Bail for Immigration Detainees
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RESEARCH PAPER

Immigration bail hearings during the Covid-19 pandemic

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Introduction

The COVID-19 pandemic has had a significant impact on immigration detention. Detention is only permitted to effect removal from the UK, and only when the Home Office is satisfied that no alternatives to detention exist. Very few removals took place during the early part of the pandemic, either because of restrictions on flights in the country of removal or for other reasons. In any case, enforced removals make social distancing impossible and risk transmitting the virus across borders. Further, detention centres themselves provide fertile conditions for the rapid spread of the virus[1].

BID has consistently argued that all immigration detainees should be released in the context of the most serious global health crisis to have faced the nation in living memory. We have made arguments in bail hearings about the health risks to individuals of both detention and removal. In most cases, judges agreed that our clients should be released.

We provided representation in 109 bail hearings[2] between 23rd March and 30th June, of which 102[3] were granted (94%) and just 7 refused. In each case, the Home Office argued that our client should remain in detention but failed to persuade the judge in almost every case. Research carried out by BID found evidence of systematic failings in the Home Office's approach to immigration detention which failed to take full account of the impact of the pandemic, particularly in relation to imminence of removal, vulnerability, risk of harm/reoffending, and availability of accommodation.

Having carried out this analysis we decided to follow up by monitoring the practical operation of bail hearings during this period, to assess the degree to which unrepresented applicants in particular were disadvantaged. Since March 2020, immigration bail hearings have been conducted by telephone. BID takes the view that this was a necessary adjustment given the risks of requiring counsel, Home Office Presenting Officers, judges, applicants, sureties and clerks to travel across the country, in order to be in the same room. Immigration bail hearings were prioritised by the First-tier Tribunal and this meant that waiting times for a full hearing after a bail application is lodged have remained short (with the exception of a short period in Spring 2020 where our clients were frequently waiting 2 weeks or more for a hearing).

However, the use of telephone hearings created some problems for applicants, particularly where there were problems with technology or where interpreters were required. Some clients informed us that before they contacted BID, they were denied a fair bail hearing – in some cases they were not produced for the hearing and so could not take part or respond to the reasons put forward by the Home Office as to why detention should be maintained. Given this feedback, we felt it was important to monitor the operation of these virtual hearings, particularly those where BID was not

[1] as was recognised in a report by Professor Richard Coker of the London School of Hygiene and Tropical Medicine
[2] This figure does not include withdrawn bail hearings
[3] Of these, 45 were grants of bail in principle, and 57 were granted bail outright

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involved and where the applicant was unrepresented, in order to better understand whether changes to the process had infringed on people's access to a fair hearing.

It is BID's view that bail hearings are already something of a lottery. Judges are given wide discretion and the matter of which judge the hearing comes before can be as important as the merits of the case. Home Office Presenting Officers (HOPOs) frequently make claims about the imminence of removal or risk of absconding or reoffending without any supporting evidence. These claims are sometimes accepted unquestioningly by a judge, while if the applicant were to make assertions without evidence, the judge would demand supporting evidence. In video-link hearings prior to the pandemic, the quality of the picture and the sound was frequently poor. In some cases our clients would complain that in video-link bail hearings they could not hear properly what was going on in the courtroom, or that there was an echo. Frequently clients held in prisons were not produced for bail hearings and unable to communicate with counsel prior to bail hearings. Even where bail is granted by a judge, unfortunately this does not automatically lead to release from detention as it can take many months for release accommodation to be sourced.

Given that an individual's right to liberty is at stake with a bail hearing, only the highest standards of procedural fairness and access to justice will suffice. Our research continues to show that in many instances the system falls short and there are insufficient safeguards to prevent wrongful and prolonged detention. In no other context would the deprivation of liberty be treated so casually.

Methodology

Five BID volunteers monitored bail hearings over a four-week period from the 6th July to 31st July. Volunteers were each allocated a particular tribunal on a given day and were asked to prioritise unrepresented hearings, but to monitor a represented hearing if that was the only option on a given day in the allotted tribunal.

Volunteers contacted the hearing centres to request access to a particular hearing once the listings had been published (usually around 2pm on the day before the hearing). All the hearings we observed were in Taylor House, Hatton Cross or Birmingham.

