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Title: Remote Hearings in the Social Security Tribunal: Should we be worried?

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Abstract

The Covid-19 pandemic has led to a complete switch to remote (in practice, telephone) hearings in the Social Entitlement Chamber of the First-Tier Tribunal. This paper considers the implications of remote hearings for social security appellants. To date, there is little specific research on the conduct of remote social security hearings, but comparisons between oral and paper appeals indicate that oral hearings are more successful than paper appeals. This is attributed to the increased information available to tribunals as a result of oral evidence and the greater credibility accorded to the appellant as a result of appearing in person. This paper examines the implications of remote hearings on appellants' cases from the perspective of communication, emotional engagement, practicalities and appellant vulnerability. Evidence drawn from recent 'Rapid Reviews' of the impact of Covid-19 on the civil and family justice systems suggests that while remote hearings may be appropriate for procedural hearings involving legal representatives, they are problematic for fact-finding hearings involving unrepresented parties, cross-examination and witness evidence. This paper seeks to use research with clients, lawyers and advisers engaged in the frontline of legal practice to challenge assumptions made by many legal commentators and policymakers that remote processes can be an adequate and/or complete replacement for face-to-face interactions. It highlights a considerable danger that, in the long-term, the current drive towards remote social

security hearings will make it harder for unrepresented appellants to mount successful appeals and undermine their access to justice.

Introduction

In March 2020, in response to the Covid-19 pandemic, making an appeal to the Social Entitlement Chamber of the First-Tier Tribunal (“the Social Security Tribunal”) became an entirely remote process – with any hearings by telephone or video only. The system that has been adopted, while understandable as an emergency measure, raises a number of concerns regarding the position of (often unrepresented) appellants. There has been very little research in relation to telephone or video hearings in social security tribunals. Thus this article draws on evidence gathered elsewhere in the civil and family justice systems to consider the potential issues for remote social security hearings. This evidence suggests that remote hearings are less suited to fact-finding and that lay litigants find them more difficult to navigate.

Research comparing oral and paper hearings confirms that oral hearings are more successful for appellants. This is largely due to the increased information available to tribunals as a result of oral evidence and the greater credibility accorded to the appellant as a result of appearing in person. The paper considers the implications of remote hearings for the content of appellants’ cases from the perspective of communication, emotional engagement, practicalities and appellant vulnerability. This article uses evidence gathered from clients and lawyers engaged in the frontline of legal practice and challenges assumptions made by many legal commentators and policymakers that remote processes can be an adequate and/or complete replacement for face-to-face interactions in the space of law. It concludes that there is a significant risk that, over the longer term, remote hearings will lead to a system that impedes the ability of appellants – especially those who are unrepresented and/or vulnerable – to present their cases effectively and thus undermines their access to justice.

Procedural background to remote hearings in the Social Security Tribunal

On 19 March 2020, the Senior President of Tribunals issued a six-month Pilot Practice Direction¹ for dealing with the Covid-19 pandemic, which stated that:

¹ Pilot Practice Direction: Contingency Arrangements in the First-Tier Tribunal and the Upper Tribunal, Senior President of Tribunals, 19 March 2020

“Where a Chamber’s procedure rules allow decisions to be made without a hearing, decisions should usually be made in this way, provided this is in accordance with the overriding objective, the parties’ ECHR rights and the Chamber’s procedure rules about notice and consent.”(Para.4)

It went on to explain that, if the consent of the parties was needed for a papers-only decision and this could not be obtained, then:

“Where it is reasonably practicable and in accordance with the overriding objective to hear the case remotely (that is in any way that is not face-to-face, but which complies with the definition of ‘hearing’ in the relevant Chamber’s procedure rules), it should be heard remotely.” (Para.6)

Under reg 1(3) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (“Social Entitlement Chamber Rules”),² a hearing is defined as “an oral hearing and includes a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication”. Accordingly, this allows for remote audio and video hearings to replace in-person appeals. The Guidance Note issued by the Acting Chamber President of the Social Entitlement Chamber on 30 March 2020 (the “Guidance Note”) also emphasises the use of papers-only determinations wherever possible and repeats that, should they be necessary, hearings should only be dealt with remotely.³ Unlike in the civil courts, there is no suggestion that there would be situations where hearings should be adjourned because a remote hearing would not be appropriate.

The Social Entitlement Chamber Rules require the Tribunal to hold a hearing unless both parties have consented (or not objected) to a papers-only decision,⁴(although since 10 April 2020 temporary changes to the Tribunal rules mean it has been possible for the Tribunal to dispense with a hearing entirely in appropriate cases⁵). The Guidance Note introduces a process whereby, if a case is considered suitable for a decision on the papers, the salaried judge is advised to issue a provisional decision to the parties. Annex B of the Guidance Note recognises that, if the provisional decision on the papers is to refuse the appeal, the appellant is unlikely to accept a decision without a hearing

² Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685)

³ Chamber President’s Guidance Note No.3. (SSCS), 30 March 2020.

⁴ Rule 27(1) Social Entitlement Chamber Rules 2008

⁵ Where (a) the matter is urgent, (b) it is not reasonably practicable to hold a hearing and (c) it is in the interests of justice (s5A Social Entitlement Chamber Rules 2008)

and a telephone hearing should be listed instead.⁶ Thus, in the short-term at least, most appellants whose cases proceed to an oral hearing will be dealing with them by telephone.

Recent decisions in the family courts demonstrate that the courts have been grappling with how to deal with remote hearings.⁷ Guidance for judges has also been issued in different courts and tribunals regarding to how deal with remote hearings. This tends to deal with technical issues and the format and conduct of hearings, rather than improving the court experience of litigants.⁸ The Judicial College Equal Treatment Bench Book, however, provides advice on good practice in remote hearings that focuses specifically on the litigant experience and the adjustments that may be required to accommodate the needs of the parties in a remote hearing.⁹

Concerns regarding the digitisation of the Social Security Tribunal predate the recent move to remote hearings. In 2016, the Ministry of Justice issued a consultation paper: *Transforming our justice system: summary of reforms and consultation*.¹⁰ The paper announced the digitisation of the Social Security and Child Support Tribunal. It was very scant on detail regarding what this would involve. Many of the consultation responses were concerned about the digitisation of HMTCS services (despite this not being an area raised for consultation), and the difficulties that this would present for those who would struggle to use online services, particularly “elderly people, people with disabilities, those without digital skills and those with poor literacy or English skills”.¹¹ More recently, research with social welfare advice agencies undertaken prior to the Covid crisis suggested that 35-50% of their clients would need assistance to be able to use a digital justice system.¹² This raises significant disquiet about the ability of social security appellants to navigate the remote hearings process effectively. Moreover, HMCTS has just announced that continuous online resolution for Personal Independence Payments (PIP) has been abandoned.¹³ Thus it seems that hearings are likely to be the key forum for social security appeals for the foreseeable future.

