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Remote Justice and Vulnerable Litigants: The Case of Asylum

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The recent acceleration in the use of remote justice in the UK, prompted by COVID-19, raises the question of how such changes affect litigants in person and vulnerable litigants. The latter include children and young adults, immigration detainees, those using English as an additional language, those facing mental health difficulties or who are neuro-diverse, those with alcohol or drug dependencies, and those who are excessively fearful and anxious.

Some of these characteristics can be especially acute among people claiming asylum. Like other jurisdictions, the UK's First-tier Tribunal (Immigration and Asylum Chamber) has expedited its rollout of online procedures which were already underway before the pandemic. Substantive hearing lists were vacated from March to June 2020 and only Case Management Review hearings and immigration bail hearings were heard. These were conducted almost exclusively via telephone, with some hearings heard via video conference. At the time of writing (October 2020), the prospect of the pandemic continuing to prompt the use of these and similar measures, including for substantive asylum appeals, seems likely as COVID-19 cases are climbing.

I have led a team of researchers over the last several years in an attempt to understand appellants' experiences of asylum appeal hearings, conducting



interviews with asylum appellants as well as legal professionals, and observing appeal processes from the public galleries of hearing rooms in the UK and various other European countries. Figure One depicts a typical hearing room in the UK, with the public seating in the background.

¹ I gratefully acknowledge my co-authors on the *Experiencing Asylum Appeals* report (Gill et al, 2020), including Jennifer Allsopp, Andrew Burrige, Daniel Fisher, Melanie Griffiths, Jessica Hambly, Jo Hynes, Natalia Paszkiewicz, Rebecca Rotter and Amanda Schmid-Scott, for their contribution to the programme of work that made this chapter possible. I also acknowledge the financial support of the European Research Council, StG-2015_677917.



Figure 1: Views inside typical hearing room in the UK, with public seating depicted in the background of the lower panel (Credit: Rebecca Rotter)

Recently my collaborators and I have written a report entitled *Experiencing Asylum Appeals* which examines the experiences of people seeking asylum in the FtTIAC and suggests reforms (Gill et al, 2020). While not all appellants characterise appeals negatively, the report identifies a series of challenges appellants encounter in their face-to-face hearings, including confusion, anxiety, mistrust, disrespect, communication difficulties and distraction. Although our research preceded COVID-19, these categories provide a ready

framework for analysing the impact of the recent move towards remote justice.

Confusion

Remote justice could mitigate some sources of confusion described in the *Experiencing Asylum Appeals* report. One example concerns legal etiquette during hearings. Most of the actors involved in asylum hearings are repeat players including the judge, both representatives and the interpreter. This makes asylum appellants' lack of knowledge about when to sit and stand, when to stay silent and speak, as well as how to address the judge, quite obvious and a frequent source of self-consciousness. The fact that all the parties might be unused to the remote technology could act as a leveller. Judges and the other repeat players may only recently have mastered the technology themselves which could be helpful in reminding them how it feels to be disorientated and struggle communicating, stimulating empathy with appellants experiencing similar difficulties. Remote hearings might also lend themselves to longer introductions because judges must explain how the remote system works and what to do if technology fails, which could help to reassure litigants generally.

Other forms of confusion may be more acute though. Many asylum appellants are unsure about the potential finality of the appeal even when face-to-face (Gill et al, 2020). When the whole hearing is confined to the screen or even a telephone call its stature is almost inevitably reduced.

Asylum appellants are also frequently ill-informed about the roles of the actors involved in hearings. We found evidence, for example, that appellants are often surprised that the solicitor, to whom they have disclosed their narrative in advance of the hearing, will not be speaking for them on the day. Rather, they sometimes meet their barrister only a few minutes before the hearing, and are expected to trust them immediately. One barrister gave this example:

'I said to the client this morning, "Hi, I'm Susan²." I introduced myself, then after a pause the client said, "Who are you?" And I said, "I'm your barrister." I mean I had said that I was a barrister, but they just didn't get it.' [Female Barrister, 25 years' experience].

Gill et al, 2020

Rapidly forming relationships of trust is difficult enough face-to-face, but the ability of barristers and others to put appellants at ease remotely may be severely limited. Ways to break the ice like discussing common experiences of weather and traffic or sharing a coffee before the hearing are often impossible.

