

Cardiff University Law School Pro Bono Scheme

Bail observation Project

2016-17 report

Observers: 8 Cardiff University law students

Number of bail hearings observed: 20

Court: Columbus House, Newport

Dates: 2016-17

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This report acts as a review of progress made since the ‘travesty’¹ first noted in 2011 and in particular how the situation has developed since Cardiff’s 2015-16 report². The Report will be structured like the previous Cardiff report in sections relating to various areas of interest with these sections each being divided into areas of improvement and ongoing failure.

Whilst there are many ongoing failures whereby the standard of Immigration Detention tribunals falls short of the standards expected in other areas of law, the overall finding of

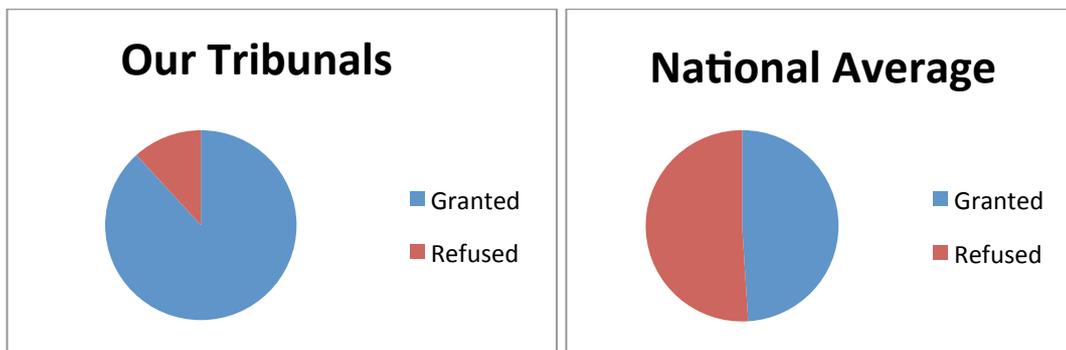
¹ B. Mackeith and B. Walker, *Immigration Bail Hearings: A Travesty of Justice? Observations from the Public Gallery*, 2011

² Cardiff University Law School Pro Bono Scheme Bail Observation Project 2015-16: Final Report, <https://bailobs.org>

the 2017 report is one of some improvements from the ‘travesty’ observed in 2011 and even noticeable improvements on the conditions observed by the 2016 report.

However, concern as to the existence of a significant ‘observer effect’ remains. The observer effect describes the higher standard of care given for justice when an external observer is present. Whilst we cannot comment on what we did not see, the fact that the bail refusal rate we observed at Columbus House was a quarter of the national average³ suggests that the tribunals we observed may have been significantly different to those in which an observer was not present.

The 2017 Cardiff Bail observation project consisted of 8 Cardiff University law students sitting in on 20 tribunals and taking notes guided by AIT guidance of standards, available on the Bail Observation Project website⁴. Conversations were also had with the Home Office presenting officers (HOPOs), the clerks, the judges and barristers.



Legal representation

Improvements

Legal representation was available for 85% of the hearings that were attended. This is about a 10% improvement on 2011⁵. The importance of professional representation to the chances of bail being granted seemed clear. In the absence of a lawyer, the Home Office presenting officers would rarely have their bail summary claims challenged by the judge.

³ In 88% of the hearings we observed, bail was granted, compared to 49% as the national average. Statistics were provided by the Home Office in response to a Freedom of Information Request numbered 113663 from Jack Woods delivered on the 9 September 2017. Whilst the figures in the answer to the Freedom of Information request do not cleanly add up, it is thought that this is an honest representation of the information. A significant aside is that if withdrawn applications are included from the national figures, the chance of an original application being granted is as low as 28%. In previous reports it has been suggested that a small proportion of withdrawn applications are done so on the basis of a judge’s reputation of high refusal rates and the additional psychological cost and increased risk of incident arising out of refusal. B. MacKeith and B. Walker, *Immigration Bail Hearings: A Travesty of Justice? Observations from the Public Gallery*, 2011, p. 7.

⁴ ‘What should happen in a well-run bail hearing’ updated from <https://bailobs.org>, See Tribunals Judiciary Bail Guidance for Judges Presiding Over Immigration and Asylum Hearings

⁵ The previous *Travesty of Justice* report, 2011 recorded 40 of 115 litigants were litigants in person.

