Inconsistency in asylum appeal adjudication

Gill, Nick; Rotter, Rebecca; Burridge, Andrew; Griffiths, Melanie; Allsopp, Jenny

Inconsistency in asylum appeal adjudication

Nick Gill, Rebecca Rotter, Andrew Burridge, Melanie Griffiths and Jennifer Allsopp

New research findings indicate that factors such as the gender of the judge and of the appellant, and where the appellant lives, are influencing asylum appeal adjudication.

There is a widespread, and growing, expectation that no matter where a person seeks asylum, comparable procedures and consistent standards of fairness will be applied in assessing their claim under the Refugee Convention. While positive steps have certainly been taken to promote consistency at a broad structural level, the extent to which it is achieved in practice is still largely unclear.

Initial findings from a three-year study by researchers at the University of Exeter[1] examining asylum determination procedures in the UK has found that there are considerable differences between the hearing centres where asylum applicants' appeals are heard, and significant inconsistencies in the practice of judges who decide such appeals.

Asylum appeals

Asylum appeals in the UK are heard at one of 13 hearing centres scattered across the country. Our researchers visited nine of the centres, and carried out a quantitative survey of 240 hearings at three of these: Taylor House, a large and chaotic centre in the heart of London; Sheldon Court, a busy, medium-sized centre in the UK's second largest city, Birmingham; and Columbus House, a fairly quiet centre on the outskirts of Newport in south Wales. We spent months sitting at the back of court rooms, recording the moods, manners and dialogues of the actors present and whether certain procedures were adhered to in order to explore whether the asylum appeals process differs between and within hearing centres.

In the UK, claims for asylum are considered in the first instance by Home Office officials. Around 75% are refused, and applicants generally have a right of appeal against this decision. Each appeal is heard by an immigration judge, and generally involves the asylum-seeking appellant and their legal representative (if they have one), a Home Office representative, and an interpreter (where required by the appellant). The hearing has a standard structure, beginning with an introduction from the judge, moving on to examination of the appellant and sometimes of witnesses by the legal representative and the Home Office representative, and culminating in summary submissions of legal arguments by both sides.

Under UK government policy, asylum seekers are entitled to accommodation and subsistence if they agree to be relocated away from London and the South East of England, the most densely populated part of the country. When they lodge an appeal, their hearing is allocated to their nearest hearing centre. In other words, asylum seekers generally have limited choice about where they live, and even less choice about where their appeal is heard.

Differences between hearing centres

We encountered striking differences between the hearing centres themselves in terms of accessibility, local resources, atmosphere and facilities. Some, such as Taylor House and Sheldon Court, are well connected by public transport but others are much more difficult to reach, which can pose barriers to witnesses, friends and family attending the hearing to support the appellant. Some appellants told us that they had to get up at dawn and scrape together the money for expensive peak-time train tickets in order to reach some of the hearing centres for the scheduled start time of 10am, with fatigue then compounding their pre-existing anxiety.

Most appellants require a consultation with their legal representatives immediately before their hearing; indeed, in most cases, the day of the hearing is the first time the appellant and their lawyer will meet. Some hearing centres are so busy, however, that

demand for consultation rooms outstrips supply, and appellants and their legal representatives have to conduct the pre-hearing consultation while sitting, standing or even squatting in noisy public waiting areas. At Harmondsworth, a hearing centre attached to a detention centre, there is only one consultation room – a suite with a prison-style glass barrier between the appellant and the visitor. Users report that the two parties must shout to hear each other – difficult for appellants with health problems or when discussing sensitive matters.

Another key difference between the hearing centres is the frequency with which appellants are able to obtain legal representation. Over the past decade the UK government has successively cut legal aid funding for immigration cases, resulting in 'legal deserts': areas where there are no legal aid immigration and asylum solicitors, or only a few suitably qualified and accredited lawyers.[2] Our research suggests that Columbus House in Newport is located in a 'legal desert': 25% of the appellants we observed there were unrepresented, compared with 13% at Sheldon Court in Birmingham and 6% at Taylor House in London.

Judges are advised to take an 'enabling' role with unrepresented appellants but in most of the cases we observed this did not achieve the aim of giving the appellant a fair chance. Although the judge often told the appellant that they would have the chance to give submissions, they did not explain what this meant, or suggest how submissions might be structured. As a result, appellants tended not to engage with the Home Office's arguments against them but simply pleaded for the judge's sympathy – a natural, but legally ineffective, tactic.

A final key difference between the hearing centres is the gender ratio of presiding judges. The percentage of hearings we observed headed by a female judge was 49% at Sheldon Court, 41% at Taylor House and 19% at Columbus House. This is particularly important in light of the correlation between the gender of the judge and the conduct of the hearing, as we show below.

