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Gill, Nick; Allsopp, Jennifer; Burridge, Andrew; Fisher, Dan; Griffiths, Melanie; Paszkiewicz, Natalia; Rotter, Rebecca

DOI:

[10.1016/j.geoforum.2020.11.002](https://doi.org/10.1016/j.geoforum.2020.11.002)

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*Document Version*

Publisher's PDF, also known as Version of record

*Citation for published version (Harvard):*

Gill, N, Allsopp, J, Burridge, A, Fisher, D, Griffiths, M, Paszkiewicz, N & Rotter, R 2021, 'The tribunal atmosphere: on qualitative barriers to access to justice', *Geoforum*, vol. 119, pp. 61-71.  
<https://doi.org/10.1016/j.geoforum.2020.11.002>

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## The tribunal atmosphere: On qualitative barriers to access to justice

Nick Gill<sup>\*</sup>, Jennifer Allsopp<sup>1</sup>, Andrew Burridge<sup>2</sup>, Daniel Fisher<sup>3</sup>, Melanie Griffiths<sup>4</sup>, Natalia Paszkiewicz<sup>5</sup>, Rebecca Rotter<sup>6</sup>

Department of Geography, College of Life and Environmental Sciences, University of Exeter, Amory Building, Rennes Drive, Exeter EX4 4RJ, United Kingdom

### ARTICLE INFO

#### Keywords:

Asylum  
Appeal  
Court  
Justice  
Immigration  
Refugee

### ABSTRACT

Vulnerable groups' direct experiences and impressions of British courts and tribunals have often been overlooked by politicians and policy makers (JUSTICE, 2019). This paper takes a geographical, empirical approach to access to justice to respond to these concerns, paying attention to the atmosphere of First Tier Immigration and Asylum Tribunal hearings to explore the qualitative aspects of (in)access to justice during asylum appeals. It draws on 41 interviews with former appellants and 390 observations of hearings in the First tier immigration and asylum tribunal to unpack the lived experiences of tribunal users and to identify three ways in which the atmosphere in tribunals can constitute a barrier to access to justice. First, asylum appellants are frequently profoundly disorientated upon arrival at the tribunal. Second, appellants become distrustful of the courtroom when they cannot see it as independent of the state. Third they often experience the courtroom procedures and the interactions that take place as disrespectful, inhibiting their participation. These insights demonstrate how the concept of 'atmosphere' can illuminate legal debates in valuable ways. Additionally we argue that legal policy making must find better ways to take vulnerable litigants' experiences into account.

### 1. Qualitative access to justice

At least 100 million people were forced to flee their homes in the last ten years, seeking safety either within their countries or internationally. In 2010 there were 41 million people forcibly displaced but by 2019 this had risen to 79 million, representing over 1% of the global population (United National High Commission for Refugees, 2020). Yet only a small fraction of the number of forcibly displaced people who cross an international border find their way to high income countries: never more than 18% in the last decade. Given the mismatch between high income countries' abilities to host forcibly displaced people and the extent to which they do so, it is reasonable to demand that they at least have systems of refugee recognition that are rigorous in upholding the rights of those who claim asylum within their territories.

Geographers and other social scientists have noted the demise, shrinkage and curtailment of asylum in rich countries, however (Tazzioli, 2018; Dempsey, 2020; Coddington, 2018). Asylum has become harder to claim because of remote border practices and deterrence measures carried out beyond the territories of rich countries that prevent would-be claimants from ever arriving (Moreno-Lax, 2017). For those that do arrive, their chances of being granted refugee protection have significantly reduced as makeshift forms of protection that offer fewer rights to forced migrants have evolved. The process of claiming asylum is also formidable: driven by right-wing media scaremongering about 'bogus' asylum claims, rich countries often provide only the meanest forms of accommodation that they can to people seeking refuge, and treat asylum claims in a perfunctory and often unfair manner (Darling, 2016; Bohmer and Shuman, 2017; Tyler, 2013).

\* Corresponding author.

E-mail addresses: [n.m.gill@exeter.ac.uk](mailto:n.m.gill@exeter.ac.uk) (N. Gill), [jennifer\\_allsopp@gse.harvard.edu](mailto:jennifer_allsopp@gse.harvard.edu) (J. Allsopp), [andrew.burridge@mq.edu.au](mailto:andrew.burridge@mq.edu.au) (A. Burridge), [daniel.fisher@hutton.ac.uk](mailto:daniel.fisher@hutton.ac.uk) (D. Fisher), [m.griffiths.3@bham.ac.uk](mailto:m.griffiths.3@bham.ac.uk) (M. Griffiths), [N.Paszkiewicz@bath.ac.uk](mailto:N.Paszkiewicz@bath.ac.uk) (N. Paszkiewicz), [R.Rotter@ed.ac.uk](mailto:R.Rotter@ed.ac.uk) (R. Rotter).

<sup>1</sup> Present Address: Immigration Initiative at Harvard (IIH) Harvard Graduate School of Education, 50 Church Street, Q-424, Cambridge, MA 02138, United States.

<sup>2</sup> Present Address: Department of Geography and Planning, Faculty of Arts, Macquarie University, Sydney, Australia.

<sup>3</sup> Present Address: The James Hutton Institute, Craigiebuckler, Aberdeen, AB15 8QH Scotland, United Kingdom.

<sup>4</sup> Present Address: School of Geography, Earth and Environmental Sciences, University of Birmingham, Edgbaston, Birmingham B15 2TT, United Kingdom.

<sup>5</sup> Present Address: Department of Social & Policy Sciences, Faculty of Humanities and Social Sciences, University of Bath, Claverton Down, Bath BA2 7AY, United Kingdom.

<sup>6</sup> Present Address: School of Social and Political Science, College of Arts, Humanities and Social Sciences, University of Edinburgh, Old College, South Bridge, Edinburgh EH8 9YL, United Kingdom.

<https://doi.org/10.1016/j.geoforum.2020.11.002>

Received 2 September 2019; Received in revised form 20 August 2020; Accepted 5 November 2020

Available online 11 January 2021

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This can extend to the legal treatment of asylum claims that have been refused at the first time of asking (Hambly and Gill, 2020; Kocher, 2018). Asylum appeals are indispensable to refugees' access to protection or deportability yet receive relatively little scholarly or popular attention, having been 'black-boxed' in scholarship on border control and enforcement (Kocher, 2018: 86). If the British Home Office, for example, decides against a claim for asylum then for the vast majority of claimants the appeal represents the last chance they have to obtain leave to remain. Between 2004 and 2017 around three quarters of initially refused asylum seekers in the UK appealed, and around a quarter of those who appealed were successful (Sturge, 2019). This means that the Home Office's decisions are frequently found to be erroneous, and thousands of people have avoided being deported to potentially face torture or death thanks to appeals. Between January 2010 and June 2018 almost 28,500 asylum seekers were successful in their appeal (Home Office, 2018).

Ensuring that the asylum appeal system is accessible is therefore a grave matter (Gibbs and Hughes-Roberts, 2012; Burridge and Gill, 2017; Baillot et al., 2012; Aliverti, 2016). Access does not simply mean staging a hearing, but also ensuring the conditions of the event are conducive to effective engagement in the proceedings. Although harder to capture statistically, the quality of hearings, representation and appellants' experiences are pivotal. There is a need to examine the workings of asylum appeal hearings qualitatively, and to research the experiences of those who have been through them.

