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## Report

### Regional online round table “Videoconference in court proceedings: human rights standards”



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The Regional online round table “Videoconference in court proceedings: human rights standards” focused on different aspects of the right to fair trial enshrined in Article 6 of the European Convention on Human Rights (the ECHR) in times of the Covid-19 pandemic, in particular on how the procedural guarantees can be secured in judicial proceedings during the extraordinary sanitary crisis.

Effectiveness of the participation of either party in a trial depends on their ability to clearly express themselves and to represent their interest. This principle is integral to the right guaranteed by Article 6 of the ECHR in civil and criminal<sup>1</sup>, as well as administrative proceedings. The Covid-19 pandemic posed unprecedented challenges to many human rights, including in the area of serving justice where a new reality started to emerge: the trials had to go on while physical distancing rules and travel restrictions did not always allow parties to be present at a hearing. At the same time, the use of IT solutions could not necessarily substitute the physical presence in the absence of clear regulations and established approaches by courts. The availability of a reliable software which would allow secure and stable connection became an additional issue. Suddenly, numerous problems could give rise to an issue under the ECHR: poor acoustics in the courtroom, poor Internet connection, concerns about personal data, availability of interpretation, public access to hearings, etc.

The European Commission (CEPEJ) published a [Declaration on “Lessons Learnt and Challenges Faced by the Judiciary During and after the COVID-19 Pandemic”](#) underlining considerable efforts of the CoE Member States to adjust to new circumstances within a short time and to make the best use of existing resources to ensure the functioning of their courts. Still, such a health crisis may repeat. Judicial systems need to be prepared, notably when it comes to effective solutions to ensure the continuity of court work and access to justice while respecting individual rights.

In its paper “[Remote Court Hearings and Judicial Processes in Response to COVID-19 in Mission and other Fragile Settings](#)” UN Justice and Corrections Service emphasised that use of video-conference facilities and other technologies to conduct court hearings and other judicial processes remotely shall be not only used to mitigate COVID-19 risks, but shall also be considered in medium and long-term planning as measures that can help improve access to justice in contexts where insecurity, limited transport, logistical and other obstacles may hamper the delivery of justice services.

The Round Table aimed at discussing human right aspects related to organisation and holding on-line hearings by courts in their respective countries and addressing some practical question related to these arrangements and their compatibility with the Convention requirements.

The discussions focused mainly on the measures adopted for enabling organisation and conduction of court hearings in the conditions of lock-down. Still, the new experience will be of relevance beyond the duration of the COVID-19 crisis and become a good opportunity for long-term changes and improvement of the operation of national courts.

# I. Overview: Case law of the European Court of Human Rights and countries experience

## 1. CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

IT technologies and videoconferencing have been used by various countries for some time with the promise to bring efficiency and greater accessibility to justice. However, there are still many challenges that remain. In the jurisprudence of the European Court of Human Rights (the ECtHR) there are not many cases on this, but the set Convention standards are still applicable to remote hearings. According to the Grand Chamber judgment in *Sakniovskiy case*<sup>ii</sup>, the use of videoconferencing is neither a problem, nor an advantage under Article 6 of ECHR. It is just a technology that can be used in Court proceedings. The use of such technology does not absolve national authorities from their obligations under Article 6 of the ECHR. The main aim of Article 6 is ensuring the overall fairness of the proceedings, which shall be assessed in light of the special circumstances of each case. The use of videoconferencing and related practicalities shall be decided on by a judge. He or she is best placed to secure due process and to consider all possible implications that might stem from use of technological solutions in a given case. The decision shall be well-reasoned and provide for a fair balance of the rights of parties to the proceedings.

## 2. COUNTRIES' EXPERIENCE / OVERVIEW

Experts from Serbia, Russia, France and the England shared their countries' experiences in application of videoconferencing in court hearings, especially during the Covid-19 crisis. In most of the referred countries, pending trials were postponed during the crisis period, while in some the cases were divided into categories based on their urgency and held either online or in a courtroom (while respecting precautionary sanitary measures). France and England have been using videoconferences extensively prior the Covid-19 lockdown, while Russia and Serbia started to use it more during the crisis. In Russia videoconferences are used more by commercial courts. Also, a special type of remote hearings – “hybrid” was introduced there with the judges sitting in court rooms and parties attending such hearings remotely. The use of hybrid proceedings will most likely continue after the pandemic is over for practical reasons: it facilitates serving of justice in a big country with long distances between regions in Russia.