Differences in adherence to procedures

During the hearings themselves, we examined 14 key procedures which, according to best practice guidelines,[3] judges should ordinarily carry out to ensure fairness. Such procedures relate to transparency, communication and accommodating needs, and led us to ask questions such as: Does the judge introduce themselves and state their independence from the Home Office, so that the appellant is aware of the role of the Tribunal and the separation of judiciary and State? Does the judge check the correct pronunciation of names and inform the appellant that they can request a break, in order to accommodate the needs of vulnerable appellants in particular and as a sign of respect? Does the judge explain the purpose of the hearing and how it will proceed, so that the appellant understands what to expect and what is expected of them? Where an interpreter is present, does the judge instruct the appellant in how to use the interpreter, and check understanding between the two, to ensure successful communication? And does the judge explain to the appellant that they must say if they do not understand anything, so that the appellant knows that they can voice problems in the hearing and so that misunderstandings are less likely to go unnoticed?

Many of these procedures are particularly important in the context of asylum, as appellants are often vulnerable, unfamiliar with the UK legal system, and wary of authority due to experiences of persecution and injustice in their countries of origin. The procedures also have a social value, in ensuring that the appellant is treated with equality and respect, and is able to participate, and a utilitarian value in increasing the likelihood that the evidence, on which the appellant's risk on return to the country of origin is assessed, will be properly adduced and reliable.

Troubling findings

Our analysis produced a number of troubling findings. The 14 procedures were carried out just over half (55%) of the time. In the case of some procedures, most of the judges behaved the same way. For example, in almost all

cases (98%), judges checked understanding between the appellant and the interpreter, and in a great number of cases (88%) they neglected to inform the appellant that they could request a break. However, there was more often significant disparity in following the procedures, with judges stating their independence in around a third of cases (35%), explaining that the appellant should say if they do not understand anything around half the time (53%), and explaining the purpose of the hearing (61%) and how it will proceed (66%) in about two-thirds of cases. It is when some judges follow the procedures and others do not that procedural inconsistency emerges.

An even more worrying finding is that the likelihood of these key procedures being followed is correlated with extraneous factors, such as the gender of the judge and appellant. Female judges were more likely than male judges to explain the purpose of the hearing and how it will proceed, to introduce themselves, to check that names are correctly pronounced and to make the appellant aware that they should say if they do not understand anything. Judges also more often explained the purpose of the hearing, introduced parties, and thoroughly checked understanding between the interpreter and the appellant when the appellant was male rather than female.

These findings have important implications. Inconsistencies in procedure undermine faith in the fairness of legal processes, and a reduced perception of fairness could result in further appeals, as appellants seek to challenge what feels like an unjust decision. The findings also raise questions about whether systems of legal determination which rely on multiple, geographically dispersed centres can be regarded as fair. Lack of adherence to procedures in particular could lead to erroneous decision making, with the grave consequence that asylum seekers may face forcible return, to face persecution or serious harm.

Addressing the issues

We advocate increased independent, external monitoring and assessment of practice in hearings, as has occurred with much success for Home Office initial decision making. Simply observing and publicising judges' behaviour, as we have done, would also help. The geographical disparities we have highlighted could be addressed through greater communication between the hearing centres, such as via regular forums which bring together dispersed judges.

Although broader inequalities, such as legal aid cuts and their impacts, need to be tackled at a societal level, procedural consistency might be improved by the provision of clearer guidelines for judicial conduct in hearings, such as a checklist that summarises the key things that immigration judges should do. Furthermore, enhanced training could be delivered to judges, including by appellants themselves, using novel methods such as peer observation and judge/appellant role-play to provide experiential insights into best practice and the consequences of not following it.

Nick Gill *N.M.Gill@exeter.ac.uk*
Associate Professor in Human Geography, University of Exeter.

Rebecca Rotter *r.rotter@ed.ac.uk*
Research, Impact and Knowledge Exchange Coordinator, University of Edinburgh.

Andrew Burridge *A.D.Burridge@exeter.ac.uk*
Associate Research Fellow, University of Exeter.

Melanie Griffiths *melanie.griffiths@bristol.ac.uk*
ESRC Future Research Leaders Fellow, University of Bristol.

Jennifer Allsopp *jenny.allsopp@gtc.ox.ac.uk*
PhD Candidate, University of Oxford.

http://geography.exeter.ac.uk/asylumappeals/

1. The research is funded by the Economic and Social Research Council, grant number ES/J023426/1.

2. Singh A and Webber F (2010) 'Excluding Migrants from Justice: the Legal Aid Cuts', *IRR Briefing Paper No 7*, Institute of Race Relations. http://tinyurl.com/IRR-BP7-Singh-Webber

3. Such guidance is ad hoc. See, for example:
the Immigration and Asylum Tribunal Guidance Notes www.judiciary.gov.uk/publications/immigration-and-asylum-tribunal-rules-and-legislation-2/
Judicial College (2013) *Equal Treatment Bench Book* and Guidance www.judiciary.gov.uk/publications/equal-treatment-bench-book/.