

The use of video conferencing in courts

By

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The legal basis for video conferencing in courts in England and Wales

Policing and Crime Act 2017, section 74 (regarding live links)

Coronavirus Act 2020, sections 53 – 57; Schedules 25, 26, 27

Makes a range of modifications to courts and tribunal practice to permit and facilitate remote working in circumstances that would usually require physical attendance.

Sections 53 to 56 make provision specifically in relation to the operation of courts and tribunals. Sections 53 – 56 provide for an expansion of the use of live links in criminal proceedings and, in relation to civil proceedings, for public participation in proceedings conducted remotely by video or audio. Schedule 25 provides detailed amendments to the Courts Act 2003 to enable the public to see and hear proceedings conducted wholly as audio or video proceedings and to regulate the recording of those proceedings.

Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, S.I. No. 350

Human rights

The Equality and Human Rights Commission has alerted the British government to take action to reduce the risk of disabled people being wrongly convicted because of video hearings in criminal cases. There has been a significant expansion in video hearings since the Covid-19 crisis, but they are not suitable for many people with a cognitive impairment or mental health condition.

Some of the issues that are a cause for concern include, but are not limited to (for full details, see *Inclusive justice: a system designed for all* Interim evidence report, Video hearings and their impact on effective participation (Equality and Human Rights Commission, April 2020), URL below):

- (i) Problems relating to language, mental health problems, autism, ADHD, or any other learning-based difficulty mean video conferencing is not suitable.
- (ii) There is a need to identify impairments and make adjustments.
- (iii) Without the lawyer being physically present with the disabled person, it is harder to build up trust and rapport with the client. This is made worse if there is only a 15-minute time slot for video consultations.

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(iv) Video links with poor sound and image quality; some not working at all or functioning intermittently.

(v) Technology in some courts can be particularly bad, leading to hearings are delayed or abandoned.

(vi) Defendants do not necessarily know what is going on because they sit in a room on their own with a screen but cannot hear what is being said.

Some practical issues

1. Connections and software

Ensure broadband speeds are sufficient for all parties.

It is necessary to determine what sort of conferencing software everybody can use. For instance, those responsible for providing judges with internet connections might have firewalls in place that prevents the use of some types of software conferencing systems.

2. Preparation

It is essential that all parties practice in advance: between all the parties, and individually between lawyers and clients. Any problems can be dealt with during this time.

It can be helpful to be supported by an IT team to assist with practical issues.

All parties must understand the features and limitation of the conferencing software.

3. Security

Consideration should be given to the security of the software and any physical facility that is used, and security of the connections.

4. Data protection

Consider whether the software complies with Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1–88.

It is better for the court to arrange the hearing and co-ordinate the admission of the parties. This means there is one less thing for the parties to worry about, especially if one party is a litigant in person.

5. Recording the hearing

Whoever sets up the hearing, they have the obligation for ensuring any recording is complies with the Regulation. If one of the parties records the hearing, they are responsible with lodging the hearing with the court.

6. Playback or record facilities

You may think that because you are not recording the hearing, it follows that the other side is also not recording the hearing. This is an important issue, because the other party might recording the hearing improperly. This could also be the case even if they have given assurances that they will not do so.

7. The passing of documents between parties

It is necessary to create an e-bundle of the documents relied upon, and to send it to the court well before the hearing. If one of the parties wants to add documents after the e-bundle has been agreed, they will have to send additional material separately.

Set out a protocol in advance for the exchange of further documents.

Consideration must be given to the method by which the e-bundle is created. It is important for all the parties, in particular the judge, to be able to search the e-bundle using a search facility. If the e-bundle does not have a search facility, it means the judge will have to scroll through many pages. This is not helpful and causes delay during the hearing.

Consider using a suitable software program to make the bundle searchable.

8. Disclosing confidential information or trade secrets, or both confidential information and trade secrets

Consideration must be made to ensure confidential documents or trade secrets are not inadvertently disclosed to parties that should not be in receipt of them.

9. During the hearing: general

To enable every party to know what is being discussed with ease, the e-bundle should be searchable and include hyperlinks.

The efficiency of e-bundle is the most important practical point that can be planned for in advance and is likely to help with the success of the hearing.

Preparation should be a priority, making sure there is a protocol for intervening during the hearing.

Each witness should have adequate facilities.

The parties must cooperate.

10. During the hearing: confidentiality

Invariably, clients will wish to discuss matters with their respective lawyers during the course of the hearing. This is why you ought to make yourself familiar with the video conferencing facilities. For instance, and depending on the equipment used, one or both sides may be able to move the camera around the room remotely. So, if you are in London and the other side in Buenos Aires, it may be possible for you to move their camera around the room to see whom else is in view, and what else they might have in the room. This can work both ways. In addition, again, depending on the facilities you are using, you may also be able to set the voice controls to mute, thus ensuring you can have a private conversation with your client (provided the other party does not have the ability to lip read).