⁶ Para. 1 Chamber President’s Guidance Note No.3. (SSCS). The Guidance refers to telephone hearings rather than video hearings, although these are possible, even if currently unlikely.

⁷ See for example, *Re A* [2020] EWCA Civ 583, *Re P (A Child: Remote Hearing)* [2020] EWFC 32 and *Local Authority v A Mother* [2020] EWHC Fam 1086

⁸ Courts and Tribunals Judiciary, ‘Coronavirus (Covid-19) advice and guidance’ (*Courts and Tribunals Judiciary*) <<https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/#tribunals>> accessed 14 November 2020

⁹ Judicial College, *The Equal Treatment Bench Book* (Judicial College: February 2018 edition, revised March 2020)

¹⁰ Ministry of Justice, *Transforming our justice system: summary of reforms and consultation*. (Cm 9321, 2016)

¹¹ Ministry of Justice, *Transforming our justice system: assisted digital strategy, automatic online conviction and statutory standard penalty, and panel composition in tribunals: Government response*. (Cm 9391, 2017) 5

¹² D Sechi, *Digitisation And Accessing Justice in the Community* (Administrative Justice Council 2020)

¹³ Benefits and Work, ‘Online appeal system scrapped before it begins’ (*Benefits and Work*, 16 October 2020) <<https://www.benefitsandwork.co.uk/news/4287-online-appeal-system-scrapped-before-it-begins>> accessed 21 November 2020

The recent abandonment of continuous online resolution for PIP appeals¹⁴ also demonstrates the reactive nature of government policies regarding social security appeals. There is little detail on the reasons for its abandonment, but the failure of the project, “primarily because it costs too much to select suitable cases and carry out all the admin tasks that were not automated within the software,”¹⁵ suggests it was a policy that was adopted with insufficient prior consideration or planning. These are problems which should have been anticipated, had an adequate planning process been undertaken. The lack of planning regarding digitisation of the court system also became apparent as hearings moved rapidly online in March 2020. Despite the plans trailed originally in 2016 regarding the digitisation of the Social Security Tribunal and other aspects of the civil justice system, it became evident that tribunals and courts were underequipped to conduct remote hearings and the availability of remote audio and video technology had to be increased at breakneck speed.¹⁶ Unsurprisingly, given the speed of transition, problems with technology are a recurring feature in reports on remote hearings (see below). These recent developments illustrate the systemic lack of planning and underinvestment which afflict the Social Security Tribunal and the wider justice system. Ultimately this will result in a remote appeals process that will not meet the needs of appellants and does not deliver justice.

Remote hearings in the Social Security Tribunal: the research context

There is very little research on telephone or video hearings in the Social Security Tribunal or in other areas of the civil justice system. My own research is a comparison between telephone and face-to-face casework in social welfare law.¹⁷ It is submitted that the evidence from this project can provide useful insights into the potential problems that social security appellants are likely to face in relation to remote hearings. The mode of communication is similar and so are the affected client groups.

¹⁴ An event which has been given far less attention than its commencement, see, for example, Joshua Rozenberg, ‘Access to justice without leaving home’ (*Law Society Gazette*, 21 January 2019) <<https://www.lawgazette.co.uk/commentary-and-opinion/access-to-justice-without-leaving-home/5068926.article> <accessed 21 November 2020>

¹⁵ Benefits and Work (n13)

¹⁶ Justice Committee (2020) Coronavirus (COVID-19): The impact on courts (HC 2019-21, 519)

¹⁷ M Burton *Calling for Justice: Comparing Telephone and Face-to-face Advice in Social Welfare Legal Aid* (PhD Thesis), (London School of Economics and Political Sciences, 2015).

A qualitative approach was adopted for this research which involved clients, lawyers and advisers dealing with telephone and face-to-face advice and casework in housing and homelessness law.¹⁸ My research used semi-structured interviews in order to explore more fully the perceptions and experiences of the research participants from their own perspective. Combined with observations, these methods provided a detailed understanding of how the day-to-day dealings between lawyers, advisers and clients are affected by the channel of delivery of legal services. All the interviews and observations were recorded or noted in detail and then transcribed in full. Data collection and analysis of the data were carried out using grounded theory method. 'Grounded theory' was adopted because of its ability to give research a 'real world' focus'.¹⁹ By employing grounded theory, I was able to produce a complex account of the advice and casework experience of telephone and face-to-face social welfare clients, their advisers and lawyers.²⁰

Litigants in person (LIPs) are the norm in social security tribunals where representation occurs only in a minority of cases.²¹ Recent work has been done on the barriers to participation faced by tribunal users and unrepresented litigants in the civil justice system.²² McKeever²³ categorises these barriers as intellectual, emotional, practical and attitudinal. The more inquisitorial nature and greater familiarity with unrepresented appellants of social security appeal tribunals mean that LIPs are unlikely to face the same attitudinal barriers as in the civil courts. However, intellectual, emotional and practical barriers are equally likely to apply to social security appeal tribunals.²⁴

In addition, the move to remote (telephone and video) hearings in the civil courts in March 2020, prompted rapid consultations on behalf of the President of the Family Division and the Civil Justice

¹⁸ Between January and September 2014, I conducted 22 observations of lawyer/adviser-client interviews (11 telephone and 11 face-to-face) and 40 research interviews, 20 with lawyers/advisers (10 telephone and 10 face-to-face) and 20 with clients (7 telephone and 13 face-to-face). The main participating organisation was a nationwide not-for-profit (NFP) organisation giving legal aid funded housing law advice face-to-face and as part of the Community Legal Advice (CLA) telephone advice service. Research took place in four local offices (2 in London and 2 outside London) and a CLA office based outside London.

