

Message for Circuit and District Judges sitting in Civil and Family
from the Lord Chief Justice, Master of the Rolls and President of the Family Division

Even before the lockdown announced by the Prime Minister on Monday 23 March we had indicated that the gathering emergency would require courts in all jurisdictions to use technology to conduct hearings in circumstances that had not been usual before. Both the Courts and Tribunals have risen to that challenge in a remarkable way. We took the view that, rather than issuing detailed national guidance, the better course was to leave the decision-making as to which cases should be conducted remotely to judges with the assistance of the DFJs and DCJs.

National guidance is a blunt instrument and cannot take any account of the strengths or weaknesses of local resources (judicial, staff and technological) and other important factors which vary from court to court and from case to case.

In the three weeks that have now passed we have all learned a good deal about remote working. That expression encompasses a number of different mechanisms. The first and best option is for the judge to work in one of the courts that remains open or staffed and to conduct a hearing with some or all of the participants attending by phone, video or an internet platform. Sometimes, hearings are conducted from home. Experience varies but dealing with anything not intrinsically simple by phone appears to be less satisfactory than by video or, for example, Skype but the way in which the participants conduct themselves is an important factor.

Much of what has been learned is positive. There have been many reports of technically effective processes and we suspect that we have all surprised ourselves by the progress that has been made in such a short time. From next week the bespoke HMCTS video hearing facility will have a greatly increased capacity; this system is expected to offer better quality all round than Skype and so should enhance yet further our ability to conduct remote hearings.

The overarching criterion is that whatever mechanism is used to conduct a hearing must be in the interests of justice, that issue being assessed by reference to the unusual circumstances that prevail and the unhappy alternative if a hearing is adjourned. Every hearing we conduct in whatever form must provide a fair hearing.

Alongside these positive reports, there are reports of negative experiences either about the hearing itself or its fairness. Last week, there were reports that using technology to conduct hearings was unusually tiring, particularly those which were relatively long. Over the course of the last few days we have been informed of a growing problem of participants not respecting the reality that although they were not physically present in a court room, they were taking part in court proceedings with all the constraints on behaviour that implies. There have been instances of judges being shouted at by litigants. There have reports of problems with the availability of papers.

It is clear to us that we have reached a stage when it is right to take stock of our collective experience of remote working to date and review whether any changes should be made. We are grateful to those many of you who have written to us and to the SPJ, and especially to the Associations who are urgently gathering descriptions of your experiences.

We would encourage all judges and leadership judges to recognise that doing as much as possible remotely does not mean, and cannot mean, trying to do everything remotely. It is important that the listing of cases, which is a matter for judges, takes account of the reality that long hours in front of a screen or on the phone concentrating hard are more tiring than sitting in a court room with all the participants present. That is an experience reported by teachers who gave remote lessons at the end of the term. No judge should be expected to endure abuse on the phone or laptop. That itself may show that some types of cases have been attempted which are not suitable for hearing in some ways remotely.

We hope to provide a short script to be read at the beginning of remote hearings. We will also ask our IT people to explore whether there is a facility for people who misbehave to be muted.

We have found the collective response of the judiciary to dealing with cases using technology remarkable, but we would observe that not all types of case can be dealt with remotely. There may be real difficulties in taking hotly contested evidence by telephone or laptop. Of course, urgent cases must be dealt with one way or another. There may be others where the parties are keen to proceed and are untroubled by the use of technology or where that is the view of the judge. But it has become clear that there are some court centres where, in comparison to the majority, far more ambitious remote listing is taking place.

We offer the following observations:

1. Since the Reform Project commenced, there has been a common understanding of the Heads of Jurisdiction (supported by the Judicial Engagement Groups, comprising judges of all tiers) that hearings with the judge and all participants attending remotely, would be unlikely to be appropriate for many cases. That position was justified by a range of reasons based on fairness, justice, the importance of the issues and the ability of the judge to assess the witnesses and lay parties in any setting other than an oral hearing in a courtroom.
2. The advent of the current COVID crisis does not undermine the soundness of the above position, although in the family context there will be cases that have to be dealt with urgently, come what may, or where delay may be damaging. That said, it remains the starting point that, for example, a remote hearing is unlikely to be appropriate for most cases involving the welfare of children before the Family Court and it is against that background that any decision to conduct a remote hearing must be taken.

3. The present restrictions mean that it is likely that case management hearings, or hearings that can be conducted by submissions only can probably be undertaken remotely. The focus of concern is upon hearings which involve the hearing of oral evidence.

Pending refinement and further discussion (including feedback from you please) the MR and the PFD would suggest the following broad parameters:

Generally:

- a. If all parties oppose a remotely conducted final hearing, this is a very powerful factor in not proceeding with a remote hearing; if parties agree, or appear to agree, to a remotely conducted final hearing, this should not necessarily be treated as the 'green light' to conduct a hearing in this way;
- b. Where the final hearing is conducted on the basis of submissions only and no evidence, it could be conducted remotely;
- c. Video/Skype hearings are likely to be more effective than telephone. Unless the case is an emergency, court staff should set up the remote hearing.
- d. Parties should be told in plain terms at the start of the hearing that it is a court hearing and they must behave accordingly.

In Family Cases in particular:

- e. Where the parents oppose the LA plan but the only witnesses to be called are the SW & CG, and the factual issues are limited, it could be conducted remotely;
- f. Where only the expert medical witnesses are to be called to give evidence, it could be conducted remotely;
- g. In all other cases where the parents and/or other lay witnesses etc are to be called, the case is unlikely to be suitable for remote hearing.
- h. Where cases have been listed for full trials over the next 3 weeks the listing be reviewed by you as DFJ together with the allocated judge in the light of the above parameters. Where it is decided not to proceed with the planned full trial, the case should be kept in the list as an IRH in the hope that, at least, the issues can be narrowed.

In Civil Cases in particular:

- i. Listing remains a matter for the judge. He or she should not feel under any pressure to list a certain number of remote hearings every day. Video hearings have proved more tiring than ordinary hearings, so lists of about half their usual length may well be appropriate.
- j. The best guide to what should be dealt with over the coming weeks is set out in the Civil Listing Priorities, although of course there will always be some cases outside those categories which are urgent and will need to be heard as a matter of urgency.

- k. Particularly careful consideration will need to be given to any remote hearings involving litigants in person, or parties (or witnesses) for whom English is not their first language.

We have heard that some judges have been told that they must undertake their full list, as would ordinarily be the case, using phone, video or the internet. We reiterate that this should not be the case. Much can be done, more perhaps if the judge is in a court building. Across all jurisdictions, around 40% of all hearings have continued, some in the traditional way, others using phone, video or the internet. It is easier to continue in this way with some types of court and tribunal cases than others. The overwhelming majority of those have not been long hearings involving difficult evidence or high emotion, and for obvious reasons.

There are unwelcome consequences of postponing hearings of any sort at the moment, and perhaps particularly in the family jurisdiction. It will, nonetheless, be inevitable that many will have to be. As we have said before, the judiciary has risen to the challenge of keeping the machinery of justice functioning across all jurisdictions in a remarkable way. But as the LCJ said at the outset, it is not business as usual (a point also now made by HMCTS) and realistically it cannot be until the emergency subsides.

The Lord Burnett of Maldon, Lord Chief Justice of England and Wales

Sir Terence Etherton, Master of the Rolls

Sir Andrew McFarlane, President of the Family Division