Although it is the judges' discretion to decide on the modalities of hearings arrangements, there are debates in France about who should be responsible to choose between an online or a usual form of hearing (judges or parties). In England practical difficulties were observed in relation to jury trials which were postponed for safety reasons during the lockdown. An experiment held by an English NGO showed that videoconferencing is suitable for short and simple cases, while it cannot be always suitable for complex cases. In all cases, the fairness of the proceedings and the interest of justice remain the crucial questions and should be taken into account.

## II. Procedural guarantees

### 3. REMOTE PARTICIPATION OF WITNESSES AND VICTIMS AND ASSESSMENT OF TESTIMONIES

In terms of remote participation, the crucial unresolved issue is the information security and identification of parties. Technical quality of a videoconference is a prerequisite of the effective participation of witnesses. Russian commercial courts, for example, have in place their own platforms with information system allowing identification of the parties to proceedings. But as this system is not available for general courts some urgent cases were heard in open communication platforms, such as Skype or Whatsapp. Serbian courts used Skype as well and the question about the level of security of this communication platform for court hearings remains open. Serbian legislation provides for a possibility of remote participation of witnesses, especially those which are vulnerable. Thus, remote participation might be a good solution when a witness cannot be present physically.

In England special guidance notes were developed to assist witnesses in their participation in online hearings. The behaviour in video proceedings shall be the same as in courtrooms. However, some NGOs raise a question on inability of effective participation of witnesses with disabilities (especially communicative disabilities). For some category of witnesses, in contrast, remote participation in proceedings could be beneficial (for example, minors or victims of sex crimes). The question on the available methods to secure the authenticity of the witness testimony during cross examination seems to have no solution at the moment and probably could be answered to by means of special technical solutions and regulation. Overall, the possibility of participation of witnesses, general effectiveness of justice and fairness of the proceedings remain the paramount aspects when a judge is taking a decision about using videoconference.

### 4. EVIDENCE PRESENTATION DURING REMOTE HEARINGS, AND EXCHANGE OF PAPER DOCUMENTS

In England electronic access and exchange of documentation is the normal practice for many years occurring at an early stage of the proceedings, especially in criminal cases. There is also an extensive use of email communication between the parties and the courts. Russia's experience during the crisis resulted in an increase of the online communication with the courts due to need for interaction and cooperation between the parties and the judges. Evidence presentation in Russia in online proceedings is normally facilitated by uploading all the documents to an IT system before the trial. However, as the disclosure rule is not strict, parties sometimes do not follow this requirement and present new documents through screen sharing during videoconference. This could jeopardise an efficient reaction by the other party to a new evidence presented in the hearing. In such cases the party which shall react to a newly presented document either does it online or ask for a break in hearing. Such questions do not occur in England as the parties are obliged to reveal their line of defence in pre-trial proceedings, failure to do it would lead to impossibility to rely on that defence during the trial.

### 5. PUBLIC NATURE OF HEARINGS AND ACCESS OF THE GENERAL PUBLIC AND MASS MEDIA

The important aspects of the public nature of hearings include, firstly, the necessity to protect litigants against the administration of justice in secret with no public scrutiny, and, secondly, a need to maintain confidence in the courts. The proceedings held via Skype were not accessible for general public and the question of their conformity to one of the requirements of Article 6 of the ECHR could be discussed. On

the other hand, broadcasting of hearings could make the courts open and more accessible regardless of distances. But this could happen only in case when the information on the online hearings is publicly available. In order to counter the obstacles involved in having a trial outside a regular courtroom, the States are under an obligation to take compensatory measures so as to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access<sup>iii</sup>.