¹⁹ B G Glaser & A L Strauss *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine de Gruyter 1967) 2-3; A L Strauss & J Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (2nd edn, Sage Publications 1998) 12-13.

²⁰ For more information on my methodology and methods, please see my thesis as referred to in n17 above.

²¹ In 2012-13, representatives attended in approximately a quarter of all social security and child support appeal tribunal hearings (HM Courts and Tribunal Service, FOI Request 80708, 2013, <https://www.gov.uk/government/publications/social-security-appeal-tribunals-and-representation-statistics-foi-80708>). The level of representation is likely to have decreased since then, due to the impact of LASPO and other funding cuts in the advice sector.

²² G McKeever, L Royal-Dawson, E Kirk, J McCord, *Litigants in person in Northern Ireland: barriers to legal participation* (Ulster University 2018); G McKeever, 'A Ladder of Legal Participation for Tribunal Users' *Public Law* (2013) (July) 575-598; G McKeever, 'Comparing courts and tribunals through the lens of legal participation' *Civil Justice Quarterly* (2020) 39 (3), 217-236

²³ McKeever, *A Ladder of Legal Participation and Comparing courts and tribunals* (n22)

²⁴ McKeever, *A Ladder of Legal Participation and Comparing courts and tribunals* (n22)

Council on the use of remote hearings in the family court and in the civil justice system. The aim of these 'Rapid Reviews' was to understand the impact of the Covid-19 crisis on the family courts and the civil justice system. Both Rapid Reviews gathered extensive evidence through consultation meetings and responses from professionals and lay court users. The Rapid Review of Remote Hearings in the Civil Justice System ("the Civil Justice Rapid Review") also conducted an online survey and carried out analysis of court listings data. The Rapid Review into Remote Hearings in the Family Justice System ("the Family Justice Rapid Review") and the Civil Justice Rapid Review reported in May and June respectively.²⁵ More recently, the Nuffield Family Justice Observatory followed up this work with another consultation on remote hearings in the family courts, which reported in September 2020.²⁶ This involved a survey, as well as further information gathered from interested individuals and organisations, and focus groups and interviews with parents. This paper will use the evidence from my work and these different sources to suggest the issues that may arise in remote audio and video hearings for social security appellants.

Oral vs paper hearings

A telephone hearing is not a hearing on the papers nor is it an online process, but there are important similarities: it is conducted remotely and it does not involve the face-to-face physical proximity of a traditional oral hearing. It is argued that research comparing papers-only with in-person oral appeals is able to provide valuable insights into the possible impact of telephone hearings on social security appellants. For a long time, the established view has been that, in relation to social security appeals, the appellant's chances of success are improved by attending an oral hearing.²⁷ This is borne out by the statistics. Thomas²⁸ analysed the data on social security and immigration appeals from 2000 to 2014. Oral appeals in these cases were more than 3 times more likely to succeed than paper appeals (48% compared to 15% respectively). More recent analysis of immigration appeal statistics has confirmed the higher success rate of oral appeals.²⁹ Thomas

²⁵ M Ryan, L Harker and S Rothera, *Remote hearings in the family justice system: a rapid consultation* (Nuffield Family Justice Observatory 2020; N Byrom, S Beardon and A Kendrick, *The impact of COVID-19 measures on the civil justice system* (Legal Education Foundation 2020)

²⁶ M Ryan, L Harker and S Rothera, *Remote hearings in the family justice system: reflections and experiences*, (Nuffield Family Justice Observatory 2020)

²⁷ See, for example, Public Law Project, *Making a social security appeal* (PLP Guide Series, 2018)

²⁸ R Thomas, 'Oral and paper tribunal appeals, and the online future' (*The UK Administrative Justice Institute*, 31 January 2017) <https://ukaji.org/2017/01/31/oral-and-paper-tribunal-appeals-and-the-online-future/> accessed on 22 September 2020

²⁹ M Gherman, 'Immigration appeals are much more likely to succeed if there's an oral hearing' (*Free Movement*, 8 June 2020) <<https://www.freemovement.org.uk/immigration-appeals-are-much-more-likely-to-succeed-if-theres-an-oral-hearing/>> <accessed 21 November 2020>

suggested that the difference in the success rate could be attributed to the additional information the tribunal was able to obtain in the oral hearing due to an inquisitorial approach. Answers to Parliamentary Questions in May 2016³⁰ revealed that, in 75% of the 60% of PIP appeals that were successful, the reason was new oral or documentary evidence supplied at the hearing. This was broken down further to show that new oral evidence accounted for the success of 66% of successful cases and in 9% of cases new documentary evidence was the cause. Clearly, the further information available through evidence given at the oral hearing is a critical factor and, in particular, it is new oral evidence, rather than new documents, that make the difference. Another reason given for the higher success rate of oral appeal hearings is the capacity for the oral hearing to establish the credibility of the appellant.³¹

Earlier research conducted by Thomas and Genn³² using the case simulation method also showed oral appeals to be more successful than paper appeals in Disability Living Allowance cases. When paper appeals were supplemented by the additional information that would have become apparent through the oral appeal process, the success rate of paper appeals increased – although not to the same level as the fully oral appeals. This indicates that oral evidence has an additional quality in terms of satisfying the tribunal of the merits of the appellant’s case. Moreover, again, the oral hearing lent the appellant greater credibility: panel members who rated the believability of the appellant more highly were more likely to allow the appeal. Evidently, the oral element of the appeal adds significantly to the effectiveness of the process from the appellant’s perspective. It does so firstly, by making new information available to the Tribunal through the appellant’s live evidence and secondly by the appellant gaining greater credibility in person. A key concern, therefore, is that the lack of face-to-face contact will have a detrimental effect on the ability of appellants to conduct their appeals successfully.

