



Informing Progress - Shaping the Future

FOIL UPDATE 19 August 2022



The NI Department of Justice consults on the future of audio and video hearings

Although the use of virtual court hearings was a feature of the Northern Ireland civil justice regime prior to the pandemic, COVID 19 accelerated the NICTS Digital Modernisation Programme, to significantly increase the use of live video and live audio links for court hearings. The DOJ has now published an 85-page consultation paper to look beyond the pandemic and consider the future of 'live links' longer term.

It is accepted that it will not always be in the interests of justice to use live links but the DOJ reports that users have found them convenient, effective, efficient and cost saving. The DOJ's aim is not to prescribe digital working but to facilitate it, and to introduce legislation following the consultation to achieve the "*right balance*" between capitalising on the benefits of live links whilst having appropriate safeguards in place.

The Coronavirus Act 2020 allows courts in Northern Ireland to receive evidence through the use of audio or video live links, provided the judge is satisfied that the use of the links is in the 'interests of justice'. The DOJ is not seeking to merely replicate the current existing powers and is examining in detail how it should be decided whether a hearing is suitable to be heard remotely.

IN BRIEF

The DOJ is consulting on the future of remote hearings in Northern Ireland, with a view to introducing legislation to take over from the provisions in the Coronavirus Act 2020.

It takes the view that the decision on the hearing should be one for the judiciary and is looking at appropriate provisions around that, to balance the benefits of live links with appropriate safeguards.

FOIL will be responding to the consultation.

The test

The ‘interests of justice’ – the test which applies currently in Northern Ireland and in England and Wales is not defined anywhere but is a standard commonly applied by judges required to make a decision. In making the decision the court must consider “all the circumstances in the case”. Schedule 27 of the Coronavirus Act 2020 introduced new provisions to allow for remote hearings in Northern Ireland, introducing a statutory obligation to take into account public health interests and the views of the parties. It also provides that the live link must allow the person giving evidence to see and hear all other persons participating in the proceedings, and equally allow them to see and hear. The Act created offences to prohibit illicit recording or transmission of the proceedings.

The test in Scotland and the Republic of Ireland is different, requiring the judge to be satisfied that a remote hearing is not contrary to the interests of justice. In Scotland and the Republic of Ireland the judge is also required specifically to be satisfied that a remote hearing will not prejudice the fairness of the proceedings.

Unlike in the Republic of Ireland, the DOJ is not intending to adopt different approaches for civil and criminal hearings. It prefers that the crucial element is a judicial decision. The DOJ intends to retain the current requirement for the judge to hear the views of the parties, but those views will not be determinative. A party will not be able to veto a decision in favour or against a remote hearing.

The DOJ is proposing that the ‘interests of justice’ should remain the test and does not believe there is a need for a court to be satisfied in addition that a live link will not prejudice the fairness of the proceedings: fairness is an inherent element in considering ‘the interest of justice’ test. Views are sought on both proposals. It does not consider that there is a need to define ‘interests of justice’. It believes the test brings with it inherent flexibility, allowing the courts to take into account the characteristics of the individual case and wider issues including the efficient dispatch of court business in general and the availability of judges, staff and court resources generally.

Factors to be taken into account in the use of remote hearings

The legislation permitting remote hearings in the Republic of Ireland gave a power to the judiciary to issue a general direction specifying types of cases assumed suitable for the use of live links. In Ontario, likewise, guidelines provide that for certain types of hearing the default will be a virtual hearing, with a default of ‘in person’ for more substantial matters. The DOJ paper notes that it will not be possible within the proposed legislation to require the judiciary to issue similar guidance or a practice direction.

The Department does not intend to legislate immediately to specify factors to which the court should have regard and, instead, a power is proposed to allow the Department to make secondary legislation to introduce specific requirements on matters to be considered. The DOJ asks for views on whether the legislation should include an obligation that the court should have regard to any guidance issued by the Lady Chief Justice.