Our paper draws on rich ethnographic material to contribute to legal scholarship that underscores the importance of qualitative work in courts alongside quantitative analysis. It does so by developing atmosphere as a lens through which to study court processes, thereby connecting work in legal and cultural geography in a new way.

Early research into access to justice prioritised questions concerning the types of people that use legal services rather than questioning the needs, interests and experiences of those that the law is meant to serve (Genn, 1999). Since then, scholars have been interested in developing holistic approaches to access to justice (Sandefur, 2009; Byrom, 2019). This paper utilises geographical work on atmospheres to contribute towards this aspiration. Despite several decades of legal geographical work, there is still a need to 'think through how geographical ideas and concepts can inform understandings of trials' (Jeffrey, 2019: 566). We draw attention to 'affective atmospheres' (Anderson, 2009) in courtrooms in order to identify a series of qualitative barriers to access to justice at these crucial hearings arguing that accounting for qualitative empirical research into tribunal users' experiences is indispensable for ensuring access to justice.

The British Judicial College arranges training for judiciary in England and Wales. It offers guidelines about the sort of environment judges should aim to create in hearings, characterised by procedures that are intelligible and trusted by its users, respectful forms of interaction and willingness to make reasonable adjustments for court and tribunal users with differing abilities. We find that the reality in asylum appeals falls short of these aspirations, however.

Asylum appellants face a confusing, labyrinthine asylum determination process involving high demands for documentary evidence to corroborate their accounts, which can be very difficult for them to meet. Many navigate this process without a legal representative, although legal counsel is no panacea. Some solicitors have been known to exploit asylum appellants (JUSTICE, 2018: 38) or simply lack 'the resources [or] time' (Ardalan, 2015: 1023) to collect the relevant testimonies for appellants. Women experience particular cultural and legal barriers that inhibit the full disclosure of sexual violence that could play an important part in their asylum cases (Baillot et al., 2012; Barnard et al., 2017).

In what follows we discuss existing work in legal geography that recommends a qualitative, ethnographic approach to understanding legal processes, and consider how an attention to atmosphere has the potential to develop and contribute to this important scholarship. We then set out our research methods and explore the experience of asylum

appellants in tribunals with reference to their disorientation, distrust of others, and feelings of disrespect.

## 2. The politics and legalities of atmosphere

The Judicial College is mindful of the difficulties of treating people fairly, especially under the circumstance that appellants are vulnerable. In the case of asylum appeal hearings tribunal judges are reminded to ensure that all parties can participate fully, and that asylum seekers and refugees are amongst the most vulnerable groups in society (Judicial College, 2018). As asylum appeals regularly rely on the credibility of the appellant rather than material evidence (Bohmer and Shuman, 2008), it is vital that judges ensure that appellants are able to give their best possible evidence, while not overly favouring them (Barnard et al., 2017).

In *The Equal Treatment Bench Book* (Judicial College, 2018), a guide issued to judges providing advice about how to run hearings, emphasis is placed on the following:

- Making sure litigants understand the proceedings. This relies upon clear communication. In the context of asylum seekers and refugees, the Bench Book draws attention to the challenges of intercultural communication and offers practical approaches to aid judges in these contexts, including in the case where an interpreter is used. The Bench Book states that 'It will be particularly important to explain the process, what will happen, the court's powers and the opportunities which the individual will have to explain his or her case' (Judicial College, 2018: chap 8, para 50). In other words, the guide emphasises orientating the asylum appellant at the start and during the hearing.
- Nurturing trust in the process, especially among litigants that are distrustful of legal systems because of experiences in their own country, or actual or perceived discrimination inherent in the British system. Trust is difficult to build in such a short space of time, but the Bench Book advises judges to give 'clear explanations of court process' and 'demonstrate a sensitivity to people's varying social experience' (Judicial College, 2018).
- Showing respect for litigants. Respectfulness is particularly important when a litigant (or anyone else involved in the hearing) does not understand or appear to understand questions or processes. It extends to making sure that the correct terminology is used to refer to disadvantages and identity characteristics of litigants. Demonstrating respect can be as simple as ensuring names are correctly pronounced.
- Making necessary adjustments for health difficulties. The Bench Book states that 'asylum seekers and refugees have higher rates of mental health difficulties than are usually found within the general population. Depression and anxiety are common. Post-traumatic stress disorder is greatly underestimated and underdiagnosed' (Judicial College, 2018: chap 8, para 48). Citing the MIND (2010) mental health toolkit for prosecutors and advocates, the Bench Book notes various conditions that can trigger mental distress in the context of mental ill health; including being interrupted, feelings of being pushed, rushed or hurried, and feelings of not being listened to or believed.

By advocating these principles, the Equal Treatment Bench Book aims to enable and encourage judges to create courtrooms that feel inclusive and understandable, comfortable, safe and respectful.

In this paper, however, we detail how the atmosphere in many of the hearings we observed did not reflect the intention of these guidelines and principles, and how disorientation, distrust and disrespect often

characterise asylum seekers' court experiences<sup>7</sup>. This became apparent because we took an ethnographic, grounded approach to court hearings which afforded a perspective that is difficult to glean from top-down or doctrinal approaches. Legal geographers have placed emphasis on courtrooms as sites of enquiry (Benson, 2014; Jepson, 2012; Valverde, 2015) and we are informed by rich recent scholarship espousing the gains available from ethnographic legal geography in courts. Walenta (2020) for example suggests that courtroom ethnography 'offers the ability to generate more nuanced understandings of the varied conditions under which space and the law combine' (ibid: 137), setting out how it can question legal power, authority and presumed objectivity. Similarly, in their feminist argument for ethnographic research in courts, Faria et al (2020) recognise that geographic ethnographies of courts are able to attend 'to the affective, intimate, and bodily politics of courtroom subjects, spaces, and moments, connecting these with wider structural processes of legal, sociocultural, political, and economic life' (ibid: 1095). Key to their approach is the importance of 'showing up' (ibid: 1107): *being there* and experiencing court processes first hand even though (as we have also found) this can be emotionally and physically exhausting. This applies even to the seemingly 'dull, everyday, un-spectacular' (ibid: 1107) parts because it is precisely here, in the expressions, interruptions and humour that judges and other legal actors involved in the hearings employ, that a plethora of 'micro-aggressions' (Torres, 2018: 32) can be located.

Legal ethnography can reveal the contradictions, limitations and effects of legal formality that can be obscured by abstract legal discourse and invisible to purely desk-based research. The emotions that imbue legal disputes, for example, betray themselves 'in posture, glances, timbre of voice, silences, flushes, crying, outbursts of laughter, and the smell of sweat' during hearings, despite the supposed un-emotionality and implacability of legal processes (Dahlberg, 2009: 184). Similarly the power relations behind the law, and which the law often attempts to conceal, shows itself in glimpses through the spectacle of hearings (Carlen, 1976). In her account of US immigration hearings, steeped in 'ritual formalities, codes, and deeply embedded power asymmetries', Torres (2018: 29) references the intimidating patriarchal atmosphere that she herself experienced as an observer. It generates such stress and alienation that asylum narratives can be curtailed and misremembered, especially when details are intimate, traumatic and long ago. The speed and complexity of immigration cases, as well as 'the fragility of the limited forms of due process' (Kocher, 2018: 97) intended to protect litigants from excessive sovereign state power, can also be confronted via court ethnography. Legal hearings emerge as always hybrid: 'legal' but always socially, economically, politically and culturally inflected (Jeffrey and Jakala, 2014).

