

Cardiff University Law School pro bono scheme Bail Observation Project

2017-18 report

Observers: 10 Cardiff University law students

Number of bail hearings observed: 21

Court: Columbus House, Newport

Dates: 2017-18 academic year

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This report is a review of immigration bail hearings at Newport's Columbus House during the year of 2017/18 by students of Cardiff University Law School. This Bail Observation Project has involved ten Cardiff University law students attending 21 hearings and noting their observations in accordance with the guidance given by the Bail Observation Project.

Around 30,000 people spend some degree of time in detention centres in the UK each year.¹ Between October and December of 2017, 18% of the detention population were bailed.² However, the figure for the entire year is a low 14% of all detainees.³ This report will discuss whether this is down to the process of bail hearings or a factor outside of the law's control.

Interpreters

In around 60% of the court hearings attended, an interpreter was used to translate the proceedings for the applicant. There were 3 cases⁴ where there was an interpreter present, but they were not used. If there was no interpreter present, the judge ensured that the applicant was able to comprehend English and the proceedings before commencing. The interpreter in the majority of instances did translate all the proceedings, but there were others where they were only used when necessary; for example, in one hearing where the interpreter was only needed for the surety to understand the proceedings. There were two hearings witnessed where the interpreter translated for the surety when giving evidence, and then only translated the opening and concluding remarks to the applicant.

Even though the use of the interpreter was mostly successful, it was not without its failures in some hearings. When an interpreter was only used for the surety, it made communication between the judge and the surety quite difficult and it seemed onerous for both to explain exactly what they meant. In addition, on numerous

¹https://www.barcouncil.org.uk/media/623583/171130_injustice_in_immigration_detention_dr_anna_lindley.pdf

² <http://www.aviddetention.org.uk/news-events/news/immigration-detention-statistics-2017>

³ <http://www.aviddetention.org.uk/news-events/news/immigration-detention-statistics-2017>

⁴ 3 cases out of 21.

occasions the interpreter did not hear what either the judge or the applicant had to say, and the judge's frustration was evident. It was noted that in one case the judge did not give the interpreter enough time to translate at the beginning of the hearing, but as the hearing went on, allowed more time for the interpreter to translate. The lack of volume in the interpreter's voice in numerous cases meant they had to repeat some conversations, and due to the video-link used this caused more delays and made the conduct of the court seem less professional.

As noted above, in a number of cases interpretation was inadequate; many interpreters did not translate all proceedings to applicants or sureties involved. In some hearings, the interpreter only translated when the judge or the representative was speaking directly to him or her, while, in others, the interpreter only translated the opening and concluding remarks to the applicant. There were also times in which interpreters translated rather quietly. These observations flag the way in which translations are conducted as a real ongoing failure in the conduct of hearings, irrespective of what had been previously observed. Interpretations were inconsistent and poor, transforming many applicants into secondary participants in their own proceedings.

Judges

Successes

At the beginning of each hearing, the judge checked that the applicant on the video-link could hear, and at times when the video link failed, they ensured appropriate steps were taken to re-establish a connection before continuing with the proceedings. In cases where the applicant required an interpreter, the judge ensured that they understood one another before continuing with proceedings. All judges seemed familiar with the relevant law and consistently noted the five criteria when deciding whether to grant immigration bail⁵. Furthermore, most judges would tell the applicant who was in the room, but often failed to mention the observers who could not be seen by the applicant. Some judges were much more passive, whilst others directed proceedings more. Neither approach seemed to disadvantage the applicant, who was kept informed most of the time.

Failures

The judges seemed to converse with the Home Office representative outside of proceedings whilst waiting for the next applicant or once proceedings had finished. This could suggest a perception of bias towards the Home Office. However, in one instance, when the Home Office was vastly underprepared, the Judge did pull them up on it and this was an important reason as to why bail was granted. One judge made numerous jokes and sarcastic comments and was far less professional than the other Judges observed – thus, appearing not to be taking these important hearings as seriously as they should.

Differing approaches

This has not previously been addressed in other Bail Observation Reports so it is difficult to analyse any improvements that may have been made. During visits to the bail tribunals we were able to engage with the judges, the Home Office representative and the detainee's legal representative (if present). When speaking with one Home Office representative, she remarked how each judge takes a different approach when deciding what is important to the decision of whether or not to grant bail. It was expressed that some judges do not attach weight to the availability of the surety money and will be satisfied with evidence that the money is available for use and do not consider the matter further, which contrasted with the approach seen

⁵ The five criteria: 1) the reason(s) why the person has been detained. 2) The length of the detention to date and its likely future duration. 3) The available alternatives to detention including any circumstances relevant to the person that makes specific alternatives suitable or unsuitable. 4) The effect of detention upon the person and his/her family. 5) The likelihood of the person complying with conditions of bail. For further information on this see <https://bailobs.files.wordpress.com/2015/06/bail-guidance-immigration-judges.pdf>

in the five other cases that day. It was also stated that this differing approach applied to a number of other factors such as address the detainee would live at if granted bail, scrutiny of the bail summary and the treatment of the detainee.

