

Briefing: Coronavirus Bill, Courts and the Rule of Law¹

18 March 2020

In light of the plans to rapidly expand use of telephone, video and Skype hearings in the justice system, this briefing discusses the safeguards that must be put in place to ensure that access to justice and open justice are maintained under the rule of law.

Summary

The following recommendations would uphold the rule of law and access to justice in the context of the rapid expansion of telephone, video and Skype hearings in the courts and tribunals system.

1. Non-urgent trials should be delayed, and existing exceptions relating to the use of video hearings set out in Criminal Practice Directions² must be applied. Individuals who are neurodiverse, have a learning disability or are experiencing mental ill health that impacts on their communication or comprehension skills should be excluded from trial by video hearing.
2. All parties in hearings facilitated fully by video link, Skype or telephone must be provided with effective access to free legal advice.
3. Judgments given in cases that are held remotely must be given in writing and made publicly available to ensure that established principles of open justice are upheld.
4. The impact of fully video hearings on the ability of legal representatives to effectively communicate with their clients must be monitored.
5. Resource should be dedicated to proactively identifying parties who may be considered vulnerable under existing law and practice directions and ensuring that reasonable adjustments are made to enable them to participate fully in proceedings. The impact of shift in mode of proceedings on individuals with protected characteristics under the Equality Act 2010 should be monitored.
6. The failure rate of the technology used and the nature and extent of technical difficulties encountered must be monitored and recorded. Parties and legal representatives should confirm that they consider the performance of the technology sufficient to facilitate a fair and effective hearing.

¹ Prepared by Dr Natalie Byrom, Director of Research at The Legal Education Foundation. With many thanks to all those who provided comments and suggestions including, Dr Jack Simson-Caird, Professor Dame Hazel Genn, Penelope Gibbs, Swee Leng Harris, Daniel Hoadley and Spike Mullings.

² Criminal Practice Directions- I 3N.6 and N.7 pp37 available at: <https://www.judiciary.uk/wp-content/uploads/2019/10/CrimPD-9-CONSOLIDATED.pdf>

7. HMCTS should urgently expand technical support to parties and Judges facilitating fully video hearings.
8. All remote hearings must be recorded, with transcripts of remote hearings being made available as soon as practicable to parties to the case and third parties. Where the recording facility fails and cannot be recovered the case should be adjourned.

Introduction

The coronavirus pandemic has prompted court systems globally to shift their working practices at scale, replacing in-person hearings with hearings conducted by telephone and video link. In the UK new emergency legislation is being drafted to facilitate the rapid expansion of remote hearings conducted by telephone and video link. What does the existing research tell us about the impact these measures might have on access to justice? What additional safeguards should be put in place, and what should be monitored to ensure that constitutional principles are upheld, and that individuals rights and trust in the justice system protected?

Background

The coronavirus pandemic is an unprecedented global public health emergency, and has required both public justice systems, and legal advice providers to pivot rapidly to technology facilitated remote working. In the courts and tribunals system, this has translated into the widespread adoption of hearings by telephone and videolink- some lawyers have reported Judges encouraging parties to accept trial by Skype.³ On 17th March, the Lord Chief Justice published the following statement on the Courts and Tribunals Judiciary website: *“Given the rapidly evolving situation, there is an urgent need to increase the use of telephone and video technology immediately to hold remote hearings where possible. Emergency legislation is being drafted which is likely to contain clauses that expand the powers in criminal courts to use technology in a wider range of hearings. The Civil Procedure Rules and Family Procedure Rules provide for considerable flexibility. Our immediate aim is to maintain a service to the public, ensure as many hearings in all jurisdictions can proceed and continue to deal with all urgent matters.”*⁴ This statement was followed by the announcement of a Coronavirus bill, which will: *expand availability of video and audio link in court proceedings. This would include magistrates’ court hearings taking place by phone or by video, should an individual appeal restriction of movement due to quarantine measures. This will ensure that an appeal takes place but will not require a person to break quarantine in order to attend in person. It will also enable the expansion of the availability of video and audio link in various criminal proceedings, including full video and audio hearings in certain circumstances, and public participation in relation to these and other court and tribunal proceedings conducted by audio and video. The measures will enable a wider range of proceedings to be carried out by video, so that courts can continue to function and remain open to the public, without the need*

