The Courts, Tribunals and the Covid-19 Public Health Crisis

Interim recommendations on safeguarding vulnerable people in the context of remote international protection and human trafficking/modern slavery legal casework

May 2020, v.1

The Helen Bamber Foundation and Freedom From Torture

The Helen Bamber Foundation is an expert clinical and human rights charity. Each year our multi-disciplinary and clinical team works with 600 survivors of human trafficking/modern slavery, torture, and other forms of extreme human cruelty. We provide a bespoke Model of Integrated Care for survivors which includes medico-legal documentation of physical and psychological injuries, specialist programmes of therapeutic care, a medical advisory service, a counter-trafficking programme, housing and welfare advice, legal protection advice and community integration activities and services. Our training, research and medico-legal evidence is recognised globally and by the UK Government and courts.

Freedom from Torture is the only human rights organisation dedicated to the treatment and rehabilitation of torture survivors who seek refuge in the UK. We do this through direct and second-tier services from our specialist centres in Birmingham, Glasgow, London, Manchester and Newcastle. Each year we support more than 1,000 torture survivors in the UK, the vast majority of whom are asylum seekers or refugees. We provide support through psychological therapies, forensic documentation of torture, legal and welfare advice, and creative projects, like Write to Life. We are the only human rights organisation in the UK that uses the in-house evidence of clinicians to hold torturing states accountable internationally. We support torture survivors to speak out about their situation to those in power; and to help break down negative attitudes to refugees. Together with survivors, we use our experience to train other service providers to understand and meet the needs of torture survivors in the UK.

During the Covid-19 public health crisis, the Helen Bamber Foundation and Freedom from Torture are continuing to deliver their multi-disciplinary and clinical services for survivors of trafficking and torture but are now doing so remotely.

Introduction and Summary

This document contains recommendations primarily for members of the Judiciary, with some features that are relevant to the Legal Aid Agency and HMCTS staff. These recommendations have been produced urgently in light of the COVID-19 public health crisis and may be updated in the future. This document is not intended to be comprehensive in that it does not cover issues affecting particular groups, such as unaccompanied minors or those in detention, in any significant detail.

It is important that standards of procedural fairness are maintained for the most vulnerable people during the COVID-19 public health crisis. Practices and procedures may need to be adapted in light of the current crisis, but the right to a fair hearing, which is protected in domestic and international law, together with the procedural protections that enable effective engagement with decision-making regarding other fundamental rights[1] should not be compromised.

It is imperative that claims for international protection from those fleeing persecution are subject to the highest standards of fairness.

The spirit of existing guidance, which helps promote access to justice for vulnerable people, should be followed, but may require adaptation. This includes statutory guidance[2], Home Office internal guidance[3] and Tribunal guidance for statutory appeals.[4] The European Council has also produced (pre-COVID-19) guidance on video-conferencing.[5] All parties working in this field should be aware of the requirements of the Equality Act 2010 in respect of people with a protected characteristic and in particular those who may require reasonable adjustments due to disability. Judges, may find the toolkits and training materials published by the 'Advocates Gateway' helpful.[6] The Helen Bamber Foundation has published the 'Trauma-Informed Code of Conduct for All Professionals Working with Survivors of Human Trafficking & Slavery' and is a contributor for the 'Slavery and Human Trafficking Survivor Care Standards'.[7]

During the COVID-19 public health crisis, it is our frontline and clinical experience that many survivors of torture, human trafficking/modern slavery and other extreme human rights abuse ('survivors') are experiencing a deterioration in their mental and physical health due to issues including isolation, uncertainty, disruptions in treatment, delays, concerns about their and their family members' health, fear for the future, lack of childcare, difficulties with accommodation and destitution issues. Survivors may also find the experience of 'lock-down' triggers traumatic memories of captivity or self-confinement, which were a characteristic of past persecution, leading to an increase in trauma symptoms and a decrease in coping mechanisms.

Asylum seekers are a particularly vulnerable group, due to combined issues including histories of past persecution, displacement, destitution and language barriers. Individual features of vulnerability, such as poor health or the impact of trauma, may not be readily apparent and will be even more difficult to identify during the current crisis where survivors are contacted predominantly remotely. Individuals may not self-identify vulnerabilities. In this context there are particular risks to