Volunteers were directed to provide as much relevant information as possible about the hearing. We asked volunteers to monitor a number of specific procedural and policy issues that we had identified through our casework, and how these issues were approached by the tribunal and the Home Office:

- How the technology worked and whether this enabled the applicant to make representations and have access to a fair hearing, with a particular focus on
    - Whether the applicant and all participants were able to attend and could be heard
    - Whether telephone hearings facilitated the use of interpreters
    - Whether telephone hearings permitted unrepresented applicants to have a fair hearing.

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  - Whether telephone hearings functioned for people held in a prison
- Accommodation issues
- The operation of the 'minded to grant' process
- Arguments and evidence about the applicant's likelihood of reoffending, risk of harm and risk of absconding
- Removability
- Any other key arguments that were put forward or information that they felt was relevant.

Limitations of the research:

It is important to note that volunteers monitoring the hearings were limited by the fact that they had no knowledge of the individual case prior to the hearing. The only information they had was whether or not the applicant was represented. They were not able to speak to those involved in the hearings and were not able to examine any documentation presented prior to or during the hearing.

Findings

We observed 20 bail hearings from 6th July 2020 to 31st July 2020. We examine in turn how the following issues were addressed in the hearings that we observed:

- the practical operation of the bail hearings;
- accommodation issues;
- access to justice for people held in prisons;
- lack of access to legal representations; the operation of the minded to grant process;
- family separation;
- Arguments made in favour or against granting bail.

The issue of most concern in our findings was the dysfunctional bail accommodation system.

Bail outcomes

The table below summarises the outcomes of these hearings:

Grant (outright)	7
Grant (in principle)	7
Refused	5
Withdrawn	1

Practical operation of telephone hearings

We did not find evidence that the holding of bail hearings by telephone systematically prevents applicants from having a fair hearing. Judges took considerable care and attention to ensure that applicants were given the opportunity to make representations at relevant points, and interpreters

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were used where required (although the amount of the hearing that the interpreter chose to translate to the applicant varied and in some cases appeared to be insufficient).

In some cases there were unnecessary delays. In one case this was because the applicant, who was detained in a prison, was not brought to the hearing[4] by the prison staff on time. In one case the Home Office signed in half an hour late to the hearing, and stated that this was because of technical issues, but it later transpired that they had needed to go and find a HOPO to conduct the hearing because they didn't have anyone prepared.

In some cases it was difficult for volunteers to contact the tribunals to facilitate our monitoring of the bail hearings, and there were a number of hearings where we were unable to observe because the tribunal did not respond to our request in time. However this situation improved over time as we developed more reliable contacts at the hearing centres.

Overall it is BID's view that telephone bail hearings have functioned reasonably well but once the pandemic is over applicants should have the choice to participate either in person or remotely. One of BID's primary concerns in relation to remote bail hearings is that it may be more difficult for applicants to convince a judge that they would not abscond and would comply with bail conditions if they are not physically present in the room. However this concern has been alleviated by the fact that judges have been more willing than usual to grant bail during the pandemic. 70% (14 out of 20) of applicants in the study were granted bail, and BID's success rate in bail hearings during the first lockdown was 94%. Both figures are far higher than the statistics across all bail hearings which show that roughly a third of tribunal bail applications are granted[5].

Lack of accommodation as a barrier to release

A grant of bail from an immigration judge does not automatically lead to release. An individual will usually need to demonstrate that they have a stable address to be released to, and for homeless detainees it may be necessary to apply for Home Office accommodation. A judge can grant 'bail in principle', meaning that the individual would be released if suitable accommodation were available. A grant of bail in principle usually provides 14 or 28 days for suitable accommodation arrangements to be put in place by the Home Office – if arrangements are made within the timeframe the individual will be released, but if this is not done then the grant of bail will lapse and a new application will need to be made.

The system for provision of release accommodation has never functioned smoothly. In many cases delays are also the fault of the probation service or poor communication between the Home Office and the probation service, or the Home Office's own poor internal communication. None of these issues are new. However the situation has worsened considerably since the repeal of section 4(1)(c)

[4] The hearing was by telephone
[5] FOI data obtained by BID shows that the success rate for tribunal bail applications in 2017,2018 and 2019 has been 31%, 34% and 33% respectively.

