Central & Eastern European Judicial Exchange Network ("CEELI")

Webinar Roundtable Discussion Series

Videoconferencing in Support of Remote Access to Courts

Webinar No 2, 21 April 2020

Preface

I am grateful to the Lord Chief Justice of Northern Ireland, Sir Declan Morgan and the President of the Association of European Administrative Judges, Dr Edith Zeller, for facilitating my participation in this excellent and timely CEELI webinar series. This paper is based on the presentation which I made at the second of the webinars, on 21 April 2020. Any views expressed are my own. I would preface an apology, namely what follows in this discourse raises more questions than I would dare attempt to answer at this difficult and delicate point in time.

I have attached six Appendices for the convenience of the reader. These consist of a short selection of materials illuminating certain of the challenges, and responses, to the administration of justice worldwide posed by the Covid -19 pandemic. They are:

APPENDIX 1: Excerpts from *R (on the application of Kiarie) (Appellant) v Secretary of State for the Home Department (Respondent) & R (on the application of Byndloss) (Appellant) v Secretary of State for the Home Department* [2017] UKSC 42, a decision of the UK Supreme Court.

APPENDIX 2: Safeguarding the right to a fair trial during the coronavirus pandemic: remote criminal justice proceedings. Extracted from the website of 'Fair Trials International'.

APPENDIX 3: Madrid Bar guidance on protecting lawyers' health while protecting defence rights

APPENDIX 4: COVID-19 toolkit for civil society on responding to human rights risks from emergency powers (a publication of Rights and Security International)

Appendix 5: Coronavirus Courts Guidance: England & Wales [Lord Chief Justice]

APPENDIX 6: Northern Ireland Arrangements [Lord Chief Justice]

The Rt Hon Lord Justice McCloskey

Court of Appeal of Northern Ireland

An Overview

1. The impact of the pandemic on access to justice generally and judicial adjudication in particular has been manifest in at least two significant respects. First, heavily reduced judicial adjudication services. Second, the emergence of the phenomenon of virtual, remote judicial hearings.

2. The first of these phenomena, namely heavily reduced judicial adjudication services, threatens and weakens the rule of law. The rule of law is a species of superior medium to which every EU Member States, every state party of the Council of Europe and every developed democracy throughout the modern world subscribes, at least superficially. It is, in short, the cornerstone and the bedrock of every civilised democracy. The second of the new emerging phenomena, linked to the first, namely remote judicial adjudication, poses a series of issues and challenges which are unavoidably evolving in nature.

3. These twin phenomena clearly have important consequences for those who are entitled to the protection of the rule of law, namely every member of society. Access to justice may be described as the overarching right. The citizen's right to a fair hearing can be viewed either as an aspect of this overarching right or a self-contained free-standing right. Either way, its content and components are essentially the same.

4. Given the unprecedented circumstances brought about by the pandemic, it is necessary to, firstly, examine the ingredients of the citizen's rights of access to justice and a fair hearing. I consider that it is possible for all of us participating in this valuable series to do so through essentially the same legal prism by virtue of what we have in common namely shared membership of the European Union and the Council of Europe, together with constitutional principles and international standards recognised by each of our countries. The rights of access to justice and a fair hearing are nothing if not internationally recognised and shared.

Article 6 of the Human Rights Convention

5. Article 6(1) ECHR provides a point of reference for all of us which is both appropriate and convenient. Article 6 states:

> "*Right to a fair trial*

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

6. The requirements of Article 6(1) apply to both civil and criminal litigation. In criminal cases there is a suite of additional rights, prescribed by paragraphs (2) and (3)[1]. Some of these additional, or enhanced, rights are clearly established by implication – and by domestic legal rules and principles, including constitutional rights in certain instances - in civil cases also: in particular the right to be notified of and understand the other party's case, the right to adequate time and facilities for the preparation of a party's case, the right to legal representation, the right to public funding for legal representation in certain cases and the right to examine the evidence of the other party and its witnesses (which plainly requires a species of oral hearing). There is also a right to an interpreter in appropriate cases.

7. Notably, Article 6(1) does not guarantee an automatic and absolute right to an oral hearing in non-criminal cases. But the principle favouring such a hearing

[1] ***"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.***

3 Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

is a powerful one. The Grand Chamber of the ECtHR has formulated the main principle thus:

"47. According to the Court's established case-law, in proceedings before a court of first and only instance the right to a "public hearing" in the sense of Article 6 § 1 entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing (see, for instance, *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 64; *Fredin v. Sweden (no. 2)*, judgment of 23 February 1994, Series A no. 283-A, pp. 10-11, §§ 21-22; and *Allan Jacobsson v. Sweden (no. 2)* judgment of 19 February 1998, *Reports* 1998-I, p. 168, § 46).[2] "

8. A breach of Article 6(1) ECHR was found by a majority of 9/8. The joint dissenting judgment of eight judges is noteworthy for its elaboration of the several governing principles:

"We disagree with our colleagues on one point: we find no violation of Article 6 § 1 of the Convention on account of the lack of a hearing during the domestic proceedings, for several reasons.