A geographical approach can offer much to this ethnographic perspective. Socio-legal scholars have emphasised the importance of paying attention to the experience of the internal space and proceedings in courtrooms (Mulcahy, 2011, 2013, 2007; Greene et al., 2010; Craig, 2016), partly to counter the doctrinal assumptions, widespread in legal studies, that law can be abstracted from place (Davies, 2017). Legal geographers helped here, questioning the placelessness of law (Blomley and Bakan, 1992) and bringing into focus the connections between legal systems and material worlds (Delaney, 2010; Graham et al., 2017). Doctrinal assumptions persist, however:

'Lawyers have traditionally looked upon space within the court as a depoliticized surface. This conceptualization of the legal arena limits our appreciation of how spatial dynamics can influence what evidence is forthcoming [and] the basis on which judgments are made.' (Mulcahy, 2007: 384)

The architecture and interiors of courthouses are designed to add a 'structure of support' (Ingold, 2016) to intended courtroom atmospheres. Artwork, layout, corridors, waiting areas, lines of sight, forms of address and body language all contribute to creating legal atmospheres characterised by formalism and gravity (Rowden, 2018; Rock, 1993). This can be intimidating for litigants (Bezdek, 1991; Carlen, 1976) but can also reduce prejudice, which tends to flourish in informal environments (Delgado, 2017).

Our argument is that a qualitative, ethnographic approach can offer insights into the atmosphere of courtrooms, which is an important but thus far largely overlooked aspect of courtroom dynamics. We do not deny that space and time are important ways to think about legal processes. Following Merriman (2012) though, we perceive that other geographic aspects are important too – like movement, rhythm, force, energy, affect and sensation - related to space and time no doubt, but also distinct from them.

One such aspect is atmosphere. Work in cultural geography on atmosphere has yet to fully permeate legal geographical and socio-legal work. Affective atmospheres are experienced as 'something distributed yet palpable, a quality of environmental immersion that registers in and through sensing bodies while also remaining diffuse, in the air, ethereal' (McCormack, 2008: 413). Atmospheres are a common feature of everyday talk e.g. 'the atmosphere in the stadium was electric', 'the restaurant has an intimate atmosphere'. Atmospheres might be positive and enjoyable, but they can also be oppressive and heavy like the tension in an exam hall.

Various legal scholars corroborate our conviction that atmosphere is a useful concept to understand affects and sensations during legal processes and events. Matoesian and Gilbert (2018) stress the importance of attending to non-linguistic, semi- or un-conscious cues and actions in the delivery of speech as a mode of legal communication during hearings for example. Their interest spans 'speech, gesture, gaze, material artefacts, posture and movement' (ibid: 7) but they do not isolate any particular one of these. Rather, they approach them together, advocating a 'multimodal' perspective that does not reify the inter-related happenings to single aspects.

Similarly, in advocating for analysis of courtroom atmospheres, Bens (2018) emphasises that 'participants also feel an atmosphere as an integrated whole, not only as a sum of individual components' (ibid: 337).<sup>8</sup> He recommends attending to atmosphere because it has the potential to move beyond what he describes as the analytic logocentrism of speech and utterances in court proceedings. This is not, he stresses, an argument for abandoning the content of speech which is clearly foundational in the courtroom, but a way to include linguistic and non-linguistic elements in approaching courtroom events. The 'relational dynamics that enfold between co-present bodies in space and the overall atmospheric feel that emerges as the result of it' (ibid: 337) are central. This may be comprised of material and infrastructural elements, visual and sonic aspects, and factors related to performance. These ingredients of courtrooms constitute a rich, under-explored world of affects that powerfully influence courtroom dynamics (Bens, 2018).

In experiencing an atmosphere participants in legal hearings also play a role in its *becoming* (Deleuze and Guattari, 1987). 'Affective qualities emanate from the assembling of the human bodies, discursive bodies, non-human bodies, and all the other bodies that make up everyday situations' (Anderson, 2009: 80). Affects, moreover, intensify as they circulate (Ahmed, 2004). This transmission of affect between bodies even has the potential to alter the body's biochemical properties through production of adrenaline, or muscle tensing (Bissell, 2010). In particularly affective atmospheres such as a riot, the ability of the

<sup>8</sup> Also, Slaby et al. (2019:4) proscribe attending to the 'persons, things, artefacts, spaces, discourses, behaviours, and expressions ... that coalesce locally to engender relational affect, and also the overall 'feel', affective tonality or atmosphere that prevails in such a locale.'

<sup>7</sup> Although we refrain from commenting on accommodating health difficulties.



individual to make rational decisions can become overridden by the majority (Dittmer, 2017). We might then think of atmospheres as being contagious (Anderson, 2009; Philippopoulos-Mihalopoulos, 2013), producing various emotions and biophysical responses, yet also mutating, intensifying and affecting other bodies.

Atmospheres can also be manipulated e.g. to encourage spending in department stores or quietness in libraries. This opens a set of ethico-political questions concerning how people can be subjected to atmosphere engineering and who can be subjected (McCormack, 2018). States govern in affective ways (Jupp et al., 2016; Laszczkowski and Reeves, 2015; Aretxaga, 2003) eliciting powerful emotions in the governed such as fear, hope and suspicion. Bens (2018) stresses how the atmosphere of a hearing emerges from and in turn influences what he calls an 'affective theatre of power' (ibid: 347).

Atmospheres can also be deceptive. Adey's (2010) analysis of security strategies in US airports focuses on the Transport Security Administration's (TSA) intent to create a calm and even 'spa-like' environment for travellers passing through security checks on the basis that in a relaxed environment a person with 'ill intent' is more likely to stick out and 'confess' their presence verbally or physically to the security guards (see also Salter, 2007).

### 3. Observing asylum appeals

People seeking asylum in the UK are entitled to appeal a decision made by the state (in this case the British Home Office) that denies them international protection. The appeal provides an indispensable counterbalance to errors that might have been made by the Home Office during their initial decision. Appellants have a second opportunity to disclose key details they may have been apprehensive about discussing, unable to disclose, or unaware they should disclose initially (Barnard et al., 2017).

Immigration and asylum tribunal hearing rooms, with their clearly divided spaces for users (Fig. 1) and particular rules and customs, are designed to create structured spaces which 'contribute to achieving the appropriate behaviour of users [and] provide a physical statement of the presence and importance of justice' (HM Courts and Tribunals Service, 2019: 12). Although tribunals have been designed to be less formal spaces than courts, judges are still addressed as 'sir' or 'ma'am' and sit behind a desk on a raised dais, while the large coat of arms present in many hearing rooms adds to the formalism.