³ <https://twitter.com/JohnMQC/status/1239997122285645830?s=20>

⁴ <https://www.judiciary.uk/announcements/coronavirus-update-from-the-lord-chief-justice/>

for participants to attend in person. This will give judges more options for avoiding adjournments and keeping business moving through the courts to help reduce delays in the administration of justice and alleviate the impact on families, victims, witnesses and defendants.” The bill is likely to be published on the 19th March. While the use of telephone and videoconferencing is well-established in certain administrative hearings, the introduction of full video and audio hearings in a wider range of criminal matters is largely untested. A report published by the Justice Select Committee in October 2019 stated that: *“The interests of justice are not served by unreliable video equipment and WiFi facilities throughout the criminal courts estate; HMCTS must expedite planned investment upgrading these. There is not enough research on the impact on justice outcomes of video hearings and video links in the UK”*⁵. In this context, and in light of the current imperative to expedite the expansion of the use of remote hearings, what procedural safeguards should be put in place to ensure that the goal of this legislation- to maintain access to and trust in the justice system- is achieved?

Maintaining access to justice

The common law in England and Wales establishes a definition of access to justice that can be summarised as consisting of four parts: i.) access to the formal legal system, ii.) access to a fair and effective hearing, iii.) access to a decision and iv.) access to an outcome⁶. This standard has been endorsed by the Justice Select Committee, who recommended that the Ministry of Justice adopt this definition in their evaluation of the ongoing programme of court reform⁷. In the context of the legislation currently contemplated, the safeguards that must be put in place primarily relate to ensuring that hearings conducted via telephone, video link and Skype are fair and facilitate effective participation i.e. that they provide parties/defendants with the opportunity to present the information necessary to enable a decision maker to make a determination based solely on applying the relevant law to the facts of the case.

Recommendations

- 1. Non-urgent trials should be delayed, and existing exceptions relating to the use of video hearings set out in Criminal Practice Directions⁸ must be applied. Individuals who are neurodiverse, have a learning disability or are experiencing mental ill health that impacts on their communication or comprehension skills should be excluded from trial by video hearing.**

⁵ See House of Commons Justice Committee, “Court and Tribunal reforms” 31 October 2019 HC 190 31 October 2019, Second Report of Session pp3

⁶ The legal basis for this definition is set out in two publications i.) Byrom N (2019) “Developing the Detail: Evaluating the Impact of Court Reform in England and Wales” available at: <https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/02/Developing-the-Detail-Evaluating-the-Impact-of-Court-Reform-in-England-and-Wales-on-Access-to-Justice-FINAL.pdf> and ii.) “Digital Justice: HMCTS data strategy and delivering access to justice, Report and recommendations” available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF

⁷ See House of Commons Justice Committee, “Court and Tribunal reforms” 31 October 2019 HC 190 31 October 2019, Second Report of Session pp65

⁸ Criminal Practice Directions- I 3N.6 and N.7 pp37 available at: <https://www.judiciary.uk/wp-content/uploads/2019/10/CrimPD-9-CONSOLIDATED.pdf>

The exceptions set out in Criminal Practice Directions I-3N.6 which provide a general guide to circumstances where live link and telephone proceedings should not be conducted must be applied⁹. Emerging evidence *[insert reference to EHRC Research if provided]* indicates that individuals who are neurodiverse, have a learning disability or are experiencing mental ill health which impacts on their communication and comprehension skills may be particularly adversely impacted by appearance via video link¹⁰. Research also indicates that children and young adults may be particularly adversely affected by having to participate in proceedings remotely¹¹. There is currently a paucity of robust evidence to indicate which forms of reasonable adjustment are effective at mitigating these negative consequences in the context of remote hearings- as such vulnerable defendants with conditions that impair their communication or comprehension skills should be excluded from trial via video link, Skype or telephone.