In the first place, the Court's case-law has never required oral proceedings in all circumstances. In many trials a written procedure may be sufficient, for example, where a litigant has expressly or tacitly waived his entitlement to a hearing, or where the dispute does not raise any public-interest issues making oral submissions necessary, or, when there is only one level of jurisdiction – which is not the case here – in exceptional circumstances. Relevant authorities include *Håkansson and Sturesson v. Sweden* (judgment of 21 February 1990, Series A no. 171-A, pp. 20-21, § 67), which concerned a dispute over the lawfulness of a sale; *Schuler-Zgraggen v. Switzerland* (judgment of 24 June 1993, Series A no. 263, pp. 19-20, § 58), concerning an appeal to the Federal Insurance Court about an invalidity pension; *Allan Jacobsson v. Sweden (no. 2)* (judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 169, § 49), concerning an appeal to the Supreme Administrative Court, ruling at first and last instance, against a refusal of planning permission; and the inadmissibility decision of 25 April 2002 (Third Section) in *Lino Carlos Varela Assalino v. Portugal* (no. 64336/01), concerning an application for a will to be declared null and void and for a declaration of unworthiness to inherit.

That case-law lays down three criteria for determining whether there are "exceptional circumstances" which justify dispensing with a public hearing: there must be no factual or legal issue which requires a hearing; the questions which the court is required to answer must be limited in scope and no public interest must be at stake. In the present case these three conditions were satisfied."

[2] See Goc v Turkey [2002] 35 EHRR 134 (Grand Chamber).

9. The following passages from *Martinie v France*[3], another Grand Chamber decision, are equally noteworthy:

"b) The Court's assessment

(i) Lack of a public hearing before the Court of Audit

39. The Court reiterates that the public character of proceedings before the judicial bodies referred to in Article 6 § 1 protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see, among many other authorities*, Axen v. Germany*, judgment of 8 December 1983, Series A no. 72, § 25).

40. The right to a public hearing implies a public hearing before the relevant court (see, *inter alia*, *mutatis mutandis*, *Fredin v. Sweden (no. 2)*, judgment of 23 February 1994, Series A no. 283-A, § 21, and *Fischer v. Austria*, judgment of 26 April 1995, Series A no. 312, § 44). Article 6 § 1 does not, however, prohibit courts from deciding, in the light of the special features of the case submitted to them, to derogate from this principle: in accordance with the actual wording of this provision, "... the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"; holding proceedings, whether wholly or partly, in camera, must be strictly required by the circumstances of the case (see, for example, *mutatis mutandis*, *Diennet v. France*, judgment of 26 September 1995, Series A no. 325-A, § 34).

41. Moreover, the Court has held that exceptional circumstances relating to the nature of the issues to be decided by the court in the proceedings concerned (see, *mutatis mutandis*, *Miller v. Sweden*, no. 55853/00, 8 February 2005, § 29), may justify dispensing with a public hearing (see, in particular, *Göç v. Turkey* [GC], no. 36590/97, § 47, ECHR 2002-V). It thus considers, in particular, that social-security proceedings, which are highly technical, are often better dealt with in writing than in oral submissions, and that, as systematically holding hearings may be an obstacle to the particular diligence required in social-security cases, it is understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy (see, for example, *Miller* and *Schuler-Zgraggen*, cited above). It should be pointed out, however, that in the majority of cases concerning proceedings before "civil" courts ruling on the merits in which it has arrived at that conclusion, the applicant had had the opportunity of requesting a public hearing.

42. The position is rather different where, both on appeal (if applicable) and at first instance, "civil" proceedings on the merits are conducted in private in accordance with a general and absolute principle, without the litigant being able to request a public hearing on the ground that his case presents special features. Proceedings conducted in that way cannot in principle

[3] Martinie v France [2007] 45 EHRR 433 [Grand Chamber] and [2006] ECHR 492. See also R (Dudson) v SSHD [2005] UKHL 52, at [3] especially.

be regarded as compatible with Article 6 § 1 of the Convention (see, for example, *Diennet* and *Göç*, cited above): other than in wholly exceptional circumstances, litigants must at least have the opportunity of requesting a public hearing, though the court may refuse the request and hold the hearing in private on account of the circumstances of the case and for the aforementioned reasons."

10. In civil cases the common law, like Article 6(1), does not guarantee an oral hearing in every instance.[4] I would suggest that some care is required in the use and understanding of the familiar expressions "hearing" and "oral hearing". Reflection on the equivalent expressions in other European jurisdictions is instructive. The favoured Spanish word is *vista*, a noun derived from the verb *ver* namely *to see.* Although in contrast in other languages the emphasis is on the *auditory.*[5]

A Commonality of Issues and Challenges

11. Some of us may have a specialism-whether as judges, practitioners, academics, legal researchers or public servants - in specific areas of legal practice: Criminal, civil, family and children, administrative law, employment, taxation *et al*. Irrespective, I suggest that in the present crisis we have much to learn from each other as many of the issues and challenges posed by the pandemic are common to multiple courts and tribunals in many countries.

12. One of the most important (and interesting) phenomena thrown up by this CEELI series is that of differing legal cultures, systems and traditions. I elaborate thus. In certain contentious litigation matters the established legal tradition, culture and practice of certain countries may entail, or favour, paper judicial adjudication. Broadly, it would seem that in this discrete cohort of cases the pandemic should not pose any major problems other than practical ones – in particular the availability of case papers and supporting staff of court administration, together with facilities for communicating efficiently with parties and their representatives. In principle cases belonging to this category have never required an oral hearing (subject to exceptions and qualifications) and, therefore, should not require any special adjustment in the crisis inflicted by the pandemic. This is the first identifiable category of cases.

13. Next, there is a category of cases with an already established practice of remote judicial adjudication by whatever means-telephone, Skype, Videolink et cetera. In principle, cases belonging to this category should be unaffected by the pandemic, subject of course to logistical considerations – in particular the availability of court administrative staff, the availability of the parties and their

[4] See De Smith's Judicial Review [7th ed], 7-062 ff.