The clearest division in the court is between public and private, symbolised by the heavy horizontal line across the middle of Figure One (Rock, 1993). On the private side, trusted legal figures circulate and only a select few clerks and other support staff are allowed entry. In hearings with juries, there is a further separation between the judge and jury to avoid legal contamination of the jury with views held by the judge (although in asylum appeal hearings there is no jury: the judge makes the decision). On the public side of the line, served by a separate entrance, security sit centre-stage, encountered at the very threshold to the centre (we return to this below).

We observed 390 asylum appeals in the UK between 2013 and 2019. Hearings generally involved an appellant, their legal representative (if they had one), the representative acting on behalf of the government, and an interpreter (if required and available). There were also sometimes witnesses to give evidence; observers including appellants' supporters, the appellant's solicitor, and an interpreter employed by the solicitor; as well as ushers, security and estates personnel.

Fig. 2 depicts an example hearing room. There is usually some form of separation of the judge, via their literal and symbolic elevation on a dais. The opposing parties' legal representatives face each other in the common law tradition of the UK<sup>9</sup> and the appellant sits between the two legal representatives, facing the judge. After the hearing (usually a

number of weeks), the judge produces a written determination, usually allowing or dismissing the appeal.

Hearings are conducted on a largely adversarial basis: each side is responsible for presenting their case and facts, and attacking their opponent's (Thomas, 2012).<sup>10</sup> The appeal hearing includes the introduction, the cross-examination of the appellant by the representative of the government (termed Home Office Presenting Officers, or 'HOPOs'<sup>11</sup>) and the questioning of the appellant by their own representative. Closing submissions are usually made first by the HOPO then the appellant's legal representative, or the appellant if they are not represented. Judges generally remain 'above the fray' in the contest<sup>12</sup>.

Before commencing fieldwork, we notified HMCTS of our intentions. We received an acknowledgment in reply, but even though we had informed the institution, this had not always permeated down as far as front-line actors and we sometimes had to explain our purposes again to clerks or judges. Hearings are ordinarily public unless there are specific exceptions, such as owing to the personal vulnerabilities of the appellant or discussion of content that could put the appellant at risk if it entered the public domain. Our access was mostly confined to the public galleries, corridors and waiting areas of courts. These are public areas that anyone can access as long as they abide by the rules of the tribunal. We generally had to go through security checks at the entrance to the courts, although their thoroughness varied. The ushers' and judges' areas were usually not accessible to us, nor was the paperwork pertaining to cases. We therefore took ethnographic fieldnotes and observations from the public area of hearing rooms. Hearings commonly lasted one to two hours but it was not unusual to see significantly shorter or longer ones. We remained as inconspicuous as possible, although when appropriate we provided an explanation of the research to the parties present. It is difficult to know how our presence impacted on the behaviour of participants but some legal representatives told us informally that judges seemed more likely to moderate their behaviour when they were being observed by an academic that was perceived to be neutral. We encountered various difficulties including emotional fatigue when exposed to many stories of trauma, as well as practical difficulties of collating information across a research team (Roach Anleu et al., 2016). To ensure a coherent approach we employed regular team meetings and attended courts that other researchers in the team had visited so as to compare notes and exchange insights.

We also interviewed 41 male and female former asylum appellants and 18 legal representatives in 2014 and 2015. Appellants were recruited via existing contacts with charities and refugee community groups separately from the hearing observations. Common countries of origin in our sample included Uganda, Eritrea, DR Congo, Sri Lanka, Iraq and Iran. The majority were in their twenties or early thirties (none were minors). Although most had had their appeals within the three years prior to the interview we conducted with them, some were recalling appeals up to a decade previously. The majority of the interviews took place in London, although some took place in smaller towns and cities in the UK. The majority of lawyers we interviewed practiced in London or the South West of England and were recruited via a combination of direct contact during fieldwork, snowballing and approaches made via email or social networking sites. Informed consent for anonymised interview material to appear in published work was collected.

<sup>10</sup> This is standard in cases involving legal representatives, but not in those of unrepresented appellants where judges are advised to adopt an enabling approach.

<sup>11</sup> Occasionally performed by independent legal counsel contracted by the Home Office called 'Home Office Barristers'.

<sup>12</sup> Unless either side is unrepresented in which case judges may be required to become more involved.

<sup>9</sup> When the appellant is unrepresented they remain in this position.

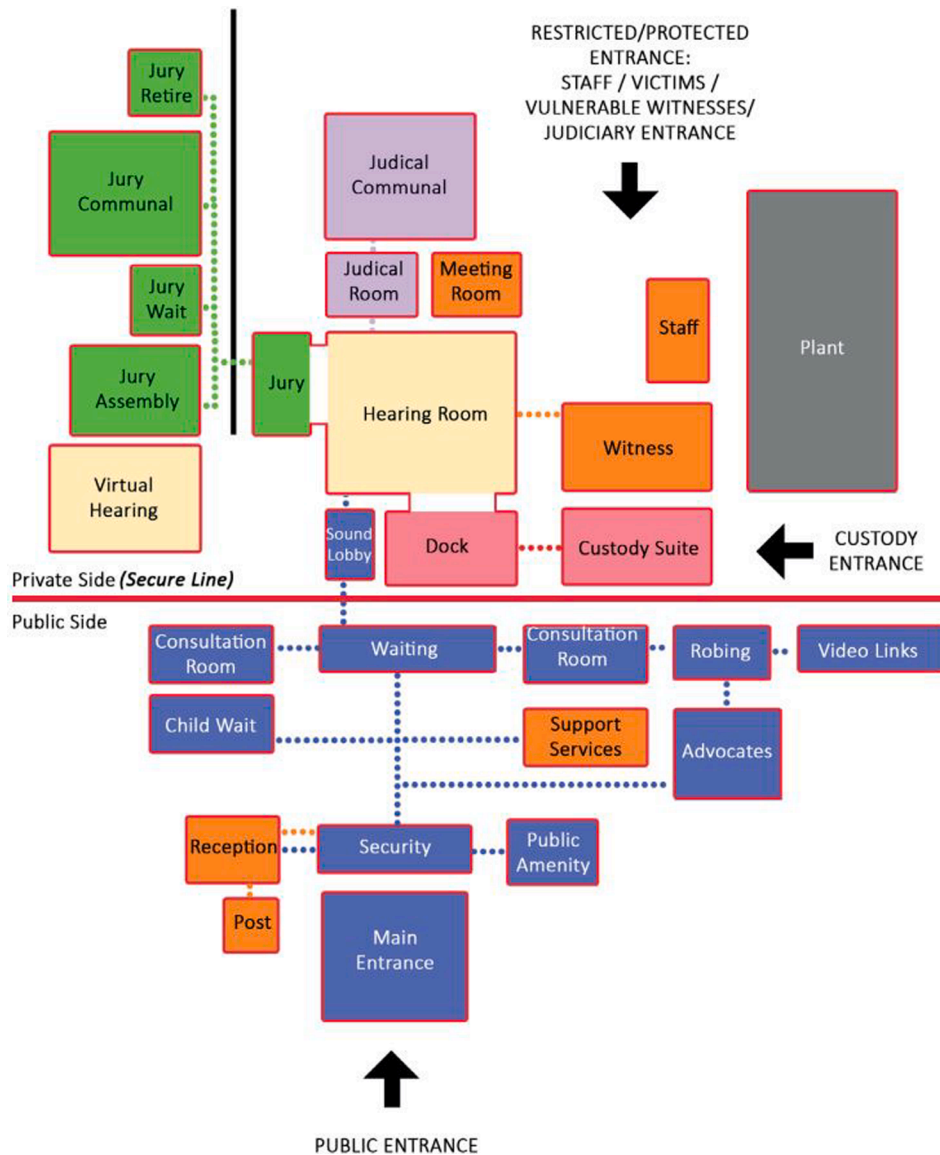


Fig. 1. HM Court and Tribunals Service’ concept blueprints for courts or hearing centres (HM Courts and Tribunals Service, 2019: 74).