There are two possibilities of public access to the trial: in real time or in record. In the former case privacy of the participants to the hearing and respective risks for their privacy shall be taken into consideration. In England all the hearings of the Supreme Court are publicly available. However, real time public access to online hearings could produce such issues as Zoom bombarding, disruption by public, improper recording and privacy breaches.

In general, recording of all proceedings (which is a case in some jurisdictions) could save resources on paper court records and eliminate problems with their credibility and risks of their challenging by the parties to the proceedings.

For the sake of fair trial guarantees it is also important to have proper video arrangement of a hearing: to ensure that the whole court room is seen on the video and not only the faces of those who are speaking at a particular moment.

## 6. INTERPRETATION

Serbia has modest experience with remote interpretation in asylum cases (use of telephone and internet technology). Using of online interpretation, especially when rare languages are at stake) allowed engagement of local interpreters, speeding up the procedures and costs (as travelling of the interpreters was not needed). On the other hand, technical problems can affect the interpretation and dynamics of proceedings. Also, in case of use of unreliable communication platforms providing of sensitive evidence can be problematic. Interpretation in hearings with a big number of participants does not always go smooth.

French experience, which is based on asylum and remand cases, shows that multilingual proceedings with the use of interpreters can be extremely complex. The following lessons were learned: (1) the interpreter should be physically close to the person who does not speak the language of the court, (2) the interpreter should be visible on screen together with the parties she/he is interpreting for, and (3) the special consideration shall be given by the courts about the location of interpreter when video links are used (and more generally about the courtroom «audio-visual ecology»).

In general, which videoconferencing is used in proceedings judges need to take into account the logistics and necessary arrangements of the remote hearings much more than usually.

In any case, the judicial discretion plays important role in decision whether a specific case is suitable for videoconferencing taking into account the interest of justice, the overall fairness of the proceedings, the effectiveness of this method in each particular case and the specific aspects, such as interpretation, witnesses participation, available technical solutions and their reliability, etc.

### III. Communication with lawyer

#### 7. PRIVATE COMMUNICATION WITH LAWYER DURING ON-LINE HEARING

Client – lawyer communication in private during criminal proceedings is one of the guarantees under Article 6. The right to effective legal assistance includes, inter alia, the accused’s right to communicate with his lawyer in private. If a lawyer is unable to confer with his client and receive confidential instructions from him without surveillance, his assistance loses much of its usefulness<sup>iv</sup>.

The respective arrangements (including technical ones) during online hearings shall be given special consideration in order to avoid any instances of pressure or influence on the accused person (especially detained) which may not be visible in the remote hearing. In civil or administrative proceedings these risks are lower as clients can always have parallel communication with their lawyers by phone or seek a recess. Although recess is a solution for private communication with the lawyer, in France the lawyers would not always seek it as it will impede and slow the case examination by court. When a private consultation with the lawyer is arranged remotely for a detained person there could be concerns about the latter’s access to a secure phone or video link.

In France there is no regulation concerning the location of the lawyer during online hearing (whether he/she shall be at the court with the judges or in prison with the client). Neither are regulated the situations of a need for private communication between lawyer and client.

In the ECtHR’s jurisprudence there is a case<sup>v</sup> in which a violation was found because a domestic court could not justify why the defense counsel for appeal was appointed from the region far from the region where the accused person was detained, with hindered their direct and meaningful communication. There are also cases<sup>vi</sup> in which a violation of Article 6 was stated by the ECtHR on the where client and lawyer could communicate in private as in the room where they were speaking prosecutor and bailiffs were present. In another case<sup>vii</sup> the ECtHR explicitly stated that a secured phone line can be a good solution for private lawyer-client communication when the client is in detention.

#### 8. CAN A LAWYER AND / OR A PARTY BE MUTED OR SWITCHED OFF THE VIDEOCONFERENCE BY A JUDGE? WHAT ARE THE PROCEDURAL REGULATIONS?