The fact that there is a lack of consistency between hearings is a cause for concern. In such a topical matter, that involves such vulnerable individuals, the fact that each judge can take their own approach to reaching a decision is a troubling picture. It is an example of judges taking the law and guidance into their own hands and applying in a way that they see fit, which would not be satisfactory in any other application of law. If this is to continue, then it will inevitably lead to more problems and it compromises confidence in immigration law.

The observer effect

Throughout the numerous observations, most judges had no issue with having external observers during the bail hearing. However, there is an important concept to consider here. 'Observer effect' refers to the idea that the act of observing will have an effect on what is being observed. Hyde⁶ produced an interesting work on the measurable impact of international observation on politics, and it provides a detailed account of how the 'observer effect' works in this context and how it may influence the outcome of elections. The fact of being observed can lead to an individual taking a consciously different approach and may mean that the events observed are not a true reflection of reality.

In the context of immigration bail observation, it was perceived that the mere presence of our group in the courtroom had a clear impact on proceedings, although of course, it cannot be proved that our viewing of the trials had a direct effect on the outcome of the decision. Our presence was acknowledged by the judge on most visits⁷ and on several occasions the clerk felt she/he had to verify with the judge if he was happy for Cardiff Law School students to observe. In addition, on several occasions the judge would discuss with the Home Office representative about how proceedings were unusually slow on that day or uncharacteristically late. We felt that these comments were for our benefit. It is worth noting that most of the different judges made a point of explaining the processes to us and engaging in conversation about our legal studies, and there was a real feeling of trying to 'impress' us. Bail was granted in an unusually high number of hearings and as much as there is no definitive evidence as to our effect, it seems coincidental and evident that the judge was very aware of our presence.

Legal representation

Successes

Legal representation this year seemed to have improved since the report conducted in 2016/17. Legal representation was available for 94% of the applicants, which is an improvement of 9% since last year. Legal representation played a substantial part in the assistance of presenting the applicant's case and challenging the bail summary. Research has shown that where legal representation was present the judge listened to the representative's case.⁸ The presence of legal representation also highlighted inadequate preparation

⁶ Susan D Hyde, *The observer effect in International Politics: Evidence from a Natural Experiment*. Cambridge University Press, October 2007 pp 37-63

⁷ 19 out of 21

⁸ Research from the US has underscored the importance of legal representation in bail hearings see E Ryo "Detained: A Study of Immigration Bond Hearings" *Law & Society Review* Vol 50(1) 2016 117-153

from some of the Home Office presenting officers. As well as the judge being responsible for pressurising the HOPO, the representatives were also partly responsible.

Failures

The dangers of not being represented should still not be overlooked. From the research of past observation reports⁹ it is clear that the absence of legal representation usually results in the bail summary not being challenged, which would in turn mean that bail would not be granted. Furthermore, in some instances where there was no legal representation, even the judge suggested seeking legal assistance, demonstrating the importance of legal representation. An increase in legal representation is to be welcomed, but if the quality of legal representation is not of sufficient quality then it compromises the improvement. This year, as with last year, some representatives were not prepared as they were given the case the night or morning before the hearing. Furthermore, in one instance there seemed to be inadequate communication between the client and solicitor, which led to the solicitors not knowing the correct information.

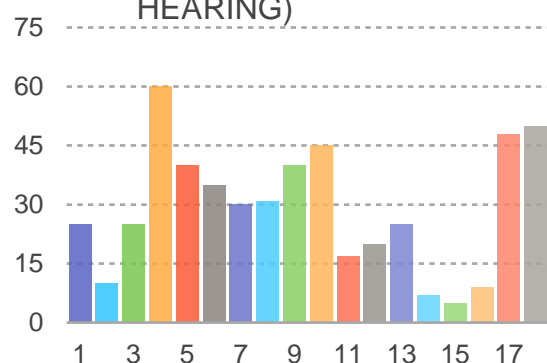
Conduct of the hearings

Successes

Most hearings started after some delay. Yet waiting times between the scheduled times of hearings and the actual times that hearings started differed each time a group visited the court. The commencement of some hearings was delayed by only 20 minutes whereas others were closer to 2 hours.

As shown in the graph, the duration of hearings ranged from five minutes to almost an hour, with an average time of approximately thirty minutes. In our previous report, duration ranged from five minutes to almost two hours, with an average time of approximately twenty minutes.

