



The new 'normal'? - Remote hearings and technology

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The Transparency Project published a number of articles¹ recently questioning the fairness of conducting Court business remotely. The main criticisms levelled were the loss of transparency and the inability of lay parties to effectively participate in these hearings because of their lack of access to technology tools. Both these criticisms are valid concerns which need to be properly addressed in the weeks and months ahead.

What should be clear to all of us by now is that the Covid-19 crisis is likely to be with us beyond the 12 weeks initially suggested. This underlines the urgent need for us as practitioners to get to grips with the varying platforms on which hearings can be enabled and to formulate a framework which enables lay parties to fully participate in proceedings during our temporary new 'normal'.

Anecdotally, some have been concerned on behalf of lay parties about their ability to follow proceedings conducted via remote platforms. It is however a truism that many lay parties under conventional circumstances are not able to follow proceedings for a myriad of reasons. Most typically this is because the stress of being in Court, where others are making decisions that will forever affect their family life, is so overwhelming that processing what is happening around them is virtually impossible. A greater use of our soft skills to spend additional time explaining what will happen before and after hearings are the essential bridge to understanding for our lay clients.

The President of the Family Division provided a short guidance note following the onset of lockdown. That guidance has been expanded upon in version 3 of Mr Justice MacDonald's 49 page document 'The Remote Access Family Court' which provides a comprehensive discourse on the framework in which these remote hearings shall proceed, the Pros and Cons of the platforms in use currently, the responsibility of the Court for facilitating the lay parties' participation, and funding. The full document can be downloaded by clicking [here](#).

The highlights are as follows:-

1. Permission from the Court is required for the hearing to be dealt with remotely unless the Court directs it of its own motion;
2. A preliminary hearing to identify what platform for communication is to be used for the substantive hearing is required;

¹ <https://twitter.com/jamesturner37/status/1247793350666645506?s=11> and <http://www.transparencyproject.org.uk/remote-justice-a-family-perspective/>

3. It is usually the responsibility of the applicant to liaise with the Court to arrange remote hearings;
4. Where video hearings are not possible, the hearing will take place by telephone as a default position;
5. The lead party must provide the other parties with the dial in details or arrangements for the hearing no later than 24 hours before the remote hearing takes place;
6. Early and careful consideration must be given to how to involve an intermediary or interpreter in the remote hearing;
7. It is an offence under ss. 53 of the Coronavirus Act 2020 to (a) record a broadcast from the court that has been directed for the purpose of enabling members of the public to see and hear the proceedings and (b) to record or transmit material gained through participation through a live link.
8. Signed FAS Forms are no longer required provided that the Order reflects the times that the parties participated in pre-hearing discussions and the hearing. There is provision for an additional hour to be added to the end of the hearing time to enable the parties to agree the Order.

We recommend advocates also read what is said in MacDonald J's guidance about maintaining professional decorum during video hearings.

When a hearing may be in person

The President's Guidance dated 19 March 2020 states that **"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."** This was subsequently updated on 24 March 2020 to state that court-based hearings will only take place in *exceptional* circumstances where a remote hearing is not possible and the hearing is sufficiently urgent. If the hearing is court-based, those attending court must comply with social distancing requirements. This mirrors, paragraph 6 of the Lord Chief Justice's direction of 23 March 2020 which provides:

"Civil and Family Courts

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."

The Protocol for Conducting Safe Live Court Based Family Hearings during the COVID-19 Pandemic 23 March 2020 sets out the necessary measures to be put in place in the court building and during hearings to maintain Public Health guidelines.

There is an acceptance within the judiciary that due to the length of some hearings, including the number of participants, there will be a need for hearings to be adjourned generally and when court's resume 'business as usual' there will be an identified list of cases that will require urgent hearing. Leadership judges are required to keep track of such cases.

