Cardiff University Law School Pro Bono Scheme
Bail Observation Project 2015-16: Final report

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Introduction

Immigration detention presents a challenging period of time for many individuals caught in the limbo of temporary imprisonment. Uncertainty surrounds not only the length of their detention, but also their future in the United Kingdom. Bail hearings, most often lasting only 30 minutes, bring decisions that hugely influence individuals' lives, deciding how they will spend what may be their last few weeks living in the UK.

In 2015 and 2016, Cardiff University Law School students contributed to the Bail Observation Project, a public-led investigation into the immigration and asylum tribunals, with the ambition of improving both the conditions of immigration detention centres and the fairness of immigration and asylum hearings. Over the course of 6 months, 8 Cardiff Law students observed a total of 23 hearings and, using guidelines established in previous Bail Observation Project reports, established a number of concerning issues at Columbus House, Newport, which is statistically a court that performs relatively poorly in the granting of bail.

Our report acts as a virtual walk-through of the hearings, and details both particular cases of injustice, as well as a broader overview of general issues. However, our discussion of these concerns must come with a caveat: circumstances do seem to be improving.

Video-link

The video-link, through which detainees may view and communicate with the courtroom, stands opposite the judge. Its use disadvantages the bail applicant for several reasons.

First, the absence of the applicant in the court automatically depersonalises him/her. His/her feelings and emotions are contained within the detention centre, hence not being felt on a more personal level at the court. Consequently, the applicant becomes a mere 'detainee' in the video.

This disadvantage is compounded in cases where applicants required interpreters. In some instances, due to reasons such as the incompetency of the interpreter or limited time given to interpret court discussions, the hearing of the case seemed to only be happening among the parties present in the court, thus separating the applicant in the video-link from his/her own hearing. The applicants, though they may be unable to understand the discussion between the parties involved, are required to remain silent and to only watch.

Technical problems further hindered the fairness of the hearings. There was background noise in most hearings, which was enough to cause distraction and a shift of focus within a case. In one instance, the alarm at the detainee's end went off midway through the hearing. Circumstances such as these cause distraction. Additionally, there were instances where a considerable amount of time was spent by the court clerk liaising with the detention centre, with several phone calls made before the right detainee was called to engage in the video link. It seems issues such as these would undoubtedly be irrelevant if the applicant were physically present.

Although the use of the video-link may save costs and potentially speed up court hearings, this consideration should be balanced with the importance of ensuring the best quality hearing possible.

Interpreters

The interpreter sits at a table in the centre of the courtroom, next to the representing solicitor (if present) and opposite the Home Office Presenting Officer. However, their presence does not guarantee a fair hearing.

Even when an interpreter is present, it appears that much of the courtroom discussion is lost in translation. Often, languages have diverse dialects, and differ on a regional basis, meaning the detainee will struggle to understand certain words and phrases. Some words simply do not translate. On one occasion, an applicant's representing solicitor interrupted the interpreter to correct a translation, due to his knowledge of the language. One can assume that not all detainees are so lucky as to have a solicitor fluent in their native tongue.

Interpreters are often not given enough time to translate all proceedings, and thus skip potentially vital details. This is unfair on the detainee, as they may lose out on an opportunity to make known their concerns. Where a detainee relies solely upon the interpreter, it therefore ought to be ensured that the interpreter has a thorough command of the language, and is given adequate time to translate.

A small miscommunication or ambiguity regarding the meaning of words can be detrimental to the detainee, and can potentially lead to refusal of bail. This situation arose in a case we observed. The interpreter was Punjabi (Hindi) and the detainee's language was an Indian regional language, Gujarati. There was confusion over the word 'visit', as the detainee thought it meant visited (i.e. for a period of hours) rather than 'stayed' (i.e. for a period of days). He had agreed that he had 'visited' the surety's house (the address where he was meant to stay if granted bail), but was unaware this was to be interpreted by the judge as 'stayed'. The judge subsequently understood that the detainee had stayed (as we understand the word) at the surety's house for a period of days, resulting in an account conflicting with that of the surety, who contended that the applicant merely visited regularly. From this, the judge commented that the relationship between the surety and detainee was unclear due to perceived disparities regarding habitation at the surety's address. The confusion regarding the bail address, and whether the detainee had 'stayed' or 'visited', was cited as a reason for not granting bail. One would hope cases such as this are not common.