[1] See for example Gudanaviciene and Ors v the Director of Legal Aid Casework and Anor [2014] EWCA Civ 1622 [2015] 1 WLR 2247; 15 December 2014.
[2] Including 'Every Child Matters: Change for Children, 2009' from the Home Office and DfE and in England and Wales 'Modern Slavery Act 2015: statutory guidance for England and Wales, 2020' from the Home Office.
[3] Including the Asylum Policy Instructions on 'Assessing Credibility and Refugee Status' 6 January 2015 (when assessing cases) and 'Asylum seekers with care needs' 3 August 2018 (when identifying safeguarding factors).
[4] Such as 'Joint Presidential Guidance Note No.2 of 2010 – Child, vulnerable witness and sensitive appellant guidance' as endorsed by the Court of Appeal in *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123; [2018] 2 All E.R. 350; 27 July 2017.
[5] 'Guide on videoconferencing in cross-border proceedings', 2013: https://e-justice.europa.eu/content_manual-71-en.do
[6] Relevant to working with vulnerable clients and witnesses: https://www.theadvocatesgateway.org/.
[7] http://www.helenbamber.org/publications/; the Survivor Care Standards are written by consensus of specialist human trafficking organisations throughout the UK and published by the Human Trafficking Foundation. These standards are endorsed by the UK Independent Anti-Slavery Commissioner, and the UK government has announced that they will be incorporated into the National Referral Mechanism victim care contract; they contain advice to enable practitioners to minimise re-traumatisation and distress, establish a working relationship of trust and assist survivors with disclosure. They are linked to within the Modern Slavery Act 2015 statutory guidance for England and Wales (as above).

welfare and to access to justice where international protection and modern slavery/human trafficking casework is undertaken by remote means rather than face-to-face.

Remote international protection or NRM casework/hearings during the COVID-19 public health crisis includes contact by a range of methods including email, instant messaging, online FAQs, telephone and video-conferencing. These recommendations are intended to inform good practice in the use of these approaches. It should be recognised that remote means of communication can be more tiring than in-person meetings[8] and so it is not realistic to expect people to complete the same volume and length of hearings as has traditionally been the case. This tiredness will impact on all professionals involved in proceedings, including interpreters. In addition (as discussed below), it should be recognised that remote hearings and interviews by definition reduce the opportunities to identify when a person is struggling to participate effectively, because visual cues and full-body language cues are reduced.[9]

Pre-Decision National Referral Mechanism ('NRM') Cases and International Protection Claims

1. **We recommend that when a case comes before a court or tribunal, care is taken to assess whether pre-decision casework in the lead up to a negative decision was procedurally fair. If a decision was taken in a procedurally unfair way then this may reduce the weight to be attached to relevant issues taken against the claimant.**

During the current crisis, survivors may find it particularly difficult to access legal advice and representation, which they cannot do in-person due to public health advice. Many law firms are not offering in-person appointments or are only operating an in-person skeleton service (some firms and legal charities have staff working remotely and others have staff furloughed and minimal work being conducted on files by principals) and a significant proportion of asylum seekers/trafficking survivors will not have access to the internet or reliable access to phone credit to contact prospective legal representatives. Furthermore, a significant proportion of survivors do not have sufficient skill in written English to be able to contact legal representatives by email or indeed to read messages on legal representatives' websites. Survivors may also be unable to access interpreters[10] and will face

[8] The clinical evidence on this is still developing, but see e.g. 'Message for Circuit and District Judges sitting in Civil and Family from the Lord Chief Justice, Master of the Rolls and President of the Family Division', 9 April 2020 " *It is important that the listing of cases, which is a matter for judges, takes account of the reality that long hours in front of a screen or on the phone concentrating hard are more tiring than sitting in a court room with all the participants present. That is an experience reported by teachers who gave remote lessons at the end of the term."* https://www.judiciary.uk/wp-content/uploads/2020/04/Message-to-CJJ-and-DJJ-9-April-2020.pdf; and *The Telegraph* 'British workers suffering from 'online meeting fatigue', psychologists warn', 22 April 2020: https://www.telegraph.co.uk/technology/2020/04/22/british-workers-suffering-online-meeting-fatigue-psychologists/.

[9] The Equality and Human Rights Commission has published clear findings that in criminal justice proceedings remote interviews and hearings can substantially undermine the ability of disabled individuals to instruct advocates, for advocates to identify impairments and for participation in proceedings, 'Inclusive Justice: a system designed for all: interim evidence report, Video hearings and their impact on effective participation' April 2020: https://www.equalityhumanrights.com/sites/default/files/inclusive_justice_a_system_designed_for_all_interim_report_0.pdf.

[10] Our position is that interpreters in international protection and NRM cases should be professional interpreters rather than friends or family members, as is the Home Office's policy, as per https://www.gov.uk/government/publications/guidance-for-interpreters/guidance-for-interpreters. Access to an interpreter is required by the EU Procedures Directive (2013/32/EU) and is covered within the 'Modern Slavery Act 2015 Statutory Guidance for England and Wales', 2020. For immigration legal practitioners EIN hosts a detailed entry on 'Interpretation at the hearing' within Chapter 34 of its online best practice guide.

substantial barriers in obtaining documentary evidence (from the UK or abroad) or in providing this to their lawyers or to the Home Office. During 'lockdown' lack of privacy, confidentiality, and (for some) lack of childcare preventing distressing material from being safely and fully disclosed, will also act as barriers to survivors accessing advice or discussing their case with relevant services.

