

Public Law Project – written evidence (CIC0038)

House of Lords Constitution Committee

Inquiry into the Constitutional Implications of COVID-19

20 August 2020

Introduction

1. The Public Law Project ('PLP') is an independent national legal charity. We work through a combination of research, policy work, training and legal casework to promote the rule of law, improve public decision-making and facilitate access to justice.
2. The Committee's request for evidence can be [found here](#). The Committee has requested evidence on both the constitutional effects of Covid-19 on the courts and separately its effects on parliament and government. This evidence deals only with the constitutional effects on courts. PLP will be providing further evidence on parliament and government next month.
3. This briefing sets out PLP's evidence on the two key areas where it has conducted research on how Covid-19 has affected the courts:
 - i) Judicial review in the Administrative Court; and
 - ii) Online court procedures in the First-tier Tribunal (Immigration and Asylum Chamber) (FtTIAC).
4. PLP's key findings were:
 - i) Practitioners supported the judicial review process continuing during the COVID-19 pandemic and remote hearings had certain strengths. However, there were also various technical difficulties encountered and remote hearings were not seen as universally appropriate.
 - ii) Practitioners were supportive of conducting case management hearings remotely in the First-tier Tribunal (Immigration and Asylum Chamber) (FtTIAC) but the majority of interviewees considered that remote hearings were unsuitable for substantive hearings, particularly asylum appeals.
 - iii) Much more research is needed on the effectiveness of online hearings and the effect they have on substantive outcomes.
 - iv) A cautious approach to the future use of virtual proceedings must be adopted until there has been systematic collection of data by HMCTs and robust evaluation of virtual proceedings, particularly in relation to outcomes and engagement levels for participants.

Judicial Review in the Administrative Court

5. During the first wave of the COVID-19 pandemic, PLP undertook empirical research to understand how the changes to the judicial review procedure were being implemented and experienced. This research has now been accepted for publication in the peer-reviewed journal *Public Law*.
6. We drew our evidence from a range of sources, including:

- i) Semi-structured interviews with 15 lawyers who had been involved in remote hearings in the Administrative Court. The interviews were conducted by video call between 6 April 2020 and 28 May 2020. This group included a mix of barristers and solicitors, and a mix of lawyers practising in London and various regional Administrative Court centres. They had participated in remote hearings via telephone (primarily by the BT MeetMe service) and via video conference (by the Skype for Business platform);
 - ii) Semi-structured interviews with one lay client – a claimant – on 19 May 2020, and;
 - iii) Observations of four remote hearings between 7 and 14 May 2020.
- 7. We are conscious that our dataset does not sufficiently represent the experiences of lay clients. Their views are important and may differ substantially from those of legal representatives. However, there are distinct and well-known challenges with accessing lay participants which are, if anything, exacerbated during a pandemic.
- 8. Our findings suggest that **there was support for the judicial review process continuing during the COVID-19 pandemic and that remote hearings have certain strengths. However, there were also various technical difficulties and remote hearings were not seen as universally appropriate, even in a 'law-focused' jurisdiction such as judicial review.**
- 9. The key observations that support this general conclusion can be summarised as follows:
 - i) **Interviewees were generally grateful that judicial reviews were still able to go ahead in the Administrative Court.** Responses indicated that all parties approached technical or practical issues with patience and problem-solving attitudes;
 - ii) **Ensuring that everyone had the same bundle and that the necessary paperwork was all in place prior to the start of the hearing was seen as vital to the effective running of judicial reviews using the new remote method.** However, many interviewees also acknowledged the Court's efforts to manage these issues. In some cases, it fell to the lawyer to proactively contact parties to ensure that everyone was speaking to the same documents. However, Court staff were often able to take on this vital role, including helping parties to upload bundles. A number of interviewees also highlighted increases in the notice that parties were given prior to the hearing as an improvement. This gave parties sufficient time to set up the technology and make any necessary arrangements for communicating with clients or instructing solicitors during the hearing;
 - iii) **A number of interviewees highlighted the value of test calls scheduled in advance of the hearing.** These ranged from several days in advance, to the day before a morning hearing, or the morning before an afternoon hearing. This 'tech rehearsal' process, as one interviewee called it, ensured that, when it came to the hearing, all parties were familiar with each other (which was particularly important for audio-only hearings) and with the technology. In cases without a pre-hearing test call, delays at the start of hearings were common, ranging from 30 minutes to an hour. Comprehensive introductory remarks by the judge were appreciated by interviewees who experienced this;

