

Bail observations 2019-2022 by students at the School of Oriental and African Studies, London

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Since the start of the pandemic bail hearings in London have been taking place exclusively online. Initially the system was extremely chaotic via telephone conferencing. Now (November 2022) it is more technological friendly via Cloud Video Platform (CVP).

All the bail hearings observed took place at Taylor House, London

Impact of the Covid-19 pandemic

The Covid-19 pandemic had a significant impact on hearings – many of those observed involved extensive periods of delay and withdrawals – and on lengthening detention.

Remote hearings

Whilst prior to the pandemic hearings were conducted with everyone in the courtroom, apart from the detainees themselves attending the hearings remotely via video link, more recent hearings have taken place via CVP or via BT Meet Me systems. Remoteness still severely impacts the conduct of the hearing. Detainees continue to be alienated from their own hearings where their fate is being decided. In remote hearings, sitting by themselves in a cubicle in an immigration removal centre (IRC) or in a prison, they have little chance to intervene and explain their version of the facts. The remoteness, whatever platform, seems to pose a real and further obstacle to the detainee's comprehension of the impact of the hearing on his/her rights and chances of success.

Whilst previously the detainees were the only ones not physically in the courtroom, currently most people taking part in the hearing – the Home Office presenting officer (HOPO), legal representative, and financial conditional supporters (FCSs), observers – are all mostly outside the courtroom. The judge is in the court. The hearing is, therefore, less personalised. There is a certain detachment from behind a video screen. The remoteness prompted by the CVP has made hearings more difficult, primarily for the applicant.

If, for instance, there is a delay in the hearing process, those physically present are told the reasons. But often detainees are the last to know what is happening. They often appear confused and uncertain, mainly when the equipment (whether CVP or BT Meet Me) has connectivity issues, rendering it difficult for them to follow the overall process.

Reasons given for opposing bail and for continued detention

In the majority of hearings observed, the Home Office opposed bail, as is customary. The rationale presented by the Home Office to oppose bail were often:

- removal imminent;
- likelihood of absconding;
- likelihood of reoffending;
- danger to the British public;
- the emergency travel document (ETD) could be produced shortly;

- unwillingness of the detainee to co-operate with own removal.

Many applicants were given the right to rebut, either by themselves or through their legal representative. On one occasion, it was clear that the history of noncompliance was due to homelessness, and therefore, not having an address to provide curtailed the chances of release.

In one particular case, the HOPO said risk of absconding, and history of non-compliance were the reasons to oppose bail, but the applicant said that the hearing was his first bail application; his non-compliance with reporting or giving notice to the Home Office of his whereabouts, was due to him being homeless, and not having an address to give officials was not a sign of bad behaviour.

Interpreters

Language and comprehension are key to the proceedings to ensure clarity and fairness: the language barrier of the applicant in one hearing was felt by the observer to be '*quite a scary position to be in*'. With the speed at which the hearing took place it was difficult to follow for the observers, let alone for the bail applicant, a foreigner, who did not seem to understand all the 'legalese' being spoken during the hearing. There was no interpretation in this hearing as it was thought that the applicant '*spoke good English*' (observer).

In one hearing, although the judge initially did not see the need to hear from the financial condition supporters (FCSs), later on he changed his mind and decided to question the FCS in the final part of the hearing. Both the FCSs and the applicant's mother – who was questioned by the judge for her involvement in the case – appeared to have some difficulties in addressing the judge in English and misunderstood the HOPO questions. They would have benefited from an interpreter for the sake of accuracy in their responses. This may have had an impact on the outcome of the bail application.

In cases of without interpretation, some observers found that when applicants were foreign national ex-prisoners, their risk of reoffending was not properly or explicitly assessed in accordance with guidelines. In one hearing, in particular, the observers felt that the whole process was rushed, lasting only 15 minutes.

On one occasion, the interpreter did not show up at first and the judge dismissed the need for interpretation as the applicant spoke English. The legal representative said that the detainee '*may not need one because he should not be expected to speak a lot*' but changed his mind (despite agreeing initially), saying that the applicant should be able to hear/understand what was being said, so requested that the hearing wait for an Albanian interpreter. As the parties grew impatient, the legal rep said he was happy with the proceeding to happen without an interpreter so long as if bail is granted the bail conditions are translated. The interpreter did show up in the end and translated the bail conditions to the applicant.