Certain expert evidence, such as Medico-Legal Reports and Independent Social Worker reports, may be inaccessible for practical and/or clinical reasons. Even where expert evidence is potentially available, remote assessment may be inappropriate for some due to safeguarding concerns, such as increased risk of suicidality following an assessment at a time when there is limited access to mental health support. Expert evidence may be vital to the consideration and understanding of a vulnerable person's case.

Many people will face substantial practical barriers in engaging with remote meetings, whether these meetings are with legal representatives, statutory interviewers, or support services. This may be due to lack of a confidential and private space, access to a smart phone, laptop or tablet, lack of phone credit, lack of access to Wi-Fi/mobile data or to an internet connection of sufficient quality to permit the person to engage effectively. There is currently no published guidance about provision for 'live link' (as used within the Criminal Justice System) for survivors' cases or about how recordings of such remote interviews would be provided. These issues interact with other circumstantial difficulties people may be facing such as food insecurity and limited therapeutic support (as above), triggering of intrusive thoughts, as well as increased rates of domestic abuse and interpersonal difficulties at home.

In order to access the technology and internet connection needed for remote casework and/or appointments, including a fixed 'live-link for an asylum interview, survivors may feel forced to breach social distancing requirements, thereby putting their own and others' health at risk. Anxiety about this could impact on their fitness for interview on a given day. Many survivors (more so than within the general population) have other underlying health conditions increasing their risk if they are exposed to COVID-19.[11]

Many people with pending cases in the asylum and/or NRM systems would need access to an interpreter and may struggle to understand a remote interpreter, particularly with the lack of visual cues and where training in working remotely has not been provided to the interpreters; this risk is particularly keen where language barriers are combined with other factors such as disability. In our collective experience working in this sector for many years, it is common for survivors to experience difficulties when speaking through interpreters which has the potential to have a profound impact

[11] There is growing evidence that Post Traumatic Stress Disorder can suppress the immune system and render people more vulnerable to illness, e.g. 'Suppression of cellular immunity in men with a past history of posttraumatic stress disorder', Kawamura, Kim and Asukai, *Am J Psychiatry*, 2001 Mar; 158(3):484-6. Connected to this issue, conditions such as depression, which can be closely linked to trauma symptoms, can impact on self-care. Asylum seekers and refugees are more likely to experience poor mental health linked with pre-migration experiences and post-migration conditions. Research in Leeds showed that asylum seekers were less likely to receive mental health treatment than the general population, despite the report recording that they were five times more likely to have mental health needs than the general population and more than 61% would experience serious mental distress, 'Mental Health and Wellbeing in Leeds: An assessment of need in the adult population', 2011, NHS Leeds; the Mental Health Foundation also publishes relevant statistics on refugees and asylum seekers. Other underlying vulnerabilities, such as cardiovascular disease, diabetes and respiratory disease are prevalent in the migrant population and may be poorly controlled due to lifestyle factors including poor nutrition and difficulty accessing healthcare (either historically or at present). Infectious diseases such as tuberculosis, HIV and hepatitis are also more prevalent within migrant communities. Such conditions may all increase the risk associated with COVID-19.

on their legal case. Where individuals have been persecuted or trafficked by their co-nationals/first language speakers, then fear of that group can make it very difficult for an individual to disclose sensitive information without being able to see the person interpreting their words. When using a remote interpreter, it is likely to be more difficult for parties to identify a problem.[12]

In addition, trauma symptoms and other mental health difficulties which are commonly experienced by survivors (such as post-traumatic stress disorder, anxiety, and depression) are likely to make it more difficult for them to recall details of their history. Shame and guilt frequently add to the issue of disclosure. Trauma can impact on the recall of both traumatic and other memories. The process of retrieving and recalling traumatic memories can also cause survivors to relive traumatic experiences and trigger a deterioration in their mental health symptoms, including suicidality (retraumatisation). One symptom of trauma can be avoidance of recalling traumatic memories, because doing so is so unpleasant and difficult. In this context it can be particularly challenging for survivors to build a rapport and a trusting relationship with a legal representative. Clinical evidence suggests that survivors are often unable to develop the trust and confidence to open up about traumatic memories and fears for their future in the context of a single interview with a stranger or official and this is likely to be amplified if they cannot even see the person or their body language.[13] The lack of visual cues, tendency to use more focussed and closed questions, difficulty interpreting silences and increased caution from both interviewer and interviewee about creating unmanageable distress will likely reduce the utility of remote interviews and the fullness of accounts given this way. In addition, it will be more difficult for others to identify cues of mental distress, such as dissociation (where people experience a disconnection with their surroundings), when interviewing or speaking with a person remotely. These barriers to accessibility may be even more pronounced in the context of statutory interviews or hearings, when people are often intimidated. Fear of the authorities can be a very prominent feature among survivors, particularly if they have been mistreated by state officials in the past, or if traffickers/abusers have used this fear to control survivors.[14]

In addition, people with a child or children will face significant practical and emotional challenges in giving their evidence whilst at the same time having to monitor and care for their children who will in many cases be in the same room. This challenge is particularly acute bearing in mind a survivor's fundamental right to privacy, to avoid sharing sensitive information which their child, which also may be distressing for the child. Safeguarding children in these situations is of fundamental importance, because a child may be highly traumatised if they witness a parent's distress or hear their parent's past experiences. For example, hearing how a parent was arrested from home could cause a child significant fear and anxiety and they may believe this could happen again at any moment. Even a child who is not yet talking should not be considered safe from this kind of distress.