- 2. All individuals who are participating in hearings facilitated by video link, telephone or Skype must be provided with effective access to legal advice.** Successive studies have indicated that in cases where hearings are conducted remotely by video-link, parties are less likely to seek legal advice and representation. Research conducted into the impact of the introduction of remote hearings in immigration detention settings in the USA demonstrated that remote hearings impacted negatively on the level of litigant engagement in the process- litigants perceived the process as less legitimate and therefore did not take full advantage of the legal safeguards available to them. Research published by the Ministry of Justice in 2010 into a pilot “Virtual Court” process that allowed defendants charged with an offence to appear in the Magistrates Court for their first hearing via a secure video link identified that: “the rate of defence representation was lower in Virtual Courts compared to the expectations of the pilot in the original model and the comparator area” (Terry, 2010:vi)- in spite of the fact that free legal advice was offered to all participants in the pilot . Studies suggest that failure to seek legal advice may be linked to diminished ability to present their case effectively (see for example Professor Ingrid Eagly writing on the use of remote adjudication in immigration proceedings¹², research published by the Ministry of Justice in 2010 into a pilot of a virtual court¹³, Professor Seidman Diamond writing on the impact of the introduction of video conferenced hearings for bail decisions¹⁴

⁹ See Criminal Practice Directions October 2015 Division I available at: <http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-practice-directions-I-general-matters-2015.pdf> pp32

¹⁰ See also: See House of Commons Justice Committee, “Court and Tribunal reforms” 31 October 2019 HC 190 31 October 2019, Second Report of Session pp24 para 67

¹¹ Standing Committee for Youth Justice (2018) “They just don’t understand what’s happened or why” A report on child defendants and video links” available online at: <http://scyj.org.uk/wp-content/uploads/2018/04/SCYJ-FINAL.pdf>

¹² Eagly, I. (2015) “Remote Adjudication in Immigration” Northwestern University Law Review Vol 109, No. 4 2015 <http://escholarship.org/uc/item/5p1044zc>.

¹³ Terry, M et al. (2010) “Virtual Court pilot: Outcome Evaluation” Ministry of Justice Research Series 21/10, December 2010 ppvi

¹⁴ Seidman Diamond, S. et al (2010) “Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions” *The Journal of Criminal Law and Criminology*, Vol. 100 No. 3 2010

and the Lammy Review¹⁵). As such, parties to video or telephone hearings who are eligible for legal advice must be given support to understand the implications of remote participation and provided with an opportunity to access free legal advice in advance of their hearing. Time limits must not be placed on consultation with legal representatives in advance of hearings- the fifteen-minute time slots deployed currently¹⁶ in criminal proceedings must be abandoned.

- 3. Judgments given in cases that are held remotely must be given in writing and made publicly available.** The principle of open justice is a fundamental feature of the legal system in England and Wales, protection of this principle is enshrined in common law, the European Convention on Human Rights and Fundamental Freedoms (ECHR) and various international human rights instruments.¹⁷ Ryder L.J. in *DE v AB [2014] EWCA Civ 1064* states that this principle enshrines the general rule that: “hearings judgments and orders made, are public”. The leading expression of this principle, per Lord Halsbury in *Scott v Scott [1913] AC 417* established a stringent test for departure from this principle, stating that in camera hearings should only be held when they are “strictly necessary” and that the threshold for “strictly necessary” is: “that by nothing short of the exclusion of the public can justice be done”. The International Covenant on Civil and Political Rights to which the UK is a signatory, states that: “even in cases where the public is excluded from the trial, the judgment must, with certain strictly defined exceptions, be made public.”¹⁸

The principle of Open Justice exists to promote a number of goals including: i.) ensuring that the public are informed about what is happening in the courts; ii.) ensuring that the public understand the law and legal developments, to enable them to both follow the development of the law and debate and change it via the democratic process and iii.) ensuring accountability of two kinds; firstly, that the law is being applied correctly by the court (“judicial accountability”) and secondly, especially where the matter is between the executive and the citizen, facilitating the democratic accountability of the parties to the public (see *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 6*). Whilst current HMCTS guidance states that public galleries will remain open for members of the public and the press, the guidance issued around non-essential travel is likely to result in diminished

¹⁵ David Lammy (2017). *The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System*. London: Lammy Review.