That guidance concerns not only how the court would determine the use of live links but also considers the behaviour and appropriate dress of participants and using and accessing the hearing through the relevant technology:

<https://www.judiciaryni.uk/sites/judiciary/files/media-files/Guidance%20on%20Remote%20Physical%20and%20Hybrid%20Attendance%20-%20FINAL%20-%2020220622.pdf>

The Department does not intend to exempt appeal hearings from the provisions, believing that all courts can be appropriate for live links, subject to judicial discretion.

Types of hearing for which live links are suitable

Evaluation of live links has been undertaken by HMCTS in England and Wales and by the DOJ. The DOJ paper reports “*apparent consensus*” that live links are suitable for procedural hearings, interlocutory applications, case management hearings, and “*hybrid hearings where part of the evidence used live links and part in person*”. It also reports consensus on remote hearings being the default for “*short or uncontroversial procedural business*”. The majority view of the Magistrates Association for England and Wales is that live links are unsuitable for “*neurodivergent defendants for substantial hearings, defendants where English is a second language, mentally unwell defendants and unrepresented defendants*”.

The Department has consider adopting the principle in place in Scotland, ruling out a virtual hearing where the hearing is determinative of the matters in issue, but allowing a judge to overrule that default if a statutory test is fulfilled. The consultation paper considers the available evidence on the commonly stated view that hearing oral evidence in person assists in determining the credibility of the witness. The Department concludes that, in its view, accuracy of evidence is more likely to be effectively judged by reference to the consistency of evidence when judged against other sources of evidence than by demeanour. Views are sought on whether remote hearings should be permitted for final hearings where contested oral evidence is required.

Technology

There is very little reference in the paper to the technology in use in Northern Ireland to facilitate remote hearings, except to note that NICTS has made significant investment since March 2020 to extend the use of Sightlink, under 72 licences, with an average of 70,000 call connections per month. It also notes that HMCTS in England and Wales has developed a bespoke IT solution known as ‘Cloud Video Platform (CVP), based on PEXIP, the system used in the Republic of Ireland.

FOIL’s work to date

During the course of the pandemic FOIL undertook an examination of civil justice In England and Wales under the constraints of coronavirus and in June last year published a detailed paper looking at post-COVID reform:

<https://www.foil.org.uk/consultation-responses/foil-position-paper-civil-litigation-post-covid/>

The paper sets out 28 proposals, including recommendations on remote hearings and e-bundles. Amongst the issues raised are:

- the need for a standard approach to listing, with presumptions put in place on whether or not hearings are suitable to be heard remotely.
- standard directions to include questions around listing and, in the event that a remote hearing is adopted, directions to be given on the setting up and handling of the hearing and the preparation and exchange of documents.
- a standard workable platform to be developed.
- a dedicated direct helpline for court users to be introduced.
- a dedicated court officer to be available to the judge during the course of the hearing, to assist with any problems on the court file.
- guidance to be provided on the setting, lighting and framing of remote hearings to ensure an appropriate virtual courtroom is created.

In general FOIL members believe that remote hearings for procedural matters work very well, but FOIL has proposed that trials, hearings involving oral evidence and hearings involving litigants in person should be presumed unsuitable for remote hearing. In its recent submission to the Scottish Civil Justice Council on Rules Covering the Mode of Attendance at Court Hearings, FOIL Scotland called for a general presumption that all civil proofs (trials) should be held in person. Concerns were also raised at proposed provisions permitting evidence to be taken on-line unless there is a particular concern over credibility.

FOIL will be responding to the consultation. If you would like to be part of the FOIL working group considering the paper, please contact Shirley Denyer direct or on info@foil.org.uk

The full paper and the consultation questions may be found at:

https://consultations.nidirect.gov.uk/doj/audio-and-video-links-live-links/user_uploads/cover-page-live-links-consultation-28.7.22.pdf

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