Remote access therefore carries significant challenges for legal representatives in taking instructions and gathering evidence safely and reliably and for interviewers (be they legal representatives or Home Office decision makers) engaging and establishing rapport with and thereby obtaining a

[12] This is already recognised as posing a challenge, as per *Kaygun v Secretary of State for the Home Department* (17213), 29 May 1998, e.g.: "*It is not easy for an adjudicator who has no command of the language to pick up problems of this sort*".
[13] 'The texture of narrative dilemmas: qualitative study in front-line professionals working with asylum seekers in the UK', Abbas et al, *BJPsych Bulletin* (2020) Page 1 of 7, the abstract summarises: "*Professionals identified a number of processes that made disclosure of personal information difficult for asylum seekers. These included asylum seekers' lack of trust towards the professionals conducting the interview, unclear ideas around pertinence of information for interviewers, feelings of fear, shame and guilt related to suspicions around collusions between UK and their country-of-origin's authorities, sexual trauma and, occasionally, their own involvement or collusion in crimes against others*."
[14] Fear of the authorities is an indicator of human trafficking recognised in the NRM referral and assessment process: https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms.

coherent, consistent, and cogent narrative from survivors. In the context of remote assessments for medico-legal reports our charities have taken extensive steps to recognise these challenges and develop safeguarding strategies. At the same time, due to COVID-19, access to support services (including GP appointments, mental health support, and specialist trauma-focused therapy) is substantially reduced. This makes it considerably more difficult to ensure that any distress caused by the remote interview session is addressed and that associated risks are mitigated. During pre-pandemic casework there are occasions when the Home Office writes to a person's GP or legal representative expressing safeguarding concerns and even occasions when an ambulance is called in relation to ill-health (such as a panic attack or stated intention to self harm) and there could be considerable additional barriers to responsive safeguarding actions in the current environment.

At the Point of Decision/Post-Decision

Many of the issues raised above in relation to access to justice and safeguarding continue to apply after a decision is made. As stated at the outset, it is vital that the highest standards of fairness are applied to international protection claims.

Many front-line charities which offer free advice drop-ins and link survivors with legal aid funded legal representatives are either not operating or are only offering a restricted service at this time. Survivors complying with social distancing and isolation recommendations are also often unable to travel to find legal representatives and may not have access to the internet to lodge an appeal online themselves. For example, if a person were self-isolating for 14 days in line with medical advice, they would then miss the entirety of the appeal timeframe. Even where a person is legally represented, there may be difficulties taking instructions at the present time, particularly from vulnerable people.

Those who have a positive Conclusive Grounds decision in the NRM should be entitled to a grant of leave to remain during the current crisis, but may have difficulty accessing legal representation to make representations on this point or to submit relevant evidence.[15] If a negative decision is made, either in the NRM or in an international protection claim, survivors may have more difficulty accessing legal advice and lawyers may not be able to take instructions effectively, adequately, safely, or at all in order to lodge an appeal or issue a judicial review challenge within relevant time limits. There may be additional problems regarding ancillary applications, for example for Tribunal and Court fee remissions, which usually require documentary financial evidence.

We therefore make the following recommendations in respect of post-decision cases:

Appeal deadlines and applications to extend time

2. **Where standard time limits are not complied with due to COVID-19, we would ask that courts and tribunals treat applications to extend time to lodge appeals and judicial review applications sympathetically.** We would ask that hearing centre HMCTS staff are also patient around delays in the submission of ancillary applications such as fee remission applications. Both unrepresented litigants and legal representatives will face intersecting challenges at the present time. It is also possible that a missed appeal or other deadline may only be identified some time

[15] See 'The COVID-19 Public Health Crisis: Urgent call for the UK Government to protect and safeguard survivors of Modern Slavery who have insecure immigration status', April 2020, the Helen Bamber Foundation: http://www.helenbamber.org/wp-content/uploads/2020/04/HBF-Urgent-Call-for-UK-Government-to-Protect-and-Safeguard-Survivors-of-Modern-Slavery-Final.pdf

after the COVID-19 crisis[16], because the person concerned may not be aware that they can seek advice on appeal or judicial review even out of time.

3. In recognition of the substantial barriers in access to justice at this time, and the vital importance of section 3C leave to welfare issues in the context of the hostile/compliant environment, **we would recommend an urgent amendment to the Tribunal Procedure Rules be considered to extend the time limit to appeal in-country to 28 days and out of country to two months** (or 56 days if it were simply doubled). This is particularly critical in respect of cases served on children, including those who turn 18 during the relevant period.