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accommodation on 15th January 2018 and its replacement with 'exceptional circumstances accommodation' under Schedule 10 of the Immigration Act 2016[6].

In our study, of the 14 people who were granted bail, only half were released. The other half (7) were granted bail in principle but remained in detention solely because of the lack of available release accommodation. Of the seven individuals who were granted bail in principle, four had been granted bail in principle on a previous occasion, and this was their second grant of bail in principle. This is consistent with the outcomes from BID's casework - during the 12 month period from the 1st August 2019 to 31st July 2020, of the 264 cases that were granted bail in which we provided representation, 120 (or 45%) of those were granted bail in principle. Many people remain in detention for many weeks or even months after a grant of bail in principle.

Case study H:

In this hearing the judge considered that removal was not imminent and the hearing centred on the fact that the Home Office had failed to find accommodation for the applicant since grant of bail in principle six weeks previously. The HOPO stated that they hadn't been able to speak to the caseworker but they were actively pursuing the finding of accommodation. The judge asked the HOPO how they could know this if they hadn't spoken to the caseworker. The HOPO was unable to provide an answer, much to the frustration of the judge. The applicant's solicitor stressed how unfortunate it was that no accommodation had been found, and the judge described the Home Office's lack of action as 'convenient'. The judge granted bail in principle giving the Home Office 14 days to find accommodation and listed the next hearing before herself, adding that if accommodation had not been found by then she would release the applicant onto the streets.

Case study: M

This was a short hearing. The Home Office had been unable to give a timescale for securing an Emergency Travel Document so that the applicant could be removed, and the judge said he was not prepared to detain the applicant any longer and granted bail in principle. He advised the applicant that the Home Office would have to find him accommodation within a set period of time, and to seek legal help from charitable organisations if they failed to do so, to push the Home Office to act expeditiously. The judge informed the Home Office that the individual's detention had gone on for far too long already, and that it must provide the applicant with accommodation promptly.

Judges appear increasingly frustrated at the inadequacies of the release accommodation system which means that an individual who they have ruled should be released is prevented from being so solely because of the Home Office's inability to provide accommodation. In the case of M above, this led to the judge directing the applicant to seek help from charitable organisations to put pressure on

[6] For more information about the changes see BID's briefing published in June 2018 https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/654/Briefing_-_Accommodation_Post_Detention.pdf

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the Home Office. It is not reasonable to expect charities to step in and resolve problems that only exist because of systemic dysfunction, nor do charities have the means to help all those whose detention is prolonged as a result of lack of accommodation.

As one judge stated[7], Home Office inaction in sourcing accommodation is 'convenient'. It is deeply concerning that the decision of the independent judiciary regarding something as important as the right to liberty can be effectively overruled by government inaction. Prolonging detention not only causes unnecessary suffering to the individuals and families directly affected but also costs the taxpayer – the cost per day to hold someone in immigration detention is £97.54[8]. Moreover, those who are granted bail in principle but not released may well pursue an unlawful detention claim against the government. In the last year the Home Office was forced to pay out £8.2million in compensation for unlawful detention claims[9].

Equally concerning is that judges, in an attempt to pre-empt Home Office inaction from obstructing release, appear increasingly prepared to remove the residence condition so that the individual can be released to the streets. In one case we observed bail was granted and the applicant's residence condition was removed so that he could be released to destitution, such was the judge's frustration at the lack of progress in sourcing an address. This is also illustrated in the case of H above and the case of J below:

Case study J

This was an application for bail in principle. The applicant had put forward 5 different addresses, all of which had been found to be unsuitable[10], and so had made an application for Home Office 'schedule 10 accommodation'. The HOPO stated that this application had been granted and they were awaiting confirmation of an approved address. She said she'd emailed the Home Office caseworker asking for a timescale but was told that they were inundated due to COVID-19, making accommodation scarce and a timeframe impossible. The applicant was very frustrated because he didn't know the reasons that probation had found his addresses unsuitable, and the Home Office had said they'd provide accommodation but hadn't done anything and he felt he was being passed back and forth between Home Office employees without any progress being made. The judge emphasised how unimpressed he was with the situation - that despite granting the applicant bail in principle a month ago he was still in detention, and that this had been going on for far too long. He was equally

