Remote Child-Related Proceedings in Times of Pandemic – Crisis Measures or Justice Reform Trigger?

by Nadia Rusinova

The coronavirus will have an enormous impact on how we consume, how we learn, how we work, and how we socialize and communicate. It already significantly impacts the functioning of the justice system – the COVID-19 pandemic and social distancing requirements have required courts to be flexible and creative in continuing to carry out essential functions.

Six weeks ago, it was almost difficult to imagine that in a regular child-related proceeding the hearing could be conducted online, and that the child can be heard remotely. Is this the new normal in the global justice system? This post will first provide brief overview regarding the developments in the conduction of remote hearings, and discuss the limitations, but also the advantages, of the current procedures related to children. Second, it will touch upon the right of the child to be heard in all civil and administrative proceedings which concern its interest, pursuant to Article 12 of the United Nations Convention on the Rights of the Child and how this right is regarded in remote proceedings in the context of the COVID-19 situation. It will also highlight good practices, which are without doubt great achievements of the flexibility and adaptability of the professionals involved in child-related civil proceedings, which deserve to be appreciated and which may provide grounds for significant change in the future (e.g. by using remote tools much more often.)

In civil and administrative proceedings, which concern children, strict insistence on personal attendance is unlikely to be feasible during the Coronavirus pandemic, and may contravene current health guidance, putting both families and professionals at unacceptable risk. As a consequence, the number of children's hearings scheduled to take place during the Coronavirus pandemic have globally been reduced to only those required to ensure essential and immediate protection

of children or to consider orders relating to restriction of liberty. So long as restrictions regarding social distancing remain in place all over the world, many children's hearings in the next months will be conducted remotely and digital facilities are being put in place to enable a wide range of people to participate remotely in virtual hearings.

I. What the recent experience on the remote hearings shows

Worldwide, over the past month, thousands of hearings took place remotely, many of them concerning children. How did the authorities comply with the current challenges and also with the right of the child to express its views?

Some countries, like Scotland, issued special rules as an amendment to the existing national law. In the context of the emergency, the provisions in the Coronavirus Act 2020 Guidance on looked-after children and children's hearings provisions, issued by the Scottish Parliament as an update to the Coronavirus (Scotland) Bill, are designed to enable best use of very limited resources by local authorities, and the children's hearings system, so that efforts can be focused on safeguarding the welfare of Scotland's most vulnerable children, and on supporting families and careers who need it most. The provisions are also time-limited and will automatically expire within six months, unless the Scottish Parliament extends them for a further period of six month.

The American Bar Association has also prepared detailed rules on "Conducting Effective Remote Hearings in Child Welfare Cases" to distill some best practices and other recommendations for remote or "virtual" hearings, providing special considerations to the judges, and directions for all professionals dealing with child-related proceedings.

The case law of the domestic courts is not less intriguing. In one recent judgment of The Family Court of England and Wales – RE P (A CHILD: REMOTE HEARING) [2020] EWFC 32, delivered by Sir Andrew McFarlane, the issues surrounding the advantages and disadvantages of the remote hearing when the case concerns children are discussed in a very original way. The case concerns ongoing care proceedings relating to a girl who is aged seven. The proceedings are already one year old and they were issued as long ago as April 2019, but the possibilities for multiple appeals in the adversarial proceedings caused immense delay. It has been initiated by the local authority, which have made a series of allegations, all

aimed at establishing the child has been caused significant harm as a result of fabricated or induced illness by its mother. The allegations are all fully contested by the mother, and a full final hearing is to take place in order to be decided if the child should be return to its mother or placed in long term foster care. Since April 2019 the child has been placed in foster care under an interim care order. The 15-day hearing was scheduled to start on Monday, 20 April, but the Covid-19 pandemic has led to a lockdown and most Family Court hearings that have gone ahead are being undertaken remotely, over the telephone or via some form of video platform.

II. Challenges

In this light it might be useful to identify some of the issues that the justice system faced in the attempts to comply with the special measures amid the pandemic and the lockdown order in disputes about children.

Must a hearing take place remotely, or this is just an option to be decided on by the court?

All the guidance available aims mostly at the mechanics of the process. The question whether any particular hearing should, or should not, be conducted remotely, is not specifically discussed. In any case, the access to justice principle should in some way provide for flexibility and practicability. In this sense, the fact that a hearing can be conducted remotely, does not in any way mean that the hearing must be conducted in that way.

As Sir McFarlane said, *"In pushing forward to achieve Remote Hearings, this must not be at the expense of a fair and just process."* Obviously, the question is how to strike a fair balance between keeping the principle of fair trial as paramount while not putting the child into an intolerable situation that might follow as a consequence of the limitations in this pandemic situation.

In which cases it is justified to hold a remote hearing?

Given the Government's imposition of the 'stay at home' policy in many countries, requests for an attended hearing are highly unlikely to be granted unless there is a genuine urgency, and it is not possible to conduct a remote hearing, taken as a cumulative condition together. If one of these elements is not present, the respective judge should assess the emergency in the particular case.

