

CRIMINAL COURTS: COPING WITH COVID-19

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This article provides an overview about how the criminal courts in England and Wales are coping with the 2019 novel coronavirus disease (COVID-19) outbreak.

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CRIMINAL COURTS AND COVID-19: INTRODUCTION

The impact of the 2019 novel coronavirus disease (COVID-19) pandemic left no part of the UK untouched. The criminal justice system was no exception. On 17 March 2020, the Lord Chief Justice stated that:

“It is not realistic to suppose that it will be business as usual in any jurisdiction, but it is of vital importance that the administration of justice does not grind to a halt.”

This was followed up the next day by the Justice Secretary:

“Our Crown and Magistrates courts provide a vital public service and until instructed otherwise, we expect all lawyers, magistrates, jurors, witnesses, defendants and court staff to continue to attend court as required, so the interests of justice can be served.”

This was before the schools were closed “for the foreseeable” and the announcement of the lockdown on the 23 March, since extended to at least 11 May.

In the immediate aftermath of the lockdown, guidance on how the criminal justice system should cope with the COVID-19 pandemic and how the various protagonists within it should operate changed and evolved on a near-daily basis.

MAINTAINING CORE JUSTICE SYSTEM FOCUSED ON MOST ESSENTIAL CASES

At the end of March, HM Courts & Tribunals Service (HMCTS) announced that:

“during this unprecedented public health emergency, we’re working hard to keep our justice system functioning. We’re focusing on priority cases, changing working practices and introducing new procedures to minimise risks to the judiciary, staff and all those who use our courts and tribunals.”

- It was confirmed that across the whole of the court estate (including civil, criminal and family) there were:
 - 160 “priority” courts and tribunal buildings, open for essential face-to-face hearings.
 - 116 “staffed” courts, staff and judges work from these buildings, but they are not open to the public.
 - 75 suspended courts.

HMCTS had already set out its priorities earlier in the month: hearings relating to urgent and vitally important issues such as the deprivation of liberty, public safety, and individuals’ rights and welfare will always be prioritised.

Crown Courts: “considerable imagination and flexibility may be needed”

On “lockdown day” the Lord Chief Justice underlined in no uncertain terms that:

“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 ... 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.”

Nevertheless, it was expected that efforts should continue to ensure that jury trials already underway could be concluded. The difficulties in maintaining social distancing at all times and in all places within court buildings were appreciated, but the only solution suggested was “considerable imagination and flexibility”. Such imagination in one instance included using several different courtrooms and video linking between them to try to conclude an ongoing murder trial at the Central Criminal Court. It quickly became clear this would not work, social distancing could not be maintained and in that trial (together with almost all others ongoing), the jury was discharged before reaching verdicts.

The concession that no new trials could start in the Crown Court followed the decision on 17 March that any trial listed for more than three days would be adjourned. It remains unclear why, other than for pure case management, as opposed to public health, reasons. It was thought that short trials could be conducted safely, but longer trials could not. In any event, within a matter of days the inevitable was accepted.

Magistrates’ court: non urgent work to be adjourned

The same considerations of court users’ safety apply to magistrates’ courts. However, it is unavoidable that magistrates’ courts must continue dealing with urgent matters, such as cases where the defendant appears in custody having been charged at the police station.

During the final pre-lockdown week of 16 March and up to after close of business on 23 March, the mantra in the magistrates’ courts was “business as usual” despite the ever-growing barriers to such an approach. From 24 March onwards, however, only “priority” cases were listed (to include among other matters all custody cases, applications to extend custody time limits and warrants of further detention). In effect, any case with a defendant not in custody and almost all summary trials and sentencing hearings, have been adjourned indefinitely.

In due course, on 14 April, the Senior Presiding Judge issued guidance which redefined priority cases as “P1” cases, moving some types of work into a new “P2” category. All other work not falling into P1 or P2 is categorised as “P3”.