[7] In the case of 'H' above
[8] Figures relate to the 2nd quarter of 2020 (the latest available statistics), for detention in an IRC. Data available via this link https://www.gov.uk/government/publications/immigration-enforcement-data-august-2020
[9] Home Office annual report and accounts 2018-19 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807126/6.5571_HO_Annual_Report_201920_WEB.PDF page 105
[10] It is not clear whether the finding of unsuitability was made by his offender manager or the Home Office, but it appears that the reasons were not passed on to the individual.

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unimpressed that the Home Office's position was simply to tell him that the addresses provided by the applicant had not been approved without providing any reasoning or information.

In granting bail in principle for 28 days the judge re-stated that removal was not imminent and that the Home Office would need to provide the tribunal with far greater evidence in any future bail hearing, and that he would consider granting unconditional bail (meaning that he can be released to no fixed address) if they did not resolve the issue within the next 28 days.

This situation is of grave concern because those subject to hostile environment laws are prevented from having any source of income and are at severe risk of destitution.

Although immigration judges' understanding of the importance of bail in principle has developed and improved since the implementation of Schedule 10 in January 2018, we still encounter cases where the judge is very reluctant to grant it. A grant of bail in principle is important as it helps to establish the fact that a person's removal is not imminent, that they are suitable for release and that they should be granted bail. From the perspective of the bailee, the grant of bail in principle enables them to place additional pressure on the Home Office and/or the Probation Service to ensure that arrangements are put into place to speed up and enable their release on bail.

The cases of O and T below illustrate the fact that some judges remain reluctant to grant bail in principle.

Case Study O:

Bail was refused in this case even though the only reason appeared to be lack of accommodation. The applicant proposed the address of a friend to be released to but, at the time of the hearing, it had not yet been checked by his offender manager. The judge stated that unless and until probation had approved the release address, the applicant couldn't be released on bail, because that would be a breach of a condition on his licence and could result in him being sent back to prison. There was no indication that bail in principle was considered.

Case study T:

The applicant put forward the release address of an ex-partner but this had not been checked by probation. The applicant suggested two other addresses but he seemed unaware of the requirement that the proposed address must be checked by probation, and neither of those addresses had been checked. The judge stated that she couldn't consider granting bail without a pre-approved address, and that she needed evidence that the landlord or person who lives there would allow him to stay. The applicant stressed how difficult it was to do anything about this while he was detained. The Home Office argued that the applicant could apply for schedule 10 accommodation from detention and did not need to be released to do this. The judge said that as the applicant did not have an approved address, she would have to refuse bail, and urged the applicant to withdraw the application and submit a new one once accommodation was sorted "in a few days". The applicant

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was unrepresented and withdrew the application but it is possible that a legal representative or a different judge might have explored the possibility of a grant of bail in principle.

Access to justice for those held in prisons

There are currently 434 immigration detainees held in prisons across the UK[11] at the end of their custodial sentence pursuant to deportation, and they face particular barriers to justice. Unlike in detention centres in the UK, there are no advice surgeries, and detainees in prisons are faced with having to find an immigration solicitor while imprisoned, and convince them to come to the prison to take on the case. Prisons in which immigration detainees are held post-sentence are often located far from any source of publicly-funded immigration legal advice, since firms providing immigration advice are overwhelmingly concentrated in cities. People in prisons do not have access to mobile phones or the internet and most communication happens via a very slow postal system.

In BID's last Legal Advice Survey 53 interviewees said that they had come to the removal centre from prison, and only 8 (15%) of those people had received advice on their case from an immigration solicitor. This low percentage is consistent with the results of the previous four surveys, in which the percentage of those who received immigration advice while they were in prison has been 9.3%, 17.5%, 12% and 10% respectively.

In one case we observed, the judge refused bail and advised the applicant to get legal advice to help him appeal his deportation order. The applicant told him that it had been very difficult to seek legal advice or challenge the deportation from prison.