One way to think about legal hearings is in terms of genre (Mullings, 2020). Popular culture is rich in references to courts, and television has disseminated a crude popular understanding of what courts look like and what happens there. Litigants will consequently have a rough idea of the roles, setting and costume associated with them. When attending a hearing in person their knowledge of the genre prompts them to expect certain things, like unusual forms of turn-taking in speech or legal forms of address they would not hear elsewhere. The markers that help to establish genre in litigants' minds are largely absent online though. There is ceremony associated with legal hearings: not everyone likes the formality but the visible structure can help to define roles. In contrast, in remote hearings litigants may feel untethered from the cultural cognitive anchor of the court space.

There is also likely to be a certain amount of confusion arising from the use of the technology itself. Technical issues frequently frustrate the flow of proceedings (Byrom et al, 2020). Although some litigants are likely to be very familiar with telephone conferencing or screen based forms of communication others may not be. The look and feel of specialist online systems in particular are likely to be unfamiliar to appellants even if they have used popular video conferencing platforms in the past. The disorientation involved in using a new platform can multiply quickly under conditions of stress.

The *Experiencing Asylum Appeals* report discusses not only the confusion that appellants experience but also some of the mitigating factors that can lessen it. Primary mitigating factors are (good) legal advice and representation. Under lockdown conditions though, or social distancing arrangements, many advice providers reduced their face-to-face provision, meaning that the quality of legal advice may well be stymied in the run-up to an appellant's hearing. Law centres, for example, have experienced a decline in their contact with many clients who cannot access their digital services due to poverty or inexperience.

Anxiety

Some appellants find their hearings stressful. This can manifest in various ways including becoming intimidated by the judge or the general situation and not being able to give their full evidence. One appellant told us that they lost their memory because of nerves.

² Pseudonym

'Before I go to that court I had so [many] things to say but when I was there it was all completely... out of my brain, I didn't remember anything to say... because the situation ... was really stressful and nervous and for me it was really big issue. I forgot everything'

Afghan Unrepresented Appellant, in Gill et al, 2020

Waiting for a long time for one's hearing date can exacerbate anxiety. Without being allowed to work or move on with their lives some appellants obsess about the hearing, and when it finally arrives it can be overwhelming or surreal.

Freedom From Torture and the Helen Bamber Foundation (2020: 2) report that lockdown and social distancing can exacerbate asylum seekers' anxieties:

"many survivors of torture ... 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"

Being at home may reduce feelings of being overwhelmed, but it can also worsen things. Appellants may feel less well supported, for example, because they do not have friends with them who might have attended a physical hearing.

From the appellants' perspective, they may be very keen to get the hearing over with if they are extremely anxious about it. Although appellants who do not want to use online procedures can opt out of them, an appellant may not be able to predict the effect that anxiety is going to have on their ability to participate in advance. They may also be reluctant to ask for allowances on the basis of their anxiety. The Judicial College's Equal Treatment Bench Book Committee (2020: 4) write that

"people in difficulty may say they are willing to continue, out of a sense of deference, unassertiveness or anxiety to get the hearing over with"

This puts onus on the judge to detect signs of debilitating anxiety during the hearing itself. Using remote hearings may make this harder, however. In a face-to-face hearing it might be possible to see the appellant shaking, or discern that they are giving whispered replies, but online only the face of the appellant might be visible, and the low volume of replies could be attributed to connection issues or compensated for by turning up the volume. Evidence suggests that appellants find it harder to challenge what is happening remotely too (Byrom et al, 2020)

A further difficulty when the appellant appears on screen is the possibility that they will react negatively to seeing themselves. It is quite common for anyone to feel embarrassed when seeing themselves. Some appellants are extremely self-conscious though, and sometimes hold highly negative self-images related to anxiety

and experiences of trauma. Seeing themselves on screen could stimulate feelings of self-deprecation and unworthiness which may lessen their abilities to give evidence.

Mistrust

The *Experiencing Asylum Appeals* report discusses two types of mistrust: the feeling appellants have of being mistrusted by judges and others involved in the hearing, and the mistrust they have of the system. In the first instance, appearing via videolink or conducting the appeal via telephone may make the assessment of credibility harder. Judges are deprived of the opportunity to see the entire body language of appellants, and eye contact in particular could be interfered with. Via videolink for example, appellants may naturally talk to their screens, which is where they can see the other participants, but their cameras could be located just above or to the side of their screen, resulting in a lack of direct view of their eyes when they are speaking which could give the impression of furtiveness. Poor lighting, small screen sizes, and constricted broadband width, resulting in a blocky picture, could all exacerbate the issues. While judges may have been briefed on the risks these issues present, appellants are still deprived of the full repertoire of body language they may have used to communicate.

