The Remote Access Family Court – What Have We Learnt So Far in England and Wales?

Mr Justice MacDonald

Deputy Head of International Family Justice for England and Wales

International Academy of Family Lawyers Webinar, 21 May 2020

INTRODUCTION

It is a truism that we cannot know what the future will hold. Recently, this has been demonstrated to me in stark terms. On 1 February 2020 I delivered a speech to the Four Jurisdictions conference, held in Malaga in the days when we could interact with each other face to face; in the days when we had only a vague notion of the storm that was even then approaching us all. The speech was entitled "Family Law – Past and Future" (see [2020] Fam Law 407). The presentation looked back at the past twenty five years of family law and forward to the next twenty five. In looking forward, I sought to peer through a glass darkly in an attempt to perceive what challenges the next twenty five years might hold, and how we might begin to think about addressing them.

Gazing into the future I noted new categories of maltreatment emerging to threaten the welfare of children that we had failed to anticipate, including the systematic exploitation of children by criminal gangs. I contemplated children whose genetic heritage is born of more than two parents. I imagined sentient, self-consciously aware androids capable of emulating well beyond good enough parenting being permitted to care for looked after children who need permanent families in a country short of foster cares and adopters. What I did *not* address, indeed what I confess did not even contemplate when writing the speech was an entirely remote access family court in which family justice was dispensed over the Internet by a judge sitting at a computer screen, remote from parties and lawyers. The reasons for omitting this possible future are probably multifaceted, not least a lack of imagination on my part. But also key to that oversight was, I suspect, that at that time, at least in this jurisdiction and in the field of family law, there remained significant, evidence based reservations with respect to the use of remote hearings in family cases.

Three months later, the family justice system in England and Wales is currently operating on an almost entirely remote basis. As I will come to, there are exceptions, borne out of an increasing understanding, based on our rapidly accumulating experience, that our initial reservations regarding the suitability of family cases for remote hearings were not misplaced, rendering some types of hearing unsuitable for the application of the remote access paradigm. But as at today's date, a large number of family cases are being dealt with each day, across the jurisdiction, by way of remote hearings.

Just as it is demonstrably dangerous to try and anticipate the future, there are many cautionary tales about writing history before it has properly become history. However, when kindly asked to give the keynote address at this event it seemed to me a good time to take stock of the lessons that the introduction of a remote access family court has taught us so far in our jurisdiction. It is not my intention to hold out our approach as being definitive, still less to persuade other jurisdictions to adopt that approach. Rather, I seek simply to set out for you the benefits and difficulties *we* have encountered in endeavouring to create a remote access family court in this jurisdiction as a means of mitigating the impact of the current public health emergency.

At the outset, it is important that I make clear that, whilst the Remote Access Family Court has allowed us to continue the effective operation of large parts of the family justice system during the course of the COVID-19 pandemic, this necessary use of remote hearings to address the current emergency has again highlighted the previously recognised difficulties with the use of remote hearings in family cases. In these circumstances, I for one am clear that such successes as we have had with remote hearings during this period of crisis should *not* be taken as establishing a settled mode of remote operation for the family courts that will apply without more *after* the resolution of the current COVID-19 crisis.

THE REMOTE ACCESS FAMILY COURT

On 16 March 2020 the Prime Minister of the United Kingdom announced a requirement for people to start working from home where possible. By 19 March the President of the Family Division had promulgated and issued practice guidance on the use of remote hearings in family cases. The rationale for that guidance was set out as follows:

> "The aim of the Guidance is to 'Keep Business Going Safely'. There is a strong public interest in the Family Justice System continuing to function as normally as possible despite the present pandemic. At the same time, in accordance with government guidance, there is a need for all reasonable and sensible precautions to be taken to prevent infection and, in particular, to avoid non-essential personal contact."

The President's guidance has formed the foundation of local guidance issued by regional leadership judges to address local circumstances. The early promulgation by the President of national practice guidance has, largely, ensured consistency at a local level subject to local conditions.

On 23 March 2020 I compiled a document entitled "The Remote Access Family Court" with a view to providing practical help for judges and practitioners undertaking remote hearings. It is important to make clear that the initial RAFC document and the production of subsequent versions has *only* been possible due to the continued and diligent hard work of judges, court staff legal and social work practitioners, civil servants and many others with respect to the myriad of problems requiring resolution in order to undertake effective remote hearings. In this context, from the middle or March and thereafter I have been able to draw on a huge body of local thinking, papers, protocols and email exchanges. In short, I was able to produce the RAFC document *only* because of the hard work of others.