[5] *L'audition, la udienza* and *la audiencia* in French, Italian and Portuguese respectively, while *audiencia* is the interchangeable Spanish word.

legal representatives, the provision of hard copy – or good quality and accessible electronic - case papers and functioning IT systems.

14. The third identifiable category is cases involving purely procedural and case management orders and the regulation of certain preliminary and ancillary and incidental matters by the court, in both civil and criminal cases.

15. In a still further category there are cases which the parties are capable of resolving their dispute consensually i.e. without judicial adjudication. Self-evidently this must be strongly encouraged. Furthermore this draws attention to the merits of mediation and the need for strong judicial exhortation and support of this valuable mechanism.[6]

16. The next category is cases where, normally with appropriate judicial encouragement, the material facts can be agreed between the parties. This mechanism can be tried in every type of case: criminal, civil, administrative *et al*. Once again, the judge has an important role. Cases belonging to this category are in principle suitable for remote judicial adjudication, whether purely on paper or with some Video-link remote hearing supplement.

17. I turn to the subject of appeals. In many jurisdictions appeals do not normally involve the reception of oral evidence. Hence these cases also are in principle candidates for remote judicial adjudication, whether on paper or supplemented by a Video-link facility.

18. All of our jurisdictions are, I believe, familiar with the phenomenon of bail. Very recent experience in my jurisdiction demonstrates that such cases do not necessarily require a conventional oral hearing. The alternative, normally paper adjudication, is more laborious, resource intensive and time consuming. It is, however, viable in practice.

19. In another distinct category, the litigant is a person in custody awaiting sentencing by a criminal court. As sentencing cases can normally be conducted on the basis of the prosecution and defence written submissions and evidence of a purely documentary kind, these are in principle suitable candidates for remote judicial adjudication.

20. Appeals against sentence and appeals against conviction are also, again in principle, suitable candidates for this form of disposal as they rarely require oral evidence. *Ditto* extradition appeals, to be contrasted with first instance hearings.

[6] See further the thoughtful publication of Emma McIlveen, a practising NI barrister and accredited mediator, on the Ireland Legal News website [24/04/20]

21. At the highest level of the judicial system namely at Supreme Court (or equivalent – eg Constitutional Court) level remote hearings should be feasible in most countries.[7]

The Prioritising of Cases

22. To summarise, in principle it should be possible for many courts and tribunals to continue to provide a reasonable, though reduced, level of services to the public by the twin media of paper adjudication and orders and remote hearing mechanisms. Each national legal system and, within each national legal system, every court and tribunal will identify what it considers to be priority cases and examine if and to what extent these can be managed in the prevailing extraordinary circumstances. These arrangements will obviously be informed by available human and technological resources.

23. An inexhaustive list of priority cases would be expected to include the following: cases involving the liberty of the citizen, Urgent family cases, particularly those where children are at risk, Urgent human rights cases for example involving issues under Articles two and three of the Human Rights Convention, together with all kinds of cases in various fields involving vulnerable persons such as children and the mentally ill: the contexts in which such cases arise (again inexhaustively) include prisons, hospitals, nursing homes and schools.

Specific Issues

24. I turn to consider briefly some specific access to justice and fair hearing issues. These are in particular:

i. The right to a hearing within a reasonable time.

ii. The requirement that the hearing be public.

iii. The requirement that the decision of the court be pronounced in public.

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[7] **One concrete example:** On 3 April 2020 – for the first time in history – the Supreme Court of Norway handed down a judgment in a criminal case after a written hearing. A written hearing means that counsel for both sides make written submissions instead of arguing their cases before the justices at the Supreme Court Building. The case concerned penalty for sexual assault. The Supreme Court was composed of Chief Justice Øie and Justices Webster, Bergsjø, Bergh and Thyness. After having studied the written submissions, the Supreme Court assembled as usual for deliberations. In these days, such deliberations take place by way of video conference. Written hearings in the Supreme Court are permitted under the newly adopted Corona Virus Act and pertaining Regulations, and may only be conducted in cases where this is considered expedient. Before the court decides on a written hearing, the parties are invited to make a statement.

iv. The scope of the exception to the public principle.

v. The need for interpreters in appropriate cases.

vi. The right to legal representation.

vii. The right to publicly funded and legal assistance in appropriate cases.

viii. The provision of special facilities for persons lacking legal capacity and other vulnerable persons.

ix. Facilities for physically disabled persons: parties, witnesses, lawyers, family members/carers and others.

Judicial Concerns

25. In addition to the foregoing, many issues of particular concern to judges (not necessarily exclusively) arise. These include the following:

I. Limited judicial control over events at the distant location and remote arrangements generally.

II. Preventing any misuse of the process of the court. Two examples may be considered. First, the unseen prompting or assisting of a party or witness giving oral evidence. Second, Misbehaving parties, witnesses and lawyers.

III. Efficient live communication with the judge, particularly where everyone involved is referring to documentary evidence, formal court papers *et al*.

IV. The use of mobile phones, laptops and other devices by parties, witnesses and lawyers at the remote location.

V. The confidentiality of solicitor/client communications at the remote location.

VI. The judge's ability to properly assess the demeanour of parties and witnesses giving oral evidence – a challenging task in the most ideal of hearing conditions.

VII. The security of the remote hearing technical mechanism in cases where either a provision of the law or the court, by order, requires limited public access and restricted reporting of the proceedings.

