When the Best is Not Enough (November 2015)

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Observers: 10 postgraduate GDL students at City University Law School, observing in pairs between January- April 2015
Courts covered: Taylor House, York House
Number of bail hearings observed: 19
Names of immigration judges presiding over bail hearings observed:
D Taylor J
S Taylor J
Gibb J
Callender Smith J
Clayton J
Simpson J
Bail Observation Project questionnaire used?: Yes
Words in this report: 1190.

Fresh-faced, bright-eyed, optimistic law students walk into the Immigration & Asylum First-Tier Tribunal building at Taylor House. They have been trained by Bail Observation Project volunteers on how BOP works, the reputations of different tribunals, and of good and ... notorious … judges. They have heard how some judges operate a fair court and turn out balanced decisions, while others pretty much allow the Home Office Presenting Officer to write their judgments for them. What awaits them, therefore, is a lottery.

Most of the students at City University attend lectures at the Northampton Square campus, a two-minute walk from Taylor House hearing centre in Rosebery Avenue. As a a result, the majority of observations over the year took place in this court, with some also at York House in Feltham, west London. We had heard earlier in the year how Taylor House has a reputation amongst BOP and lawyers as generally giving a fairer hearing to both sides. For the most part we found this to be the case. The majority of judges were courteous and fair-minded, very often granting bail where it was possible under the rules.

Today, however, is no ordinary day. A volunteer student observer goes through security, and scans the bail list. He finds a suitable bail application and enters the court, as he is entitled to do. Remember, this is a volunteer who may be nervous at court procedure, not having completed a vocational course teaching him legal procedure. These are not seasoned lawyers experienced at dealing with judges. With reason, volunteers are often daunted by a real court before they even start.

Immediately: ‘What’s your status?’ The volunteer explains that he is attending court to observe the bail application on behalf of the Bail Observation Project. The judge kicks him

out on the pretext of his clothes, claiming that it is not an open court. This is despite him looking 'perfectly smart' to barrister Colin Yeo of Garden Court Chambers, who tweeted on the subject that day. He came back in a three-piece suit later on with a colleague, and was allowed in by the same judge. So much for open justice to all members of the public.

The judge's allegation that it is not an open court is patently false. The Asylum & Immigration Tribunal (Procedure) Rules 2005 state that all tribunal hearings must be held in public, subject to extremely narrow exceptions regarding public order and prejudicing the interests of justice, neither of which applied in this case. It is a court of public law, and justice must be seen to be done. This flagrant making-up of rules by the judge as they went along – by a person in an authority position – shocked us at City BOP. The volunteer, after consulting members of the City BOP group, filed a complaint. The judge in question has since retired.

Notwithstanding this major exception, the judges were generally courteous, and were considered impartial by the volunteers in the large majority of hearings. However, our observation surveys raise serious questions about court procedure and the extent to which the judges are following the 2012 Guidelines for Judges Presiding over Immigration and Asylum.

First, while, as has been mentioned, any member of the public should simply be admitted to the tribunals by default, the majority of volunteers were asked about their affiliations and why they were attending the hearing[1]. The 2014 Tribunal Rules (§27), allow for hearings to be held in private only if a person's presence is likely to be disruptive, to prevent the giving of evidence or would defeat the purpose of the hearing.

Second, as has been found by the Refugee Studies Centre [2], and the UNHCR[3], there seems to be a pervasive culture of disbelief in the Tribunal system. The credibility of the applicants was raised in the majority of cases.[4]

Third, in over a third of hearings the judge failed to clarify to the applicant how the case would proceed.[5]

Fourth, in the majority of cases, the judge made no comment on the length of detention, despite the fact that in the Guidelines it is noted that 'the judge must take into account the length of immigration detention because the period will be informative about why the person remains detained and whether they should continue to be.' (§17). The Guidelines

[1] Volunteers were asked about their affiliations/why they wished to attend in 11/19 observations.
[2] Working Paper series no. 102, 'The Culture of Disbelief', July 2014.
[3] 'Beyond Proof – Credibility Assessment in EU Asylum Systems', May 2013
[4] In 12/19 observations
[5] In 6/19 observations

emphasise that 'it is generally accepted that detention for three months would be considered *a substantial period of time and six months a long period* [authors' italics]. Imperative considerations of public safety may be necessary to justify detention in excess of six months' (§19). Worryingly, such considerations did not feature (explicitly) in the reasoning of the judges.[6]

Finally, Bail applicants who require an interpreter seem to be at a significant disadvantage. In Appendix B of the Guidelines it is advised that 'all parties speak clearly so that the Applicant can hear what is being said' and that 'time is given to the Interpreter to translate if required.'

The reality is that in many cases involving an interpreter, insufficient time was given to the interpreter to translate. The bail applicant is expected to simply sit and wait while her or his case is being discussed and decided, in a language that they do not understand. In some cases the HOPO and the judge spoke so quietly to one another that the interpreter would not have been able to hear even if they *had* been given time to translate. Perhaps this is a reflection of what the judges deem to be 'required' (see above), but clearly for the applicant not to understand the proceedings of their case is a violation of basic legal principles.

Moreover, that interpreters are not often given the opportunity to translate is compounded by the decreasing competency of interpreters as a result of the 2012 government policy to outsource interpreting services to the private company 'Capita', rather than employ independently qualified interpreters on regulated national registers such as NRPSI and NRCPD.[7]

It would seem, therefore, that while the majority of judges are impartial, and seek genuinely to give the bail applicants a fair hearing, there are still serious procedural flaws resulting in a fair trial being denied to the applicants. There is a worrying disconnect between the generally good intentions of the judges and the reality faced by the applicants. Arguably, this is a matter of discipline and training.

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[6] The Judges did not consider the duration and proportionality of detention in 12/19 cases, neither did they note the Guidance's definition that 3 months is 'substantial' and 6 months is 'long' in 15/19 observations. Indeed they the judges did not comment on the length of detention in any way in 15/19 observations

[7] Manifesto of Personal Interpreters for Justice: http://b.3cdn.net/unitevol/479d44c183a5393fb9_jbm6ibft6.pdf