The case of L below highlighted the dual and mutually reinforcing problems of difficulty accessing release accommodation, and detention within a prison.

Case study L:

In this case the applicant had already been granted bail in principle over a month before. The applicant had made an application for Section 95[12] Asylum Support accommodation and was waiting for an address to be sourced. The HOPO was unable to give a definite timeframe as to how long it would take to source accommodation. The judge told the applicant that all he could do was to chase Migrant Help for information on accommodation. The applicant said that being in prison made it difficult for him to contact anyone.

[11] This figure fluctuates but it is always close to 400 people. In the months leading up to the Covid-19 pandemic the figure was usually above 400, and since March it has been closer to 350. At any one point there will be roughly 70 prisons were immigration detainees are held, but this can vary.

[12] Of the Immigration and Asylum Act 1999

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During the hearing the applicant became very distressed and started crying, stated that he didn't understand why he was still in prison, that he was suffering due to his illness and he could not wait any longer to be released. The judge granted bail in principle again, giving the Home Office 28 days to provide an address so that the applicant could be released.

Lack of access to legal representation:

Of the 20 bail hearings that we observed, 6 people had a legal representative and 14 did not. In many cases the judge took care to ensure that unrepresented applicants had access to a fair hearing and were given time to explain to the court why they should be released. Even so it was clear there are clear benefits to legal representation in bail hearings – many applicants were unsure about how to articulate the reasons why they should be granted bail, and focussed instead on reasons why they should be allowed to remain in the UK. Applicants were also not aware of the possibility of being granted bail in principle, as shown in the case of T above.

Case study S:

The applicant was unrepresented and it appears that this had a detrimental impact on his bail hearing. During the hearing it emerged that the applicant had an outstanding deportation order and had made no appeal against it even though he is desperate to stay in the country. Instead he made arguments about why he should be allowed to remain in the UK during the bail hearing. It is likely that this influenced the judge's decision to refuse bail by convincing him that he would be likely to abscond if released, such was his desperation to remain in the UK.

In the hearings that we observed, of the 6 people that were not granted bail (5 refusals and 1 withdrawal) all except one were unrepresented cases. Of the 6 people in the sample who did have legal representation, 5 were granted bail. This sample is clearly far too small to draw any conclusions but overall statistics obtained by us through Freedom of Information requests indicate that people who were legally represented in their hearing were twice as likely to be granted bail.

Outcomes for bail applications[13]

		Withdrawn	Granted	Refused
2017	Unrepresented	38%	18%	40%
	Represented	41%	35%	23%
2018	Unrepresented	33%	23%	38%
	Represented	37%	37%	24%
2019 (to date)	Unrepresented	34%	21%	43%

[13] The figures do not add up to 100% as there are other possible outcomes in the FOI not included in this table – including 'bail dismissed without hearing'; 'completed' and 'continued'. These categories have not been included here because they only apply to a very small minority of applicants.

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	Represented	40%	36%	22%

Operation of the tribunal's 'minded to grant' process

Since the outbreak of COVID-19, the First-tier Tribunal instituted a 'minded to grant' process to try to reduce the strain placed on the tribunal and ensure that everyone would have access to the court. Under this process, the judge provides a provisional decision on the papers to either grant or refuse bail, and there will only be a full hearing if one party objects to the provisional decision. It has been our experience that frequently where our client receives a 'minded to grant' decision, the Home Office opposes this decision but without producing any additional evidence at the hearing beyond what had already been submitted in the bail summary. This means that bail is granted but the resources of BID, the Tribunal, and the Home Office have been needlessly deployed and the applicant is put through another night (at least) in detention and the ordeal of a full hearing. The 'minded to grant' process was designed to ease the pressure on the FTT during the COVID-19 pandemic but the Home Office's approach to these cases means that it has done the opposite and imposed additional strains on the tribunal.

In the bail hearings that we observed there were two cases where the judge had already issued a `minded to grant' decision. In neither case did the Home Office put forward any additional arguments from what was included in the bail summary and on which information the decision was made.