The implications of remote hearings for unrepresented appellants

The evidence suggests that remote hearings may inhibit the ability of appellants to make their case effectively. As stated above, the appellant’s case is strengthened in an oral hearing by the improved content and greater credibility of their oral evidence. The research on remoteness in relation to

³⁰ Written Answers to Parliamentary Questions by Secretary of State for Work and Pensions, Mr Justin Tomlinson: 23 May 2016 <<https://questions-statements.parliament.uk/written-questions/detail/2016-05-18/37130>> and 31 May 2020 <<https://questions-statements.parliament.uk/written-questions/detail/2016-05-20/37774#>> both accessed on 22 September 2020

³¹ Thomas (n28)

³² C Thomas and H Genn, *Understanding tribunal decision-making: A foundational empirical study - Preliminary Report* (Nuffield Foundation 2013)

advice and the civil justice system suggests that critical factors affecting the appellant's case are communication, emotional engagement and empathy, focus, practical considerations and appellant vulnerability. Each of these is explored in more detail below.

Communication

Remote interaction places a number of restrictions on the expression and understanding of the parties involved. Research has identified the significance of language issues and communication in enabling tribunal users and LIPs to participate intellectually in hearings.³³ Poor communication meant that lay participants were unable to understand the law and the legal process in relation to their case. It also inhibited their ability to follow the proceedings and to ask and answer questions effectively.

Remoteness has the potential to limit further the ability of lay parties and witnesses to be actively involved in a remote hearing. In social welfare law casework, clients reported finding it easier to express themselves face-to-face and also to understand the adviser. They were more at ease face-to-face and found that the more open structure of the face-to-face interview meant they could explain themselves more freely and ask more questions. In addition, vulnerable clients often obtain support from family, friends and key workers to assist them with explaining their problems.³⁴ Evidently, while restrictions remain on visits into private homes, it will be more difficult for vulnerable litigants to access this form of support.

The Family Justice Rapid Review commented on the difficulties faced by non-professional parties in understanding and participating in remote proceedings.³⁵ It was pointed out that many parents will find the hearing very daunting and are unlikely to have the confidence to interrupt in order to ask for an issue to be explained further. Notably, in the Family Justice Rapid Review follow-up report, nearly half of the parent respondents stated that they had not understood what had happened in the hearing.³⁶ Communication was also raised as an issue in the Civil Justice Rapid Review.³⁷ Problems with communication were cited as one of the main reasons for audio hearings being considered worse than physical hearings. Recent research into remote hearings in the

³³ McKeever, *A Ladder of Legal Participation* (n22); McKeever et al (n22)

³⁴ A Buck & M Smith, 'The Importance of Family and Friends in Advice-Seeking for Rights Problems' *Social Policy & Society* (2015) 14(2), 175–188

³⁵ Ryan et al, *Remote Hearings* (n25)

³⁶ Ryan et al, *Reflections and Experiences* (n26)

³⁷ Byrom et al (n25)

Administrative Court suggested that lawyers would find more complex hearings, involving, for example, 'significant debate' or lacking substantial pre-hearing case management, more difficult to conduct remotely.³⁸ Language issues are also likely to form an additional barrier to communication in remote proceedings. Using interpreters may present problems for effective communication where hearings take place remotely.³⁹ As I found in my own research with social welfare law clients, difficulties can also arise in relation to participants for whom English is an additional language, but who do not need an interpreter.⁴⁰ Evidently there is a significant risk of social security appellants finding communication more difficult in remote hearings and therefore being less able to give their evidence and to challenge the case against them.

Non-verbal communication

Non-verbal communication is an important element of communication that is removed by telephone-only contact and limited by video-only hearings. With regard to face-to-face and telephone casework, non-verbal communication was considered to make a significant contribution to the more effective exchange of information and advice between face-to-face advisers and clients. Seeing the adviser's body language aided the client's understanding. At the same time, advisers were able to use clients' expressions to gauge whether the client had understood them. In addition, physical assessment of the client could add to the information available to the adviser. The Family Justice Rapid Review identified concerns about remote hearings in terms of the lack of face-to-face contact and the inability to read body language. This was mainly associated with telephone hearings, but extended to video hearings as well. In the Civil Justice Rapid Review, the lack of visual cues led to problems with parties interrupting each other and over-speaking. Audio-only hearings were considered to impede communication due to being unable to see the judge and other participants in the process. In video hearings, the less fluent nature of proceedings and the inability to gauge the reactions of others were raised as potential problems. In addition, more nuanced interactions were considered to be lost. Participants in research regarding remote judicial review hearings also felt that their advocacy suffered from being unable to see the judge's reaction to their submissions.⁴¹

³⁸ J Tomlinson, J Hynes, E Marshall, J Maxwell, *Judicial Review in the Administrative Court during Covid-19* (Public Law Project Research Paper 2020) <<https://publiclawproject.org.uk/wp-content/uploads/2020/04/200420-JR-during-COVID-19-Research-paper-for-publication-final.pdf>> accessed 22 September 2020

³⁹ Ryan et al, *Remote Hearings* (n25)

⁴⁰ Ryan et al, *Remote Hearings* (n25)

⁴¹ Tomlinson et al (n38)

The greater credibility gained by appellants in oral appeals may in part be due to a strong cultural association of physical presence with truth-telling in our courts. This is influenced by a perception that it provides a better opportunity for assessing 'demeanour'.⁴² Demeanour or body language as a guide to the truthfulness of witnesses is a contested concept in the legal sphere. There is little psychological evidence to support the notion that witness credibility can be determined by demeanour.⁴³ Nevertheless, there remains a strongly-held view among professionals that: 'the way a man behaves when he tells a story...may furnish valuable clues to his reliability'.⁴⁴ Moreover, in my research, caseworkers considered that clients' emotional remoteness from the interview could make it easier for them not to tell the truth. A telephone adviser stated plainly: 'I think clients find it easier to lie over the phone...I think because you can't see how [someone is] going to react, it's easier not to be as truthful over the phone' (TA3). A face-to-face client made a similar point:

'...[W]hen you're speaking to someone on the phone, because you don't know who they are, you're not getting that sympathetic feeling from them and basically you're not going to tell the full story or the whole of what's going on or you might even lie. And I've found myself doing this.' (FC12)⁴⁵

Taken together, these factors make many lawyers sceptical about the ability of remote hearings to assess the veracity of witnesses.