DURATION OF HEARINGS
(IN MINUTES FOR EACH
HEARING)



In most cases the immigration judge followed important procedural safeguards to ensure a fair hearing such as communicating the procedure that would be adopted throughout the hearing and also asking the attendees to respect the privacy of the applicants. Judges also ensured that applicants were able to understand and hear the proceedings via the video-link.

⁹ Note for example 'Immigration Bail Hearings: a travesty of justice? Observations from the public gallery (2011) accessible at <https://bailobs.files.wordpress.com/2015/03/ccc-bop-report.pdf>, which discusses the higher rate of granted bail in cases with adequate legal representation.

Judges assessed all arguments on an objective basis and questioned the accuracy of the bail summaries. They also ensured that all bail summaries were available to the applicants and their legal representatives and they had had the opportunity to discuss them. One out the 18 applicants had not received the bail summary.

Overall, hearings were conducted in a clear, courteous and fair manner, albeit with slight differences in the approach to proceedings depending on the presiding judge. Specifically, most conduct is consistent with fair judicial practice, as had been previously observed, with slight improvements in some areas - such as the verification of the accuracy of bail summaries.

Failures

In very few cases, the immigration judge attached more weight to substantive safeguards than to procedural ones in conducting the proceedings. One judge conducted the hearing in a relatively short period of time as a result. The judge approached the proceedings with the assumption that bail should be granted unless the presenting officer provided sufficient evidence to the contrary, in accordance with the bail guidelines.¹⁰ After listening to both parties, and refusing further assistance from the applicant's representative, the judge immediately asked the presenting officer why he should not grant the applicant bail before he went on to grant it. In fact, this quick manner to the conduct of proceedings is not unusual. It had been previously observed that some judges rushed through proceedings in a matter of minutes. While it is unclear whether the cases that were concluded quickly were a product of different judicial approaches to the conduct of proceedings (i.e. following flexible substantive rules or strict procedural ones), the speed with which some cases were conducted and concluded continues to raise serious concerns about the quality of justice being served in those cases.

Yet, the deficient manner in which translations are conducted as a whole; and the quick manner in which some hearings are conducted and concluded, often with limited effective participation from applicants, continue to stand as a real practical barrier to a fairly conducted bail hearing.

There remains an on-going deficiency in the sense that applicants without legal representation are limited in their contribution to the hearing by only having the opportunity to answer the questions posed by the judges, which does not represent an active participation from the applicant.

Video link

Successes

Technical difficulties did not occur too frequently, which is satisfactory considering that all of the hearings attended were conducted via video-link. When technical difficulties do occur, it can hamper the timing and effective running of the bail proceedings. Some judges took the time to ensure that the applicant could hear the proceedings when there were noise interference or interruptions, again ensuring the effective running of proceedings.

Failures

¹⁰ Clements, Bail Guidance For Judges Presiding Over Immigration and Asylum Hearings, Presidential Guidance Note No 1 of 2012, para 27 <<https://www.judiciary.gov.uk/wp-content/uploads/2014/07/bail-guidance-immigration-judges.pdf>> assessed 23 March 2018.

Interpretation was seen to be more difficult through video-link. In one hearing, the interpreter was having difficult time interpreting for the applicant in comparison to the interpreter who was translating for the sureties who were in the room. The applicant had to sit through the hearing without having proper interpretation for a substantial part of the proceedings since the interpreter only had limited time given to interpret court discussions through the video-link.

In several hearings, noise from the detention centre was a prevalent issue. In one, the clerk had to call the other side of the link to resolve the issue. Technical problems seem to have hindered some of the hearings as well. In another hearing, there was a technical lag at one point causing the applicant and the judge to speak over each other and having to stop and repeat things again. There was also an instance where the connection was lost completely. Circumstances like these cause distractions to proceedings.

Outcomes

In our 2017-18 observations, bail was granted in 34% of cases. The figure for our 2016-17 observations was 31%. All of the hearings attended were conducted via video-link, in comparison to our 2016/17 observations, where only 80% of the hearings attended were through video-link. The difference is not reflected in the outcomes.

As observed, the applicants did not have much involvement in the proceedings at all. Although the video-link is intended to be more efficient in relation to time and cost, it is still important to ensure that the applicant gets the best quality hearing and proper engagement during the proceedings in order to preserve the integrity of immigration hearings. Thus, much improvement is still needed in this area.

Conclusion

Many areas have been improved upon since previous reports, and in general the conduct of hearings was respectful and fair. However, there are still concerns with judicial approaches and the use of a video link in particular. It is hoped that these reports will influence a change in the courts' conduct and that future reports will be able to note substantial developments.