

Remote Hearings - Emerging Issues

Paper 2 - Expert Legal Testimony: Summary of ECHR Seminar

Justice Analytical Services

Background

This is the second in a short series of brief papers on the use and effectiveness of remote hearings. It reports on the main issues raised by four legal experts in Scotland at a seminar held at the Equality and Human Rights Commission (EHRC Scotland) webinar during the Covid 19 pandemic in 2020.

Main Points

The discussion noted some positive aspects of remote hearings but it was suggested that the decision to go ahead should be made on a case by case basis with a particular focus on whether or not a remote hearing would mean vulnerable members of society could fully participate in proceedings.

Positives

- Mock trials conducted in England although '*not perfect*' were certainly considered '*a viable option*' as participants, lay and professional, in general found the experience positive¹
- This was dependent on all parties joining remotely and that none of the parties could be described as vulnerable.
- Taking the hearing to children and young people through remote means, commentators suggested, may help them become the centre of the proceedings by increasing their participation.

Challenges

- In situations where lay participants were remote and all other parties were co-located, lay participants said they felt isolated and the pre-existing power imbalance was exacerbated.

¹ Please note the third paper in this series is an in-depth analysis of the four mock trials

- Parties being remote from their lawyer led to a lack of time to prepare and build understanding of the issues lay participants were facing.
- Remote interpreter services led to impoverished experience of justice for all participants.
- Disabled people and people with other vulnerabilities may not be able to access justice where proceedings are conducted remotely.

How to improve remote hearings

- Preparation for all participants is key including for example videos on what to expect
- Everyone involved must appear remotely not just some or one of the parties
- Take account of the need for extra time where interpreters are involved and understand and be aware of their key role
- A tight control needs to be taken over proceedings, for example, turn taking, lack of excess noise and background clutter, ensuring technology is working
- Bespoke assessments of parties' ability to take part fully should be made before decisions to proceed remotely
- Lay parties could be given a choice, and that choice should be informed by preparation for what the hearing would look and feel like

Introduction

In order to keep the rule of law during the COVID-19 emergency, court systems across the world adapted to introduce or escalate the amount of business they conducted remotely. This included digital filing of paper work and the use of communication technology to conduct court hearings remotely.

This is the second in a series of papers that were rapidly produced to deliver emerging evidence on remote hearings, their positives and negatives and lessons learned.

The evidence was emerging and could be sketchy: as such these papers were not designed to be comprehensive or rigorous, rather they were designed to deliver any emerging intelligence that could be of use for those developing policy and practice around remote hearings.

Themes discussed

This webinar brought together four legal experts to share their knowledge and expertise on remote hearings: positives and negatives and suggested solutions.

The issues driving the review were:

- Arrangements for remote hearings that common law jurisdictions have put in place
- Lay and professional parties experience of remote hearings
- Positives and negatives of remote hearings and lessons learned

Comparison with findings from previous paper (Paper 1).

In the first paper of this short series on remote hearings in Australia and New Zealand we found:

- Although the use of remote hearings had enabled '*justice to be done*' during the COVID emergency, they are inaccessible to significant sections of the population. Further some hearings are not suited to remote practice. Commentators advised caution before their use became the norm

Issues to consider with regard to remote hearings:

- **Accessibility** for remote hearings to be fair, participants need access to:
 - ✓ A computer or smart phone,
 - ✓ A reliable browser,
 - ✓ A strong stable internet connection,
 - ✓ A microphone and camera,
 - ✓ The skills necessary to use all of the above.
- **Symbolism and rituals** (for example, bowing to the Judge) can be lacking which could impact on the delivery of 'justice' but equally could make court hearings more inclusive.
- **Open justice** could be enhanced by remote hearings as it could enable the press and the public to attend more easily BUT only where live streaming occurs.

- **Efficiency and productivity** are promoted by remote hearings but this should be weighed up against access, integrity and equality issues.
- **Technology** - as it improves, so will remote hearings.
- **Preferences** - Victims and witnesses, may prefer NOT being in the same room as the accused but on the other hand some may want the right to confront the accused.
- **The accused's** right to comprehend and participate may be compromised in remote hearings.

The issues brought up in the EHRC event reflected and consolidated most of these issues² within the general theme of access to justice. The main issues discussed are set out under the following headings:

- **Access to Justice – Remote court participants** (which includes accessibility, preferences and defendants)
 - Full participation
 - Lack of co-presence
 - Remote interpreters
 - Disabled people, children and young people and other vulnerabilities
 - Potential to intimidate
 - Participation
- **Access to Justice - Remote court circumstances** (which includes symbolism and ritual, efficiency and productivity and technology).
 - Decision making
 - Technical glitches
 - Controlling proceedings
 - Set up
- **Improving Access to Justice in Remote hearings**
 - Preparation
 - Interpreters
 - Controlling proceedings
 - Participation, assessment and choice

Access to Justice - Remote Court Participants

Full Participation

- One legal expert expressed the need for full participation as a basic principal in the rule of law and the key element of access to justice for participants in any hearing.
- It was noted that ensuring people can and do access justice was the duty of judges and lawyers.