In *Re A*,⁴⁶ the President of the Family Division remarked: "...[T]he more general point that a judge will be in a better position to assess the evidence of a witness who gives evidence live from a witness box than one who speaks over a video link is plainly right." Reflecting this, respondents to the Family Justice Rapid Review were concerned about the ability of the court to make a fair assessment of witnesses or parties when they were unable to assess them in person. Conversely, in the case of *Local Authority v A Mother*,⁴⁷ Lieven J stated that 'demeanour will often not be a good guide to truthfulness', that a good liar could be as convincing in person as on a videolink and there was no empirical evidence regarding which forum was more likely to elicit truthful evidence. This may be true. It is contended, however, that, although demeanour may not be a reliable guide where the appellant or a witness is an accomplished liar, relatively few individuals will come into this category. It is possible that the appellant will be ambivalent about lying or may not have anticipated the

⁴² K Leader, 'Closed-Circuit Television Testimony: Liveness and Truth-Telling' *Law Text Culture* (2010) 14, 312–336

⁴³ M Stone, *Cross-Examination in Criminal Trials* (3rd ed, Tottel 2009)

⁴⁴ J Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press 1949) 21

⁴⁵ Burton (n17) 239

⁴⁶ *Re A* (n7) para 58

⁴⁷ *Local Authority v A Mother* (n7) para 27

question. Hence, demeanour may provide useful ‘deception clues’ when an appellant is trying to be evasive about the truth⁴⁸ and these are less likely to be apparent remotely.

The above means that remote hearings may make it more difficult for social security appellants to establish their credibility with the tribunal. As stated above, prior research has shown that the appellant being able to convince the judge of their credibility in the oral hearing has a significant impact on judges’ decisions.⁴⁹ In the Civil Justice Rapid Review, some respondents were concerned that their ability to influence and persuade the judge of their arguments was diminished by remote hearings. There is a strong cultural attachment to live presence as the method for establishing veracity in our courts,⁵⁰ although researchers into jury decision-making have argued that this may be overstated.⁵¹ It is possible, nevertheless, that appellants may struggle more to persuade judges to believe them when contact is audio or video only.

Legal cultural associations between presence and truth-telling suggest that an appellant who appears remotely may find it more difficult to establish their credibility with the tribunal. There is a strong possibility that, as has been seen in relation to oral and paper appeals, this will have a significant impact on the decision of the tribunal.

All of the above factors are potential barriers to communication and hence to the full participation in remote hearings by social security appellants. Both of the Rapid Reviews identified contested final hearings and any hearings involving cross-examination as unsuitable for remote hearings. The position of litigants in person was a specific concern and it was suggested that audio hearings were not appropriate for matters involving litigants in person and/or vulnerable parties. Similar issues have been raised regarding litigants in person and remote hearings in judicial review cases.⁵² This is particularly worrying, given that social security appeal tribunals are mainly fact-finding hearings and, according to previous studies, are often the forum where the information that is needed to uphold the claimant’s appeal is finally established. Furthermore, as well as being unrepresented, many appellants in social security cases are likely to have vulnerable characteristics. Thus they may be doubly disadvantaged by a remote hearing. The issue of vulnerability is discussed in more detail

⁴⁸ Such as a change in facial expression, a body movement, a change in inflection, or a pause or inadvertent gesture (P Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics and Marriage*. W W Norton and Co Inc. 1992).

⁴⁹ Thomas and Genn (n32)

⁵⁰ Leader (n42)

⁵¹ L Ellison & V E Munro, ‘A ‘Special’ Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials’ *Social & Legal Studies*, (2014) 23(1), 3–29.

⁵² Tomlinson et al (n38)

below. Effective communication is clearly paramount in these hearings and the potential for this to be diminished due to remoteness is a cause for significant concern.

Emotional engagement and empathy

An advantage of remote hearings is that LIPs are likely to find them less intimidating than appearing in person at the tribunal. The daunting nature of proceedings forms part of the emotional barrier to participation faced by tribunal users and LIPs in court and tribunal hearings.⁵³ The less intimidating nature of remote hearings was welcomed by some respondents to the Family Justice Rapid Review, including those working in the area of domestic abuse. Many social security appellants will be very relieved at not having to attend a physical hearing.

It is also the case, however, that improved communication may be facilitated by emotional engagement. My research found that face-to-face contact is likely to foster a stronger connection between lawyer and client than telephone-only casework. Further, the greater trust and rapport that is likely to develop between client and adviser face-to-face can improve clients' openness with the adviser. Many advisers made a direct instrumental link between emotional engagement and obtaining full client instructions. They reported that the strength of the lawyer-client relationship led to greater client disclosure.

Legal proceedings are highly emotional events for many lay participants.⁵⁴ Given the critical issues at stake, this is particularly likely to be true for appellants in social security matters. Emotion is generally regarded as inappropriate in the space of law.⁵⁵ However, there is a growing body of scholarship which rejects the traditional dichotomy between law and emotion and asserts that the recognition of emotion in the legal process is essential to the rule of law.⁵⁶ In line with these theories and confirming previous empirical studies, my research indicates that the greater emotional strength of face-to-face advice in areas such as personal contact, emotional support, empathy, compassion and adviser commitment have an instrumental role in facilitating client disclosure and co-operation. By handling their cases sensitively, tribunal members, tribunal staff and external

⁵³ McKeever *A Ladder of Legal Participation and Comparing courts and tribunals* (n22)

⁵⁴ McKeever, *A Ladder of Legal Participation* (n22); McKeever et al (n22); L Trinder, R Hunter, E Hitchings, J Miles, R Moorhead, L Smith, M Sefton, V Hinchly, K Bader and J Pearce, *Litigants in person in private family law cases* (Ministry of Justice, 2014)

⁵⁵ D Feenan, 'Law and compassion' *International Journal of Law in Context* (2017) 13(2) 121–142

⁵⁶ K Abrams and H Keren, (2010) 'Who's afraid of law and the emotions?' *Minnesota Law Review* (2010) 94(6) 1997–2074; S A Bandes, 'Moral Imagination in Judging' *Washburn Law Journal*, (2011) 51(1) 1–24; C Westaby and E Jones, (2018) 'Empathy: an essential element of legal practice or 'never the twain shall meet'?' *International Journal of the Legal Profession* (2018) 25(1) 107–124

advisers were able to increase the ability of tribunal users to participate in proceedings.⁵⁷ In addition, establishing trust with LIPs through personal interactions at court has been identified as a way to break down the emotional barrier to participation for LIPs.⁵⁸