Hearing *in absentia*

In one case where the equipment did not work, the hearing took place *in absentia*, i.e. the detainee gave permission to the legal representative to carry on with the bail hearing even if he could not be present. Bail was granted.

Interaction between judge and detainee

In some remote hearings, *prior* to the pandemic, the judge only addressed the applicant towards the end of the hearing, upon making the decision on whether to grant or deny bail. In one hearing, the detainee asked whether he could leave the room halfway through the hearing, demonstrating his

confusion. In another case, the applicant was left standing for about 10 minutes at the beginning of the hearing as he was unaware that the hearing had started. The judge seemed to disregard their presence for the entirety of the hearings.

On the other hand, in many observations *during* the pandemic, judges seemed to interact with the detainees, asking relevant questions directly, including questions regarding language and comprehension of the proceedings. But attitudes seem to have changed in more recent hearings. Whilst bail hearings were still remote, judges appeared rather more mechanical, following the rules. They did not seem to empathise, to connect with the detainee. Nevertheless, no real evidence of partiality towards either party was found. But no real scrutiny of the HOPO or the applicant took place either. It was often a rather rushed process. It was felt that participants in the hearing wanted to get the case over with. Bail might be granted, but the process was hurried and failed to take all factors into account. Only the applicant's residence, crimes and time in prison that were mentioned.

The interactions between judge and HOPO in some circumstances may be seen as to affect the outcome of the hearing. On one occasion, it was observed that the judge seemed to believe that the HOPO was incompetent, but that was because the HOPO made themselves appear incompetent being confused about facts and dates. Although the judge's behaviour was felt to be impartial, he called out HOPO for not mentioning that the applicant suffered from mental illness issues. The judge emphasised the importance of being 'honest' in disclosing and mentioning this information in a tribunal. The observers were impressed by how quick the hearing was. The judge took the applicant's risk of being groomed into criminal gangs very seriously and his mental health too.

During another hearing, the observers noted that the judge challenged the HOPO very strongly due to the Home Office's action of not including the [Rule 35 report](#) findings in the bail summary. The detainee was affected by mental illness. The representative raised issues of a potential article 3 European Convention on Human Rights (ECHR) infringement, which however he was not certain about. The judge, nonetheless, granted bail in principle due to exceptional circumstances, posing the condition for the government to provide the detainee with accommodation within seven days upon receiving bail confirmation. Unusually, the HOPO did not advance any further requests.

Non-represented cases and interaction

In cases where there was no legal representation and no interpretation, the interaction between judge and detainee was varied; on a few occasions, the judge failed to ask if the detainee had had a chance to look at the bail summary and had understood the facts outlined. On more than one occasion, the judge did not ask whether the applicant wished to challenge the bail summary nor was the detainee allowed time to challenge the bail summary. On the other hand, in some hearings observed where there was no legal representation nor interpretation, the judge seemed to be making the applicant's case on their behalf. It was as though the judge had read the bail summary and already knew his decision.

Reaction to observers' presence at the hearings

Prior to the pandemic, hearings were attended in person by a number of observers and the room was filled with observers, the judge, the HOPO, and family or friends of the applicant, serving often as financial condition supporters (ex-sureties). On one occasion, the number of attendees surprised the usher, who asked '*Are you trying to break a record?*', thus suggesting the scarcity of members of the public which typically attend hearings, despite hearings usually being carried out in public when this does not pose a risk for the detainee, or in the interest of confidentiality. If more members of the public were to attend hearings, it would ensure greater transparency and would help render the court more accountable in case of possible errors or injustices. Further, the HOPO in this hearing also

admitted being nervous in presence of what she termed '*an audience*'.

Issues of clarity and transparency

In some hearings one could identify a degree of general confusion regarding cases listed. In one instance, the HOPO was unaware of the case at hand, and the judge proceeded to 'brief' the HOPO on the facts of the case, without appearing surprised nor concerned about the unpreparedness of the HOPO. The HOPO was not aware of the reasons for which removal had been deferred or of the applicant's recent asylum application, so that the representative had to clarify it. In another case, the hearing had to be adjourned due to lack of clarity as to the facts and chronology of the bail summary; the HOPO, judge and representative had different versions of the bail summary. On this occasion, the judge failed to inform the applicant of the change of schedule; he was only later informed by his representative.