In terms of appellants' mistrust of the system, many asylum seekers struggle to trust interpreters who are co-nationals or co-ethnics, owing to the bad experiences that prompted their flight. Furthermore, many have deep reservations about state authorities owing to the experiences that led to their flight or their experiences of border control *en route*. A common perception for example, is that the judge or their lawyer is not independent, but in fact in league with the Home Office in some way.

'When I claimed asylum, and they said they will give me legal aid, I was afraid. Because legal aid is paid by the government. So in my head I thought, if a lawyer is paid by the government, then it means that the government can influence the process. ... I felt like, "Hmm, OK" I was suspicious.'

Male Appellant, Cameroon, quoted in Gill et al 2020.

Appellants' mistrust of the process can be affected by the publicness of the hearing. Traditionally journalists, interested parties and the public have had the right to attend hearings unless there are reporting restrictions or they are conducted in camera. On the one hand, making sure that justice is open to the public is important for building trust in the system. It is constructive to show the appellant that there is nothing to hide. Indeed, there has been much debate about the importance of maintaining open justice where appropriate during the pandemic, including making provision for journalists to see hearings where appropriate. Consideration has also been given to members of the public. Freedom From Torture and the Helen Bamber Foundation (2020), for example, recommend that a published protocol is made available for third parties to observe hearings or watch recordings taken by the tribunal after the event.

On the other hand, appellants who are concerned about malevolent forces in their home countries might understandably also be keen to know what will happen to any recording made of their hearing. There is a risk that public observers of asylum appeals will record or livestream the hearing on the internet, against the instructions

of the judge, which would have been harder in a face-to-face hearing. The worst case scenario would be that either a videostream or a recording would be somehow accessible to a third party outside of the United Kingdom and every measure must be taken, and seen to be taken, to ensure against this possibility because appellants may not disclose their full case if they are not convinced about this. How the official recording of the hearing is stored and how it is distributed is therefore of uttermost importance. While remote hearings present a good opportunity for the tribunal service to improve its data collection and transparency, bearing in mind that no transcript or recording of asylum appeals is usually produced in face-to-face hearings, this cannot come at the price of appellants' trust in the system. One solution may be to only allow the recording to be viewed or listened to in a court or tribunal building, but the appellant may still be reticent about this because they will not be able to see who watches it.

Face-to-face hearings are public and the security arrangements they entail are not perfect, but there are checks at the entrance to hearing centres, and judges and appellants can see the other parties in the room. The unease that could be generated when it is impossible for the appellant to see who is viewing (or will view) the hearing needs to be taken extremely seriously.

Disrespect

Some appellants report experiencing disrespect because they feel as though the process of appealing treats them as though they are criminals, or because they feel that judges are not taking a keen interest in their case. They feel devalued when judges or other actors in the hearing do not pronounce their names correctly. They sometimes find the questioning of the Home Office Presenting Officer to be particularly patronising and confrontational. They also object to situations in which the repeat players in the room share a joke or informal conversation before the hearing, making them feel excluded. They are also aware of the marked difference in respect shown to them and to the judge, whose status is indicated by the physical architecture of the room such as their raised dais and ritualised behaviours like when the parties stand as the judge enters and leaves.

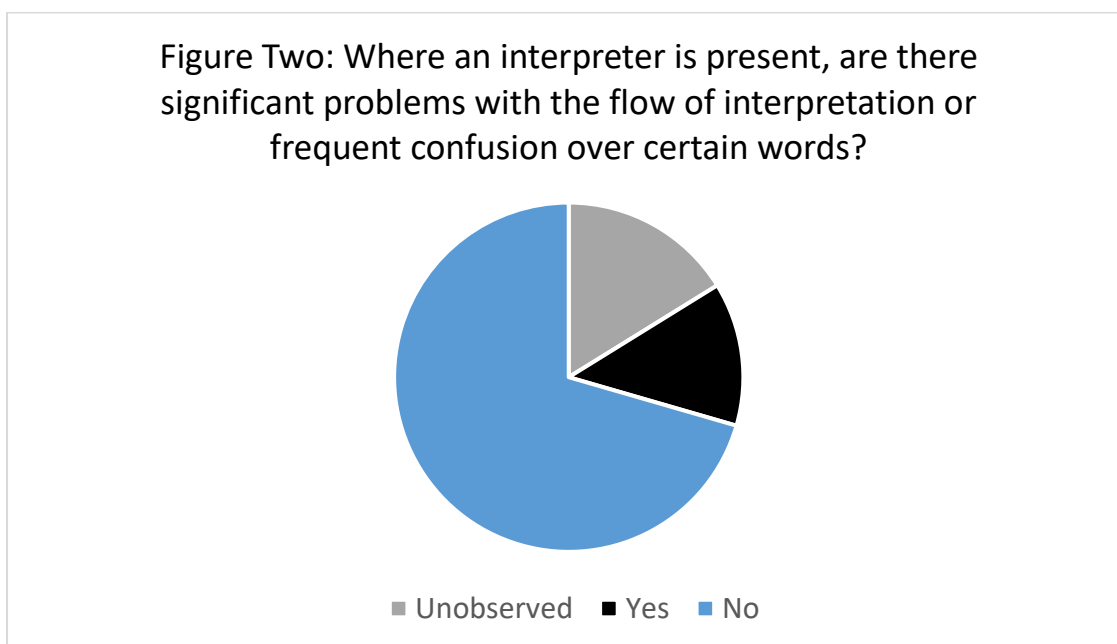
Remote hearings have the potential to improve appellants' perceptions of respect and disrespect in various ways. There may be fewer opportunities for the repeat players to hold informal conversations that exclude the appellant for example, and many of the ritualised aspects of the hearing will also be tempered (although forms of address like using 'sir' and 'ma'am' to address the judge may continue). Appellants may also be unable to detect when judges are bored and disengaged in the hearing.