The difficulty lies in replicating these interpersonal elements in the remote environment. It is posited that remote hearings are likely to struggle to create a forum where the client feels emotionally engaged. A reduction in empathy was noted by participants in recent early virtual hearings.⁵⁹ The Family Justice Rapid Review reported that: “Many respondents noted that it is extremely difficult to conduct the hearings with the level of empathy and humanity that a majority of those responding thought was an essential element of the family justice system.”⁶⁰ This echoes indications in my research that telephone advisers tended to have a more limited emotional imagination in relation to the client experience of advice. Further, with regard to telephone and face-to-face casework, there were emerging signs of telephone advisers viewing clients in a more threatening light. It has also been suggested that the lack of personal contact may result in harsher decisions by judges.⁶¹ In the Civil and Family Justice Rapid Reviews the possibility of harsher decision-making was raised as a concern by respondents. The greater emotional sterility of the remote hearing seems likely to have an adverse impact on the appellant’s efficacy in the hearing. This will have a corresponding effect on the outcome of the appeal.

It is also possible that participants will seek the psychological reassurance of the gravitas associated with a physical hearing. When decisions that fundamentally affect their lives are being taken, participants may need the formality of a physical hearing in order to be reassured that their situation is being taken seriously.⁶² This sense of procedural justice and fairness is likely to be particularly important for appellants whose appeal is unsuccessful. The importance of procedural justice has been identified in relation to litigants in person⁶³ and in relation to remote hearings in the Civil Justice Rapid Review. The possibility that litigants who are only able to have a remote hearing may feel that they have been denied their ‘day in court’ was raised in responses to the Civil Justice Rapid Review.

⁵⁷ McKeever, *A Ladder of Legal Participation* (n22)

⁵⁸ McKeever, *Comparing courts and tribunals* (n22)

⁵⁹ C Kitzinger, ‘Remote justice: a family perspective’ (*The Transparency Project*, 29 March 2020 <<http://www.transparencyproject.org.uk/remoted-justice-a-family-perspective/>> accessed on 22 September 2020)

⁶⁰ Ryan et al, *Remote Hearings* (n25) 10

⁶¹ E Rowden, A M Wallace & J Goodman-Delahunty (2010). Sentencing by videolink: Up in the air? *Criminal Law Journal* (2010) 34(6), 363–384; M Terry, S Johnson & P Thompson, *Virtual Court pilot: Outcome evaluation* (Ministry of Justice 2010)

⁶² Kitzinger (n59)

⁶³ McKeever, *Comparing courts and tribunals* (n22)

For appellants to believe that a hearing has been just and fair, they will need to be convinced of the judge's attentiveness and interest in their case. This may be more difficult in a remote environment where visual cues are lost or (on video) are less evident. Clients assess adviser commitment by their body language.⁶⁴ In relation to telephone and face-to-face advice, adviser commitment was a key component of building trust. Face-to-face interviews were seen as particularly valuable in conversations that involve challenging the client's version of events and/or advising them that they do not have a good case. This is because it was easier to convey the adviser's commitment to the client in person: "I imagine that they find it quite important to see me to know that I'm hopefully sympathetic and giving them good advice rather than just disbelieving them" (Face-to-face lawyer).⁶⁵ Other research has also shown that a client's willingness to accept unpalatable information is influenced by the depth of their relationship with the adviser.⁶⁶

With regard to casework, face-to-face clients believed that being able to be more certain of the adviser's commitment by assessing their body language was a major benefit of face-to-face interviews. Knowing that they were 'being heard' by the adviser assumed high importance for clients.⁶⁷ Similarly, appellants at a tribunal hearing will be alert to the body language of the judge in order to be convinced of his/her focus on their case. A judge's response to the Family Justice Rapid Review underlined this point:

"There is so much non-verbal communication. The process is about building knowledge, trust and understanding...You have to inspire confidence that you can be trusted with the information you have read, that you understand the issues, that you have a plan to resolve the dispute and that the process will be fair (Judge)."⁶⁸

Without the reassurance of visual cues, it may be more difficult for appellants to be satisfied of the fairness of the tribunal process. Over time, this will undermine the credibility of the tribunal's decisions. This may already be happening. It is notable that the majority of parents responding to the Family Justice Rapid Review follow-up report felt that their case had not been dealt with well.⁶⁹

⁶⁴ A Buck, M Smith, J Sidaway, & L Scanlan, *Piecing it Together: Exploring One-stop Shop Legal Service Delivery in Community Legal Advice Centres* (Legal Services Research Centre 2010)

⁶⁵ Burton (n17) 168

⁶⁶ H Sommerlad & D Wall, *Legally aided clients and their solicitors: qualitative perspectives on quality and legal aid* (Law Society 1999)

⁶⁷ Burton (n17)

⁶⁸ Ryan et al, *Remote Hearings* (n25)

⁶⁹ Ryan et al, *Reflections and Experiences* (n26)

Focus

It was suggested in the Family Justice Rapid Review that telephone hearings enabled more focused hearings. Telephone advisers also felt that they could be more focused on the telephone.⁷⁰ However, greater focus seems largely a benefit for legal representatives. Concerns about the impact of remote hearings on lay participants' ability to engage with the proceedings were raised by both Rapid Reviews. This was considered a particular issue for more vulnerable clients with physical or mental health needs. The use of technology was seen to contribute significantly towards problems with engagement and participation (see further below regarding vulnerability). In my research, face-to-face advisers explained that clients could struggle to focus for long periods of time over the telephone. A face-to-face client with mental health needs confirmed: "...if I'm not looking into someone's face I just...blank out basically" (FC2).⁷¹ Remote tribunal hearings may go on for longer than telephone interviews, which can be more tailored to the needs of the client. There is some suggestion that remote hearings take longer than face-to-face ones.⁷² They are certainly considered more tiring than physical hearings and that more intense concentration is required.⁷³ Hence, social security appellants may find it difficult to give the required degree of focus to the hearing for the full period of time.