In one hearing it was noticed that whilst the applicant said that most of the bail summary was accurate, it was clear that it contained some inaccuracies. The bail summary did not include the information about the applicant's refusal to comply with the emergency travel document (ETD) which was because he did not understand the scheme when he was asked to sign it for early release. However, it also meant that he spent a further eight months in prison because of it. His sentence would have been reduced if he had agreed to sign the document. This happened whilst he was in prison but then he was detained in an IRC for a year. There he was asked to sign a document for voluntary return, and he said he would but the immigration officers said that the applicant did not have to sign it. The applicant was representing himself because he had had issues with his previous solicitor. The applicant wanted to challenge the deportation all over again.

Credibility assessment

Issues of credibility were often raised in bail hearings. The credibility of the assertions of the detainee are at stake at bail hearings. In some instances, a credibility assessment was also conducted regarding the financial condition supporters. Their financial stability seemed to be an important aspect of their credibility, seemingly trumping their good faith in assuring compliance with court's ruling.

Length of detention

According to the Home Office, [Detention; General Instructions](#), immigration detention should be a measure of last resort and for the shortest period of time possible. It must be '*necessary and proportionate*'; '*Detention must be used sparingly, and for the shortest period necessary.*' Immigration detention is permissible when it is to effect removal; initially to establish a person's identity or basis of claim, or where there is reason to believe that the person will fail to comply with any conditions attached to a grant of immigration bail. To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law but must also accord with stated policy ([see HO, Detention: General Instructions, p.6](#)).

However, the time people spend in immigration detention can be indefinite. Many will be incarcerated for months even though either they have already served their custodial sentence for a crime they have committed, or they have not committed any crime but don't have the legal right to be in the UK but are behind bars, nevertheless.

In 30% of hearings observed, people had been held under immigration powers for more than three months. In some hearings it was clear that non-compliance with the emergency travel document (ETD) prolonged people's detention by months.

People held under immigration powers in prison

A number of the applicants in hearings observed had served a prison sentence and therefore already had an automatic deportation order pending. During the lockdown flights were suspended and obtaining documentation to travel was also difficult, therefore the timeframe for removal was said to be around 2-3 months. Another reason for people to be kept in prison under immigration detention was the scarcity of accommodation within approved premises. In several hearings observed judges were '*mindful to grant bail once accommodation was supplied and approved*'. In some cases, even with accommodation approved, electronic tagging was also a measure recommended.

The reasons for maintaining people in prison at the end of their custodial sentence were not always clear. The limited supply of approved accommodation, where a family address was not possible, was one explanation often given. Lack of probation approval for set accommodation was also often raised.

For people who had finished their criminal sentences, the risk of re-offending and the particular risk of absconding must be weighed against the presumption in favour of immigration bail. There is a risk assessment (Detention: General Instructions, p. 16) to be made by the judge which is based on the protection of the public from harm from a person whose criminal record is sufficiently serious as to satisfy the deportation criteria, and/or because of the likely consequence of such a criminal record for the assessment of the risk that such a person will abscond. In many cases this is likely to result in the conclusion that the person should be detained, provided detention is, and continues to be, lawful.

In several hearings observed where the applicant had been in prison and was now held under immigration bail, there was an evaluation of the evidence to establish the relatively low/or high probability of the applicant absconding, the likelihood of reoffending, and the danger to the British public.

Bail granted or refused

In the majority of hearings where bail was granted, certain conditions were also imposed:

- **Accommodation**

In many cases bail was granted in principle pending the availability of accommodation – or an address where the detainee could be found. Lack of approval of accommodation by the probation service in cases of foreign national prisoners was the principal reason people were not released immediately.

- **Electronic monitoring (tag)**

If bail was granted, the practice of electronic monitoring (tag) for people with past convictions, now under immigration bail, has become routine. This means that the applicant can be constantly monitored by the Home Office. Often the arrangements for the electronic tag take 3-5 days and applicants are not, therefore, released until the electronic tag is sorted out. In some cases, judges clearly emphasised that 'If not done within three days, the applicant will be released and the electronic tag issue will be dealt with afterwards from outside detention.'

- **Reporting**

On granting bail, in the vast majority of cases, a reporting condition is set. It has become customary that judges transfer the management of the bail to the Home Office. This means that the reporting condition is generally monitored by the HO and reporting takes place at centres managed by the Home Office.