Bail summaries

The bail summary is a document outlining the reasons why the Home Office opposes the applicant's bail request. It consists of the applicant's immigration history and an explanation of the Home Office's reasons for considering it appropriate to detain the applicant. Such a document is critical to the case and hence must be given to the detainee, and any legal representation, in sufficient time before the hearing. In the majority of the hearings observed, this requirement was adequately achieved, and the bail summary was made available to applicant in advance. Any errors within summaries were thus noted and amended prior to the hearing.

Prior provision of the bail summary is necessary so as to allow the detainee, or their representing solicitor, to counter any claims within it. Evidence refuting claims may then be presented at the hearing. At the hearings we observed, the bail summary was both provided appropriately and correctly challenged for false statements, as the applicant was given time to challenge or question the Home Office.

One occasion where a challenge to an incorrect summary was properly made was where an applicant had been described as 'disruptive' in detention. However, upon examination, it was revealed that this claim was made merely because the applicant refused to go on a plane back home. This behaviour was clearly not disruptive, thus demonstrating how statements made were not always correct and supported by evidence by the Home Office.

Furthermore, despite the bail summary being provided in advance, errors were present nonetheless. For example, in one hearing there was an error present on the bail address. Though amendments were subsequently made, and the application granted, this illustrates a worrying lack of attention to detail and communication between the Home Office and the applicants.

Sureties

Sureties sit at the side of the courtroom, and may be called to the table upon questioning.

In theory, a surety, agreeing a monetary forfeit if the detainee breaches their bail conditions, simply exists to mitigate the risk of the applicant absconding. However, judges take different approaches to the weight they accredit to their presence. Sureties would sit at the side of the courtroom, and be called to the table upon questioning.

The Bail Guidance Summary states that a Tribunal Judge may require an applicant to produce sureties, but this is not an automatic requirement. However, it was witnessed in at least 3 cases that the judge in fact asked applicants why they did not have any sureties, despite Bail Guidance that Tribunal Judges must have due regard to the fact that people may have nobody whom they could expect to stand surety for them. For one applicant, who represented himself, the judge's line of questions regarding a lack of sureties provoked emotional responses in detailing previous drug problems and the applicant's family disowning him. It was perhaps these honest answers which led to the granting of bail, yet one must question the necessity of these questions.

In two cases, the Tribunal Judge's requirement of sureties was so significant that it was noted as a fundamental factor in the application's refusal. One could thus infer from this that some judges may put unnecessary weight on whether an applicant has sureties or not, and may consider a surety synonymous with a trustworthy applicant. On the other hand, one may find the existence of a surety, and the provision of monetary insurance for a case, standing as reason alone for the awarding of bail, without a complete examination of the applicant's objective likelihood to abscond.

However, in the majority of applications observed, a general opinion was that the judge did not put unnecessary weight on the presence of sureties. In the hearings where the judge's attitudes towards sureties was noted, sureties were treated with courtesy, and the legal implications of their position were clearly explained to them. Furthermore, judges took into consideration wide factors with regards to sureties. For example, there was an understanding that, in certain cultures, being an elder within a family meant you would be respected and obeyed – a fact which was discussed in the granting of bail.

Despite a clear underlying respect paid by the judge, some Home Office Presenting Officers did not treat the sureties in an acceptably polite and considerate manner, and many questions were posed with cynicism and distrust. Though it is the HOPO's job to oppose the position of the applicant and their sureties, this is not enough of a reason for their rudeness.

With regard to questions asked of the sureties, they were often required to produce recent bank statements and, in some instances, the source of the money was questioned. This was due to money suddenly appearing in accounts without any acceptable explanation as to its origin.