#### 4. The tribunal atmosphere: Three qualitative barriers to access to justice

##### 4.1. Disorientation

Despite the Judicial College’s attempts to orientate appellants and reduce their anxieties, our research revealed serious reservations.

*At 9:30am the reception area ... feels hectic as appellants and representatives sign in at the reception desk and are matched up by the receptionists. Once they are paired, appellants and representatives quickly make their way either to the consultation rooms or the seating areas and, in hushed voices, discuss their cases. They often have only a few minutes. The tense expressions and general silence of the appellants contrasts sharply with the loud jovial greetings shared between the clerks, the Home Office Presenting Officers and appellants’ legal representatives. Meanwhile a lone mother with a large pram anxiously hovers next to the reception desk as she waits for someone – most likely her legal representative. She casts furtive glances around the room and towards the lift doors, her discomfort silently screams her ‘out of placeness’. (Fieldnotes, 15/02/2018)*

There is a mismatch of emotions that can be observed from the reception areas of immigration and asylum tribunals, which can indeed mean that the tribunal atmosphere is deceptive for appellants as Adey (2010) discusses. Those working at the tribunal, most of whom have passes which exempt them from security checks, are present for an ordinary working day and mostly demonstrate a comparatively care-free attitude. The waiting areas’ atmospheric lightness conceals the seriousness of the work executed there. For appellants, by contrast, their presence represents the culmination of months spent waiting and worrying about their court date. For many, their arrival at the court can itself be considered a feat; overcoming financial<sup>13</sup> and mental hardships in order to mount an appeal and attend court.

Unsure of where to go upon arrival, few appellants expect security guards to be the first people they meet and to undergo a security check before being permitted to enter. We were surprised by this too initially:

<sup>13</sup> While most people are entitled to financial support for their first asylum claim, those that appeal a negative decision can often also have their application for support rejected.

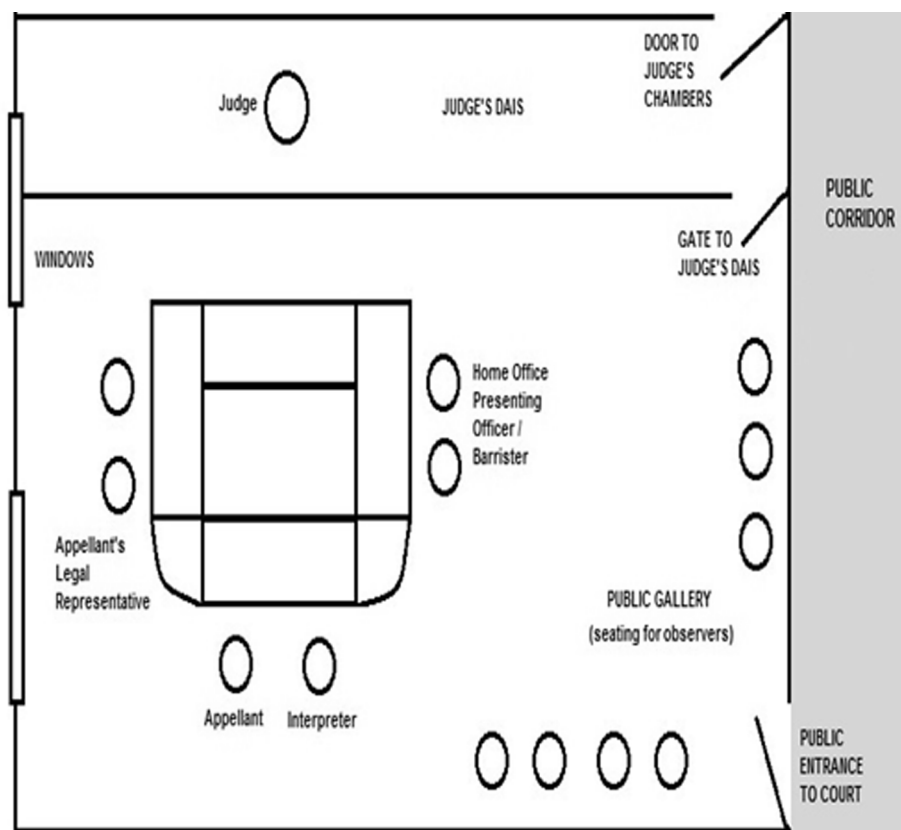


Fig. 2. Layout of typical hearing room in immigration and asylum tribunal (Rebecca Rotter).

*I am checked thoroughly every time I go to the court... Almost every time I am asked if I have a compact mirror or any perfume. I have seen the guards confiscate these from people. They put them in a bag and lock them in a draw to be collected upon leaving. There are three security guards on duty at any one time. There is a sign laminated on a notice board as you wait to pass through security which always reads 'security level: high risk'. (Fieldnotes, 28/4/2014)*

The security procedures and waiting areas of hearing centres are experienced in significantly different ways according to individuals' relative positions of vulnerability or authority (Buser, 2017; see also Jeffrey and Jakala, 2014, on the waiting area of a war crimes court). They also introduce unpredictability to the atmosphere (McCormack, 2018): sometimes guards would confiscate things, other times a different guard would wave us through.

For those accustomed to the 'slow time' (Sharma, 2013) of waiting for a Home Office decision and appeal date, which can render them numb and passive (see Rotter, 2016 for a critical discussion), their disorientation is worsened by the sheer pace of hearing centre business. Once inside the hearing centre, appellants must quickly become accustomed to the frenetic new environment and ready themselves for their appeal, adapting to the hectic schedule of the various professionals there (see Griffiths, 2014 for a discussion of the coexistence of multiple speeds in the asylum bureaucracy).

To an outsider new to this reception-space, as most appellants are, differentiating between court clerks, legal representatives and the HOPOs can be almost impossible. If their case is first in line, appellants will have very little time to meet their barristers and discuss their cases before entering the hearing room. It is also on the morning of their hearing in the waiting area that many appellants learn that their solicitor, whom they have met previously and has completed the legal paperwork, will not act as their legal representative in the appeal hearing itself. Many are shocked to discover that they are going to be

represented by a barrister,<sup>14</sup> who may not be as familiar with their case as the solicitor. We interviewed Adama,<sup>15</sup> a female appellant from DR Congo, who described being 'really, really stressed' in the waiting area. She was unaware that her solicitor would not be there to represent her. Instead she was met by an underprepared barrister who pronounced her name incorrectly.