Another issue is whether a lay party has someone else in the room. There is no way of being sure if they do have somebody with them. Consider asking the lay party to scan the room with their camera to show that it is empty. The judge is best advised to give a clear warning at the beginning of the hearing that no-one must record the meeting, other than those authorized to do so.

Lawyers are advised to set up separate methods to speak with their clients that

are not connected to the videoconferencing system that is used. This allows the lawyers to communicate with their clients separately from the hearing.

11. During the hearing: physical issues

It is necessary to have breaks at various points for a number of reasons, such as allowing the lawyers to take instruction, for coffee and lunch, and because a remote hearing or trial may be more tiring than a face-to-face hearing or trial.

12. During the hearing: number of screens

Those taking part will find it helpful to have at least two, or perhaps three screens. One screen will be for the video image, one for the e-bundle, and one for any additional documents.

13. Decorum

All parties ought to be conscious of the background. Remove unsuitable pictures or objects from the line of sight of the screen. A neutral background is ideal. It is better to maintain all the formality and decorum of a physical court hearing.

Selected materials online

Legislation

Access to Justice Act 1999: <http://www.legislation.gov.uk/ukpga/1999/22/contents>

Policing and Crime Act 2017:

<http://www.legislation.gov.uk/ukpga/2017/3/contents/enacted>

Coronavirus Act 2020: <http://www.legislation.gov.uk/ukpga/2020/7/contents/enacted>

Subordinate legislation

Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, S.I. No. 350: <http://www.legislation.gov.uk/uksi/2020/350/contents/made>

Practice Directions

Practice Direction 32 – Evidence, Annex 3:

http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd_part32

Practice Direction 51Y – Video or Audio Hearings during Coronavirus Pandemic:

<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic>

Protocols (regularly up-dated)

Civil Court guidance on how to conduct remote hearings:

<https://www.judiciary.uk/publications/civil-court-guidance-on-how-to-conduct-remote-hearings/>

Coronavirus (COVID-19): Message from the Lord Chief Justice to judges in the Civil and Family Courts, Lord Chief: <https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/>

General advice and guidance from the judiciary (regularly up-dated)

Coronavirus (COVID-19) advice and guidance:

<https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/>

The Lord Chief Justice: *Jury trials to resume this month* (11 May 2020):
<https://www.judiciary.uk/announcements/jury-trials-to-resume-this-month/>

HM Courts and Tribunals Service (regularly up-dated)

HMCTS daily operational summary on courts and tribunals during coronavirus (COVID-19) outbreak <https://www.gov.uk/guidance/hmcts-daily-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak>

Coronavirus (COVID-19): courts and tribunals planning and preparation
<https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation>

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

Chief Coroner

Chief Coroner Guidance – COVID-19: <https://www.judiciary.uk/wp-content/uploads/2020/03/Chief-Coroner-Guidance-No.-34-COVID-19-26-March-2020-.pdf>

Case law

Blackfriars Ltd, Re [2020] EWHC 845 (Ch)
<http://www.bailii.org/ew/cases/EWHC/Ch/2020/845.html>

John Kimbell QC, sitting as a Deputy High Court judge, refused to adjourn a trial due to begin in June. He ruled that it should proceed remotely by video-link. This ruling is significant, because it concerns litigation on a large scale. The claim is for damages of £250m arising from alleged negligence in the conduct of the administration of a company. The trial is due to last five weeks; there are 9,000 documents and there will be live evidence from four witnesses of fact, and thirteen experts. If the trial were adjourned, it would not be relisted in the Chancery Division before June 2021.

A Local Authority v Mother [2020] EWHC 1086 (Fam)
<https://www.bailii.org/ew/cases/EWHC/Fam/2020/1086.html>

This is a published interim judgment by a High Court Judge, Mrs Justice Lieven, dealing with a care case, rather than an appeal. The judge was conducting a fact finding hearing into the circumstances of a sibling who had died and who had been found post-mortem to have suffered many fractures. The medical evidence had been successfully completed by video hearing. The question was whether the judge should continue to hear the evidence of the parents about what they knew about the injuries.

The father wanted to adjourn. He had been in a mental health crisis. He had been assessed as having capacity to carry on. In fact said the use of video link was his preference.

The judge reviewed the arguments, and decided have a remote hearing on the basis that if things became unfair, she could always pause the hearing.

One of the things she considered was:

- (i) whether it was harder to get to the bottom of factual disputes and to assess evidence using a video link, and

(ii) whether it was more or less likely people would give accurate and truthful evidence over a link than in a court

The judgment contains a discussion about the already well established use of video links to assist vulnerable witnesses under Practice Direction 3AA – Vulnerable Persons: Participation in Proceedings and Giving Evidence, which is intended to improve the quality of their evidence rather than to diminish it.

The judge concluded that it was impossible to say one way or the other, and said, at [29], that:

“I do not think that it is possible to say as a generality that a remote hearing is less good at getting to the truth than one in a courtroom.”

The judge said the process of cross questioning by all the lawyers in this case would be demanding whatever the form – and in fact the father thought it would be more manageable by video link. Arrangements had been set up so that the lawyers would read documents to him as they asked questions about them, to make sure he could follow and answer properly.