² Open justice was not discussed

- And that whether justice is done should not only depend on it being done, and being seen to be done but that it should be felt by the participants as being done.

Lack of co-presence

- Another participant set out difficulties identified in the use of remote hearings for immigration bail proceedings in a study of 89 such hearings in Glasgow in 2015. One issue they discussed was the lack of '*co-presence*'.
- A situation was described at an immigration hearing where the person seeking bail was linked to the hearing remotely whereas the other parties including the Judge, lawyers and crucially interpreters were co-located. This tended to result in a sense of isolation experienced by the person, and in this way an impoverished experience of justice.
- This experience of isolation was particularly compounded where the person seeking bail was not co-located with the lawyer representing them. The lack of time spent together impacted on the preparation made for the case and diminished the all-important relationship between the two and as such the lawyers understanding of the issues faced by the person.
- A further issue was that the isolation felt by the person joining remotely magnified an already existing imbalance of power between professionals and lay parties; being isolated exacerbated and consolidated that lack of power.
- One participant raised the issue of the disparate nature of the experience where some but not all participants are co-located. A comment on the full mock criminal trials in England suggested that although the experience of both lay and professional participants in these pilots is largely positive, there is an overriding caveat to these findings in that all participants had to be remote under the same circumstances with no exceptions. Further, the mock trials did not include participants with vulnerabilities.
- In general and taking account of the issues above, the mock trials although '*not perfect*' were certainly considered a '*a viable option*' as participants lay and professional, in general found the experience positive, so much so that people who had experienced doubts previously were converted to the method.

Remote Interpreters

- In a specific issue for people for whom English is not their first language. Multiple issues with the use of interpreters in remote bail hearings were identified by one participant. The lack of co-presence with interpreters exacerbated feelings of isolation further. This not only impacted on the person in need of translation but professionals as well.
- Interpreters could miss parts of the proceedings, and also, simply, not translate some of the discussions. The speed of the hearings was a key culprit and increased the difficulty the interpreter might have in understanding the proceedings.
- Altogether these issues limited the information getting to the applicant, meaning they could miss key information. Another issue raised focused on instances where the

applicant could not understand the interpreters and a feeling amongst applicants in some instances where they could suspect that the interpreter was *'not on their side'*.

Disabled people, children and young people and other vulnerabilities

- Another reflection centered on the Health and Education Chamber of the First-tier Tribunal for Scotland. The key point was the imperative of ensuring disabled people and children (including for example, people with Autism) should have *'the same access (to justice) as others'*, for which the speaker asserted that what's needed is *'..to move heaven and earth to make sure those who want to participate can participate'*.
- One participant told of a positive impact of remote hearings where they found they could enable the subject of the hearing to become the center of the hearing, by *'bringing the hearing to them'*. Which could increase the desire in children and young people to participate.
- The need to take account of vulnerabilities when making decisions to undertake remote hearings was stressed by one participant. In particular in his experience the accused, disabled people with learning difficulties and other vulnerable people.
- It was reported that parties involved in remote hearings had both positive and negative experiences. The positive example involved a highly educated defendant who coped well with the remote setting, on the contrary the negative example involved an accused, charged with murder, who had been through three hearings without ever meeting their QC face to face. It was asserted that this did not serve the cause of justice.
- As mentioned above, the positive findings from the mock trial pilot were heavily caveated around the issue of disabled and vulnerable participants. No account was taken of any vulnerabilities and as such caution was recommended and a step in the process that asks *'is this person suitable for a remote hearing?'*

Potential to Intimidate

- One of the findings in the previous paper in this series was that there are two schools of thought on the co-location of the accused and victims and witnesses. With regard to the mock trial pilot, it was suggested in remote trials there is potential for a more equal and level playing field than with physical hearings, so for example, there is no dock and the virtual nature of the proceedings makes it far more difficult to intimidate people.

Participation

- Two further positive findings from the mock trial pilots were that Jurors were happier to raise issues than in an open court. Further the accused could find it easier to get hold of their lawyer during the proceedings.
- The subject of tiredness was discussed and the pilot acknowledged it was more tiring to participate on screen than in person and as such recommended that there were adequate and frequent breaks.

- In general, the pilot found that the virtual court room appeared to facilitate more participation, by creating a sense of intimacy. Possibly because when taking part remotely everyone can see everyone which is not possible in a physical court.

Access to Justice – remote hearing circumstances

As well as focusing on the participants involved in remote hearings, speakers at the event set out how the circumstances of remote proceedings could impact on access to justice.