VIII. The fatigue factor: it is well recognised that remote hearings are more tiring than conventional hearings.

IX. Fair hearings for the physically and mentally disabled and the accommodation of other vulnerable persons.

X. Remote hearing etiquette

Some Concluding Comments.

26. I would offer the following final observations:

1) It seems likely that there will be heavier reliance by judges on legal representatives than ever before. The duties owed by lawyers to the courts will assume ever greater importance.

2) The investment by governments of financial resources in the necessary technology is essential.

3) Judges everywhere are on a learning curve involving unpredictable outcomes and developments. So too are lawyers, administrators, academics and politicians. There shall be much trial and error. We shall all learn much from the experience of judicial colleagues in other jurisdictions.

4) A constant alertness to the basic principles of access to justice and fair hearing is indispensable. The application of these principles in the context of the pandemic will require imagination and flexibility on the part of judges, court administrators, parties and legal representatives.

5) The fundamental principle that the specific requirements of a fair hearing vary according to the individual features of each particular case is likely to emerge as one of the dominant principles.

27. In their efforts to ensure ongoing access to justice, governments and judiciaries are rapidly introducing various forms of remote court - audio hearings (largely by telephone), video hearings (for example, by Skype and Zoom), and paper hearings (decisions delivered on the basis of paper submissions). Rapidly new methods and techniques are being developed. This is unfolding without adequate planning, testing and training. There is a danger that the wheel is being reinvented. A concerted, uniform approach among states, with all appropriate local adjustments, has much to commend itself. This is precisely what this welcome CEELI series is capable of delivering.

BERNARD McCLOSKEY

24 APRIL 2020

APPENDIX 1

R (on the application of Kiarie) (Appellant) *v* Secretary of State for the Home Department (Respondent)

R (on the application of Byndloss) (Appellant) *v* Secretary of State for the Home Department (Respondent) [2017] UKSC 42

60. The first question is whether an appellant is likely to be legally represented before the tribunal at the hearing of an appeal brought from abroad. Legal aid is not generally available to an appellant who contends that his right to remain in the UK arises out of article 8: para 30, Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012. So, in order to obtain legal aid, he must secure an "exceptional case determination" under section 10 of that Act. Although an appeal brought from abroad is in principle as eligible for such a determination as an appeal brought from within the UK, the determination cannot be made unless either the absence of legal aid *would* breach his rights under article 8 or it *might* breach them and provision of it is appropriate in all the circumstances: section 10(3). It suffices to say for present purposes that it is far from clear that an appellant relying on article 8 would be granted legal aid. One can say only that, were he required to bring his appeal from abroad, he might conceivably be represented on legal aid; that alternatively he might conceivably have the funds to secure private legal representation; that alternatively he might conceivably be able to secure representation from one of the specialist bodies who are committed to providing free legal assistance to immigrants (such as Bail for Immigration Detainees: see para 70 below); but that possibly, or, as many might consider, probably, he would need to represent himself in the appeal. Even if an appellant abroad secured legal representation from one source or another, he and his lawyer would face formidable difficulties in giving and receiving instructions both prior to the hearing and in particular (as I will explain) during the hearing. The issue for this court is not whether article 8 requires a lawyer to be made available to represent an appellant who has been removed abroad in advance of his appeal but whether, irrespective of whether a lawyer would be available to represent him, article 8 requires that he be not removed abroad in advance of it.

61. The next question is whether, if he is to stand any worthwhile chance of winning his appeal, an appellant needs to give oral evidence to the tribunal and to respond to whatever is there said on behalf of the Home Secretary and by the tribunal itself. By definition, he has a bad criminal record. One of his contentions will surely have to be that he is a reformed character. To that contention the tribunal will bring a healthy scepticism to bear. He needs to surmount it. I have grave doubts as to whether he can ordinarily do so without giving oral evidence to the tribunal. In a witness statement he may or may not be able to express to best advantage his resolution to forsake his criminal past. In any event, however, I cannot imagine that, on its own, the

statement will generally cut much ice with the tribunal. Apart from the assistance that it might gain from expert evidence on that point (see para 74 below), the tribunal will want to hear how he explains himself orally and, in particular, will want to assess whether he can survive cross-examination in relation to it. Another strand of his case is likely to be the quality of his relationship with others living in the UK, in particular with any child, partner or other family member. The Home Secretary contends that, at least in this respect, it is the evidence of the adult family members which will most assist the tribunal. But I am unpersuaded that the tribunal will usually be able properly to conduct the assessment without oral evidence from the appellant whose relationships are under scrutiny; and the evidence of the adult family members may either leave gaps which he would need to fill or betray perceived errors which he would seek to correct.

62. When the power to certify under section 94B was inserted into the 2002 Act, an analogous power was inserted into the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) ("the 2006 Regulations"), now recently replaced. Regulation 24AA(2) enabled the Home Secretary to add to an order that an EEA national be deported from the UK a certificate that his removal pending any appeal on his part would not be unlawful under section 6 of the 1998 Act. But regulation 24AA(4) enabled him to apply "to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision". In *Secretary of State for the Home Department v Gheorghiu* [2016] UKUT 24 (IAC), the Upper Tribunal (Blake J and UTJ Goldstein) observed at para 22 that, on an application for an order to suspend enforcement, the court or tribunal would take due account of four factors. The fourth was

> "that in cases where the central issue is whether the offender has sufficiently been rehabilitated to diminish the risk to the public from his behaviour, the experience of immigration judges has been that hearing and seeing the offender give live evidence and the enhanced ability to assess the sincerity of that evidence is an important part of the fact-finding process …"

It is also worthwhile to note that, even if an EEA national was removed from the UK in advance of his appeal, he had, save in exceptional circumstances, a right under regulation 29AA of the 2006 Regulations (reflective of article 31(4) of Directive 2004/58/EC) to require the Home Secretary to enable him to return temporarily to the UK in order to give evidence in person to the tribunal.

