for immigration matters. Most controversially perhaps, the new Tariff Expiry Removal scheme means that foreign national prisoners on a life or IPP (indeterminate sentence for public protection) sentence can be deported at or after tariff expiry. Foreign national prisoners who were expecting to spend a considerable time in prison may find themselves being deported with little or no preparation. Conversely, for British citizens on indeterminate sentences, who face the prospect of potentially a long time in prison and no release date, this can appear deeply unfair. British nationals will still need to have their release agreed by the parole board.

Foreign national prisoners are in danger of becoming a population who are seen purely in immigration terms. Their welfare and rehabilitation needs are becoming invisible. They are doubly disadvantaged through being at the mercy of the immigration and

prison systems. The Prison Reform Trust's concerns about the treatment of foreign national prisoners are shared by other charities, visiting groups, lawyers and HMCIP. There has been no assessment of the impact of the hub and spoke scheme on family ties, rehabilitation opportunities and sentence progression. There is no comparative information regarding work, education and other opportunities for post-sentence detainees and other foreign national prisoners. There is no real understanding of the need for preparation for release and resettlement support. Welfare, cultural and language needs are not always addressed. Overall, the failure to recognise the diversity, individual circumstances and different needs of foreign national prisoners leads to unfairness in the system.

The prison service should implement a policy on foreign nationals that sets out a coherent strategy to improve their predicament. This will require leadership, recognition that foreign national prisoners are entitled to be treated as prisoners rather than deportees and a real commitment to preventing unfair differential treatment.

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Edge Hill
University

The Prison and the Public

27 March 2013

Edge Hill University

Plenary speakers:

Dr Jamie Bennett (Governor of HMP Grendon, Research Associate at the Centre for Criminology, University of Oxford, and Editor of the *Prison Service Journal*).

Eric Allison (prisons correspondent for the *Guardian* newspaper, trustee of the Shannon Trust and a former prisoner).

This one-day conference will focus on the relationship and interface between the prison and the public. The imposition of state punishment has historically kindled the public imagination and, as such, the 'private' world of the prison has become increasingly exposed through a range of modes. The aim of this conference is to explore the variety of means through which the prison becomes connected with the public and vice versa. This conference will be multi-disciplinary, topics will include:

- Representations of prisons in film, TV and literature
- The relationship between the prison, prison service and the public
- The role and methods of the media and journalism in relation to the prison
- Academic analysis (criminological, historical) of the prison and the public
- The construction, purpose and diversity of prison exhibitions
- Visual images of, and from the prison in art and photography.

Speakers will include academics, writers, practitioners, artists, journalists, archivists and curators and those who work within TV and film. Selected contributions to this conference will be published in a special edition of the *Prison Service Journal*.

Please submit an abstract of about **250 words** and a short biography by **Friday 22 February 2013** to either Alyson Brown (browna@edgehill.ac.uk) or Alana Barton (bartona@edgehill.ac.uk). To book whether giving paper or just attending see www.ehu.ac.uk/bookthepreisonandthepublic