In general, all cases are pressing when the welfare of children is to be determined. However, some of it indeed call for urgency and it is to be analyzed on a case by case basis, in accordance with the claims of the parties and available evidence. In the discussed case RE P [2020] EWFC 32 the girl was already suffering significant emotional harm by being held "in limbo", and that she could only be released from this damaging situation of simply not knowing where she is going to live and spend the rest of her childhood, at least for the foreseeable future, by the court decision. As the judge says, *"she needs a decision, she needs it now and to contemplate the case being put off, not indefinitely but to an indefinite date, is one that (a) does not serve her interests, because it fails to give a decision now, but (b) will do harm itself because of the disappointment, the frustration and the extension of her inability to know what her future may be in a way that will cause her further harm."*

Another issue to be considered is to which extent the personal impression (for which the face-to-face hearing is best suited to) and the physical presence in the courtroom as a procedural guarantee for fair trial in adversarial proceedings, are decisive in the particular case. In RE P [2020] EWFC 32 sir McFarlane holds that *"The more important part, as I have indicated, for the judge to see all the parties in the case when they are in the courtroom, in particular the mother, and although it is possible over Skype to keep the postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge's screen at any one time, it is a very poor substitute to seeing that person fully present before the court."* This is a case for protection from violence, and taking into account the subjective aspect, the personal impression is crucial. Yet, it might be that other type of cases, with less impact on the life of the child, or when the balance between the urgency and the importance of personal attendance might affect the best interest of the child ,might still be held remotely. In the discussed case the judge refers explicitly to the need of the physical presence of the parties, and especially of the mother, for him to get personal impression, and to give her full opportunity to present her defense and to ensure fair trial. The Court therefore finds that a trial of this nature is simply not one that can be contemplated for remote hearing during the present crisis. It follows that, irrespective of the mother's agreement or opposition to a remote hearing, the judge holds that this hearing cannot "properly or fairly" be conducted without her physical presence in a courtroom.

A similar approach (with different outcome) has been taken in Ribeiro v Wright, 2020 ONSC 1829, Court of Ontario, Canada. The parties, currently in the process of divorce, and the plaintiff wishes to obtain a safeguard order so that the defendant's access rights are modified such that they are suspended and replaced by contacts via technological means (Skype, Facetime, etc.). Due to the ongoing divorce procedure at the stage of the application for the safeguard order, some evidence is available already. The judge recognizes that the social, government and employment institutions are struggling to cope with COVID-19 and that includes the court system. Obviously, despite extremely limited resources, the court will always prioritize cases involving children, but it is stated that parents and lawyers should be mindful of the practical limitations the justice system is facing. If a parent has a concern that COVID-19 creates an urgent issue in relation to a parenting arrangement, they may initiate an emergency motion under the domestic law – but they should not presume that raising COVID-19 considerations will necessarily result in an urgent hearing. In this case the judge refuses to start emergency proceeding (which would be conducted remotely), takes into account the behavior of the parents and urge them to renew their efforts to address vitally important health and safety issues for their child in a more conciliatory and productive manner, asking them to return to court if more serious and specific COVID-19 problems arise.

In order to determine some general criteria to be applied when the emergency assessment is to be done, a good general example can be seen in the Coronavirus Act 2020 Guidance on looked-after children and children's hearings provisions (Scotland). The Scottish Government seeks to empower professional staff and volunteer tribunal members to exercise sound judgment and make decisions to protect and support children and young people, based on available information and in partnership with families. It provides that this exercise of emergency powers should: i. be underpinned by a focus on children's, young people's, and families' human rights when making decisions to implement powers affecting their legal rights; ii. be proportionate – limited to the extent necessary, in response to clearly identified circumstances; iii. last for only as long as required; iv. be subject to regular monitoring and reviewed at the earliest opportunity; v. facilitate, wherever possible and appropriate, effective participation, including legal representation and advocacy for children, young people and family members, and vi. be discharged in consultation with partner agencies.

Furthermore, in the Scottish Children's Reporter Administration update paper on Children's Hearings System, issued on 20 April 2020, it is stated that the reporter assesses and considers each individual child's case and their unique circumstances, and the panel makes the best possible decision based on the information before them. Priority is given to hearings with fixed statutory timescales, or to prevent an order from lapsing. The UK Protocol Regarding Remote Hearings, issued on 26 March 2020, also sets some general criteria in par. 12 applicable to child-related proceedings, stating that it will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely. Some witness cases will also be suitable for remote hearings.

What form the "remote" hearing may take?

There is currently no 'single' technology to be used by the judiciary. The primary aim is to ensure ongoing access to justice by all parties to cases before the court, so the professionals and parties involved must choose from a selection of possible IT platforms (e.g. Skype for Business, Microsoft Teams, Zoom, etc.) At present, many courts provide laptops to magistrates with secure Skype for Business and Microsoft Teams installed.