The fair trial requirements and the principle of equity of arms in the court proceedings require equal opportunities for parties to take part in the proceedings. However, in some instances a disruptive party could be temporarily excluded from the proceedings upon decision of a judge. The rights of an excluded party in such case shall be well balanced. Although there is a case law of the European Court related to exclusion of parties from courtrooms<sup>viii</sup>, it seems there have not been yet respective occurrences in online hearings at a national level. In England there have been some discussions about disruptive witnesses, difficulty in controlling them, and their muting as a short-term solution with due regard to the overall fairness of the proceedings. In France in professional legal community the idea of muting a party would not be accepted as jeopardizing the requirement of equal resources for defense and prosecution.



#### 9. HOW SHOULD A JUDGE ACT IN CASE OF BAD CONNECTION AND INABILITY OF PARTY TO HEAR / SPEAK?

Holding remote hearings requires from judges special technical skills, logistical arrangements before the hearings and additional management responsibilities. To ensure quality connection during court proceedings it could be recommendable to hold moot sessions prior the remote trials. Guidance on such procedural and technical issues can be drawn from recent recommendations of the International Chamber of Commerce on this topic.

A resumption of proceedings after an interruption is not an easy task for a judge who needs to make sure that all the parties have equal opportunities to present their arguments. Probably a special training for judges on this could be useful. In case of regular technical interruption in the proceedings a decision to postpone the hearing could be considered. But in such case consideration shall also be given to the overall length of the proceedings.

#### 10. ARE THERE ANY SPECIAL PROCEDURAL REGULATION OF REMOTE HEARINGS AND WHAT SHALL BE CONSIDERED IN THIS REGARD?

The questions related to remote court hearings, such as logistics, visibility, ethical and overall fairness of the proceedings need to be considered when online hearings are organised and held. Special guidelines to the parties would be of assistance<sup>ix</sup>. The question is to what extent legally binding rules are necessary or would soft law guidelines be sufficient? Taking into account fast and constant development of the technologies some experts are in favour of soft regulation though guidelines rather than legally binding regulations. However, the form of regulation will to some extent depend on the legal system in each particular country. In any case, it is important to have the respective guidelines in place (in either form). In addition to regulations, two other elements are importance for successful remote trial: (1) collaboration of parties to online proceedings, and (2) consideration of lessons learned from previous experience in online proceedings.

In England online hearings are regulated good. For example, there exist special guidance notes for witnesses and now there are discussions in legal community about a need for such guidelines for lawyers.

A revision of the existing procedural legislation might be required in order to bring it in line with the new forms of hearings through videolinks. Some problems could hail from strict legal determination of cases and situations when on-line proceedings are allowed leaving no room to judicial discretion, especially in critical situations, such as, for example, the COVID-19 sanitary crisis.

## IV. Videoconference for pre-trial detention decisions

#### 11. CAN PRE-TRIAL DETENTION BE DECIDED IN A VIDEOCONFERENCE? WHAT ARE THE SPECIFICITIES OF THE PROCEDURE IN SUCH CASE?

During the Covid-19 lockdown in some jurisdiction remote remand hearings were facilitated. The are several problematic aspects of such proceedings: introduction of a lawyer to a defendant and their personal communication; absence of a direct and private contact between the lawyer and the defendant;

discipline during remand hearings; risks of pressure or influence on the defendant; engagement of the parties in the proceedings.

Thus, it is very important to ensure the respective safeguards and effective participation of the detained person in online remand hearings, especially in cases where the lawyer is not in the same room with such person.

While there is no respective jurisprudence of the ECtHR under Article 5 of the Convention on remote remand hearings, the same principles shall apply. In such cases the concerns of time and logistics can put an additional level of complexity on the proceedings while trust and communication between the lawyer and the client is of crucial importance. According to *Salduz*<sup>x</sup> and *Ibrahim*<sup>xi</sup> cases failure to ensure respect of the procedural guarantees set in Article 6 during the initial interrogation could jeopardise the fairness of the overall criminal proceedings in a particular case, which demonstrates the importance both of this stage of proceedings and the trust between a lawyer and his client.