Another potential barrier to focus is the lack of private or protected space from which to participate in the hearing. The Family Justice Rapid Review referred to children being present during hearings due to a lack of childcare and/or limited space in the home. Difficulties around finding appropriate private space also affected professional participants in the hearings.⁷⁴ Clearly, during a period of lockdown or reduced school hours as a response to Covid, such demands are likely to be even greater. In a pressured home environment, appellants in the social security tribunal may find it difficult to carve out the space to give their full attention and energy to the hearing.

The lack of a physical space for the hearing may also mean that appellants are concerned about being unable to see who else is present during their hearing. A striking and unexpected finding of my research was the extent of mistrust of telephone-only communication among client interviewees. This was particularly voiced by clients who came originally from overseas. A typical comment was:

⁷⁰ Burton (n17)

⁷¹ Burton (n17) 224

⁷² Ryan et al, *Remote Hearings* (n25)

⁷³ Ryan et al, *Remote Hearings* (n25), Byrom et al (n25)

⁷⁴ Ryan et al, *Remote Hearings* (n25)

“On the phone also with this technology which is there, you don’t know whether you are speaking to [the adviser] alone or there’s someone also listening on the other end. Face-to-face is sort of privacy, it’s you and I.” (Face-to-face client)⁷⁵

Misgivings around telephone fraud were also raised as a potential issue when being asked to provide personal financial information to an unseen telephone adviser.⁷⁶ The Family Justice Rapid Review received evidence regarding concerns about unseen third parties, listening into or possibly even recording the hearings. The prospect of being unable to verify who else is present at a hearing may lead to greater wariness and unease in respect of remote tribunal hearings among certain client groups. This may lead them to forego appeals altogether or limit their openness with the Tribunal.

Practicalities

Practical advantages

For lay appellants, the practical advantages of remote hearings should not be underestimated. Importantly, as explained above, many appellants will feel relieved at not having to attend a physical hearing in front of a judge.⁷⁷ Remote hearings are often more convenient for appellants, avoiding the need to travel to the hearing or to make arrangements for childcare or other caring responsibilities. Remote hearings are also more physically accessible for appellants with mobility problems. In the Civil Justice Rapid Review, remote hearings were viewed positively for reasons due to increased efficiency, as a result of less time spent on waiting or travel, and benefits for the environment and work-life balance. Clearly, the remote hearing may have a number of attractions for social security appellants.

Practical difficulties

Nevertheless, there may also be a number of practical difficulties that a social security appellant will have to overcome. In the first instance, social security appellants are likely to struggle with using documents in remote hearings. Documentation is a significant barrier to participation for tribunal users and LIPs in physical courts and tribunals.⁷⁸ In casework, the remote environment substantially increases the difficulty of dealing with documents.⁷⁹ A face-to-face adviser commented: “Practically,

⁷⁵ Burton (n17) 176

⁷⁶ Burton (n17)

⁷⁷ Ryan et al, *Remote Hearings* (n25) 13

⁷⁸ McKeever, *A Ladder of Legal Participation* (n22); McKeever et al (n22)

⁷⁹ Burton (n17)

I find the hardest thing [over the telephone] is looking at documents together”.⁸⁰ The evidence from the Civil Justice and Family Justice Rapid Reviews pointed to the management of documentation being a considerable issue in remote hearings.⁸¹ A lack of clarity regarding the preparation and filing of e-bundles was a frequent concern. Issues with e-bundles for LIPs were highlighted by lawyers, including a very worrying example of a LIP pretending to have access to an e-bundle when he did not.⁸² This evidence suggests that unrepresented social security appellants may face considerable problems using documents in remote hearings.

Secondly, the use of technology is a significant practical issue affecting social security appellants in remote hearings. In this section of the article, the focus is on the functionality and availability of the relevant technology, not the capability of individual litigants in using the technology, which may also be a matter of concern (see below regarding vulnerability). Unsurprisingly, given the speed of transition to remote hearings, technological difficulties were reported in a significant proportion of remote hearings in the civil courts (44.7%).⁸³ This was seen as a factor particularly affecting more vulnerable litigants, but technological issues also affected the court and the professionals involved in the court process. Responses to the Civil Justice Rapid Review suggested that the sudden shift to remote hearings has revealed the consequences of underinvestment in the civil court infrastructure.⁸⁴ Social security judges are required to conduct remote hearings without the assistance of a clerk and without technical support. It seems likely that they will be beset by similar technological problems. In such circumstances, hearings will become less effective, more time-consuming and more stressful for all involved.

The lack of access to adequate technology and/or internet connectivity available to lay parties was raised in both the Civil Justice Rapid Review and the Family Justice Review. Shelter reported to the Civil Justice Rapid Review that: “there is an assumption that clients have access to the internet and telephone. Not all of them can afford access.”⁸⁵ The Official Solicitor made a similar point. Access to the internet may be widespread, but disadvantaged groups are still significantly less likely to have online access than the rest of society.⁸⁶ The pandemic has highlighted the high proportion of the UK population without functional access to the internet: only 2% of teachers in the most deprived

⁸⁰ Burton (n17): 210

⁸¹ Byrom et al (n25); Ryan et al, *Remote Hearings* (n25)

⁸² Byrom et al (n25)

⁸³ Byrom et al (n25)

⁸⁴ Byrom et al (n25)

⁸⁵ Byrom et al (n25) 63

⁸⁶ C Denvir, *Assisted Digital Support for Civil Justice System Users: Demand, Design and Implementation* (UCL Centre for Access to Justice 2018)

schools thought that all the children in their school would have adequate access to the internet for learning purposes.⁸⁷ The pandemic has revealed that, rather than being overstated as has been claimed by a major proponent of online courts,⁸⁸ the extent of digital exclusion has been underestimated.