Platforms

There are currently three main audio video platforms in use. Skype for Business (now re-branded as Microsoft Teams), Zoom and Lifesize². HMCTS Guidance to the Judiciary (2 April 2020) sets out **'Skype remains the default video app at the moment because (i) it is loaded on most judicial laptops, (ii) there is detailed and user-friendly guidance about it, (iii) staff are trained to support its use and (iv) it is tried and tested'**. Therefore, it is likely that Skype for Business will become the key platform for court users to participate in court proceedings by video, at least until the reform project to modernise the court system sees a new cloud video platform introduced throughout HMCTS.

² <https://www.skype.com/en/business/>
<https://products.office.com/en-gb/microsoft-teams/group-chat-software>
<https://zoom.us/>
<https://www.lifesizesolutions.co.uk/lifesize-solutions/cloud-solutions/>

All of these platforms allow participants the ability to participate in meetings either in audio only mode or in video-audio mode. The basic versions of each platform are free to download and to use with limited functionality but all allow multiple participants. The good news is that we do not all require paid-for subscriptions to use the platforms.

For pre-hearing discussions and Advocates Meetings, which are unlikely to exceed 40 minutes, Zoom’s free basic service has proven a useful resource. Although the service times out after 40 minutes, that does not preclude participants logging back into the same meeting using the same link to the original chat to resume discussions as many times as necessary.

Paid-for subscriptions only become relevant if an advocate plans acting as host on one of these platforms to facilitate a substantive hearing. In that event all other participants including the Judge will be invited as guests to join the platform. The only requirement under those circumstances is that the guest participants have pre-loaded the relevant App well before the hearing commences. Both Zoom and Skype for business work in browser only.

A quick guide to the **Pros and Cons of each platform** is set out in the table below:-

Platforms and their features	Skype for Business	Microsoft Teams	Zoom	Lifesize
Free?	Yes (but need to pay IF hosting calls)	No	Yes (only necessary to pay for upgrade if wishing to host calls longer than 40 minutes in duration.)	Yes (for 6 months)
Upgrade Cost?	Starting costs £9.40 pcm to buy Microsoft Office 365 which includes Microsoft Teams * current offer available for 1 month free	Starting costs £9.40 pcm to buy Microsoft Office 365 which includes Microsoft Teams	£119 annually or £11.99 pcm	Monthly charge dependent on package chosen starting at £9.99 pcm
How to use?	Download App	Download App	Download App	Download App
More than 4 participants?	Yes- up to 250 participants	Yes	Yes - up to 100 participants even on Free package. Up to 1000 participants on subscription package.	Yes - up to 40 participants.
Limited call time?	None	None	On basic package - yes, calls limited to 40 minutes but with option to dial back in as many times as necessary. Unlimited duration of call on subscription package.	None
Audio function?	Yes	Yes	Yes	No

Video function?	Yes	Yes	Yes	Yes
End-to-End Encryption? (this means that the communication channel is secure and only users can read or access messages or content)	Yes, has the capability.	Microsoft teams say it has encryption in 'transit and at rest' but details about end to end encryption.	No and it has had negative reports about security vulnerability which Zoom says that they have recently addressed by requiring participants to enter a password before they can join the meeting.	Yes, has the capability.

Parents with additional needs or lack of access to technology

The glaring question which remains in the minds of most practitioners is how parents who require the assistance of a translator, an intermediary or simply lack access to technology can meaningfully participate. There is no simple answer. We however invite consideration of whether One Word, the Court's translator providers should be directed to provide the contact number for translators to the Court so that they can listen into hearings on mute whilst translating to the lay client on another line.

Whilst Communicourt is not providing assessments currently, other intermediary services and independent intermediaries who are able to assess remotely are open for business. It is open for consideration by practitioners whether on a case by case basis these resources should be made greater use of.

There is the remaining worry about how parents access technology tools to participate in hearings. Can schools and local authorities assist? Limited exploration seems to have been undertaken as to the ability/ willingness of schools which remain open for key worker's children and vulnerable children to allow the use of their IT facilities and space. Similarly, we do not know whether local authorities could allow the use of their technology and space.

As we settle into our temporary new normal, let us hope that constructive thought can be given to grappling with these challenges.