63. The Home Secretary submits to this court that the fairness of the hearing of an appeal against deportation brought by a foreign criminal is highly unlikely to turn on the ability of the appellant to give oral evidence; and that therefore the determination of the issues raised in such an appeal is likely to require his live evidence only

exceptionally. No doubt this submission reflects much of the thinking which led the Home Secretary to propose the insertion of section 94B into the 2002 Act. I am, however, driven to conclude that the submission is unsound and that the suggested unlikelihood runs in the opposite direction, namely that in many cases an arguable appeal against deportation is unlikely to be effective unless there is a facility for the appellant to give live evidence to the tribunal.

64. But in any event, suggests the Home Secretary, there is, in each of two respects, a facility for an appellant in an appeal brought from abroad to give live evidence.

65. The first suggested respect was the subject of a curious submission on the part of the Home Secretary to the Court of Appeal. It was that from abroad the appellant could apply for, or that the tribunal could on its own initiative issue, a summons requiring his attendance as a witness at the hearing pursuant to rule 15(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604) ("the 2014 Rules"). The curiosity of the submission is that such a summons is not enforceable in respect of a person outside the UK. Nevertheless the Court of Appeal held that the issue of a summons would be a legitimate way of putting pressure on the Home Secretary to allow the appellant to return to the UK to give oral evidence. Before this court the Home Secretary does not continue to contend for the suitability of a summons under rule 15(1). She nevertheless suggests that the tribunal could, by direction, stress the desirability of the appellant's attendance before it and that, were she thereupon to fail to facilitate his attendance, the appellant could seek judicial review of the certificate under section 94B and, if successful, a consequential order for his return at least pending the appeal. But whether the tribunal could, or if so would, give such a direction in the teeth of a subsisting certificate is doubtful; and in any event it seems entirely impractical for an appellant abroad to apply first for the unenforceable direction and then for judicial review of any failure to comply with it.

66. The second suggested respect has been the subject of lengthy and lively argument. The suggestion is that the appellant can seek to persuade the tribunal to permit him to give live evidence from abroad by video link or, in particular nowadays, by Skype.

67. There is no doubt that, in the context of many appeals against immigration decisions, live evidence on screen is not as satisfactory as live evidence given in person from the witness box. The recent decision of the Upper Tribunal (McCloskey P and UTJ Rintoul) in *R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 561 (IAC) concerned a claim for judicial review of the Home Secretary's decision to curtail a student's leave to remain in the UK on the grounds that he had obtained it by deception. The Upper Tribunal quashed the decision but, in a footnote, suggested that the facility for a statutory appeal would have been preferable to the mechanism of judicial review and that it would be preferable for any statutory appeal to be able to be brought from within the UK. It said:

> *"(90) Experience has demonstrated that in such cases detailed scrutiny of the demeanour and general presentation of parties and witnesses is a highly important factor. So too is close quarters assessment of how the proceedings are being conducted - for example, unscheduled requests for the production of further documents, the response thereto, the conduct of all present in the courtroom, the taking of further instructions in the heat of battle and related matters. These examples could be multiplied. I have found the mechanism of evidence by video link to be quite unsatisfactory in other contexts, both civil and criminal. It is not clear whether the aforementioned essential judicial exercises could be conducted satisfactorily in an out of country appeal. Furthermore, there would be a loss of judicial control and supervision of events in the distant, remote location, with associated potential for misuse of the judicial process."*

Although the Home Secretary stresses that the Upper Tribunal was addressing the determination of issues relating to deception, its reservations about the giving of evidence by electronic link seem equally apt to appeals under article 8 against deportation orders. Indeed one might add that the ability of a witness on screen to navigate his way around bundles is also often problematic, as is his ability to address cross-examination delivered to him remotely, perhaps by someone whom he cannot properly see. But, although the giving of evidence on screen is not optimum, it might well be enough to render the appeal effective for the purposes of article 8, provided only that the appellant's opportunity to give evidence in that way was realistically available to him.

68. Inquiry into the realistic availability of giving evidence on screen to the tribunal gets off to a questionable start: for in her report entitled "2016 UK Judicial Attitude Survey", Professor Thomas, UCL Judicial Institute, records that 98% of the judges of the First-tier Tribunal throughout the UK responded to her survey and that, of them, 66% rated as poor the standard of IT equipment used in the tribunal.

APPENDIX 2

Safeguarding the right to a fair trial during the coronavirus pandemic: remote criminal justice proceedings

FairTrialsAdmin - April 3, 2020 - COVID-19 Updates, Guides, Remote Justice

The Coronavirus (COVID-19) pandemic is now a global health emergency, affecting more than a billion people worldwide. In more and more countries, normal life has effectively been suspended, as sweeping measures are introduced to control the

spread of the disease by way of 'lockdowns', bans on social gatherings, and the closure of public facilities.

These measures have also had an impact on criminal justice systems, as access to courts and prisons have come under severe restrictions, and as non-essential travel has become almost impossible in many countries.

Many states have temporarily postponed all non-urgent court hearings, but with no clear end of the crisis in sight, various **jurisdictions across the world are seeking ways to keep the courts running through means of remote access**, including via video-link or telephone hearings. It is essential, however, that states do not rush to adopt these measures without properly considering the human rights impact of remote justice procedures, and in particular, the implications on the right to a fair trial. **Defendants should be able to exercise their rights fully and effectively, even when they are not physically present in court**, and are unable to meet their lawyers in person. It is crucial that any decisions to introduce or expand the use of remote court hearings are informed by human rights concerns, and accompanied by appropriate safeguards to protect the rights of defendants.