¹⁶ Gibbs, P. (2017) “Defendants on video – conveyor belt justice or a revolution in access to justice?” *Transform Justice*, available online at: <http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf> and House of Commons Justice Committee, “Court and Tribunal reforms” 31 October 2019 HC 190 31 October 2019, Second Report of Session pp24 para 70

¹⁷ For a comprehensive overview of the principle and relevant legal frameworks see Bosland and Townend (2018) “Open Justice, transparency and the media: representing the public interest in the physical and virtual courtroom” *Communications Law* Vol. 23, No. 4, 2018 and Ana Harvey, *Public Hearings in Investor-State Treaty Arbitration: Revisiting the Principle* (February 2020, Doctoral thesis, University of Luxembourg) <<https://orbilu.uni.lu/handle/10993/42628>>. On file with author.

¹⁸ Ana Harvey, *Public Hearings in Investor-State Treaty Arbitration: Revisiting the Principle* (February 2020, Doctoral thesis, University of Luxembourg) <<https://orbilu.uni.lu/handle/10993/42628>>. On file with author. Pp86

attendance and therefore an undermining of the key mechanism through which the principle of open justice is currently delivered. In the context of a sudden shift in the mode through which hearings will be conducted, it is vital that the goals that open justice exists to advance are upheld. Publicly available judgements can assist in delivering these goals. It is therefore vital that judgments given in hearings that have been conducted remotely are given in writing and made publicly available.

- 4. Resource should be dedicated to proactively identifying parties who may be considered vulnerable under existing law and practice directions and ensuring that reasonable adjustments are made to enable them to participate fully in proceedings. Judges should have wide discretion to adjourn cases if a party to proceedings expresses a complaint that they cannot follow proceedings.** Existing law and practice directions set out the circumstances in which parties to a hearing may be considered vulnerable¹⁹ and therefore require reasonable adjustments to ensure a fair and effective hearing. Current HMCTS guidance states that individuals requiring reasonable adjustments should self-identify and seek support.²⁰ In the context of the widespread introduction of video, Skype telephone hearings, resource should be dedicated to proactively identifying those individuals who may be considered vulnerable in the context of being able to participate fully and effectively, and ensuring that reasonable adjustments are put in place. In the case of criminal proceedings, existing criminal procedure rules state that it is duty of the parties to alert the court to any reason why live links or telephones should not be used²¹ where Criminal Procedure Rules otherwise would oblige the Court to do so- in the current circumstances the onus should be reversed.

Where defendants are identified as vulnerable, either by existing liaison and diversion schemes, by defence advocate or by the court, consideration must given to: i.) the extent to which vulnerable defendants can be effectively supported by intermediaries in the context of appearing via telephone or video link ii.) the ways in which the process can be meaningfully adapted to address any communication needs that may be exacerbated by appearing remotely, for example, by allowing additional time for hearings. Legislation and practice directions should empower Judges to make procedural adjustments and utilise discretion to ensure that access to justice is upheld. Judges should have the power to adjourn cases if, for example, a party to proceedings expresses a complaint that they cannot participate or otherwise follow proceedings. The impact of shift in mode of proceedings on

¹⁹ For a summary see: Byrom, N. (2019) “Developing the Detail: Evaluating the Impact of Court Reform in England and Wales” available at: <https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/02/Developing-the-Detail-Evaluating-the-Impact-of-Court-Reform-in-England-and-Wales-on-Access-to-Justice-FINAL.pdf> pp10. See also Criminal Practice Directions 2015 Division I per CPD-I 3D- 3G and R v Cox [2012] EWCA Crim 549

²⁰ <https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/equality-and-diversity>

²¹ [http://www.justice.gov.uk/courts/proc/Recommendations for Coronavirus Bill V4edure-rules/criminal/docs/2015/crim-practice-directions-I-general-matters-2015.pdf](http://www.justice.gov.uk/courts/proc/Recommendations%20for%20Coronavirus%20Bill%20V4edure-rules/criminal/docs/2015/crim-practice-directions-I-general-matters-2015.pdf)

individuals with protected characteristics under the Equality Act 2010 should be monitored.²² HMCTS has designed systems for capturing protected characteristics under the Equality Act 2010 as part of the ongoing programme of court reform. These must be immediately deployed.

5. **The impact of fully video hearings on the ability of legal representatives to effectively communicate with their clients must be monitored.** Existing research has identified concerns regarding the impact of remote hearings on the ability of legal representatives to communicate with their clients privately and effectively²³. The impact of the rapid expansion of video and telephone hearings on the ability of legal representatives to communicate with their clients must be monitored, and any concerns raised by legal representatives regarding the impact of this mode of hearing on their ability to effectively discharge their role must be recorded. Judges must be empowered to adjourn cases where, for example, a party to proceedings complains that they cannot follow the hearing due to technical difficulties.