On the other hand, it may be harder for the judge to demonstrate to the appellant that they are alert and paying attention to their case via remote means. Making eye contact, looking engaged and interacting frequently are all more difficult in remote environments. Difficulties of pronunciation of names may also be harder to clear up if audibility is imperfect or there is a poor connection.

Communication Difficulties

Effective communication during the legal hearing demands that litigants understand the relevance of points raised, are able to follow proceedings, are able to make themselves understood, are able to introduce and respond to relevant issues, and that they understand the consequences of decisions or court or tribunal directions.

Face-to-face asylum appeals are often characterised by communication difficulties because the appellant is frequently operating in a second or third language. Of 240 mainstream asylum appeals surveyed for the *Experiencing Asylum Appeals* report 79% involved an interpreter³. Interpreters are not a panacea, however, even with the help of visual cues in a face-to-face environment. For example, in over 15% of cases (15.8%) researchers recorded 'Yes' to the question 'If there is an interpreter, are there significant problems with the flow of interpretation or frequent confusion over certain words?' – see Figure Two.



Notes:

Data refer to face-to-face hearings observed between 2013 and 2016. A version of the data is available here:

<https://reshare.ukdataservice.ac.uk/852032/>

N=173

Unobserved means that the researcher either a) could not observe the instance of data because it did not come to light during the data collection; or b) is uncertain about whether the data was observable during the data collection owing, for example, to their unfamiliarity with the language spoken between the interpreter and appellant.

Under remote conditions, the lack of visual cues is likely to hamper effective information exchange between the interpreter and the appellant even more. Their interaction is vulnerable to even minor distortions such as buffering delays. Interpreters have a difficult job that requires a good deal of skill and concentration and the additional cognitive demands of screen based or telephone hearings may provoke fatigue and lead to mistakes.

The Judicial College's Equal Treatment Bench Book Committee (2020) notes that there are particular difficulties with telephone hearings because of the reliance on the

³ This excludes a small number of ambiguous cases relating to the match between the interpreter's language and that of the appellant.

tenor of voice to convey meaning. Judges themselves should seek to avoid any tension in their own voices as a result, and also need to take 'particularly active steps' (ibid: 4) to ensure all the participants remain fully engaged. Judges managing hearings on screen or via telephone connections may be tempted to use relatively closed questions which do not afford the same opportunities for explication. They might also find it harder to interpret silences (possibly attributing them to the technology) that would have spoken for themselves face-to-face.

Another issue facing remote appellants is the challenge of finding a space that is private from which to participate. Parents may face challenges of disclosing sensitive aspects of their case if their children are within earshot. Children themselves may be exposed to hearing things that could traumatise them, so safeguarding is an important consideration in remote hearings.

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.

Freedom from Torture and the Helen Bamber Foundation (page 5)

This issue is not confined to the hearings themselves: appellants need to be able to communicate freely with their legal representatives and any supporters they have in advance of hearings too.

There are also inequalities in practical access to technology. Wifi, phone credit, broadband width and access to devices all cost money. Much of the guidance available for operating in a remote hearing is written too, which may render it useless for illiterate appellants. It may also not be available in a language they can understand.

Distraction

Face-to-face hearings are *immersive* because a journey is required. But to what extent is this valuable? On the one hand, certain litigants could appreciate not having to travel. Parents of children with disabilities, for instance, might appreciate the convenience of a remote hearing, sparing them the difficult journey to a hearing. Busy litigants - not to mention busy barristers, interpreters and judges - may also appreciate the reduced travel time, since face-to-face hearings can involve long travel times and a lot of waiting around. Expert witnesses may be more likely to attend remotely too.