*[It was] only on that day I know that when you go to court your solicitor don't come, they're going to send someone called a barrister. And the barrister is one lady who I'd never met before, [...] Before we even get to the [hearing] they give her five minutes to consult in case they need to rectify some things and I'm telling her some questions and I'm asking as well [but] she didn't know much about my case. (Interview, Adama)*

Given the myriad reasons that asylum seekers have fled their homes, and given the inhospitable government policies directed towards them in the UK, it is little surprise that they frequently struggle to trust their solicitors (who are often paid by government) and even omit key elements of their asylum claims to them in consultation with them (Baillot et al., 2012). Then appellants are suddenly expected to put their trust in a new person, their barrister, in a stressful environment, surrounded by unknown persons, some of whom are Home Office employees, and when they are uncertain of what to expect in the hearing. For many appellants the disorientation they experience upon arrival can turn into distrust. Their barrister is another stranger to confront, another person to convince who might judge them.

After entering the hearing other factors add to this sense of abstruseness. The 'repeat' players like the judge and legal

<sup>14</sup> Scotland differs: solicitors are more likely to also represent their clients at the tribunal hearing.

<sup>15</sup> Pseudonyms have been used for interviewees and gender/nationality altered occasionally to protect anonymity.

representatives did not always explain what was happening to the appellants at key points in the hearings and it was sometimes difficult for appellants to tell if the hearing was in progress, or suspended. ‘Sometimes discussions between the legal parties morph into the hearing itself – particularly when the judge forgets/skips the introduction’ (Fieldnotes, 2014). In the case of adjournments of hearings, for example, which occurred for a variety of reasons,<sup>16</sup> we noted that

*there can be little to mark the fact that a decision has been reached and that the person’s case is effectively over for the day. I have seen appellants left sitting at the back of the room ... with no one telling them what has happened, and the judge shifting seamlessly into the next appellant’s substantive hearing... I wonder whether this lack of cues puts the appellant at ease, or whether it might confuse or perhaps even alienate them.* (Fieldnotes, 2014)

The location of hearing centres can also exacerbate this disorientation when they are on the peripheries of urban centres, as one barrister, interviewed in October 2014, expressed:

*The geography of a particular hearing centre ... has an impact on the psychology of everybody that is in it. When hearing centres are sited in places like [city redacted], it’s on the edge of the motorway; people can be expressly...you know, there’s that sort of metaphor to it.*

At other times, though, the inclusion of the hearing centre in the city can add to the inclusive feel of the proceedings within it, as the same interviewee pointed out:

*And you have somewhere like [hearing centre redacted], you’re in the heart of the city, you can go out for lunch, so you feel like you’re in this more liberal metropolis where there is a fluency of people and a bigger, wider ethnic mix of people. And as a consequence of that you feel as though the general atmosphere is more amenable and friendly to the immigrant.*

More practically, peripheral hearing centres that are outside, or on the edges of, urban areas, are often harder to find. Numerous interviewees recounted how they had struggled to navigate public transport in order to arrive at their hearing on time. Some had very early starts on the day of their hearing and had been up for hours before they even arrived.

#### 4.2. Distrust

Many people seeking asylum in the UK are fearful of the British Home Office because of the policies it has implemented to deter fraudulent applicants. For example, the monetary support available to asylum seekers was reduced at the height of the so-called refugee crisis (BBC, 2015), a range of quasi- and non-governmental partners have been enlisted in checking and verifying immigration status, which has made everyday life in the UK for people without immigration status much harder (Webber, 2018),<sup>17</sup> ‘Go Home’ messages have been displayed on vans and inside reporting centres (Jones et al., 2017), and the use of targets for rejecting and detaining asylum seekers at reporting centres have been introduced (Fisher et al., 2019).

Although the appeal hearing is their chance to argue against the reasons the Home Office have provided for rejecting their asylum claim, many appellants we spoke to did not have a clear understanding of the purpose of the hearing or the roles of the other people in the room. Appellants could arrive without knowing that the tribunal is formally a neutral environment independent from government. As Samuel, a former appellant in his 50s from Uganda, explained, attending his

appeal hearing filled him with dread not about appearing before a judge, but rather as a result of the Home Office’s involvement.

*[I]t is very stressful to go to the court. It makes you anxious. If you are signing<sup>18</sup> for 3–4 years and then they ask you to go to the court, how will you feel? And when you sign, you never know what will happen. You might be detained [...] So that fear will never disappear. And when you go to court, it is even worse.* (Interview, Samuel)

Similarly, David, who had not wanted to attend his appeal but had been convinced to by his lawyer, explained:

*But it was not good, you think they will say no, they will put you in a van, they will beat you, they will take you somewhere you don’t know, and the last accommodation where we lived we had trucks coming at night taking people just like that. So it’s trauma over trauma, torture over torture. You are cooking with someone tonight, you eat dinner tonight, in the morning his room was broken, he is gone. What? I don’t know, so it’s something like that, so you know when you are going to court that these are your days now, it’s coming, it’s coming and you are waiting for something good, bad, you don’t know.* (Interview, David)

As voiced by Samuel and David, the affective atmosphere that is experienced by appellants at the hearing centre can be ‘conditioned’ by previous experiences (Edensor, 2012: 114), in this case experiences of the British state’s border enforcement practices. Even before entering the tribunal hearing room and standing before a judge, appellants can already feel uncomfortable; not as a result of the tribunal building or the appeal itself, but because of the inseparability of the appeal from the wider context of the border and appellants’ experiences of Home Office policies.

The adversarial system within the tribunal means that HOPOs confront appellants with searching questions and accusations during hearings. ‘The way the guy from the Home Office was talking it was quite rude, really, really, rude’ Adama recalled. HOPOs have a target win rate of 70% for asylum appeals (Campbell, 2019). In conversations with HOPOs at various tribunal centres we were informed that they could be reprimanded if their targets were not met, and rewarded with high street shopping vouchers and other incentives if they met their targets (Taylor and Mason, 2014). Combined with their lack of formal legal training – HOPOs receive around two weeks initial training followed by on-the-job monitoring (see Campbell, 2019)<sup>19</sup> – HOPOs are known to sometimes ‘become too carried away, and overstep the mark by engaging in aggressive cross-examination’ (Thomas, 2011: 118), and fail to display basic levels of empathy towards vulnerable appellants (Baillot et al., 2012; Barnard et al., 2017).

HOPOs’ cross-examination tactics can have a negative effect on appellants and their ability to provide clear and coherent answers. Lack of credibility is the main reason that asylum claims are refused by the Home Office (Right to Remain, 2019), and is consequently a frequent point of contention at appeal. It refers to whether an account of something that happened in the past is deemed to be believable or likely to have happened. Credibility often becomes the key criteria in assessing asylum claims because of the lack of verifiable evidence and the distance between the country in which asylum is being claimed and the country or countries that feature in the accounts of asylum seekers’ reasons for claiming asylum. Research has raised serious concerns about credibility assessments in the UK. Inconsistencies between accounts given on different occasions (such as the initial Home Office interview and at the appeal) are often taken to undermine credibility, but psychologists have drawn attention to the effect that trauma can have in producing

<sup>18</sup> Frequently people seeking asylum must regularly report to the Home Office at reporting centres, often on a monthly or bi-monthly basis.