- iv) **Many interviewees found it difficult to comply with the Administrative Court Office's strict guidance on electronic bundle formats and the small file size limits of 20MB for urgent cases and 24MB for non-urgent cases.** One interviewee found it difficult to manage a large electronic bundle during the hearing and to clearly direct the judge to specific references, while also maintaining the flow of submissions. They were concerned that managing multiple computer applications would be even more difficult for litigants in person who only had access to a smartphone;
- v) **A number of interviewees felt that Administrative Court cases, by their nature, were often more suitable for remote hearings: submissions are often very focused on specific points of law, litigants are rarely in court, and there is generally no live evidence to test.** Many interviewees felt a remote hearing was appropriate for their particular case but expressed concerns about remote hearings in other settings or in other circumstances. Several interviewees also indicated that they would be less comfortable with remote hearings in more complex cases, such as those with 'significant debate' or where a substantial amount of case management had not already been completed prior to the hearing. In particular, they were concerned that cases which were more 'document heavy' would be more difficult to conduct efficiently by remote hearing;
- vi) **Two interviewees had conducted judicial reviews in the Administrative Court where a litigant was unrepresented. This presented a number of issues.** For example, one litigant in person did not have access to the bundle or to video conferencing technology, which meant that the hearing had to take place via telephone and at a slower pace to compensate for their lack of bundle access. One litigant in person began to cry during the hearing, while another was cut out mid-way through their submissions by technical problems. In each case, it was difficult for the judge to respond effectively to these problems within the timeframe of the hearing. Whilst the interviewees considered that, in these instances, the issues were ultimately handled well, they expressed concern about the experiences of litigants in person in remote hearings more generally;
- vii) **One interviewee noted that their client felt that the remote setting created a more equitable atmosphere during the hearing.** This was because no-one was wearing robes and each participant was represented by an equally sized square: 'we were all things on the screen'. This made the client feel more comfortable and less like an 'imposter' (see also: C. Kitinger, 'Remote justice: a family perspective' (Transparency Project, 29 March 2020) www.transparencyproject.org.uk/remote-justice-a-family-perspective). As observers, we thought that the screen arrangements could make it difficult for lay observers to correctly identify the different actors in the court room. In absence of a physical court structure and with participants left to name themselves appropriately on the video platform, the roles of different participants were often unclear until the hearing commenced in earnest. One judge, for example, was simply named 'HMCTS Skype';
- viii) **There were multiple challenges arising from the use of telephone or video conferencing technology.** Common issues included problems logging into the remote hearing and calls suddenly freezing or

dropping out when an internet connection failed. These were largely navigated with patience but could be frustrating for participants who were cut off in the middle of a sentence and lost their flow. Even when the software worked well, access to the necessary hardware was a frequent problem, e.g. a need for two screens when engaging with extensive paperwork or lay clients without access to a computer;

- ix) **The use of the audio or video link also made it more difficult for participants to take instructions from clients or solicitors and for judges to deliberate during a hearing.** Interviewees developed workarounds for this problem, such as communicating with others via WhatsApp or text message. One interviewee noted the potential for breaches of confidentiality with the use of audio or video links. In one instance, witnessed in a break before judgment was handed down, one participant disconnected their video connection but forgot to mute their microphone. This led to them inadvertently broadcasting their informal discussions with colleagues and some frantic emailing to alert them to what they had done;
- x) **Many interviewees highlighted the challenge of not being able to see how submissions were being received, particularly by the judge, during both telephone and video hearings.** This was frustrating for some interviewees, as they felt they were not always able to adequately address points during the hearing;
- xi) **Multiple interviewees conducted their hearings via telephone as this was the platform chosen by the Court, but the majority said that they would have preferred to conduct the hearing via video link.** Telephone hearings also created greater feelings of disconnection from the other participants, not least because whilst conducting them, as one interviewee noted, participants are left 'just staring into the abyss'; and
- xii) **A number of the interviewees' hearings had a press or public presence.** While some saw the process of gaining access to remotely observe hearings as 'quite easy to arrange,' others noted instances immediately before a hearing where there was a struggle for press to be given the login details to observe the hearing remotely. One interviewee observed that it was not clear whether the court was exercising its power under CPR Practice Direction 51Y to make the hearing private and that this should be made clear to all parties.

Online proceedings in the First-tier Tribunal (Immigration and Asylum Chamber) (FtTIAC)

10. Between 20 April and 24 June 2020, PLP conducted research into the recent shift towards adopting digital ways of working in the First-tier Tribunal (Immigration and Asylum Chamber) (FtTIAC).
11. Our methodology draws on both quantitative and qualitative data produced through interviews, observations and Freedom of Information Act (FOIA) requests. Our evidence was drawn from the following sources:
 - i) We conducted semi-structured interviews with 43 lawyers, appellants, representative bodies and appellant support organisations. These interviews focused on interviewees' experiences of the online procedure during the pandemic and, where relevant, their experiences of the online procedure pilot.

- ii) We also conducted observations of 13 immigration bail hearings, in order to observe how remote hearings were proceeding in the Tribunal during the pandemic.
- iii) Quantitative data was sourced through a combination of publicly accessible data published by Her Majesty's Courts and Tribunals Service (HMCTS) and two successful FOIA requests.