As the President of the Family Division subsequently made clear in the Court of Appeal in *Re P (A Child: Remote Hearing)* [2020] EWFC 32, the RAFC document does not constitute judicial guidance. Rather, it is better characterised as a 'manual' for remote working in the family justice system, as indeed the Court of Appeal characterised it in *Re A (Children)(Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583. The aim of the RAFC manual is to identify clearly the problems which arise from the urgent need to move to remote hearings, to identify potential solutions to those problems and to set out operational protocols to govern the implementation of those solutions. As solutions are found to each problem, an updated version of the manual is circulated. As made clear in *Re P* the RAFC manual deals with *how* to set up and hold a remote hearing. It does not constitute guidance on *whether* a hearing should or should not be conducted remotely.

With respect to that latter question, between March and April there was an ongoing debate regarding the type of family cases that are, and that are not, appropriate for a remote hearing. This has resulted in a number of appeals to the Court of Appeal and further communications from the senior judiciary. On 9 April 2020 the Lord Chief Justice, the Master of the Rolls and the President of the Family Division communicated to judges a number of suggested parameters to assist a court in deciding whether or

not to conduct a remote hearing in civil and family cases. Prior to that, on 27 March 2020 the President had issued further guidance which emphasised the primary purpose of the justice system:

> "Can I stress, however, that we must not lose sight of our primary purpose as a Family Justice system, which is to enable courts to deal with cases justly, having regard to the welfare issues involved [FPR 2010, r 1.1 'the overriding objective'], part of which is to ensure that parties are 'on an equal footing' [FPR 2010, r 1.2]. In pushing forward to achieve Remote Hearings, this must not be at the expense of a fair and just process."

Within this context, on 16 April 2020 the President handed down the judgment in *Re P* in which he held that, because no two cases may be the same, the decision on remote hearings would be left to the individual judge in each case, rather than making it the subject of binding national guidance.

The iterative process I have described has resulted, over the period of some two months since 16 March 2020, in the development and continued operation of a Remote Access Family Court that functions based upon the following cardinal principles:

> (a) Ensuring the safety from infection of judges, court staff, lawyers and litigants whilst at the same time facilitating a hearing that permits the parties to participate fully and that ensures both procedural and substantive fairness in accordance with the imperatives of Art 6 and the common law principles of fairness and natural justice.
>
> (b) Ensuring, in so far as far as possible, that all hearings deemed by the judge to be suitable for a remote hearing replicate the 'live' court process and the usual practice in court.
>
> (c) Ensuring the maintenance of the *decorum* of a court hearing, commensurate with the gravity and seriousness of the issues being decided in the formal legal arena.
>
> (d) Ensuring, where possible, transparency with respect to the operation of the Family Court by seeking to facilitate the rules as to press access.
>
> (e) Ensuring that the decision whether to proceed with a remote hearing remains at *all* times a matter of judicial discretion for the judge hearing the case.
>
> (f) Ensuring that where the requirements of fairness and justice require a court-based hearing, and it is safe to conduct one the existence of the Remote Access Family Court does not preclude such a hearing.
>
> (g) Recognising that there will be some cases that will need to be adjourned for longer periods of time because a remote hearing is not possible *and* it undesirable to hold a court based hearing having regard to guidelines on social distancing.

Within this operational paradigm, remote hearings are set up in accordance with the *Protocol For Remote Hearings in the Family Court and Family Division of the High Court* appended to the RAFC manual. That Protocol deals with practical issues ranging from the provision of electronic bundles, arrangements for recording, dealing with the attendance of the press and the conduct of the remote hearing itself. Where a court based hearing is proposed, the *Protocol for Conducting Safe Live Court Based Family Hearings during the COVID-19 Pandemic* appended to the RAFC manual sets out the method by which such a hearing may be achieved safely.

In so far as possible the Remote Access Family Court has taken an agnostic approach to the communications platforms to be used to access remote hearings, subject to any specific government

guidance. This has been labelled the 'Smörgåsbord' approach, whereby judges, lawyers and litigants choose from a suite of commercially available platforms depending on the circumstances of the court, the parties and of the particular case, subject to the requirement on judges to encourage the use of platforms supported by the Court Service.

During March and early April 2020 it became clear that it was desirable for there to be an evaluation of the operation of the remote system. To this end, the President commissioned the Nuffield Family Justice Observatory to undertake a rapid consultation on the operation of the Remote Access Family Court. On 5 May 2020 the NFJO produced the results of the consultation. Those who responded to the survey were evenly balanced in terms of their overall positive and negative reactions to remote hearings. Most thought that remote hearings were justified for certain cases in the current emergency. Some felt that this way of working could continue for certain cases in the future. The NFJO report also however, highlighted significant issues with remote hearings.