When these claims were challenged in the presence of a barrister, the claims were often found to be unsubstantiated. Beyond scrutinising Home Office evidence, the presence of a legal professional helped the presentation of the applicant's case and their inclusion in the process.

Ongoing failures

Whilst the presence of legal representation is considered valuable in combating the flaws highlighted by the observer effect, there were clear issues in the quality of representation. Many barristers received their cases the night or morning before the tribunal and had limited time to prepare. Barristers tended not to specialise in the area of law and this sometimes led to a visible lack of confidence. In one instance a barrister failed to challenge an incorrect use of the '14 day rule'⁶ meaning that the judge heard the entire case based on Home Office assurance that whatever he ruled they would be able to overturn and carry on with deportation. It was not until the decision was actually made and the tribunal closed that the barrister realised the mistake and had to request that the judge now consider this.

Video-link

Improvements

The technical difficulties were less frequent than in previous reports, in that in only two cases the video link stopped working. The judges took more care to overcome the inherent barriers created by the video-link (when it worked), often taking more time to ensure that the claimant could understand what was going on.

Ongoing failures

16 out of 20 cases that we attended were conducted via video-link. Several notes from these hearings concern problems which arose from using video-link. Despite greater efforts by judges to explain to applicants what was going on, technical difficulties such as background noise interfering with the microphones contributed to an increased degree of detachment of applicants from the proceedings in all of the hearings. Furthermore, in two of the cases, the video link stopped. The lack of visuals and sounds from the court room meant that the applicants could not participate and did not know what was happening in the case. The technical difficulty did not prevent the proceedings from continuing; the judge saw no need to try to fix the video-link but instead just required that a message was passed on to the applicant with his decision.

⁶ Paragraph 22(4) of Schedule 2 to the Immigration Act 1971 gives the Home Office the ability to ignore the decision of the tribunal judge and carry on with its removal orders

Whilst conducting these court hearings via video-link is considered cost-effective and time-saving, there may be a cost to the standard of justice. This suggestion that video links and their quality has an effect on the outcome of tribunals is echoed by an emerging body of research⁷. The *Travesty of Justice* report recommended proper technical training of clerks and judges; that judges ensure applicants are fully involved in the hearings; and that ultimately applicants should be given an option to be heard in person. For the most part these recommendations have not been adopted.

Bail Summary

The bail summary discloses both the immigration history of the applicant and the Home Office's reasons for opposing bail; it should be received by 2 p.m. the day before the hearing. This provides the bail applicants with an opportunity to read the arguments made by the Home Office prior to the hearing, allowing time to formulate a counter argument and identify errors and false statements to challenge these.

Improvements

From what we observed, the bail summary was usually successfully received by all detainees prior to the hearing. Typically, judges would ensure that all evidence was provided to support the claims of the Home Office and those of the Bail Summary.

Ongoing failures

In one case observed, the Home Office had misstated the length of judicial review proceedings in the case which in truth was 3-4 weeks, a matter unknown to the Home Office presenting officer. Bail summaries are not completed by the HOPO and there was sometimes a visible distinction between the Bail Summary and the case knowledge of the Home Office presenting officer.

Providing the Bail Summary is served, the points made within it must be supported by evidence. Although this requirement was mostly adhered to, we did observe failures. In one hearing, the Home Office presenting officer had not received evidence for the Court of Appeal case currently being processed, one of numerous examples of internal communication inadequacies within the Home Office.

⁷ D. Tait, 'Gateways to Justice: Improving Video-Mediated Communications For Justice Participants' <http://researchdirect.westernsydney.edu.au/islandora/object/uws%3A15505/>; A. Wallace, 'Virtual Justice in the Bush: The Use of Court Technology in Remote and Regional Australia', *Journal of Information and Science* 19 (2008): 1; Rowden, E., 'Virtual Courts and Putting "Summary" back into "Summary Justice": merely brief or unjust?', in J. Simon, N. Temple, and R. Tobe (eds), *Architecture and Justice: Judicial Meanings in the Public Realm*, Ashgate, 2013, pp. 101-13.

Checks regarding the evidence provided and in ensuring the Bail Summary can be understood were also observed. The cost of late delivery was highlighted when an autistic applicant was forced to read his document as the court waited. The cost of the Home Office's failure was that felt by the applicant.