Fair Trials has produced a guide which summarises human rights concerns related to the use of remote justice procedures and provides practical recommendations for states that are either considering adopting or expanding the use of remote communications systems in criminal justice proceedings, or are in the process of implementing them**.**

Read the guide **here**. (available in German and Czech)

APPENDIX 3

Madrid Bar guidance on protecting lawyers' health while protecting defence rights

FairTrialsAdmin - April 2, 2020 - COVID-19 Updates, Remote Justice, Access to lawyer

On 25th March the Madrid Bar published guidance on protecting health of lawyers while protecting defence rights (in Spanish).

The guide highlights, amongst other things, the urgent need for suspects and victims in police and judicial custody to have access to confidential means of remote communication with their lawyers (such as via videolink). Where a lawyer's presence is required in person, the guide sets out social distancing and hygiene requirements to be followed.

APPENDIX 4

COVID-19 toolkit for civil society on responding to human rights risks from emergency powers

FairTrialsAdmin - April 9, 2020 - COVID-19 Updates, Rule of Law

The NGO Rights and Security International (formerly Rights Watch UK), in collaboration with nineteen civil society partners globally, has launched a Covid-19 Toolkit for Civil Society Partners on Emergency Powers and Crisis Responses: Human Rights Risks.

The toolkit provides a guide for civil society organisations (CSOs) and human rights defenders (HRDs) to anticipate emergency laws and policies; scrutinise, from a rights based perspective, the process by which these laws and policies are passed and their content; and identify and respond to emergency measures, particularly those that are having a disproportionate impact on marginalised and vulnerable groups.

APPENDIX 5

Another week has passed labouring under strange conditions.

A remarkable proportion of the work ordinarily carried out in the courts continues although there are understandably difficulties in collecting accurate data.

Hearings are continuing with judges sitting in court with all other participants present in the normal way, but often with some or all attending remotely. Other hearings are being conducted with the judge at home using the phone or an internet platform. Working from home is advantageous in some respects but less so in others. Many are finding sitting in a courtroom infinitely preferable, not least because of the support available from HMCTS staff, the ready availability of papers, space and the usual recording facilities.

There remains a worrying level of absence of HMCTS court staff which affects the volume of work that can be done, in particular in the civil and family courts where professional and lay litigants often encounter difficulty in communicating with the court.

This may be helped as a result of the testing now available to essential workers including the judiciary and court staff, which should give people certainty that they are well enough to attend court. A number of judges have already booked appointments and no doubt more will do so as the capacity increases.

In the civil and family courts a great deal of work is being done using all media. Experience has shown that using Skype or Teams is often better than a phone. Judges have long conducted hearings by phone but the face to face platforms are easy to use (if I can use them, I think anyone can). That said, logistical difficulties of arranging remote hearings are most acute in the County and Family Courts which I hope will abate as more staff return to work or themselves can work remotely.

Trials in the Magistrates' Court have recommenced, in addition to the urgent work and sentencing which continued almost as usual. We hope to see the level of trials rise. The Single Justice Procedure has also started again. The Crown Court continues to deal with sentencing, pre-trial hearings and other hearings, but not yet jury trials. Work is well advanced to enable jury trials to start again when circumstances allow, taking account of what will almost certainly be a continuing need to observe social distancing and ensure other precautions are in place. It will be a gentle process, building over time, rather than a sudden return to business as usual.

Technology that has been available is some criminal courts and tribunals will be rolled out in civil and family courts in the near future. I hope that will make it easier to conduct hearings with some or all of the participants elsewhere.

The fact that so much court business has continued in England and Wales, by contrast with many jurisdictions around the world, has been noted and commented upon widely. For all concerned, judges, magistrates, staff and professionals alike, it has been a tough time. We have all been running to catch up and adapted our ways of working at great speed. Whatever the immediate future holds there will be no swift return to business as usual; and business as usual will inevitably have changed.

In the meantime please accept my thanks and admiration.

The Lord Burnett of Maldon,
Lord Chief Justice

27 April 2020

[FROM 20 APRIL 2020 -

Events have continued to move at great speed. I indicated during the course of last week that we would keep them under review. As the Prime Minister has been telling the country, the spread of COVID- 19 has continued to accelerate. The clear message from Government is to take all precautions to avoid unnecessary contact. A review of the arrangements in our courts is called for. This short statement comes to judges, and others, to provide some clarity for the coming few days.

We have put in place arrangements to use telephone, video and other technology to continue as many hearings as possible remotely. We will make best possible use of the equipment currently available; HMCTS is working round the clock to update and add to that. Some hearings, the most obvious being jury trials, cannot be conducted remotely. I have decided that we need to pause jury trials for a short time to enable appropriate precautions to be put in place.

Crown Courts

1. My unequivocal position is that no jury trials or other physical hearings can take place unless it is safe for them to do so. A particular concern is to ensure social distancing in court and in the court building.

2. This morning no new trials are to start. Jurors summoned for this week are being contacted to ask them to remain at home, and contact the court they are due to attend. They will only be asked to come in for trials where specific arrangements to ensure safety have been put in place. In some cases, this may mean that jurors may be

called in to start a new trial later on Monday. All hearings in the Crown Court that can lawfully take place remotely should do so and other hearings not involving a jury should continue if suitable arrangements can be made to ensure distancing.