BENEFITS

The Remote Access Family Court has provided manifest benefits, which benefits are no less important for the fact that they can be stated both simply and shortly.

At the level of high principle, the operation of a remote access family justice system has contributed to the maintenance of the rule of law in this jurisdiction during the current crisis. Situations of crisis have the potential to place the rule of law under stress and may increase the risk that violations of both the rule of law and of the fundamental rights that flow from it will occur. Within this context, it is all the more important to ensure that the family justice system continues to operate, in so far as it is able safely to do so within the constraints imposed by the pandemic, as an element of ensuring the operation of the constitutional imperative that is the rule of law.

In the circumstances, the key benefit of the Remote Access Family Court has been that during the course of the current public health emergency vulnerable children and families and families in crisis have retained effective access to justice for the resolution of issues arising out of family break down and child abuse and for the protection of their rights. This has been particularly important where the COVID-19 pandemic, and the measures that have been necessarily implemented to arrest the spread of the virus, have in certain cases exacerbated pre-existing risks, in particular with respect to domestic violence in the context of a requirement for people to stay at home. Further, in circumstances where s.1(2) of the Children Act 1989 places a statutory duty on the court to have regard to the general principle that delay is ordinarily inimical to the welfare of the child, the Remote Access Family Court has enabled the court to continue to endeavour to meet this duty in cases suitable for remote hearing.

A second and related advantage is that the Remote Access Family Court has allowed the family justice system to mitigate (although not eliminate entirely) the inevitable backlog of cases resulting from the impact of the COVID-19 pandemic on public institutions in this jurisdiction. By continuing to deal with those cases suitable for remote hearing through the Remote Access Family Court as and when they arise and within the timescales laid down by the law, the family justice system has been able to reduce the accumulation of cases falling to be dealt when live hearings are once again possible. This is particularly important in circumstances where it is to be anticipated that, once schools are re-opened and primary health care services resume normal operation, there will be a significant uptick in the number of child protection cases requiring resolution in the family courts. It is also plain that some litigants have welcomed the ability to continue to access the family court remotely during the course of the pandemic. In particular, it was reported to the NFJO that parents involved in Family Drug and

Alcohol Court (FDAC) programmes were grateful that their non-lawyer reviews with judges are still able to take place.

Finally, family lawyers constitute an indispensable part of the family justice system. Within this context, the ability of the courts to deal with family cases in the future, including the backlog built up during the public health emergency, will be severely prejudiced if there are insufficient numbers of legal practitioners to do that work. Research by the Bar Council of England and Wales undertaken at the end of April 2020 indicated that 53% of all self-employed barristers could survive in practice only six months and 74% could survive a year given the impact on incomes of the COVID-19 pandemic. A survey undertaken by the Law Society, also at the end of April, indicated that 71% of small high-street firms, which firms make up the bulk of family law solicitors, believe they may have to close within the next six months as result of the COVID-19 crisis. Within this context, maintaining a Remote Access Family Court during the course of the pandemic has, it is to be hoped, allowed the acute impact of the crisis on legal practitioners to be mitigated.

THE NEED FOR CAUTION

The writing of history can have a sanitising effect, not least because it so often falls to be written by the victorious, keen to play up their virtues and disguise their failures. This risk is even more acute if history is written too soon and thus without the sobering perspective provided by the passage of time. Accordingly, in seeking to summarise for you our experience in creating a remote access family court in this jurisdiction as a means of mitigating the impact of the current public health emergency, it is important also to be candid about some of the difficulties that we have encountered (for a complete account of the difficulties see the NFJO report at https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/nfjo_remote_hearings_20200507-2-.pdf).

It has quickly become apparent that not all cases are suitable for remote hearings. It is the case that justified caution has been expressed in using witness demeanour as an indicator of credibility. The court's impression of a parent, and its assessment of the credibility and reliability of that parent, should coalesce around matters such as the internal consistency of their evidence, its logicality and plausibility, details given or not given and the consistency of their evidence when measured against other sources of evidence and other known or probable facts. Against this however, and as the President made clear in *Re P*, in some cases a crucial element in the judge's analysis is nonetheless the judge's ability to experience the behaviour of the person who is the focus of the allegations throughout the oral court process, not only when they are in the witness box but also when they are sitting in the well of the court.

This issue does not only concern the judge. The effective cross examination by an advocate of a witness arguably depends to a degree on close observation of body language and subtle indications of discomfort and variations in tone of delivery. An advocate's job also involves, of course, reading his or her tribunal. Within this context, the NFJO report noted many responses stating it is difficult, if not impossible, in a remote hearing to judge the reactions of a witness giving evidence or the reactions of a party hearing that evidence. Within that context, many respondents to the NFJO report felt that contested final hearings and hearings requiring cross-examination are not suitable for remote hearing.