The Public Law Project's research report examining the operation of telephone hearings found a "lack of meaningful Home Office engagement with the bail process,[14]" and in particular the `minded to grant' process. Their findings echoed BID's experience from both casework and bail observations: "*In seven of the bail hearings we observed, the judge had made a provisional decision to grant bail ('minded to grant'), which was served on the Secretary of State prior to the hearing… in all of these hearings the Home Office maintained their position to contest a grant of bail. The HOPO then relied solely on the bail summary and the evidence contained in the bundle, both of which the judge would have already used in reaching their provisional decision. The hearings consequently proceeded without any additional relevant submissions from the Home Office.*"

This approach was criticised by the President of the Tribunal who stated in a letter to the Home Office on the 1st May 2020."*Unfortunately the feedback that I am receiving is not only that the Home Office rarely consent to the grant of bail having seen the 'minded to grant' but that bail is still*

[14] Online Immigration Appeals: a case study of the First-tier Tribunal https://publiclawproject.org.uk/wp-content/uploads/2020/08/200825_Online-Immigration-Appeals_FINAL.pdf

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opposed at the hearing without any meaningful additional representations being given by Presenting Officers which address or challenge the reasons."

Separation of children

There were six cases where the applicant was separated from their children in the UK by detention. In three cases the applicant had one or more biological child, in three cases they were stepchildren. In one case the applicant had been detained for almost six months, and at the point he was detained his child was 3 months old. He was understandably very upset to have missed this important bonding period.

Risk of harm

it is our experience that in bail hearings Home Office assessments of risk of harm frequently rely wholly and exclusively on a bail summary that cites the applicant's previous offending but presents no additional evidence such as from the individual's offender manager. In some cases the Home Office assesses an individual at a higher risk of harm than that which is stated in the individual's OASys report produced by their offender manager. This is highly problematic as it is the offender management service, and not the Home Office, that has the knowledge and expertise to make accurate assessments of risk of harm.

Case Study F:

The Home Office argued that the applicant carried a high risk of harm to the public. The judge asked for a copy of the OASys report, which the HOPO did not have. The judge criticised the Home Office for not having a copy of the document that was alluded to in the bail summary.

The applicant countered the HO's assertion of high risk of harm, explaining that although he had been categorised as a high risk of harm when he first went into custody, he had since then done courses and completed his sentence plan, and was awaiting an updated risk assessment from his probation officer, but that it had been delayed due to the pandemic. Bail was granted by the judge.

Conclusion

In our bail observations we found that telephone bail hearings have thus far functioned reasonably well and judges have taken a more lenient approach in favour of applicants. However there were a number of difficulties for applicants who were detained in a prison, and this resonates in our casework experience. Since the end of the monitoring period we have been told that our clients in a particular prison could not be present at their own bail hearing due to a coronavirus outbreak in the prison. This is unacceptable even where BID or a law firm is able to provide representation on the day of the hearing, but for an unrepresented applicant it denies them any meaningful access to the bail process.

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Through monitoring bail hearings we found that the entire system is frequently undermined by the Home Office's failure to source accommodation. This finding is echoed in our casework. It is of the gravest concern that a decision of the independent judiciary regarding an indivdiual's right to liberty can be de facto overruled by Home Office inaction.

We found that the Home Office continues to fail to engage with the 'minded to grant' process, wasting tribunal resources and unnecessarily prolonging detention.

It is BID's view that once COVID-19 restrictions are lifted to the point where hearings can safely be held in person, applicants should be given the choice to participate either in person or remotely. Technology can be useful in enabling witnesses to participate where this would not otherwise be possible due to health reasons or geographical location. However for vulnerable people, the experience of having a digital hearing may be particularly stressful. It may also be important for the judge to be able to assess the demeanour of the applicant, particularly in immigration bail hearings where an important element for the judge is to assess whether the applicant is likely to abscond if released on bail.

Immigration bail hearings are essential for an individual to assert their right to liberty. The 2018 Bail Guidance for Tribunal Judges states: *"Liberty is a fundamental right of all people and can only be restricted if there is no reasonable alternative. This principle applies to all people in the UK, including foreign nationals".* BID believes that in addition to being expensive and unnecessary, immigration detention is inherently harmful and should not be used. While detention does exist, however, it is vital that bail hearings provide access to justice.