

PROFESSIONAL REGULATORY BRIEFING NOTE

PREPARING FOR REMOTE HEARINGS: PLANNING AHEAD TO AVOID PITFALLS

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The outbreak of Covid-19 and the effective shut down of the UK has put a sharp focus on video hearings in legal proceedings, and has greatly accelerated their use. The Lord Chief Justice has said that *“it is of vital importance that the administration of justice does not grind to a halt”*. Speaking to The Times on 9 April, he went on to say *“in just a few weeks great strides have been made in the use of technology, which traditionally would have taken much longer”*, and that *“we will be able to learn much more quickly than would otherwise have been the case about what is good about [technology and virtual hearings] – where it works extremely well, and importantly, where it works less well”*. The Coronavirus Act 2020 expanded the use of remote hearings in the criminal courts. It is anticipated that remote hearings will be used more and more over the next few months - and beyond.

Although rapid steps have been taken in the past weeks through force of circumstances, it is less well known that remote hearings were in fact piloted in 2018 for the First-tier Tribunal (Tax Chamber) as a part of a larger effort to transform and modernise the justice system. Whilst UK courts and tribunals were already familiar with the use of video links in various types of hearings (for example bail applications from a police station) this was the first pilot of an *entirely* virtual hearing, where all parties appeared remotely. In that pilot scheme, only a limited number of hearings were deemed suitable following a pre-hearing questionnaire, and the cases heard tended to be simpler ones. Further, the cases were considered by a single judge rather than a panel of tribunal members. It nonetheless represented a significant milestone in the relationship between technology and justice. The pilot was generally received positively, although there were some concerns about the effectiveness of the technology, and the amount of time such hearings took when compared to hearings *“in person”*.

The following is a non-exhaustive list of matters you might like to consider when a hearing you are involved with will hear from a remote witness over a video link. It is hoped the matters listed below will assist in effective preparation for what can be logistically complex hearings. If the parties and the Tribunal will be remote from each other as well, many of the topics below are of equal application.

1. Is a video link appropriate?

You may want to consider whether it is appropriate to hear from the witness in question remotely at all. Is the witness vulnerable? Does the witness have any form of impairment

or disability which will make a link difficult? Is the witness otherwise able to use and marshal the technology? Might the witness struggle to read or locate documents in a large bundle? Is the witness's evidence controversial? Can they be effectively cross-examined via the link? Do all parties consent to the witness appearing remotely? Can the link be agreed between the parties, or will the matter need to be formally argued?

2. Making the application

Are you required, under the rules of practice for the hearing in question, to make a formal application for evidence to be heard remotely? If so, the application should be made in as timely a manner as possible, so nobody is ambushed by it. Does the tribunal in question have guidance on when live links should be granted? Is there any relevant case law you should be aware of? Does the application need to be supported by a skeleton argument? Should the argument happen at a preliminary hearing, or during the course of the hearing itself?

3. Building up to the hearing

Plan ahead. What time-zone is the witness in? Does the witness require travel assistance to get to the place they will appear from remotely? Is the place from which they will give evidence appropriate? Will the background be neutral? Will the place be quiet, and quiet for the whole time they will be needed? Is the witness anxious or reluctant? If so, what can be done to reassure them or compel them? Do arrangements need to be made for somebody to travel to be with them when they give their evidence? Might this need to be somebody independent, akin to an usher? Might a person assisting the witness also need to be connected via a link? How much time will you need to ask the witness to be available for?

4. Technology

What type of link will be used - Skype, Zoom etc? Is a "secure" connection really needed? Does the witness have adequate technology, both hardware and software? Has the link software been downloaded and activated in good time? Is the hardware properly adjusted, both audio and visual? Can the witness use it unaided? Would a tutorial in advance assist? Will the witness have access to a power source? What back up might be used if the link fails – are the parties content to resort to a telephone link? Be inventive - some hearings have used both a telephone link and a video link in conjunction where there have been problems with the audio quality of the video link. Will the witness need two screens when they give evidence, for example if they are required to look at an electronic bundle or a video during the hearing?

5. Paperwork

What documents will the witness need before they give their evidence? A copy of their signed statement, and their exhibits? How can you get such material to them, both before and during the hearing – does the witness have access to email, Dropbox etc? Ensure that nothing is given to a witness in advance of a hearing that is not agreed by the other side, especially if you are prosecuting. Sometimes papers can be sent to a witness with strict instructions not to open them until the hearing, which they can then do

on camera. A joint position between the parties as to what the witness can and cannot look at before a hearing is often helpful.

6. Listing considerations

It is generally a good idea, where remote witnesses will be giving evidence, to allow more time than you would for witnesses in person. Everything takes that little bit longer (as our experience shows, and as the 2018 pilot study confirmed). Technology does fail. Sometimes it is necessary to pause for lengthy periods of time while advocates take instructions from their clients. Ensure, so far as possible, that the witness is not detained for longer than they have been told they would – it is better to explain the situation to witnesses and warn them that their evidence may carry over into the following day.

7. The test call

A test call is nearly always a good idea (to take place immediately before the witness gives evidence) to establish that the link is working. Who should make this call? In Tribunals, the panel secretary can often do this. Is the witness all set up, with everything they need, and comfortable with the technology? Are they in a quiet place with a neutral background? Is there anything in shot that should be moved? Is the lighting appropriate? Is the camera set up at a proper angle? Does the sound work properly? Is there a delay? If so, can efforts be made to improve any delay? Any back up arrangements should be explained to the witness (e.g. resorting to a telephone call if the link fails). Is the recording equipment able to pick up all the parties in case a transcript is needed later?

8. Getting started

Can the witness take the oath? If the witness wishes to take a religious oath, they will need the relevant holy book physically with them. Oaths and affirmations can simply be read aloud, with the witness repeating the words read to them over the link.

9. Chair guidance

Should the Chair be invited to set some ground rules, such as turn taking conventions, so the parties don't speak over one another? Consider agreeing breaks for the advocates to take instruction. If the defendant/respondent and their counsel are in separate locations, this will need to be done over a separate link, obviously. Should something be said about the formality of the proceedings, notwithstanding their remote nature? Should something be said to the witness about breaks? The Chair will usually introduce all the parties to the witness, and explain who will be asking questions, and in what order. This can help orientate a witness.

10. Once underway

Experience shows that it is best if questioning proceeds at a much slower pace than would be the case with a witness "in person", allowing time for answers, and for witnesses to orientate themselves if shown anything for the first time. "Signposting" is sensible so all parties know what area is being covered. Turn taking conventions should be established and respected so that parties are not speaking over each other.

Although the use of video links is already reasonably well established in some proceedings, we anticipate that their use will become more common in the future. There is a general trend in the justice system, and certainly accelerated by the Covid-19 outbreak, to hear evidence or cases remotely wherever possible. The use of such links - where appropriate - can save time and money. However, live links are far from problem free. It should be remembered that successful live links require a good deal of prior thought and careful preparation.

This briefing note was produced by Selva Ramasamy QC, Lydia Barnfather, Alexandra Felix, Fraser Coxhill, Tom Orpin-Massey. This note should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website at <https://www.qebholliswhiteman.co.uk/>.