A related issue has been the difficulty in replicating in a remote hearing the humane and sensitive way in which cases in the family court must be, and are dealt with. Respondents to the NFJO consultation noted that it was "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" and that it is "difficult, if not impossible, to ensure that parties to proceedings receive the level of

support before, during and after hearings that they would normally get if they are legally represented".

A further key problem for the Remote Access Family Court has been ensuring equal access to justice. By definition, access to the Remote Access Family Court relies on having available the technology required to participate in a remote hearing. As the NFJO report makes clear, in the context of the demographic with which the family court is often concerned this can be an issue. In public law child protection cases many parents do not have access to the technology required for fair and efficient remote hearings. Many parents do not have sufficient phone credit, WiFi, or data allowance to participate in telephone or video conferences. These difficulties also risk exacerbating existing inequalities based income, race and mental capacity. In particular, parties in cases involving domestic abuse, parties with a disability or cognitive impairment or where an intermediary or interpreter is required are at a particular disadvantage within the remote access paradigm. Particular difficulties have also arisen in seeking to ensure effective access to justice for litigants in person.

A further issue that was not immediately anticipated but has come to the fore has been the evidence of the adverse impact of remote hearings on the wellbeing of judges and lawyers. The NFJO report identified increased levels of tiredness, headaches due to eyestrain from more hours spent looking at a screen and a reduction in job satisfaction, one judge observing that "I didn't sign up to this job because I wanted to spend all day, every day on the phone and in front of a computer screen". More fundamentally, the concept of video-hearings as conceived prior to the COVID-19 pandemic anticipated a judge conducting the remote hearing from a courtroom. With the advent of government guidance stipulating working from home, judges now find the difficult and sometimes horrific cases they deal with are brought directly into their homes, comprehensively destroying the vital boundary between the professional and the personal. This breach of the border between home and the court has also been a difficulty for parties and for children. The NFJO report cited victims of domestic violence feeling distressed by hearings effectively taking place in their homes. With the schools closed due to the COVID-19 pandemic there have also been significant issues with the presence of children during proceedings and the risk, for example, of parents' distress at the end of hearings being immediately evident to their children.

Finally, technology is characterised traditionally as an indispensable aid to increasing productivity. We are regularly told that there is no process that technology cannot make better organised and more efficient. One surprising difficulty therefore, in implementing the Remote Access Family Court, has been the fact that it has proved impossible to replicate, using remote hearings, the high levels of judicial productivity seen in 'live' court lists. Within this context, one clear conclusion that can already be drawn from the widespread implementation of remote working is that it results in a *radical* reduction in the number of cases that can be accommodated in a given court list.

CONCLUSION

The COVID-19 crisis has the constituted an unprecedented challenge to the provision of core public services that are traditionally delivered face to face. As an emergency measure to address an unprecedented restriction on access to family justice caused by the COVID-19 pandemic, I would argue that the Remote Access Family Court has been, on balance, a success. Through the use of remote hearings we have been able to maintain, albeit at a reduced level, effective access to justice for families in crisis and for vulnerable children and to continue mitigate the damage done by family breakdown and child abuse notwithstanding the unprecedented impact of a global crisis.

But, as I have sought to demonstrate, there have also been difficulties. Perhaps most acutely those arising from the loss of that direct human connection that it is now clear so many see as the keystone in our administration of family justice. Family law is concerned, at its heart, with the human condition and the resolution of the myriad of tragedies and complications that flow from it in all its chaotic splendour. In this context, and requiring as it does the application of empathy and compassion, it is perhaps unsurprising that people believe strongly that absent the current public health emergency family justice is best achieved face to face and not via a computer screen.

This position also highlights the continued importance of public engagement in the designing of critical public institutions. The design and functioning of the family justice system is a matter of acute public interest and therefore a matter that must be subject to the disciplines of democratic accountability and public oversight. It would undesirable for a system rolled out as a matter of urgent necessity in a state of emergency to become the *de facto* format of the family justice system without the appropriate level of public consultation and debate, particularly in circumstances where the adoption of that system would shape access to family justice for the populace for years and decades to come.

Within this context, and to repeat, whilst remote hearings will likely remain *one* of the tools for the administration of family justice long after the end of the COVID-19 pandemic, I for one am clear that such successes we have had with implementing the widespread use of remote hearings during the current period of acute crisis should *not* be taken as establishing a settled mode of operation for the family courts *after* the resolution of the current emergency.

Thank You.