Decision making

- The COVID-19 emergency gave courts the Hobson's choice of a remote hearing or no hearing, and this led to a suggestion that a remote court is better than no court nevertheless all the speakers urged caution when deciding whether a hearing should or should not take place remotely.
- In the Health and Education Chamber (as in other justice settings) the decision on the type of hearing lies with the Judge, however they must take into account the preference of parties.
- As there is currently no robust evidence on the preferences of children and young people on remote or physical hearings a participant suggested the six Bangalore Principles (independence, impartiality, integrity, propriety, equality and competence and diligence) as the context on which Judges could make decisions that are fair for the parties.
- Concerns focused on the remote bail hearings reported above as *'the thin end of the wedge'* stating *'they were in place before COVID and will continue after'*, and as such pleaded that remote hearings should never become the default option.

Technical glitches

- The importance of ironing out *'technical glitches'* was raised. One participant found these were not addressed in some of the 89 hearings they studied. As an example, in one hearing for all parties the view of each other was blurred; it was remarked upon and yet nothing was done to correct the issue and the hearing continued.
- Mock trials showed that excellent technical facilities were essential for a successful remote experience.

Controlling proceedings

- As identified in the first paper in this series maintaining control of the hearing was vital. One participant identified difficulties with a lack of control in immigration bail hearings with, for example, finding that it was common for people to interrupt and talk over each other.

Set up

- The mock trials found that the layout of the screen is very important for the success of the trial, in particular the Judge must be seen at all times. Further the set up must reflect the nature of court proceedings to ensure that: *'if you treat it like a Zoom call it will feel like a Zoom call'*. As such court dress and backdrop are vital including, for

example, the coat of arms behind the judge. This also echoed the findings in the previous paper.

How to Improve Access to Justice in Remote Hearings

Preparation

- The findings from the four mock trials in England³ showed that **preparation was key**. For example, videos were made on what to expect, with guides to show participants from entrance to virtual court into court room.
- The need identified in the mock trial pilot that **everyone involved in the proceedings must appear remotely**, with no exclusions is mentioned above, but reiterated here for emphasis.

Interpreters

- With regard to interpreters, it was asserted that a key issue is that parties do not understand the importance of the role of an interpreter and there should be work done to rectify this. If it was understood then, it was suggested that, more time would be allowed and interpreters could be encouraged to interrupt and ask for clarity. Hearings should also be taped. These tapes could be used to identify where the applicant may need some more clarity and to check if the interpreter is not only translating everything but also making an accurate translation.

Controlling proceedings

- In terms of the control of proceedings, the importance of '*turn taking*' to ensure that everyone has their say and can be heard. This was referred to by a professional participant in New Zealand as the judge acting as '*air traffic controller*' for the event.
- Some practical advice was set out including no background clutter, and little noise as possible and that the technology must be accessible.

Participation, assessment and choice

- In terms of participation in tribunals Roger Harts Ladder of Participation⁴ was referenced to assert that a child or young person must remain '*at the centre of the hearings*'. '*Taking the hearing to the child*' might be a better way to ensure such participation, and vitally that more children and young people are now attending hearings when they are remote.
- Where technology is used, it should be used to protect the appellants' rights, it should and could be used to assist people rather than put up barriers.
- In order for this protection to occur it was asserted that lay participants should have a choice as to whether they wanted their hearings to be conducted remotely. And that in

³ Please note the third paper in this series is an in-depth analysis of the four mock trials in England

⁴ https://www.unicef-irc.org/publications/pdf/childrens_participation.pdf

order to make an informed choice they needed to be comprehensively prepared and informed about every aspect of the hearing.

- One participant asserted that ensuring vulnerable people can fully take part in remote hearings should be assessed on a case by case basis, with '*bespoke assessments*' of the needs of parties involved being a necessary preliminary step in the decision to conduct remote hearings.
- Learning from other jurisdictions was also recommended and further from other ways used to support vulnerable people in the justice system. The use of '*registered intermediaries*' in England were also lauded and the use of trauma informed practice where innovative processes are used to support the vulnerable.

Conclusions

- The need for all those involved in remote hearings to strive to ensure that '*remote is not a lesser form of justice*' was highlighted. And that in order to do this, remote hearings should not become the default. Attention should be paid to lay participants' choices, their ability to make an informed choice, there should be resource put into preparation of all parties and bespoke assessments on a hearing by hearing basis.
- Technology needs to be of excellent quality with equal access to all participants.
- Finally, plea was made that in these initial stages it is crucial that every trial is evaluated.

Some useful references.

<https://www.gov.scot/publications/scottish-jury-research-fingings-large-mock-jury-study-2>

<https://www.gov.scot/publications/impact-use-pre-recorded-evidence-juror-decision-making-evidence-review>

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