The central question to sureties concerned how they would ensure that the applicant would adhere to the bail conditions, and how they would act in the event of a failure to comply. Responses to this latter question differed. Sureties either reeled off the response preferred by the Home Office and judges (that they would contact the authorities straight away) or they stumbled over a number of reasons why this wouldn't happen, reassuring those present that they would go and find the absconding applicant themselves. The first answer suggested the surety had listened closely to legal advice and were responding with an appropriately concise and cooperative answer, while the latter implied little research had been done as to potential questions they would face in the tribunal. This second response would sometimes harm the detainee's case, and it became clear that if representing solicitors had committed adequate time to preparing sureties for these questions, the likelihood of bail being granted would have been greatly improved.

A further question presented to sureties was whether they knew that the applicant had entered illegally. On the whole the response was no, though at times, upon questioning from the Home Office representative, this 'no' transformed into more of a 'maybe'. This would further harm the applicant's case, as a trustworthy surety is vital.

The presence of sureties seemed to be one of the most persuasive factors in the granting of bail. One particular judge gave little in the way of elaboration when granting bail in two hearings where there were sureties present, considering it unnecessary to interview them in any detail. One may therefore conclude that you are far more likely to succeed in your application if a surety is present, as long as the answers given by said sureties match those required by the Home Office and the judge.

Reasons for granting bail

The Bail Guidance for Judges Presiding over Immigration and Asylum Hearings states that 'a First-tier Tribunal Judge will grant bail where there is no sufficiently good reason to detain a person and lesser measures can provide adequate alternative means of control.' It provides 5 criteria that Judges should consider: the reason(s) for detention; the length of detention to date and likely future duration; the available alternatives to detention; the effect of detention upon the person and his/her family; and the likelihood of the person complying with conditions of bail.

On the whole, the judges across the 23 hearings complied with the Bail Guidance. The main reason given for the granting of bail was that removal was not imminent, meaning detention could not continue indefinitely (something judges wish to prevent). One judge dismissed the Home Office Presenting Officer's claims that removal was imminent, despite claims that arrangements were being made for the applicant to board the next available flight back to his country of origin. Other reasons given for granting bail included previous compliance with reporting conditions, length of detention to date and the presence of sureties (as discussed).

During hearings, judges often took account of the applicant's personal circumstances rather than referring to the specific criteria mentioned above. In one case, the judge accepted the surety's authority over the applicant, by virtue of him being the eldest brother. This is an established aspect of the applicant's culture. In another, the judge placed weight on the fact that the applicant's release address was his family home and he had resided there since 2010. He agreed that this was a sensible alternative to detention, particularly as the applicant was already on licence.

In another case, the judge took account of the applicant's wish to attend an upcoming High Court hearing in person, but dismissed a medical argument as the applicant would be receiving treatment in the detention centre if necessary. Medical arguments have not tended to be successful due to the quality of treatment available in detention compared to that at potential bail addresses. For those who are suffering from illnesses, it is argued, the best place for them may in fact be under state control if there is access in detention to medical facilities.

Reasons for denying bail

Reasons for refusal of bail consistently centred on previous non-compliance with reporting and histories of the applicants' absconding, as well as insufficient evidence in relation to sureties and/or agreed residence addresses following release. Some decisions for refusal of bail noted that continued detention was a proportionate response, given the particular facts of the case. This proportionality was with regard to the illegal nature of the applicants' actions prior to detention. One detainee, who had previously travelled to Ireland (for a holiday) using a forged Spanish passport therefore faced huge difficulties in convincing the court that this behaviour was conducive to an adherence to bail conditions. With a judicial review imminent and the future length of detention limited, a denial of bail seemed to be an objectively proportionate response in this circumstance.

In refusing bail, judges often noted that the 'case will not get better with repetition' (or words to this effect) and that there was 'no chance of success'. It did, though, on occasion, appear as though a decision had already been made in the mind of the judge prior to hearing the case. As confirmation of this, we would often witness the Home Office Presenting Officer conversing with the judge before the applicant's representative and sureties entered the room, discussing the likelihood of the granting of bail – prematurely damning the applicant to their fate.