In judicial review proceedings

In addition to the point on extensions of time as above, we would recommend that:

4. Directions set down for parties take into account public health, safeguarding, and practical feasibility issues due to the present crisis, which may require standard directions to be amended;

5. Remote filing should be allowed for both urgent and non-urgent casework to allow parties to comply with social distancing and isolation advice;

6. Each case may benefit from being listed initially for a Case Management Review Hearing to consider whether a remote hearing can fairly proceed and/or what measures need to be put in place;

7. Where a remote hearing is possible (taking into account practical and safeguarding issues, as above and below), there may be a need for frequent breaks and shorter hearings in recognition of the way that remote hearings are potentially more tiring.

First-Tier Tribunal Statutory Appeals

The President of the First-tier Tribunal has published 'Presidential Practice Statement Note No.1 of 2020: Arrangements during the COVID: 19 Pandemic', which brings into force aspects of the digital courts pilot scheme for all appeals. At the date of writing, daily operational updates[17] have confirmed that face-to-face First-tier Tribunal hearings have been vacated and replaced by digital hearings, with bail hearings being prioritised. There is therefore an indication that at least some cases may proceed remotely, most likely following a remote Case Management Review Hearing or paper review exercise.

The Tribunal Procedure Rules have been temporarily amended[18] to allow for decisions which dispose of an appeal to be made without a hearing where a matter is urgent, it is not reasonably practicable for there to be a hearing (including a remote hearing) and it is in the interests of justice to do so.

[16] Particularly, for example, where a minor is granted limited leave under the UASC DL policy and may not receive or understand legal advice that they had a right of appeal of the refusal of their asylum claim until significantly later on.
[17] https://www.gov.uk/guidance/hmcts-daily-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak
[18] The Tribunal Procedure (Coronavirus) (Amendment) Rules 2020

Our understanding from this is that there is not currently a fixed plan for First-tier Tribunal final hearings in statutory international protection appeals to proceed on the papers only.[19] Although this position may develop going forwards, given the stringent requirements for procedural fairness in international protection cases (as above), we believe that it is difficult to envisage any circumstances where it would be in the interests of justice for such appeals to proceed on the papers only.

Many of the issues raised above in relation to access to justice and safeguarding continue to apply after a decision is made and a Tribunal appeal is being pursued, including the practical difficulties many people would face in order to access remote hearings.[20]

It is critical that justice is not just done, but is seen to be done, and that the overriding objective to deal with cases fairly and justly continues to be applied. It goes without saying that the focus in statutory appeals must remain on real and effective procedural fairness and access to justice rather than dispensing with these for the sake of convenience or speed.[21]

Immigration law is complex and rapidly evolving.[22] The issues at stake in statutory immigration and asylum appeals are often of vital importance to the person and involve issues of fundamental rights to which anxious scrutiny must be applied.[23] Therefore, in the context of international protection appeals only the highest standards of fairness will suffice, notwithstanding the current situation.

Appellants and witnesses in this jurisdiction often face language barriers, may be disabled, and are frequently survivors of torture, human trafficking/modern slavery or other forms of severe abuse. The power imbalances between appellants and witnesses on the one hand and presenting officers, judges, court staff, and legal representatives on the other can be very stark and are likely to be amplified in any remote hearings.

The Tribunal recognises these imbalances and has strong powers to make special measures and reasonable adjustments through the Civil Procedure Rules, its own Procedure Rules[24], Practice Directions[25] and Guidance including through the application of 'Joint Presidential Guidance Note No.2 of 2010 – Child, vulnerable witness and sensitive appellant guidance'. The relevant practice direction and guidance should be applied to all cases involving vulnerable appellants and witnesses. However, this guidance is not exhaustive and does not expressly cover the Equality Act 2010, cases

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[19] See also letter from the First-tier Tribunal President Michael Clements to stakeholders dated 21 April 2020, which recognises that "*many appellants in protection and other appeals are vulnerable or have special litigation needs*".

[20] The family court has recently explored these issues in the recent case of *Re P (A child: remote hearing)* [2020] EWFC 32; 16 April 2020, on the appropriateness of proceeding with a remote hearing in case proceedings where, amongst other issues, the mother faced difficulties in accessing relevant technology.

[21] *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840; 29 July 2015 e.g. para 22 "*Speed and efficiency do not trump justice and fairness. Justice and fairness are paramount*". See also *Nwaigwe (adjournment: fairness)* [2014] UKUT 418; 4 September 2014.

[22] So much so that the Law Commission is currently undertaking a major law reform initiative to propose simplification of the immigration rules. This point has also been repeatedly made by the higher courts, see for example *Sapkota v Secretary of State for the Home Department* [2011] EWCA Civ 1320; [2012] Imm AR 254; 15 November 2011 at [127] and *Singh & Khalid v Secretary of State for the Home Department* [2015] EWCA Civ 74; [2015] Imm. A. R. 704; 12 February 2015 at [59] "*it is no doubt unrealistic to hope that every provision will be understandable by lay-people, let alone would-be immigrants. But the aim should be that the Rules should be readily understandable by ordinary lawyers and other advisers. That is not the case at present*".

