

Clients & Friends Memo

COVID-19 Update: Coronavirus Bill Radically Overhauls the Use of Video / Telephone Facilities in UK Criminal Proceedings

27 March 2020

Summary

The Coronavirus Bill 2020 (the “**Bill**”) received Royal Assent and passed into law on Wednesday, 25 March 2020. Amongst a wide range of emergency measures, the Bill includes urgently-needed provisions allowing for the greater use of video and telephone communication in UK criminal court proceedings. The Bill updates several pieces of legislation including the Criminal Justice Act 2003, the Crime and Disorder Act 1998 and the Criminal Procedure Rules (“**CrimPR**”).

The criminal courts have historically been hesitant to embrace modern technology and allow for the possibility of remote hearings. The unprecedented challenges presented by the Coronavirus crisis are forcing a rapid adjustment in working practices and are essential to ensure that, “*the Courts can continue to function and remain open to the public, without the need for participants to attend in person*”.¹

The criminal courts have allowed the use of audio and video facilities (referred to as “live link”) in limited circumstances for some time. These reforms greatly expand the availability of live link in criminal proceedings and allow for the possibility of full video and audio hearings, with the exception of jury trials. They also allow the public to participate in court and tribunal proceedings through audio and video in certain circumstances.

Although the new practices are stated to be temporary, their effects are likely to be long lasting and represent a fundamental overhaul of how criminal hearings are conducted. These changes will transform how the 77 Crown and 161 Magistrates’ courts operate and potentially stand to benefit all parties and greatly increase the efficiency of criminal procedure.

Video and Audio Hearings Are Now a Possibility in a Wider Range of Circumstances

The criminal courts have allowed witnesses to give their evidence via video link for some time. Video facilities have also been available to allow attendance by defendants remanded in prison

¹ Department of Health & Social Care, *What the Coronavirus Bill will do*, available at <https://www.gov.uk/Government/Publications/Coronavirus-Bill-What-It-Will-Do/What-the-Coronavirus-Bill-Will-Do>.

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awaiting trial and live link between the court and police stations is also in use for first hearings in the Magistrates Courts.² Following recent investment in the court IT systems, criminal cases are also now largely digital.

The radical overhaul introduced by the Bill will now permit all parties involved in a hearing to attend remotely – including the court itself, defendants, counsel and members of the public and press. The use of video and audio calls should assist with management of the court's limited resources by improving efficiency. It will also improve access and reduce travel time for people who wish to (or are obligated to) participate but are in other jurisdictions.

The Lord Chief Justice has ordered the courts to “*continue as many hearings as possible remotely*”. Jury trials have been suspended “*for a short time to enable appropriate precautions to be put in place*”. Other Crown Court and Magistrate hearings “*should continue, providing they can do so lawfully*”.

The Supreme Court and Judicial Committee of the Privy Council have already announced that all cases will be heard, and all judgments delivered, via video conferencing until further notice. The first Supreme Court case to be entirely conducted by video conferencing was held on Tuesday³ with the first judgment handed down remotely on Wednesday.⁴ The Supreme Court building is temporarily closed and members of the public and press will be able to follow live proceedings online.

The courts have announced plans to use, make publicly accessible and greatly expand the licences for existing video / audio systems (Justice Video Service and BT Meet Me) alongside the use of Skype for Business.

Updates to Key Legislation

Under section 51 of the Criminal Justice Act 2003 (“**CJA**”) and sections 57A to 57G of the Crime and Disorder Act 1998, the courts may allow a participant, including someone who is to give evidence, to take part by live link in a trial, a criminal appeal to the Crown Court or other hearings as listed in section 51(2) of the CJA. The court may make such a direction which includes any or all of the participants, including the court itself.⁵

Proceedings are regarded as taking place at the location where the member or members of the court takes part in the proceedings and joining via video or audio live link will be considered as complying with any obligation for a person to attend court. A hearing may now be conducted

² For further information and guidance, see: The Law Society, *Virtual court first hearings*, available at <https://www.lawsociety.org.uk/Support-Services/Advice/Practice-Notes/Virtual-Courts/>.