3. Efforts to bring existing jury trials to a conclusion should continue. Social distancing in accordance with PHE guidelines must be in place at all times and at all places within the court building. Considerable imagination and flexibility may be needed to achieve that. This is already happening in some Crown Courts. HMCTS will continue to work to ensure that safety measures are in place in all parts of the court building in which trials are already taking place. The basic hygiene arrangements urged upon us by the Prime Minister must be available. Resident Judges, with HMCTS staff, will determine whether a trial can safely be continued.

4. If it is necessary to adjourn trials already underway for a short period to put those safety measures in place, this must be done.

Magistrates

5. The same considerations, in relation to safety, apply to Magistrates' Courts. Magistrates' Courts will need to continue to deal with urgent work, in accordance with guidance given by the Judiciary to judges and staff. They are the first court to which all criminal cases are referred. All hearings that can lawfully take place remotely should do so if the facilities exist.

Civil and Family Courts

6. Guidance has already been given about the use of remote hearings. Hearings requiring the physical presence of parties and their representatives and others should only take place if a remote hearing is not possible and if suitable arrangements can be made to ensure safety.[8]

This guidance will be updated, as events develop.

APPENDIX 6: Northern Ireland Arrangements [Lord Chief Justice]

COVID-19 – GUIDANCE FOR COURTS

24 APRIL 2020

[8] The most recent developments suggest an acceptance that conventional family hearings are not suitable for remote judicial adjudication. A worrying void in this field seems therefore to be looming.

This guidance revokes and replaces the guidance note issued on 24 March 2020. Court business will continue to be consolidated in the Royal Courts of Justice (RCJ), Laganside Courts, Lisburn, Dungannon and Londonderry Courthouses. Taking into account Public Health Agency guidance, the Lord Chief Justice has initiated reviews of cases listed for hearing in the Court of Appeal and High Court with a view to commencing the recovery of court business.

The key changes to note are:

- The reviews of cases listed for hearing in the Court of Appeal and High Court;
- The forthcoming review of cases listed for hearing in all other courts;
- The arrangements for Grants of Representation, Probate: and
- The listing of Preliminary Enquiries for hearing where the defendant is in custody.

CURRENT POSITION

The following matters are currently being progressed by way of a court hearing (the form of which will be determined by the relevant judge) or on the papers where possible.

1. **Urgent Matters.** Examples of urgent matters, which typically involve the immediate liberty, health, safety and wellbeing of individuals include:

    a. **Criminal proceedings** – First remands in the Magistrates' Courts (overnight charges and first appearance on charge sheets after 28 days); Custody remands; Bail applications; PACE applications; and Sentencing where delay may mean time on remand exceeds any likely/realistic custody period under the sentence.

    b. **Family proceedings** – Non-molestation Orders; Applications under the Children (NI) Order 1995 such as Care Orders, Prohibited Steps Orders, Emergency Protection Orders and Secure Accommodation Orders; Declaratory judgments in patients' cases; Child abduction.
    c. **Civil proceedings** – Habeas Corpus applications; Urgent injunctions; Urgent judicial reviews.
    d. **Other matters where the legal representative or a party to the proceedings has requested a hearing and the judge considers it urgent or necessary.**

2. **Agreed Matters**. Where parties have agreed a way forward in their case they should complete the relevant form, sharing it with the other party/parties to enable it to be completed, and lodge it with the court office by 4.00 pm five

working days before the case was scheduled for hearing. Please note that this option applies to all cases.

Where the requirements of fairness and justice require a court based hearing, and it is safe to conduct one, then a court based hearing should take place. The judge may limit the number of persons present in court at any time. **Members of the public should NOT attend court.** The matters listed above will generally be undertaken remotely either by Sightlink, telephone, email or BTMeetme etc. A party or legal representative should notify the court office of the means by which they will engage with the court.

All forms, correspondence and emails MUST include the ICOS number, the relevant Courthouse (and the court number if a Laganside Courts case). They should be lodged with the court office by 4.00 pm five working days before the case was scheduled for hearing. Forms for all court tiers can be found on the Covid-19 page of the Judiciary NI website. Please note that other than as set out below no form, correspondence or email is required where an adjournment is the preferred course of action.

MAGISTRATES' COURTS

Magistrates' Courts business is amalgamated in the following courthouses:

- Laganside, Belfast – also dealing with Ballymena, Antrim, Ards and Downpatrick;
- Lisburn – also dealing with Craigavon, Armagh, Newry and Banbridge;
- Dungannon – also dealing with Omagh, Enniskillen and Strabane;
- Londonderry – also dealing with Magherafelt, Limavady and Coleraine.

The parties should check ICOS to confirm the date to which a case has been adjourned. Court staff will advise non-represented parties (defendants) of the revised date for hearing where a judge determines that it should be listed for hearing. Where a case has been adjourned no formal notification will issue.

Arrangements are being developed to facilitate the hearing of Preliminary Enquiries at the magistrates' court, where the defendant is in custody.

HIGH COURT REVIEWS

1. **Court of Appeal**. A review of Court of Appeal cases will take place on Friday 1 May 2020. Representatives have already been asked to submit forms.

2. **High Court Family Cases**. The judge will undertake an administrative review of High Court Family cases listed for hearing between 26 March and 8 May 2020. Representatives should complete and lodge form FCI1 with the Family Office in the RCJ by 1 May 2020. Where the judge determines a review hearing is required this will take place on Monday 11 May 2020.