[23] *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514; 19 February 1987 at p 531F.

[24] Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, SI 2014/2604, with similar rules for the Upper Tribunal at Tribunal Procedure (Upper Tribunal) Rules 2008, SI 2008/2698.

[25] Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal; of particular relevance is the Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses', 30 October 2008 issued by the Senior President with the agreement of the Lord Chancellor.

where an appropriate adult may be needed due to the particular challenges to effective participation, a litigation friend may be needed due to lack of mental capacity and the 'equality of arms' challenges presented by remote hearings.

The lack of appropriate technology, internet access, and private space for many appellants and witnesses in this jurisdiction means that they will not be able to participate effectively in a remote appeal hearing because they will not have a secure and stable connection to the hearing centre or an area which allows for appropriate privacy to ensure that they can see and hear other participants in the hearing at all times and not have the hearing be overheard by others. Many survivors will not be able to see whether justice is being done, may not be able to observe their legal representatives (and provide instructions and corrections if necessary), and may face insurmountable barriers to engaging with and understanding proceedings.

In a significant proportion of cases the risks of re-traumatisation may be unacceptably high, at a time when support networks and treatment are severely restricted. Furthermore, notwithstanding Case Management Review Hearings being available, this risk may go unidentified. There is also a significant associated risk that testimony adduced from a vulnerable person in this context may be unreliable or misunderstood. There are sound reasons why very few categories of hearing in this jurisdiction have thus far been deemed acceptable to hold via video-link. Even those that are held via video-link generally involve the person whose case is being heard accessing a formal video-conferencing facility (such as 'live link'), rather than an informal or ad hoc system at home, where there may be an uncertainty regarding the technology and/or a lack of confidentiality, privacy, security and care for dependents.

There will be some statutory appeal hearings where very limited engagement from the appellant may seem relatively acceptable. For example, there may be cases that are due to proceed on submissions only or where time is truly of the essence (such as cases involving family reunion with a separated child who is at risk of harm). However, even in these cases, consideration has to be given to the serious practical hurdles to case preparation and gathering evidence currently faced by parties and their representatives.

Even in cases where the appellant may not be called to provide live evidence, it still may not be appropriate to proceed without them being present and able to understand the proceedings. The meaningful engagement of appellants in their own immigration and asylum hearings is a fundamental building block in an accountable and fair justice system. If appellants and their supporters are denied real and effective access to these proceedings, there would be an unacceptable reduction in accountability in respect of legal conduct and judicial decision-making, contrary to the principles of open justice and natural justice, which in our view is unjustified, notwithstanding COVID-19.

We therefore make the following further recommendations in respect of statutory appeals:

Case management/adjournments

The expertise of our charities is in international protection and human rights claims, although these recommendations may have wider relevance.

8. We recommend that as a starting point **it should be rare for international protection or human rights appeals to be deemed appropriate to proceed remotely** where:

- The appellant is not legally represented[26];
- Oral evidence is likely to be required[27];
- The appellant/a witness requires and interpreter;
- The appellant is particularly vulnerable due to factors such as age or illness/disability; or
- The case involves traumatic material.[28]

9. There will be cases where appellants are not able to effectively engage with a remote hearing, even at the stage of a Case Management Review Hearing, and **care should be taken not to 'automatically' list remote Case Management hearings in cases where this is not appropriate**.

10. **It is also far less likely to be appropriate to proceed in an appellant's absence due to 'non-attendance'** at the present time given the difficulties many people have in accessing and engaging with remote hearings.

11. We recommend that Judges **take into account that it also may not be feasible for individuals to send in medical evidence explaining non-attendance** at the present time.

12. We recommend that Judges **take safeguarding concerns from legal representatives seriously**, including where these are unsupported by clinical evidence, given the particular obstacles to obtaining medical evidence in the current crisis.

13. Legal representatives and Home Office presenting officers may make submissions on the appropriateness of proceeding remotely, but it is the Judge in whom the duty to uphold the fairness of the proceedings is vested. Survivors may not understand the system or may be unrepresented. It is therefore vital that care is taken by **Immigration Judges to manage cases actively during the COVID-19 crisis and to postpone those where there is a real risk that the case cannot proceed fairly** at the current time, even if neither party applies for an adjournment.

Consent to proceed

Usually a capacitous litigant could be expected to give or refuse informed consent to proceed with a hearing unrepresented or to a kind of hearing that is not a usual in-person appeal hearing. Individuals may have very good reasons for wishing to proceed with a hearing at a particular time or in a particular way. In particular, people separated from their families due to a risk of persecution

[26] See for example the barriers to access to justice highlighted in *Kiarie and Byndloss v Secretary of State for the Home Department* [2017) UKSC 42 [2018] AC 391; 14 June 2017; noting however that this did not relate to international protection, where the highest standards of procedural fairness are required, and was a case where only one party, and not their representative, would need to attend an appeal remotely.