Judges

Improvements

During the observed hearings, the judges were familiar with the relevant law and proceedings. At the beginning of each hearing the judge would ensure that the applicant on the video-link could hear the proceedings, and ensured that they understood what they were being asked. In cases where the applicant required an interpreter, the judge would typically make certain that they understood one another and spoke the same dialect. They also checked whether the sureties needed to use the interpreter. Once this was established, most judges would then tell the applicant who was in the room. Sometimes the observers would be mentioned. If the applicant was a litigant-in-person they would check to see if they understood how the procedure works and if they required more time with the documents.

The tribunals ranged from 5 minutes to almost two hours, with an average time of approximately 20 minutes. It was not typical, as previous reports and anecdotes from other tribunals have suggested, to have judges rush through proceedings.

Ongoing failures

Most of our observers recorded some reluctance from some of both judges and Home Office presenting officers at being observed. Also as noted, there were issues with continuing without the video link and with the use of evidence. The duration of the hearings was on average much shorter where there was no legal representation.

Accountability, scrutiny and monitoring

Improvements

As mentioned above, there was an increase in the proportion of cases with legal representation and this adds an important layer of accountability and scrutiny.

Ongoing failures

Although there has been a significant increase in the duration of the hearings, a number of them were still rushed through, particularly in cases where the applicant had no legal representation. In some hearings, the judge was quick to dismiss evidence given by the applicant unless certain highlighted matters were brought up by the Home Office presenting officer (HOPO), although this was rare.

In some hearings, the judge allowed time for the applicant to clarify uncertainties before and after the hearing only. Previously it has been recommended that the applicant is allowed time to clarify uncertainties at regular intervals throughout the hearing.

In many of the hearings, the HOPO was not aware of the applicant's full immigration history or pending applications. In most instances, the HOPO explained that this information was not made clear to him/her, a clearly unacceptable breakdown of communication. A recommendation that has not been adopted is that of written or audio recording of the entire proceedings made available to interested parties. This easily implemented accountability, monitoring and scrutiny procedure has not been adopted, at substantial cost to the reputation and standards of the tribunals.

Reasons for decision

Improvements

In the large majority of cases we observed, clear reasons for decisions were given. The judges mostly outlined all five of the factors that they must consider before giving the ruling.

Other factors that were apparently important were the availability of sureties and the amounts of recognizance offered. However, some judges explicitly stated that this was 'not a bargaining process' and observers did not feel that any particularly inappropriate amounts were requested.

Sureties

Sureties were typically treated well, although sometimes the scepticism with which the judges examined their claims seemed unfair to the surety. By comparison to previous reports, the treatment of sureties was indeed much improved and, as reported above, the requests for recognizance seemed consistently proportionate.

Conclusions

Compared to previous reports, the cases that we observed had improvements, including a far greater proportion of applicants being legally represented⁸. However, there were still prominent examples of less than ideal procedure, with the majority of applicants being constrained by the video-link requirement.

The key concern, however, is that the 'observer effect' obscures much deeper problems. It may be suggested that much of the statistical disparity in bail refusal rates may be explained by the relaxation of procedural rigour and the presumption of refusal rather than granting bail. Whilst it cannot be suggested that there should be an expected bail granting rate, the suggestion that the prospects for applicants dramatically improve in the presence of an observer strongly suggests that reforms ought to include the audio or written recording of cases, an increased availability of professional representation and that there be yet another reminder of the procedural requirements of rejecting bail only as a last resort⁹.

The policy of indefinite detention for immigrants has been under particular scrutiny recently and lapses in rigorous and fair hearings for bail applications must be taken far more seriously than they have been if the Home Office is not to compound its issues of poor treatment of immigrants in detention

Whilst much is promising in the steady improvement from the state of affairs in 2011, there is significant room for improvement to bring the tribunals to the standard expected in other areas of law. Despite this, the singular concern of this report is that away from observation the standard of procedural rigour and subsequent justice may be worse than reported here.

⁸ It may be inferred that the increasing effectiveness of the procedure explains a dramatic increase in the proportion of applications granted as there is certainly a strong correlation. Unfortunately any such inference is far from scientific and a host of other factors may have had their own significant effect.

⁹ *Bail Guidance for Judges Presiding Over Immigration and Asylum Hearings*, Presidential Guidance Note No. 1 of 2012.