3. **Chancery Cases**. The judge will undertake an administrative review of High Court Chancery cases listed in week commencing 27 April and week commencing 4 May 2020. Representatives should complete and lodge form ChanCI1 with the Chancery Office, RCJ by 4 May 2020. Where the judge determines a review hearing is required this will take place on Monday 18 May 2020.

4. **Judicial Review Cases**. The judge will undertake an administrative review of Judicial Review cases listed in week commencing 27 April and week commencing 4 May 2020. Representatives should complete and lodge form JRCI1 by 5 May 2020. Where the judge determines a review hearing is required this will take place on Tuesday 19 May 2020.

5. **Commercial Court**. The judge will undertake an administrative review of Commercial Court cases listed in week commencing 27 April and week commencing 4 May 2020. Representatives should complete and lodge form COMCI1 with the Commercial Office, RCJ by 6 May 2020. Where the judge determines a review hearing is required this will take place on Thursday 21 May 2020.

6. **Queen's Bench Division (QBD)**. The judge will undertake an administrative review of QBD (medical negligence) cases [listed in weeks commencing 4 May, 11 May and 18 May 2020. Representatives will shortly be notified of the date for submission of forms.

This process will involve the judge considering the information provided in both the case files and the forms before determining a way forward, which may be for example, issue of Directions, requests for further information, list for review on the allocated Review Court date, adjourn or list for a future hearing.

Where a review hearing is required it will be undertaken remotely on the dates as identified above. Representatives/parties to the proceedings will be notified of the time and details of how to log into the hearing.

If a future hearing date is required it is anticipated that generally they too will be dealt with remotely, which will be in slower time than usual to take account of the need to sequence and timetable this type of hearing. Initially the focus will be on addressing

uncontentious matters, matters where the issues have been narrowed, where there is legal argument and where limited oral evidence is required.

GRANTS OF PROBATE

In relation to Grants of Representation from the Probate Master the LCJ directs as follows:

During the current Public Health Emergency, and subject to regular review by the Probate Master, the Probate Master and the administrative staff of the Probate Office shall accept applications for Grants of Representation supported by Statements of Truth rather than affidavits, where it has not been possible to have evidence taken by affidavit. Affidavits remain the most acceptable way of providing supporting evidence, but the Master recognises that this is not practical in many cases due to the Government's current measures to enforce social distancing. Statements of Truth shall begin simply with the following wording "I/We Name and Address make the following Statement". There will then follow the substance of the Statement which will conclude prior to signature with the following wording "I/We believe that the facts stated in this witness statement are true and understand that criminal proceedings for fraud may be brought against me/us if I/We are found to have been deliberately untruthful or dishonest in the making of this Statement."

Insofar as Grant applications are concerned, the layout of the commonly used oaths of executor/administrator will otherwise be identical save for the opening and concluding wording as above. The Statements will simply be signed. There is no need for the signature to be witnessed.

This guidance will last initially until 30th June 2020 when it will be reviewed by the Master. In respect of any application which proves to be disputed it shall be for the Master to be satisfied as to the quality of the evidence and such disputed matters may well simply have to be adjourned until affidavit evidence becomes available.

Practitioners should note that normal turnaround times will not apply given reduced staffing resources. Applications will take a longer time period to process. Practitioners should alert the Probate Office to reasons for any requirement for priority handling. Those applications which are identified as urgent will continue to be passed to the Master to determine if they should be afforded priority.

ALL OTHER MATTERS

Generally all other court business will follow the broad approach of reviewing cases and identifying next steps on a progressively phased basis and further advice will issue. Consideration is being given for example to brigading non-contentious work into specific remote hearings, for example, undefended divorces (at both the county court and high court).

In the interim the current arrangements will continue for urgent and agreed matters. Representatives should complete and submit the relevant form to the relevant court office when applying for a hearing providing as much detail as possible and attaching the relevant documents.

Otherwise the default position remains that all other matters will be adjourned by a judge without a hearing unless they fall within the categories identified above, urgent or agreed. Where a case is to be adjourned the adjournment date should be fixed. The period will generally be for four weeks unless the particular circumstances indicate the need for a different timeframe. Representatives should not contact court offices or members of the judiciary unless a case is urgent or agreed or where they have been specifically requested to do so in relation to a non-urgent matter.

There are a number of work streams underway by NICTS ie court administration]. They include:

- increasing IT capacity for home working,
- identifying the potential for file movement between office and home locations (both for staff and judiciary) taking into account data protection

- assessment of office space that can utilised while social distancing requirements remain

Currently NICTS staff may be required to travel to work to deliver essential services where they cannot do this remotely and this, combined with social distancing requirements, places constraints on NICTS capacity. We need to work hand in hand with NICTS and others to effectively manage a staged and consistent approach to ensure what we aim to do is achievable. In that regard I and my office are engaging with the legal professions, police, PPS, DLS, DSO,CSO, NIGALA and others.

Even when the restrictions are eased it is anticipated that the requirement for social distancing will remain in the longer term and this will present challenges for administration with physical capacity significantly reducing the number of staff

potentially available. The working assumption is that NICTS will be able to provide a maximum 70% staff capacity (in office and home working) once the current restrictions are eased and that additional court venues can reopen. There is also some potential to very gradually increase the business we are currently undertaking in the interim, where NICTS and all those involved can accommodate that additional business, such as custody PEs.

The challenge of social distancing is perhaps a greater issue for court users when we get to the point of attendance at court and we will need to have a consistent approach. While remote hearings are likely to remain, for these to be effective the number of participants and the number of cases need to be kept within manageable levels across all courts.