On the other hand, a journey can focus appellants' attention. The journey is a reminder that this is something of sufficient gravity to be set aside - literally and physically - from everyday life. Upon arrival the appellant is bodily surrounded by the hearing in the venue at which it takes place. Even if their attention starts to wander, or they start to dissociate, then the venue can anchor their cognitive presence. In their home there may be multitudinous distractions ranging from serious obstacles such as the presence of abusive partners and the threat of off-screen coercive control, to overcrowding, to more minor forms of distraction such as television,

internet surfing, and simply looking around the room. A small screen is no match for the immersive experience of the face-to-face event for commanding the attention of all involved.

Furthermore, recalling traumatic experiences can often be difficult at the best of times, and if the appellant has done it various times before then a degree of jadedness can enter into recollections. Screen-based communications can be more tiring because of the intensity of focussing on a small screen and missing out on visual cues provided by body language in face-to-face interactions. This could lead to lethargic or curtailed responses to questions.

The technology itself may also become distracting. Fiddling with the screen brightness and contrast, worrying about the connectivity and availability of credit, battery life, reception, and broadband speed could all tax litigants' attention. What is more, the features of homes that can impact on appellants' abilities to concentrate are not confined to technical ones. The Judicial College's Equal Treatment Bench Book Committee (2020) raises the possibility that there may be unsuitable seating arrangements available at home, for example, which could quickly lead to posture related discomfort.

Appellants are not the only ones affected by these considerations. Barristers, interpreters and judges may be more susceptible to challenges of distraction in remote settings because they are repeat players. They may be tempted to multitask while the hearing is on in the background. Mutually enforced, largely unspoken, standards of professionalism that were helpful in focussing attention in face-to-face settings may be lacking in remote situations.

Conclusion

It is fair to say that the moral coordinates of the debate about remote justice changed with the onset of the pandemic. For a time at least during the full lockdown in 2020, no longer was the issue about whether online and remote forms of justice are preferable or comparable to face-to-face forms. Suddenly the issue was whether online and remote forms of justice were preferable to no justice at all, or at least much slower and more impoverished forms. In this context it is worth noting the efforts of court and tribunal staff and judges to keep justice moving during the pandemic. One of the most difficult aspects of seeking asylum is the interminable waiting, and so maintaining a sense of the possibility of progress is, all other things equal, a welcome achievement.

There are also some potential advantages of remote hearings such as reducing confusion over court and tribunal etiquette, reducing the association some appellants have with face-to-face hearings and disrespect, and improving the convenience of the proceedings. Taking these factors on board, there may be certain types of hearings that are suitable to be heard remotely. Much depends on the particular participants involved, but hearings dealing with routine questions or questions of law rather than contestations of fact may be examples. The latter tend to be at higher courts which are better-resourced, with a greater proportion of professionals involved.

It is nevertheless necessary to raise concerns about the turn to remote justice. In asylum appeals, where the publicness of hearings is ambiguous, serious trust issues could arise. It may become more difficult to communicate effectively with judges, interpreters and lawyers. Inequalities could be introduced through uneven technical capacities. And the participants may be exposed to more distractions and obstacles such as off-screen coercion or inhibition by abusive partners or the presence of children.

For these reasons, in cases where oral evidence is likely to be needed, there should be a presumption against remote hearings if the appellant is unrepresented, requires a witness, needs an interpreter, is vulnerable, or if the case concerns traumatic material.

This should not be taken to indicate that paper based hearings should become the norm though. Asylum appellants generally appreciate the opportunity to be heard by a judge. Wherever possible, every effort should be made to hold in-person hearings, with appropriate social distancing measures. To do this, court and tribunal estate capacity may need to be increased to meet the need for space. Nor should court and tribunal authorities take 'nonattendance' at a remote hearing as carte blanche to go ahead with a paper-based hearing when social distancing measures are in force, given the difficulties many people have in accessing and engaging with remote hearings.

Finally, if remote hearings are to become more common there should be guidance for asylum appellants in a medium they can easily understand. Judges, lawyers and various court and tribunal users have been issued with guidance and there is discussion of a new guidance note for judges. Asylum appellants themselves need more guidance in their own languages though, that does not rely on textual forms of communication (which assumes literacy). For asylum hearings in particular, information films in the main languages of asylum appellants should be produced⁴.

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⁴ As a template see these videos for face-to-face appeals: <https://geography.exeter.ac.uk/research/appeal/>

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