Bail was most often refused when the detainee represented themselves and provided no sureties, with some such hearings lasting no longer than 5 minutes On paper, a vast majority of these fell within

proportionality guidelines, as the individuals had no family ties in the United Kingdom and were facing imminent removal from the country and so may have been refused bail even with legal representation. However, without access to legal aid, or sufficient funds for a solicitor, continued detention appeared to be unfortunately an inevitable outcome.

Withdrawals of applications

In 7 out of 23 cases it was suggested by the judge that the application be withdrawn. As the rules stipulate that if an application is refused then detainees must wait for 28 days until they are able to reapply, it seems judges are indeed operating with the best interests of the applicants in mind, suggesting withdrawal to prompt applications for the following week. They often spoke with optimism when suggesting withdrawal, proposing that additional evidence or information would result in a positive outcome.

The further evidence required by judges ranged from issues with sureties' addresses, appropriate sureties being unavailable, confusion regarding Home Office information, and lack of evidence to confirm statements made in bail summaries. Furthermore, in one case, a lack of interpreter served as an impetus for the judge to request that the applicant withdraw their case. However, this seemed to be more an organisational failure than a failure of the case. It is hoped this kind of organisational failure is an exception, and happens infrequently.

Overall, withdrawing a case was consistently portrayed as a means by which applicants could strengthen the possibility of bail being granted. In one instance, the judge commented that it is 'possible that another judge could come to different conclusions with further evidence', and it is this prediction of possible release which suggests that with correct and full information a case would have a good chance of succeeding.

Judges

In the hearings observed, it was noted that the immigration judges were generally familiar with the relevant areas of law and proceedings, sometimes commenting on the length of detention, noting that 3 months is 'long' and 6 months is 'very long'. The immigration judges did generally take into account the duration and proportionality of detention and the risk of absconding and previous compliance. However, the weight which judges accorded to these factors in coming to their decisions was unclear.

Save on one or two occasions, judges generally carried out hearings in a fair manner. Applicants were given the opportunity to raise any points of doubt regarding the bail summary, and where issues relating to the documents presented to court arose, both the Home Office Presenting Officer and the applicants were allowed to cross check those documents. The judges generally appeared to listen to both the Home Office and the applicants' representations, although they seemed impatient at times with regard to the clarity of the video link and the quality of the interpreters. In most cases, they were courteous towards all parties in the proceedings, including the applicant, sureties and observers.

The main issue regarding the immigration judges is the lack of consistency in ensuring that all parties to the hearing understand the proceedings. While the judges did ensure that all parties were able to clearly see and hear one another over the video link, they often failed to ensure that the applicant and/or the sureties were able to follow the hearings. Little guidance was given to the applicant and sureties regarding the procedure. Often, the applicant would be silent throughout the proceedings and one can therefore not be sure if they were able to understand the judges, their representatives, or even their interpreters (if any). There seemed to be an overall failure on part of the immigration judges to create an inclusive environment for the applicant where hearings were carried out over the video-link.

Conclusions

From our observations, we have therefore found a number of troubling issues. Initially, it seems peculiar considering the importance of the decision that the applicant is not present. Though a cost-saving move, the nature of a video-link seems disproportionately damaging to the applicant, and leaves them unable to both follow and influence proceedings.

There were also some issues with errors in Bail summaries.

The presence of sureties appeared to be an overriding factor in granting or refusing bail, with the merits of individual cases somewhat cast aside.

In cases where the detainee had no legal representation, the hearings were short and the outcome was generally a refusal of bail.

The observations also raise concerns about the use of interpreters. Interpreters should be given time to translate and should be able to speak and understand the proper dialect/language being used.

However, an overview of the 23 cases witnessed does paint a more positive picture than previous Bail Observation Project reports. Judges generally adhered to guidance standards and, through their discussions with the applicants, seemed sympathetic to their situations. There are clearly issues restricting access to justice that need to be addressed. However, it can also be concluded that levels of injustice in this tribunal may be diminishing – a positive prospect for the increasing number of individuals detained in immigration detention centres across the United Kingdom.

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