6. **The failure rate of the technology used and the nature and extent of technical difficulties encountered must be monitored and recorded.** The literature on the conduct of video hearings in the UK is replete with references to instance where the technology has failed²⁴. A process evaluation conducted into party-state video hearings by academics from the London School of Economics in the context of the ongoing programme of reform reported that: “the majority of video hearings experienced technology difficulties...including issues around Wi-Fi, audibility, visibility of parties on the screen or access to documents”²⁵. Whether or not technical difficulties endanger the effectiveness of a hearing is ultimately a decision to be taken by the court, however, in the absence of arrangements for external observation of hearings, it is important that information on the nature and extent of any technological difficulties encountered is recorded, and scrutiny facilitated through providing public access to hearing transcripts (see recommendation 8 below). Legal representatives should be asked to

²² For technical advice on this see:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF HMCTS has designed systems for capturing protected characteristics under the Equality Act 2010 as part of the ongoing programme of court reform. These must be immediately deployed.

²³ See Seidman Diamond (footnote 11 supra), Terry, M (2010) and evidence submitted to the Justice Select Committee inquiry into court reform See House of Commons Justice Committee, “Court and Tribunal reforms” 31 October 2019 HC 190 31 October 2019, Second Report of Session p24 para 69

²⁴ See House of Commons Justice Committee, “Court and Tribunal reforms” 31 October 2019 HC 190 31 October 2019, Second Report of Session p24 para 69

²⁵ Rossner, M. and McCurdy, M. (2018) *Implementing Video hearings (Party-to-State): A Process Evaluation* Ministry of Justice, London, 2018 available online at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740275/Implementing_Video_Hearings_web.pdf

confirm that they consider the technical conditions satisfactory in terms of facilitating a fair and effective hearing.²⁶

7. HMCTS should urgently expand technical support to parties and Judges facilitating fully video hearings. Existing research suggests that this support is critical to ensuring that parties experience the process as fair, which in turn is highly correlated to public trust and confidence in the system. A process evaluation of a pilot of fully video hearings²⁷ conducted by academics at LSE identified the critical role played by HMCTS staff in ensuring that parties participating in video hearings felt positively about their experience. The video hearings administration team held pre-hearing calls to assist appellants with “impression management”- ensuring that lighting and camera angles were adequate, that they were centred on the screen, that they were suitably located and had an appropriate background in which to conduct their hearing. The video hearings administration team also liaised with appellants, representatives and respondents to resolve technical issues and ensure users were successfully logged in. Technical support staff and project managers were also based in the court to assist the Judge. This intensive support was reported as crucial to ensuring that parties were satisfied with their experience and perceived it as fair. Maintaining parties perceptions of procedural justice is inextricably linked to maintaining public trust and confidence in the justice system- as such, the resourcing of this support is of vital important.

8. All remote hearings must be recorded, with transcripts of remote hearings being made available as soon as practicable to parties to the case and third parties. All hearings conducted remotely or via telephone must be recorded, and recordings should be made available to be watched or listened to by members of the public. Where the recording facility fails and cannot be recovered the proceedings should be adjourned. Transcriptions should be made available to enable public scrutiny of decision making, and a protocol established for providing access to these. This is in line with the model for delivering open justice already agreed by the Tribunals Change Network and HMCTS in the context of the ongoing programme of court reform.²⁸ HMCTS update published today²⁹ states that public galleries will remain open, however, in the context of government guidance around self-isolation and social distancing, it is unlikely that this will provide an effective mechanism for delivering the goals of open justice.

²⁶ For a discussion of this in case law see: R (on the application of Kiarie) v Secretary of State for the Home Department; R (on the application of Byndloss) v Secretary of State for the Home Department [2017] UKSC 42

²⁷ Ibid, pp14

²⁸ Senior President of Tribunals (2018) “The Modernisation of Tribunals 2018 : A Report by the Senior President of Tribunals” available online at: https://www.judiciary.uk/wp-content/uploads/2019/01/Supplementary-SPT-report-Dec-2018_final.pdf

²⁹ <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>