From the second week of May, it is anticipated that listing of P2 matters will start with remote pre-trial hearings intended to ensure that any trials listed are effective.

Case categories

As things stand at the time of writing, the categories are as follows:

P1:

All custody cases, to include:

- Overnight custody cases from police stations (including arrest warrants and breach of bail cases).
- Productions from prisons.
- Arrest warrants issued under the Extradition Act.
- Sentencing cases.
- Applications to extend custody time limits.
- In hours and out of hours terrorism applications.
- Civil applications relating to public health legislation, particularly under the Coronavirus (Emergency) Act 2020.
- Warrants of further detention (police and HMRC).
- Closure order applications.
- Urgent applications for Domestic Violence Protection Notices.
- Urgent applications for rights of entry or search warrants.

P2:

- Any public health or coronavirus related prosecutions (including breaches of restrictions or requirements imposed to protect public health, and other criminal activity designed to exploit the situation).
- Sensitive or high profile cases and cases involving children and vulnerable witnesses or victims.
- Any serious and time-sensitive Youth Cases (for example, where delay might mean a relevant age-threshold was crossed).
- Custody trials.

The move to remote working

The Coronavirus Act 2020 (sections 53 to 57 and Schedules 23 to 27, in force from 26 March 2020) allows for the expanded use of video and audio technology in criminal proceedings. The legislation is typically long and complex but for the Crown Court, almost all hearings other than jury trials or trials of issue can be conducted by video or telephone.

In reality, that use of technology has been considerably more widespread in the Crown Court than in the magistrates' court up until recently and there have been very real obstacles to remote hearings in the latter (for

example, early on in the lockdown an anecdote circulated that Westminster Magistrates' Court, the venue for many of the most significant summary cases and for all extradition cases, had a grand total of a single "spider phone" to conduct teleconferences).

The main difficulty with remote hearings in the magistrates' court is not with technological difficulties, it is with arranging such a remote hearing. Listings are centralised with little flexibility to allow change and there are no real channels of communication with individual courts. Emails to central "enquiries@" addresses are not able to be accessed or responded to in time. Even under ordinary circumstances arranging listings in the magistrates' court can be a difficult and frustrating process. The result now is that even if parties request a remote hearing, the messages are not picked up in time and cases are listed in person, regardless of the reality of social distancing measures. If a case is listed to be heard remotely, there remains great difficulty for the defence in obtaining instructions from the defendant and accessing pre-sentence or Youth Offending Team reports. The reality is that for urgent hearings, most of which are overnight custody cases, it is easier to list in person although the CPS and probation are regularly attending remotely with only the defence advocate physically present in the courtroom. With any other hearings which can be heard remotely, the advice seems to be to make the best of it.

In the Crown Court telephone hearings for straightforward administrative hearings have been in use for some time and work relatively well if all parties refrain from speaking at the same time and mute themselves when not. Despite the obligatory delays at the start of any hearing regarding who can be heard and who cannot hear, telephone hearings are now the norm and have been used with success for more complex matters including multi-handed sentences before arrangements were fully in place for video hearings. The move to video hearings has been more difficult. The platform currently widely used is old and out of date. Presently, most Apple Mac users cannot be heard and so have to communicate by notes held up to screen before dialing in on a telephone line at the same time. Audio feedback is an ever-present difficulty. There is a commitment from all those involved to make remote hearings work for all parties and this includes access to hearings for the press and family members where appropriate. A collateral benefit is a greater emphasis on efficiency during hearings, with written submissions avoiding the need for lengthy oral arguments.

On 23 April, the South Eastern Circuit and Criminal Bar Association hosted a useful Remote Working Virtual Seminar to assist members of the circuit with practical advice on issues which have commonly arisen during this transition to remote hearings. HMCTS staffing rates are 30% on a good day, remote hearings are more labour intensive to organise and they take longer to conduct. The facilities for video links are variable in the prisons and video link slots are in high demand which limits the number of custody cases which can be dealt with. However, the message was clear, on the South Eastern Circuit a great deal of work is being done to get cases moving and key to that is going to be better technology for remote hearings.