In view of the potential disadvantages of remote hearings in terms of the participation of an unrepresented and/or vulnerable litigant, it seems there is a potential conflict between the practical convenience of a remote hearing and the positive effects of appearing in person. The difficulty for the lay appellant is that they are a 'one-shotter' in this process.⁸⁹ This means that they are not alert to the potential deficiencies of the remote hearing and are therefore not in a position to compensate for them. Thus, it is essential that the limitations of the remote hearing are at the forefront of any judge's mind – they cannot expect a litigant in person to 'perform' to the standard they might expect in a physical hearing. This is a point made in the Equal Treatment Bench Book⁹⁰ and cannot be emphasised enough. Currently, in the context of the pandemic, and while remote hearings are almost as unfamiliar to judges as they are to appellants, tribunal judges are likely to be taking a more sympathetic approach to appellants. As remote hearings become more the norm, however, there is a strong possibility that judges who are accustomed to the remote experience will lose their awareness of the additional difficulties that remoteness may have for a social security appellant. In order to prevent this, social security judges and tribunal staff must be encouraged to cultivate an ongoing attitude of adaptation and accommodation in procedural and practical terms in order to meet the needs of social security appellants in remote hearings.

Vulnerability

The problems associated with remote hearings are likely to be more severe when individuals are vulnerable.⁹¹ The nature of the welfare benefits system means that many appellants to the social

⁸⁷ C Cullinane and R Montacute, *Covid-19 and Social Mobility: Impact Brief #1: School Shutdown* (The Sutton Trust 2020)

⁸⁸ M Cross, 'No basis for face-to-face justice, says digital court guru Susskind' (Law Society Gazette, 8 November 2018) < <https://www.lawgazette.co.uk/practice/no-basis-for-face-to-face-justice-says-digital-court-guru-susskind/5068230.article>> accessed 22.11.20

⁸⁹ M Galanter, 'Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change' *Law & Society Review* (1974) 9(1), 95–160, 97

⁹⁰ Judicial College (n9)

⁹¹ In recent Law Society research, only 16% of the solicitors surveyed believed that vulnerable clients could 'effectively participate in remote hearings' (*Law under lockdown: The impact of COVID-19 measures on access*

security tribunal will be vulnerable. The range of factors which make a person vulnerable has been described as including ‘learning and language problems, complex physical and mental health needs and cultural issues’.⁹² It is also essential to recognise that people who are able to cope under normal conditions may be rendered vulnerable by the problem they currently face or by difficult personal circumstances, such as serious illness or bereavement. Advisers identified that, in legal casework, clients with mental health issues, cognitive difficulties and hearing impairments were more likely to struggle with telephone-only services. Research by the Equalities and Human Rights Commission (EHRC) as part of its Inquiry into Legal Aid for Victims of Discrimination confirmed the problems faced by clients with disabilities in relation to using telephone-only services.⁹³ This was a point also made by the EHRC in its response to the Civil Justice Rapid Review. In the Civil Justice Rapid Review, mental and physical disabilities were identified as common barriers to participation for vulnerable parties. The Family Justice Rapid Review referred to parties with cognitive or hearing impairments finding it particularly difficult to participate in remote hearings. It is argued that the issues that vulnerable clients and litigants experience in relation to telephone-only casework and remote hearings more generally will also affect significant numbers of social security appellants.

Use of internet technology is a particular problem for more vulnerable clients: Shelter reported to the Civil Justice Rapid Review that: “20% of our existing clients are able to communicate via email. The remainder do not have Zoom/Skype, and telephone contact is being maintained.”⁹⁴ The Official Solicitor and other advice agencies also raised use of and access to remote technology as an issue for their client groups. At the consultation meeting, the Law Centres Network reported that the number of vulnerable clients being seen had decreased, as they did not have the remote technology to contact Law Centres and this extended to telephones, due to the cost of connection.⁹⁵ Moreover, access to digital technology does not equate to digital capability or legal capability, which presents a significant problem for disadvantaged groups in relation to online digital legal services.⁹⁶

There are many problems associated with remote hearings for vulnerable appellants which mean they are likely to struggle to understand and engage with the process. In combination, the

to justice and vulnerable people, The Law Society 2020) <<https://www.lawsociety.org.uk/topics/research/law-under-lockdown-the-impact-of-covid-19-measures-on-access-to-justice-and-vulnerable-people>> accessed on 26 September 2020

⁹² Buck et al (n64) 47

⁹³ Equality and Human Rights Commission, *Access to legal aid for discrimination cases* (Equality and Human Rights Commission 2019)

⁹⁴ Byrom et al (n25) 80

⁹⁵ N Byrom, S Beardon and A Kendrick, *The impact of COVID-19 measures on the civil justice system - Appendices* (Legal Education Foundation 2020)

⁹⁶ Denvir (n86)

disadvantages faced by vulnerable appellants in remote hearings in the social security tribunal are potentially so severe that it is argued that the only way of redressing the balance is to provide such appellants with representation. While remote hearings are the only option, this could be done through a duty scheme arrangement or through publicly-funded legal representation for social security appeals. When in-person hearings return, it is appellants with vulnerable characteristics that should be prioritised for face-to-face oral appeals.

Conclusion

The evidence suggests that remote hearings are likely to have an adverse effect on the appeals process to the detriment of social security appellants. Physical hearings were never easy for unrepresented appellants, but remoteness increases the difficulties that appellants already faced. Evidence from both of the Rapid Reviews and elsewhere suggests an emerging consensus that remote hearings may be appropriate for procedural hearings involving legal professionals, but are less likely to be suitable for fact-finding hearings involving unrepresented litigants and/or the giving of witness evidence.

In common with the rest of the civil justice system, the social security appeals process has suffered from a lack of planning and strategic oversight. This is exemplified by the fact that, when this crisis hit – despite a long-stated intention to move to the digitisation of the Social Security Tribunal – the use of technology in the justice system was described as ‘virtually below sea level’ by Professor Dame Hazel Genn in her evidence to the Justice Committee.⁹⁷ Similarly, continuous online resolution, intended to play a significant part in the digitisation of social security appeals, has been abandoned with little ceremony and less discussion about what went wrong and why. The reactive approach which has so far characterised government attitudes towards the Social Security Tribunal must not continue when the crisis recedes. A failure now to consider the implementation and impact of remote appeal hearings in the social security system will mean, yet again, that decisions are taken about changes to the social security system without sufficient consideration of the long-term implications for appellants. There is a risk of serious injustice in the cases of appellants forced to use a ‘digital by default’ system that is ill-equipped and under-resourced to meet their needs.

⁹⁷ Justice Committee (n16) 16