<sup>19</sup> Further details were made known through a Freedom of Information Request, 2013: [https://www.whatdotheyknow.com/request/presenting\\_officer\\_training\\_mate](https://www.whatdotheyknow.com/request/presenting_officer_training_mate).

<sup>16</sup> Such as because there is not enough evidence to conclude the case.

<sup>17</sup> In 2012, the then Home Secretary Theresa May announced that Britain was aiming to create ‘a really hostile environment for illegal immigrants’.



inconsistencies in accounts, especially in relation to peripheral details (Herlihy and Turner, 2006; Memon, 2012; Torres, 2018). This particularly affects women who have suffered sexual violence. The difficulties they face in disclosing their evidence might explain why they tend to be disbelieved more frequently than men at the initial stages of the asylum determination process (Asylum Aid, 2011). There is also evidence that the Home Office have not considered all the available evidence in assessing credibility in the past, nor made proper use of country of origin information<sup>20</sup> (Amnesty International and Still Human Still Here, 2013). The Home Office's approach to credibility has been linked to an endemic "culture of disbelief" (Gibson, 2013).

A common complaint from legal representatives is that HOPOs will regularly engage in what has been termed 'fishing expeditions' as they search for inconsistencies between what the appellant has previously stated in their screening and substantive interviews, and their answers before the tribunal (Good, 2011; Gill et al., 2019). Appellants can be repeatedly questioned by HOPOs on the smallest of details. In one case, for instance, we saw the government representative for the Home Office conduct 'a long series of questions to test the relationship between an appellant and her partner including the colour of bed sheets, birthday presents [and] morning routine' (Fieldnotes, 2014). In cases where appellants have not been informed of this tactic beforehand, this manner of cross-examination can feel intensely distressing.

*I [was] very worried, very scared ... For instance when they treat you like a criminal, ask you too many questions, argument, try to influence anything you are saying, it's [a] terrible, terrible situation. For me I feel it's not fair. You are not a criminal [...] Why they don't try to understand or explain to give us time to answer? Why they have only one side? They want to understand in their mind only this.* (Interview, Mira)

Even if the judge later decides that some small mistakes do not impact on the appellant's credibility, if a HOPO is aggressive it can make appellants less able to fully answer relevant questions. As one specialist in international human rights law expressed, many appellants "feel that they've been attacked by the Home Office and they worry that because the Home Office is the government that the judge will necessarily put more weight on what they're saying".

In these ways the neutral intended atmosphere of the appeal hearing can be tainted by the stance of the Home Office towards unwanted asylum seekers. In other words, the securitised and inhospitable atmosphere that the Home Office creates in other situations in which the appellant might have come across them (e.g. through their allocation of accommodation, the requirement to sign in, and and their potential detention and deportation-related experiences) is contagious within the tribunal (Anderson, 2009; Philippopoulos-Mihalopoulos, 2013). Where appellants may have felt that the appeal was their chance to tell their story and convince a judge of their claim, the HOPO's cross-examination can result in the courtroom atmosphere feeling hostile and further impeding the appellant's participation in the appeal. One Home Office representative 'was especially unsympathetic in relation to a frail elderly Pakistani appellant who required assistance getting into the court room. She commented, sarcastically: 'she needs help getting in here but managed all right on her own at Heathrow...' (fieldnotes, April, 2014). Comments like these create an unwelcoming atmosphere.

#### 4.3. Disrespect

Unlike in the Crown, civil and family courts, there is no official recording made of proceedings in immigration and asylum tribunals. This may have the effect of stunting the way in which communication takes place inside the hearing. In the majority of the appeals we

<sup>20</sup> Country of Origin Information is produced by a team of researchers in UKBA to provide information on asylum seekers' country of origin.

witnessed, judges, legal representatives and HOPOs fastidiously take notes to refer to later while the appellants speak, and questions are predominantly addressed to either the interpreter or the judge rather than the appellant. Appellants often consequently find themselves uncertain of where to look when answering questions, especially when there is no interpreter present at whom they can direct their answers. The frequent silence from the judge during cross-examination, in addition to the lack of eye-contact between appellants and the other actors in the courtroom, gives the hearing a 'cold' atmosphere that some appellants interpreted as disrespectful (see also JUSTICE, 2019).

A cold atmosphere may not be a barrier to access to justice in itself. Indeed, research has raised the possibility that a 'warm' atmosphere can be created by judges who are intending to find against a defendant, 'arguably attempting to appear fair' (Blanck, 1996: 899) and several legal professionals mentioned to us that judges were sometimes 'colder' towards appellants whose appeals they intended to grant, in order to appear balanced and avoid an onward appeal from the Home Office. In general, there is a risk that subjective perceptions of fairness based on the inter-personal happenings in court can distract from evaluating the substantive outcome of the process. At the extreme this might lead appellants to accept decisions that are in fact unfair if they are delivered in a 'warm' manner (Tyler, 1997; Byrom, 2019).

Coldness becomes a problem, however, when the appellant is so intimidated, or feels so disrespected, that their participation and engagement in the hearing is curtailed, or a perception of unfairness develops as a result. Omar, an appellant Egyptian in his 20s, felt as though he had not been heard in this environment "because the judge didn't even listen to me" and the HOPO was 'cold. Very cold. [They] don't even look at you. They don't care about you'. He made a direct connection between the atmosphere that he perceived and the likelihood that his appeal would be turned down: "I had never been in the court and it was very cold court atmosphere, no-one talk to another person and *they were ready to refuse*" [emphasis added].

Some judges also appeared disinterested. Our fieldnotes record numerous instances in which judges 'appeared to be staring out the window' or 'generally bored and inattentive'. These sorts of behaviours elicited frustration from appellants:

*[The appeal] was quite horrible. I didn't like it at all. Even the judge, I tried to have eye contact but... he doesn't want to have any contact eyes with me, he was looking somewhere else [...] so every time they asked me questions I tried to talk to him, but he's not looking at me [...] So it was quite intimidating as well. It's like, 'Is something wrong with my body or everything that I'm saying is not right?' [...] It was quite frustrating as well because I know in this country they say, if you want to tell the truth, someone has to look them in the eyes. You don't look away, that means they don't trust anything you're saying. [So] I say, 'What's the point?' So I was discouraged, what's the point even killing myself give them the explanation, they're not even paying attention, so [I] just keep quiet. It was hard.* (Interview, Adama)

Here Adama reports that the atmosphere made her disengage from the process ('what's the point?'). This feeling is exacerbated by the unfamiliarity of the proceedings and surroundings. 'From the moment a member of the public enters a court or tribunal building, they find themselves in an unfamiliar, intimidating environment', write the charity JUSTICE (2019: 4) in reviewing tribunal and court hearings. They continue:

'[Members of the public] must negotiate security, find the relevant courtroom, and try to make sense of the process and outcome of the hearing. Increasingly, they must also represent themselves. These features are exacerbated by the fact that legal professionals and judges are often not representative of the people using our courts – in particular in terms of gender, racial, ethnic and socio-economic background. The look, manner and language of court professionals

can alienate many members of the public who do not identify with their culture, lifestyle and heritage.’