TECHNOLOGY

On 30 April 2020, HMCTS announced the Cloud Video platform (CVP) was being rolled out to 60 magistrates' courts and 48 Crown Courts with others to follow as soon as possible:

"CVP connects securely to the existing justice video network which links police stations and prisons to courts and can be accessed by any internet-enabled device with a camera and a microphone."

The first hearings in magistrates' courts have already begun and it is being trialed in Crown Courts on the North Eastern Circuit. So far, HMCTS has "run 412 remand hearings using CVP, brought on line 26 police custody suites, and connected 95 advocates, 42 Crown prosecutors, 20 Probation officers and two translators." Initial reports are positive.

HMCTS has specifically stated CVP will not be used for Crown Court trials and it will be up to judges to determine if a hearing is suitable for CVP on a case-by-case basis.

The logistical challenges are undoubtedly greater in the magistrates' court, with a much greater volume of cases and typically less use of technology to date. However, from late April, HMCTS has embarked on an "aggressive"

timetable for rolling out video links from police stations to nine courts across London (before which only two courts had such a facility, with mixed reports of success), to which defence practitioners will also have access. What is certain is that courts are capable of handling only a fraction of pre-lockdown volume, and the stresses and strains on those physically in the court buildings have increased.

THE FUTURE

The reality is when full lockdown ends it will not be back to business as usual. It will be a slow and phased return to work in the criminal courts but with social distancing in place, much more so in the Crown Court with jury trials the most difficult part to manage. Technology is only part of this. There are any number of blue sky ideas being floated including how the aging, shrinking Crown Court estate can be best managed or how jury trials can be adapted. Our courts were not built for video hearings and social distancing. On 30 April the Lord Chief Justice was quoted on the BBC as being supportive of reducing the numbers of jurors and regarding where our trials are held, the use of large venues is being considered.

As for virtual trials, it might be possible for summary trials before a district judge, building on experience in the civil and family courts, to be conducted by video link. Whether an entirely virtual jury trial could achieve its main purpose, a fair trial, is open to question. The human rights group Justice has run a series of virtual mock jury trials and the Justice Secretary has told the Joint Committee on Human Rights the work merited "careful scrutiny". However, several commentators have expressed concern that remote trials face very serious practical difficulties (particularly in paper-heavy cases) which may not be caused simply by technological limitations (poor connections and the like). Remote hearings are more tiring and it is more difficult to maintain and monitor concentration on a screen rather than a person in the same room. More worryingly, although witnesses in some circumstances do already give pre-recorded evidence or appear by video link, it is unclear whether a remote trial would affect how witnesses and perhaps more importantly defendants are perceived by the judge and jury. Therefore, many prosecutors would prefer to have their main witnesses in person. How these factors will impact the fairness of proceedings is unknown and care should be taken before embracing any such fundamental change.

Assuming, therefore, that fully remote trials remain some way away, imaginative solutions to the current suspension of trials need to be found. Whether using old department stores which have fallen to the Coronavirus crisis as temporary courtrooms, moving to trials with fewer jurors (as was done during the war), or even offering defendants the option of a judge-only trial, we are a long way from knowing how the future will look. Seemingly, the expansion of remote hearings (at least for pre-trial matters) is here to stay, and there will be no return to the traditional, semi-nomadic day-to-day working life of criminal advocates. Undoubtedly there are advantages: an end to the myriad inefficiencies such as regular wasted treks to court only to find a defendant has not been produced or there is some other reason for an ineffective hearing. But there is also sadness, not just sentimental, that the benefits of courthouse life, the sharing of ideas in the robing room, the opportunity to observe one's peers in action, the vital element of real human contact between lawyer and client, may be lost for good.