³ *Fowler v. Commissioners for Her Majesty's Revenue and Customs* UKSC 2018/0226.

⁴ *Elgizouli v. Secretary of State for the Home Department* [2020] UKSC 10.

⁵ Section 53(1) of Criminal Justice Act 2003 states that “*The court may sit for the purposes of the whole or any part of the proceedings at any place at which such facilities are available*”.

entirely as a video or audio hearing (subject to certain prohibitions and limitations) and a participant may take part by live link from any place in the world.

The Magistrate and Crown Court hearings covered by sections 57A to 57G of the Crime and Disorder Act 1998, include a pre-trial hearing (preliminary hearing), a sentencing hearing or hearing relating to the enforcement of a fine or other orders for payment (enforcement hearing).

For a court to give a live link direction, they have to be satisfied that hosting the hearing by live audio or live video link is in the interests of justice and that the parties to the proceedings have also been given the opportunity to make representations regarding the use of live link (section 51(4) of the CJA). The court is also required to take into account various circumstances when giving or rescinding a live link direction, including the importance of a witness's evidence, the availability of a person to attend, the suitability of the facilities and also whether the person will be able to participate effectively via live link. Under section 51(9) of the CJA, a single justice of the magistrates' court will be able to give a live link direction and require or permit a person to attend by live link.

The main exception, as previously announced by the Lord Chief Justice on Monday, is that no juror may participate by live link (section 51(1B) of the CJA). Another relevant exception to note is that under section 51(10) of the CJA, a court may not refuse or revoke bail for a person if any person (other than someone giving evidence) attends proceedings via a live audio link and that person also objects to the refusal or revocation.⁶

Part 18 of the CrimPR has been amended and is now titled "*Measures to assist a Witness, Defendant or other person to give evidence and participate*".⁷ A key amendment, can be found at 18.1(e) where the court is now empowered to grant a direction to permit a "*defendant or other person to give evidence or to attend a hearing when not giving evidence by live link*". Previously, this solely applied to witnesses giving evidence to the court. It is clear that the aim of these amendments is to assist parties, the public and courts themselves with continuing normal operations. As set out below, under 18.23(2)(b) the court may not give live link directions in certain circumstances where limitations are imposed by the Crime and Disorder Act 1998 and the Criminal Justice Act 2003. The court, under 18.23(3), when "*everyone taking part in a hearing must do so by live link*" may now require for the hearing to be broadcast to the public or instead recorded.

Potential Issues

It remains to be seen how jury trials can be accommodated in the present reality. The live event of a jury trial includes numerous safeguards designed to protect the rights of defendants. Unscheduled private consultation between lawyers and clients, the ability to observe and react in real time to developments in court and the ability for the jury to physically get together and

⁶ Criminal Justice Act 2003 Section 51(11) contains an exception to this rule: "*But subsection (10) does not apply if section 4 of the Bail Act 1976 does not apply to P*".

⁷ The underlining denotes additions to the title.

debate amongst others. There is, however, an urgent need to get the wheels turning again as the backlog of cases in the Crown Court has already reached a two year high. At the end of December 2019, there were 37,434 cases waiting to be heard at Crown Courts which is a 13% increase on the previous year and the highest level reached since 2017.⁸

It will also be interesting to see how these new procedures interact with the principle of open justice. The criminal courts have previously aggressively restricted recording of court proceedings (for example, Stephen Yaxley Lennon - who goes by the name Tommy Robinson – was sentenced to 9 months for contempt of court for live-streaming and aggressively confronting defendants outside Leeds Crown Court along with also breaching reporting restrictions). It is not clear how the courts could continue to maintain these restrictions in an era of public video transmission.

As always with such fundamental reforms, the devil will be in the detail. Communications need to be both secure and stable and it remains to be seen how the existing live link platforms will function under real-world conditions.

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⁸ The Guardian, *Number of outstanding crown court cases reaches two-year high*, 26 March 2020, available at <https://www.theguardian.com/world/2020/mar/26/number-outstanding-crown-court-cases-reaches-two-year-high-covid-19-crisis>.