While appellants have the most to feel emotional about, we observed that it is the tribunal judges that are most likely to become visibly animated and let their emotions show in the courtroom, reflecting their powerful position. We saw judges become impatient or even irate if they believe an appellant to be purposefully evading questions. On one occasion an 18-year-old Vietnamese appellant became the subject of a judge’s indignation:

*It was very clear when the judge didn’t believe the appellant’s answers. She visibly rolled her eyes at some of his answers, raised her eyebrows in disbelief, seemed to sneer at him, her questions became increasingly incredulous and her voice increasingly loud in volume. Communication really broke down, which she interpreted as his being difficult, and she eventually told him ‘I’m just going to write that you aren’t answering the questions’.* (Ethnographic Fieldnotes)

Lawyers we interviewed confirmed that some judges failed to adjust their behaviour when addressing appellants.

*If [the judge] wants to be rude and aggressive and like that to me, I can handle it, I get paid to handle difficult judges and I don’t mind doing it, I’ve got a lot of patience... But there’s some judges who are like that just to the clients and not to us, they do reserve a modicum of respect for us as professionals, but they obviously don’t think they need to extend that respect and that courtesy to the client which is really problematic.* (Interview, barrister and specialist in international human rights law, 2015)

While the majority of judges were not rude towards appellants, it was evident that being able to read the mood and patience of a judge is a useful skill for the parties involved. Although impatient judges were frequently impatient with everyone in the room, as ‘repeat-players’ legal representatives and HOPOs would often be able to alter their response-styles based on the judge. In contrast, appellants tended to be disproportionately affected by impatient judges as they would be least likely to be able to detect the judge’s mood or level of attentiveness, or alternatively, be least prepared to respond to the judge’s impatience in a way that the judge was likely to perceive as positive.

Although subjective measures of procedural justice have limitations, research and judicial guidelines have emphasised the importance of being able to participate fully in hearings, trust legal authorities and be treated with dignity and respect (Tyler, 2000; Judicial Group on Strengthening Judicial Integrity, 2002). When a cold atmosphere inhibits an appellants’ confidence to the extent that they do not participate in the process as fully, or when it elicits feelings of disrespect that precipitate their disengagement from the process, it should be viewed as a threat to access to justice itself.

All these considerations affect access to justice because they muffle the voice of the appellants: the clarity, consistency, confidence and demeanour with which they are able to relay their experiences. When they shut down and start to give short, mumbled or incoherent replies their chances of obtaining refugee protection are reduced. This is because, unlike in other areas of law where the benefit of the doubt resides with the individual under legal scrutiny, the burden of proof in these hearings is on the asylum seekers themselves. If they do not say what they are facing then the required standard of proof may be unattainable.

Given the existence of possible trauma and ill-treatment at the hands of state authorities, it may only take one or two micro-aggressions to cause appellants to close down in this way. While it might be abundantly clear to the legal actors involved that the judge is independent from the HOPO, and that each of them is also distinct from the security staff, it is precisely the *general feel* of the experience that matters most to asylum seekers who will be unfamiliar with these distinctions. The ability of the concept of atmosphere to capture an overall climate and mood therefore

reflects well the connections appellants are likely to make.

## 5. Conclusion

Going to hearings and being there can improve the quality and texture of data that can be generated in research into legal processes. A whole range of factors that lie outside the doctrinal, formal legal frame are important to how justice is experienced and accessed (or not), and these have become visible in our research as a result of our ethnography of asylum appeal hearings. They include the timing and spacing of hearings but extend to the body language, gestures, eye contact, memories, associations, symbolism, emotions and affects in the courtroom.

Many asylum appellants do not feel as though they have had access to justice in their asylum appeals despite the advent of their hearing, and even the presence of legal representation (Clayton et al., 2017). We have argued that the atmosphere in hearings can have the effect of precipitating disengagement in legal processes, through intimidation, indignation or resignation. By foregrounding atmosphere in our work we have attended to the additive, overall perceived qualities of courtroom dynamics that can be triggered from a relatively small number of isolated qualitative behaviours. It is natural to generalise in this way, especially in a new and intimidating environment, and so atmosphere is a key concept that reflects the way appellants themselves think about their experiences of legal processes.

One challenge of working in a qualitative, ethnographic way on legal processes concerns the difficulty of getting the attention of policy makers, senior law makers and system designers. In legal circles the doctrinal paradigm is still dominant, and sits comfortably alongside assumptions of objectivity and positivism that ethnographers frequently question. Nevertheless we have been pleasantly surprised by the receptivity of the judiciary to our ethnographic work, which has been disseminated to them in various ways. Hearing about everyday situations in court can help them to think outside the doctrinal lens which can obscure issues of practicality and process.

The disorientation, distrust and disrespect our appellant interviewees felt is better conveyed via qualitative spoken and textual testimony<sup>21</sup> than statistics. Moreover, the fact that there are detailed guidelines produced by the Judicial College for the generation of comprehensible, respectful and inclusive courts and tribunals demonstrates how hard it is to control and manage atmospheres in practice. We take this to illustrate the importance of conducting qualitative work with vulnerable tribunal and court users, despite the difficulties of accessing them. Recent work to reform immigration and asylum appeals has not included the direct experiences of tribunal users (e.g. JUSTICE, 2018) and future work is likely to be enhanced by doing so. One challenge is that vulnerable groups may be distrustful of being approached by government departments conducting research. Independent researchers, such as those at universities, can play an important role here: collecting data and presenting anonymised work to policy makers.

The insights reported here suggest that the concept of atmosphere is useful for understanding access to justice because it is capable of shedding light on the textured, inter-personal experiences of appellants during hearings that determine their perceptions of justice and participation in proceedings. Socio-legal scholars have recognised the importance of the ‘minutiae’ of judges’ work (Moorhead and Cowan, 2007: 316), communication and interpersonal interactions (Bezdek, 1991), spatial configurations (Rowden, 2018; Mulcahy, 2011; Rock, 1993) and power asymmetries (Carlen, 1976) in courts for the way hearings play out. The concept of legal atmospheres allows us to integrate these concerns in one analysis and make connections between individual actions and the overall perception and experience of legal events. In so doing it is able to connect the work of legal, social and geographic theorists.

<sup>21</sup> creative and artistic forms of communication may be even better.

## Author contribution

In attributing authorship we have followed the British Sociological Association's guidelines that: 1) Everyone who is listed as an author should have made a substantial direct academic contribution (i.e. intellectual responsibility and substantive work) to at least two of the four main components of a typical scientific project or paper: a) Conception or design. b) Data collection and processing. c) Analysis and interpretation of the data. d) Writing substantial sections of the paper (e.g. synthesising findings in the literature review or the findings/results section). 2) Everyone who is listed as an author should have critically reviewed successive drafts of the paper and should approve the final version. 3) Everyone who is listed as author should be able to defend the paper as a whole (although not necessarily all the technical details).

## Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

## Acknowledgements

**Funding:** This work was supported by the Economic and Social Research Council [grant number ES/J023426/1] and the European Research Council [grant number StG-2015\_677917, acronym ASYFAIR]. We are also grateful for the work of Abigail Grace and Amanda Schmid-Scott for their help with data collection and analysis respectively.

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