12. The key findings from our research can be summarised as follows:

- i) **Interviewees were largely supportive of conducting case management hearings remotely.** There was an almost unanimous agreement from interviewees that conducting case management review hearings via telephone was sensible if the appellant was represented. The elimination of travel time for short administrative hearings was described as a real benefit. Many interviewees also expressed a desire to see remote case management review hearings continued beyond the pandemic, as they were viewed as primarily administrative hearings that could be efficiently conducted remotely.
- ii) **Many interviewees expressed significant concern about conducting substantive hearings remotely.** The majority of interviewees, told us that conducting substantive hearings, particularly asylum appeals, via a remote link was unsuitable. Their concerns related to a number of challenges, including:
 - i. **Unsuitability of cases:** Many interviewees were concerned about remotely conducting appeals that involve an assessment of credibility or the discussion of sensitive issues through live evidence, such as asylum appeals.
 - ii. **Unsuitability of appellants:** Interviewees expressed concern about appellants' lack of access to technology and private space, raising issues of appellant participation and witness contamination. Interviewees noted the high prevalence of the use of interpreters in this Tribunal and were concerned about the efficacy of simultaneous whispered interpretation via remote link.
 - iii. **Responsibilities of practitioners:** Interviewees expressed discomfort that the onus of providing access to a remote hearing for appellants was put onto representatives, particularly solicitors.
 - iv. **Difficulty making submissions:** A number of representatives also suggested they would prefer an in-person hearing, as they believed it would benefit the case and their own ability to make effective submissions.
- iii) Interviewees also expressed concerns in relation to access to justice and participation in and fairness of proceedings:
 - i. Interviewees had felt pressured by judges during case management review hearings to proceed with paper or remote hearings. One interviewee experienced a judge being strongly in favour of conducting an asylum appeal remotely despite the appellant being street homeless, suggesting the appellant could use their mobile phone from the street to participate in the hearing.

- ii. Interviewees were concerned about the slow progression of their appeal if they did not agree to a hearing being conducted remotely or on the papers.
- iii. Interviewees expressed concern about a two-tier system developing, with appellants who had better access to technology and private space able to have their appeals heard more quickly than those with limited or no access to these resources.
- iv. Interviewees were uncomfortable with the idea of being located separately from the client and were anxious about their client's abilities' to engage with and trust the process of the hearing whilst located alone.

13. There is a clear need for further research on the effects of online hearings:

- i) Even on an international scale, very limited research has been conducted to date regarding the outcomes of virtual proceedings compared to the outcomes of their in-person counterparts. Research on the outcomes of virtual proceedings is essential in order to be able to fully evaluate the impact of remote links beyond the procedural benefits and challenges we have highlighted in our research.
- ii) There is a significant body of literature which suggests that virtual proceedings may lead to poorer engagement from participants.
- iii) Further research is needed to evaluate how both outcomes and engagement levels in virtual proceedings interact with protected characteristics. This research requires systematic data collection by HMCTS on virtual proceeding outcomes and the protected characteristics of hearing participants.

14. We recommend a cautious approach to the future use of virtual proceedings. This should be underpinned by a commitment from HMCTS to systematically collect data to facilitate robust evaluation of virtual proceedings, particularly in relation to how outcomes and engagement levels in virtual proceedings interact with protected characteristics. To date this evaluation has been notably lacking, although we are encouraged by the recent publication by HMCTS of a Vulnerability Action Plan and in particular the collection of protected characteristics data on service users.

15. We also recommend that individual jurisdictions produce jurisdictional specific guidance notes about good practice in conducting virtual proceedings and reflect on the needs of different groups. The judiciary, user groups, and interested stakeholders could make valuable contributions to this. In the FtTIAC, this note should particularly focus on the possible technical, financial, and linguistic constraints experienced by appellants, both represented and unrepresented, with regards to their ability to engage with digital processes.

16. Our research indicated that the following types of cases were proceeding during lockdown:

- i) In the FtTIAC, immigration bail hearings have been prioritised since March 2020. These have been proceeding almost exclusively via telephone with the appellant generally not present for the hearing. However, the set-up has varied across hearing centres and from June 2020 some bail hearings began to be heard via the Cloud Video Platform.

- ii) In accordance with Presidential Guidance Note No 1 of 23 March 2020, from March 2020 to June 2020, substantive hearing lists were vacated. Instead, appeals began to proceed through the online procedure HMCTS had been piloting in 2019 and were listed for remote case management review hearings, largely via telephone.
- iii) Many interviewees expressed concern about the lack of consultation regarding the rapid expansion of the online procedure pilot as a response to the pandemic. A number of interviewees felt that familiarising themselves with the new procedure took a significant amount of work and were unclear how it assisted case progression during the pandemic. They also had concerns with the nature of the online procedure, not least the legal aid funding framework associated with it and the perceived gaps in sufficiently resourcing the Home Office review team. Interviewees felt that both of these issues generated further delays and undermined the ability of the online procedure to engage parties at an earlier stage.
- iv) A number of interviewees expressed frustration at the time it took for the Tribunal to be able to offer video conferencing in hearings, due to the Home Office not having the capability to use this technology for a significant period. After engaging with what some interviewees perceived to be the onerous nature of the online procedure and meeting the tight deadlines associated with it, some interviewees were frustrated that their appeal was simply adjourned until hearings using video conferencing were possible.