P (A Child: Remote Hearing), Re (Rev 3) [2020] EWFC 32

<https://www.bailii.org/ew/cases/EWFC/HCJ/2020/32.html>

Sir Andrew McFarlane, President of the Family Divisions said, at [24]:

The decision whether to hold a remote hearing in a contested case involving the welfare of a child is a particularly difficult one for a court to resolve. A range of factors are likely to be in play, each potentially compelling but also potentially at odds with each other. The need to maintain a hearing in order to avoid delay and to resolve issues for a child in order for her life to move forward is likely to be a most powerful consideration in many cases, but it may be at odds with the need for the very resolution of that issue to be undertaken in a thorough, forensically sound, fair, just and proportionate manner. The decision to proceed or not may not turn on the category of case or seriousness of the decision, but upon other factors that are idiosyncratic of the particular case itself, such as the local facilities, the available technology, the personalities and expectations of the key family members and, in these early days, the experience of the judge or magistrates in remote working. It is because no two cases may be the same that the decision on remote hearings has been left to the individual judge in each case, rather than making it the subject of binding national guidance.

Quality Solicitors Harris Waters v Okonkwo [2020] EWHC 1168 (QB)

<https://www.bailii.org/ew/cases/EWHC/QB/2020/1168.html>

The quality of the telephone line broke up during a hearing with a litigant in person, so the judge had to terminate the hearing and, rather than giving a full oral *ex tempore* judgment, it was necessary to give reasons in writing, following the hearing: see [2] and [3].

Human Rights

Inclusive justice: a system designed for all Interim evidence report, Video hearings and their impact on effective participation (Equality and Human Rights Commission, April 2020)

Our inquiry looked at how effectively cognitive impairments, mental health conditions and/or neuro-diverse conditions are being identified among defendants in the criminal justice system. It examined whether the appropriate adjustments are being made to ensure that individuals with such conditions can effectively participate. This included looking at the impact of video hearings on participation for defendants. [p 4]

https://www.livelaw.in/pdf_upload/pdf_upload-373538.pdf

Practical video conferencing issues

Dr Meredith Rossner and Ms Martha McCurdy, *Implementing Video hearings (Party-to-State): A Process Evaluation* (Ministry of Justice, 2018):

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

Rapid Consultation: The impact of COVID-19 measures on the civil justice system (1 May 2020): <https://www.judiciary.uk/announcements/rapid-consultation-the-impact-of-covid-19-measures-on-the-civil-justice-system/>

The Sussex Police and Crime Commissioner, Katy Bourne, asked the University of Surrey to conduct an independent evaluation of a new booking tool for use in organising first appearance remand hearings held by video: Professor Nigel Fielding, Professor Sabine Braun and Dr Graham Hieke, *Video Enabled Justice Evaluation* (University of Surrey, Final Report, v11, March 2020): <http://spccweb.thco.co.uk/our-priorities/access-to-justice/video-enabled-justice-vej/video-enabled-justice-programme-university-of-surrey-independent-evaluation/>

Research regarding hearings held remotely

When Remote Justice Works: <http://www.transparencyproject.org.uk/when-remote-justice-works/>

Joe Tomlinson, Jo Hynes, Emma Marshall and Jack Maxwell, *Judicial Review in the Administrative Court during the COVID-19 Pandemic* (Public Law Project Research Paper, April 2020). This Report deals with how the judicial review procedure was working in practice. For instance, page 5, dealing with public access, caused problems:

We had hoped to remotely observe some judicial review hearings under COVID-19 measures. However, the Administrative Court is sitting on a limited number of days and did not respond to our email requests for access to arranged hearings. We acknowledge that court staff are under a great deal of pressure at present, but based on our experience, there are two barriers to access to remote hearings: the Court requires observers to specify the case(s) they wish to observe, but releases case lists online with only minimal notice; and the Court requires observers to request access via the generic listings email address, which presumably experiences significant traffic and cannot respond to urgent requests for observation login details. For researchers and other observers, this is a significant problem. We intend to pursue this research further to broaden and widen our dataset. However, we see a strong benefit in publishing our preliminary findings at this stage.

<https://publiclawproject.org.uk/wp-content/uploads/2020/04/200420-JR-during-COVID-19-Research-paper-for-publication-final.pdf>

An article about the use of cameras in courts that is of tangential interest

Stephen Mason, 'Cameras in the courts: why the prohibition occurred in the UK', *Amicus Curiae The Journal of the Society for Advanced Legal Studies*, Issue 91, Autumn 2012, 22 – 27 <https://journals.sas.ac.uk/amicus/article/view/2095>

Free materials not directly associated, but relevant

Council of Europe on digital evidence

<https://www.coe.int/en/web/cdcj/activities/digital-evidence>

Draft Convention on Electronic Evidence

<https://journals.sas.ac.uk/deeslr/article/view/2321>

Stephen Mason and Daniel Seng, editors, *Electronic Evidence* (4th edn, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2017)

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<https://journals.sas.ac.uk/index.php/deeslr>