#### Relevant ECtHR case law:

- [BIVOLARU v. ROMANIA \(No. 2\) no. 66580/12, 2 October 2018](#)
- [BLOKHIN v. RUSSIA \(GC\) no. 47152/06, 23 March 2016](#)
- [DOYLE v. IRELAND no. 51979/17, 23 May 2019](#)
- [GRYAZNOV v. RUSSIA no. 19673/03, 12 June 2012](#)
- [IDALOV v. RUSSIA \(No. 2\) no. 41858/08, 13 December 2016](#)
- [KASPAROV AND OTHERS v. RUSSIA \(No. 2\) no. 51988/07, 13 December 2016](#)
- [KHODORKOVSKIY AND LEBEDEV v. RUSSIA no. 11082/06, 13772/05, 25 July 2013](#)
- [MAKEYEV v. RUSSIA no. 13769/04, 5 February 2009](#)
- [NEKRASOV v. RUSSIA no. 8049/07, 17 May 2016](#)
- [RAZVOZZHAYEV v. RUSSIA AND UKRAINE AND UDALTSOV v. RUSSIA, nos. 75734/12, 2695/15, 55325/15, 19 November 2019](#)
- [ROKHLINA v. RUSSIA no. 54071/00, 7 April 2005](#)
- [SAKHNOVSKIY v. RUSSIA no. 21272/03, 2 November 2010](#)
- [SCHATSCHASCHWILI v. GERMANY no. 9154/10, 15 December 2015](#)
- [T.P. AND K.M. v. THE UNITED KINGDOM no. 28945/95, 10 May 2001](#)
- [TREPASHKIN v. RUSSIA \(NO. 2\) no. 36898/03, 19 July 2007](#)
- [MARCELLO VIOLA v. ITALY, no. 45106/04, 5 October 2006](#)
- [GOLUBEV v. RUSSIA \(dec.\), no. 26260/02, 9 November 2006](#)
- [GRIGOREVSKIKH Vv. RUSSIA, no. 22/03, 9 April 2009](#)
- [SAKHNOVSKY v. RUSSIA \[GC\], no. 21272/03, 2 November 2010](#)
- [KHISMATULLIN v. RUSSIA, no. 33469/06, 11 December 2014](#)
- [BIVOLARU v. ROMANIA \(N° 2\), no. 66580/12, 2 October 2018](#)

## SPEAKERS

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Mr **Christian Licoppe**, professor of Sociology of Information and Communication Technologies, National School of Telecommunications Paris-Tech (France). Mr Christian Licoppe initially trained as an engineer (Ecole Polytechnique) and researcher in condensed matter physics, turned to the history of science and the sociology of digital. He has done extensive research and made a number of publications on the use of videoconference in court proceedings. He has collaborated, as a scientific expert, with the European Commission for the Efficiency of Justice (CEPEJ).

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<sup>i</sup> MURTAZALIYEVA v. RUSSIA, no. 36658/05, 18 December 2018

<sup>ii</sup> [SAKHNOVSKY v. RUSSIA \[GC\], no. 21272/03, 2 November 2010](#)

<sup>iii</sup> RIEPAN v. AUSTRIA, no. 35115/97, 14 November 2000

<sup>iv</sup> S. v. SWITZERLAND, nos. 12629/87 and 13965/88, 28 November 1991

<sup>v</sup> [SAKHNOVSKY v. RUSSIA \[GC\], no. 21272/03, 2 November 2010](#)

<sup>vi</sup> ICHETOVKINA AND OTHERS v. RUSSIA, nos. 12584/05 and 5 others, 4 July 2017

<sup>vii</sup> [MARCELLO VIOLA v. ITALY, no. 45106/04, 5 October 2006](#)

<sup>viii</sup> IDALOV v. RUSSIA, no. 5826/03, 22 May 2012

<sup>ix</sup> See CEPEJ Declaration on “[Lessons Learnt and Challenges Faced by the Judiciary During and after the COVID-19 Pandemic](#)”.

<sup>x</sup> SALDUZ v. TURKEY, no. 36391/02, 27 November 2008

<sup>xi</sup> IBRAHIM AND OTHERS v. THE UNITED KINGDOM, nos. 50541/08 et al., 13 September 2016

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