[27] See above from 'Message for Circuit and District Judges sitting in Civil and Family from the Lord Chief Justice, Master of the Rolls and President of the Family Division', 9 April 2020.

[28] Which may be retraumatising (see above and below), but also there are increased risks that accounts and displays of emotion will be regarded as less 'authentic' when many visual cues are lost. See, for example, 'In defence of the hearing? Emerging geographies of publicness, materiality, access and communication in court hearings', Hynes, Gill and Tomlinson, *Geography Compass*, 2020;e12499, which explores the evidence that asylum proceedings can face particular challenges to fairness if conducted remotely, noting that cultural differences may be exacerbated, feelings of alienation and stress increased and witnesses may be treated as less believable when evidence is obtained remotely causing 'incomplete' communication. On the difficulties with interpreters see 'Keep your distance? Remote interpreting in legal proceedings: A critical assessment of a growing practice', Braun, *Interpreting*, 15(2):200-228, November 2013.

may feel desperate to avoid delays to potential family reunification. However there are specific vulnerabilities amongst people seeking international protection that are important to consider.

Due to underlying mental health issues or trauma symptoms (which may not be apparent), people may feel desperate to have a hearing proceed or may make other risky decisions and instruct their representatives to try and proceed in the teeth of any difficulties and notwithstanding sound (and confidential) advice from their legal representative to the contrary.

This is particularly likely to occur in the cases of children or young adults, where the impact of delay can be very keenly felt. Furthermore, survivors of human trafficking/modern slavery and sufferers of conditions such as post-traumatic stress disorder (and complex post-traumatic stress disorder) can present as particularly compliant or withdrawn. Their experiences may have adversely affected their self-confidence to such an extent that they may give an appearance of 'consent' to proceed unrepresented even if this is likely to be contrary to their best interests and welfare. Traumatised people may also acquiesce to paper hearings out of fear of giving oral evidence and having to revisit traumatic material, as opposed to giving informed consent in all the circumstances

Therefore children, young adults and vulnerable people may not truly be giving informed consent to proceed and consent cannot necessarily be relied on alone to render a hearing fair.

14. Even if a litigant, and particularly an unrepresented litigant, apparently consents to proceed, we strongly recommend that **Immigration Judges err on the side of caution and nonetheless consider whether they should adjourn proceedings** to give the person the chance to present their cases fully and, where necessary, to find legal representation, once the current crisis has passed.

Special Measures/Reasonable Adjustments

15. We recommend that in cases **where litigants are unrepresented or where oral evidence is likely to be needed, the starting point should be that such cases are inherently unsuitable for a remote hearing which disposes of proceedings.**

16. However, even in cases where a remote hearing is considered to be more appropriate, **care should be taken to adapt and implement special measures and reasonable adjustments for vulnerable appellants and witnesses.** This is likely to be an issue which can be explored in a Case Management Review Hearing. We support the approach of such a hearing being listed in every case before directions are issued, so that directions can be tailored to the specific case, taking into account those matters which are within the ability of legal representatives and appellants to comply and in line with any safeguarding concerns.

Best Available Evidence

People may not be able to access documentary or expert evidence at this time, may have to rely on scans or copies, and expert evidence that is produced, including medico-legal reports, may be interim only. Evidence of torture survivors' physical injuries may be inaccessible.

17. We believe there is a basis, when assessing the current situation in the round, for **being sympathetic to these difficulties and for applying the benefit of the doubt to appellants** in the current circumstances. In many claims it may be that even **copy and interim evidence, including medico-legal reports, is sufficient to substantiate a claim**, when applying the lower standard of

proof for international protection claims and recognising the collaborative duty in such claims to establish a claim.

18. We would recommend that in the interests of fairness **any concerns should be put to legal representatives** and, if necessary, for hearings to be adjourned to allow fuller evidence to be filed when possible (which may be post-COVID-19).

Principles of Open Justice

The current situation creates particular challenges for members of the public who wish to observe appeals.

19. We recommend that, **when listings for the First-tier Tribunal are published, any substantive hearings are identified.**

20. We also recommend that **a published protocol is available for third parties who wish to observe hearings or access recordings after the event.** Observers can reasonably be asked to identify themselves, but supporters of an appellant, journalists, legal observers, and trainees (such as pupil barristers, trainee solicitors and trainee Presenting Officers) traditionally have a right to observe proceedings as indeed does the public at large unless an application is granted to hear a matter 'in camera'.[29] This encourages professionalism and due care in the different professionals engaged in the justice system. We would also hope that the Tribunal may find feedback into new ways of working useful.

Upper Tribunal Statutory Appeals

As in the First-tier, the Upper Tribunal Procedure Rules have been temporarily amended to increase powers to dispose of appeals through a paper hearing.[30] The Upper Tribunal has published 'Presidential Guidance Note No.1 of 2020: Arrangements During the COVID-19 Pandemic'. This will remain in place for up to six months. It envisages hearings proceeding on the papers only or remotely during the current crisis, with an accompanying reduction in oral hearings. The guidance includes an apparent presumption that unless oral evidence or findings of fact are necessary, or the case is particularly complex or novel/important issues of law are to be raised, then an oral appeal hearing may not be necessary.

Traditionally, appeal hearings in the Upper Tribunal have been oral hearings in which parties make submissions to a Judge, even if no evidence is required. In very rare cases, we are aware that the Upper Tribunal has disposed of an appeal without a hearing, either where the error of law is very clear[31] or where the parties agree that there is an error of law. The usual practice, however, has been for appeal hearings to include oral argument on both sides, even at the stage of deciding

[29] Rule 27(2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, SI 2014/2604; and see for example the Judiciary of England and Wales 'Civil Justice in England and Wales Protocol Regarding Remote Hearings', 26 March 2020. The temporary amendment to the Tribunal Procedure Rules encourages hearings to be recorded where they have been heard in private.

[30] The Tribunal Procedure (Coronavirus) (Amendment) Rules 2020

[31] For example this occurred in the series of case law following *Sala (EFM: Rights of Appeal)* [2016] UKUT 411 (IAC); 19 August 2016 overturned in *Khan v Secretary of state for the Home Department* [2017] EWCA Civ 1755; [2018] 1 WLR 1256; 9 November 2018 and *SM (Algeria) v Entry Clearance Officer* [2018] UKSC 9; [2018] 1 WLR 1035; 14 February 2018, where a category of extended family members of EEA nationals had wrongly been denied a right of appeal.

whether the First-tier Tribunal has made an error of law. These are statutory appeals, not judicial review hearings, and in our experience input from appellants can be significant.

These hearings are of critical importance. Oral advocacy plays an important role in our justice system and the opportunity a hearing provides to address the Tribunal's concerns and respond to the case advanced by the other party is of crucial importance in a context where the highest standards of fairness are required. The fact that oral evidence is not required does not justify dispensing with an oral hearing, although it may be more appropriate to hold such hearings remotely. We are concerned by the implied suggestion that oral advocacy is not of benefit to the Tribunal in these kinds of proceedings. This is not the experience of our clients and our staff. There is a very strong tradition of oral advocacy in the United Kingdom; it is a key part of what makes the current international legal protection system a fair process. As Laws LJ stated in *Sengupta v Holmes* [2002] EWCA Civ 1104; 31 July 2002 at [38]:

"*oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it.*"[32]

Paper-based decision-making in arguable cases (those which have passed through the permission filter) also threatens open justice. Survivors seeking international protection have often fled oppressive regimes where dissidents are denied a fair hearing and so it is critical in this jurisdiction that justice can be seen to be done. People whose lives can depend on the outcome of a hearing should be able to see it and thereby appreciate where a legal decision may be final and why and where they may need to provide further instructions. Denying appellants access to this process has the potential to harm the reputation of the Upper Tribunal amongst court users. On the other hand, open justice also serves to promote accountability amongst court staff and also amongst legal representatives, whose clients can see them in action.

We are already concerned that Upper Tribunal standard practice risks excluding vulnerable people from decision-making. For example Judges seldom introduce themselves and the proceedings to appellants who are legally represented and interpreters are not provided by the Tribunal for error of law hearings. This additional step of suggesting that a greater number of hearings would proceed not only without appellants being able to meaningfully participate, but on paper is of significant concern.

We are also concerned that this process will impact on the finality of proceedings. Senior Home Office Presenting Officers often have a good reputation for legal knowledge and common sense. They can give clear advice to the Home Office in cases that are not worth pursuing and regularly do make it clear during oral submissions when they are not pursuing a point. The Judge is then able to record this in their determination and this can help bring finality to proceedings. In our experience it is the pinch-point of being required to make these oral submissions or to stand at the door of court that provokes these sensible changes in position. We are therefore concerned that such changes are less likely to arise without an oral hearing. There is therefore a risk of a related reduction in finality and collaborative legal practice in international protection litigation.

We hope that in this context this current Upper Tribunal guidance will be interpreted restrictively.

[32] This and other legal sources are cited by Alasdair Mackenzie of Doughty Street Chambers in his online article 'Oral hearings – who needs them', 9 April 2020; https://insights.doughtystreet.co.uk/post/102g4es/oral-hearings-who-needs-them.

21. We recommend that this current Upper Tribunal guidance would benefit from amendment to make it clear that **the starting point in every case would be to invite submissions on whether the appeal, or any part of it, can be fairly heard remotely** and, if the legal representative believes not, whether alternatively the hearing should be adjourned or otherwise could be fairly resolved on the papers.

In the context of appeal hearings in the Upper Tribunal which do require oral evidence, we would refer to our recommendations, as above.