Remote hearings may be conducted using any of the facilities available. Generally, it could be done by way of an email exchange between the court and the parties, by way of telephone using conference calling facilities, or by way of the court's video-link system, if available. In the specific child related proceedings however, it should be noted that the UN General comment No. 12 (2009) on the right of the child to be heard sets one recommendation in par. 43 – the experience indicates that the situation should have the format of a talk rather than a one?sided examination. Therefore, the use of tools allowing conversational approach, like Skype for Business, BT MeetMe, Zoom, FaceTime or any other appropriate means of remote communication can be considered. If other effective facilities for the conduct of remote hearings are identified, the situation obviously allows for any means of holding a hearing as directed by the court, so there is considerable flexibility.

The timing of the hearing of the child

Naturally, if there are rules in place regarding the timely hearing of the child, in the current situation some adjustments could be accepted. In the domestic

systems, when such provisions exist, respective temporary amendments could be a solution to facilitate the activity in these very challenging circumstances.

If we look again at the Coronavirus Act 2020 Guidance on looked-after children and children's hearings provisions, it provides for situations where it will not be practicable for there to be a hearing within three working days (as prescribed by the law), due to the likely shortage of social workers, reporters, decision-makers, children and families to attend an urgent hearing in the new area. As a result, the Act amends the time limit for some particular proceedings involving children up-to seven days. It is duly noted that in order to avoid unnecessary delays, the respective professionals involved should note these extended timescales, and prepare accordingly.

Is the objection by the parties to the hearing being held remotely decisive?

The pandemic situation is very potentially convenient for the parties who seek delays for one reason or another. As an example, the passage of time could undoubtedly affect the court's decision to assign custody in parental disputes, or as pointed by the ECtHR in Balbino v. Portugal, the length of proceedings relating to children (and especially in child abduction proceedings) acquire particular significance, since they are in an area where a delay might in fact settle the problem in dispute.

The objections that deserve attention would be most likely based on two grounds: health reasons, related or not to COVID-19, and the technical issue of internet access. When we speak about health reasons, the first logical suggestion would be to request medical evidence. Sadly, in the coronavirus situation this is not the case – simply because one can have contracted it without any knowledge or symptoms, which puts the courts in difficult position having in mind the considerable danger if they take the wrong decision. Therefore, it is justified that the judges continue with the proceedings and do not accede to these kinds of applications, but to indicate that the party's health and the resulting ability to engage in the court process would be kept under review.

Regarding internet access, this might arise as a difficult issue. On one side, it is easy to say that the arrangements for the party to engage in the process, as they are currently understood, involve the party being in her/his home and joining the proceedings over the internet, and all that's needed is some basic internet access.

It can be also said that the party can go to some neutral venue, maybe an office in local authority premises, a room in a court building, and be with an attorney that they are instructing, keeping a safe socially isolated distance. However, for objective reasons the internet access available might be not sufficient, and this should not lead to a violation of the principle of a fair trial, and the judge should also take these considerations seriously.

How is security and transparency addressed?

This section will briefly touch upon only two of a multitude of issues related to the security and transparency when dealing with remote hearings – the open hearings principle and the recording of the hearing.

Obviously, all remote hearings must be recorded for the purposes of making records of the respective hearing, and it goes without saying that the parties may not record without the permission of the court. Some of the solutions might be recording the audio relayed in an open court room by the use of the court's normal recording system, recording the hearing on the remote communication program being used (e.g. BT MeetMe, Skype for Business, or Zoom), or by the court using a mobile telephone to record the hearing.

As to the second issue, remote hearings should, so far as possible, still be public hearings. Some of the proceedings concerning children are indeed not public, but this is not the rule. The UK Protocol Regarding Remote Hearings addresses how this can be achieved in times of pandemic: (a) one person (whether judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing a media representative to log in to the remote hearing; and/or (c) live streaming of the hearing over the internet, where broadcasting hearings is authorized in legislation. This way, the principles of open justice remain paramount.

It could be suggested that, in established applications moving to a remote hearing, any transparency order will need to be discharged and specific directions made. In the UK Court of protection remote hearings the authorities are satisfied that, to the extent that discharging the order in such a case engages the rights of the press under Article 10 ECHR, any interference with those rights is justified by reference to Article 10(2), having particular regard to the public health situation which has arisen, and also the detailed steps set out are designed to ensure that

the consequences on the rights of people generally and the press in particular under Article 10 are minimized.

III. How to assess if a particular child-related hearing is suitable to take place online?

As noted by Sir McFarlane, whether or not to hold a remote hearing in a contested case involving the welfare of a child is a particularly difficult one for a court to resolve. A range of factors are likely to be in play, each potentially compelling but also potentially at odds with each other. The need to maintain a hearing in order to avoid delay and to resolve issues for a child in order for its life to move forward is likely to be a most powerful consideration in many cases, but it may be at odds with the need for the very resolution of that issue to be undertaken in a "thorough, forensically sound, fair, just and proportionate manner". The decision to proceed or not may not turn on the category of case or seriousness of the decision, but upon other factors that are idiosyncratic of the particular case itself, such as the local facilities, the available technology, the personalities and expectations of the key family members and, in these early days, the experience of the judge or magistrates in remote working. It is because no two cases may be the same that the decision on remote hearings has been left to the individual judge in each case, rather than making it the subject of binding national guidance.

Therefore, it should be assessed on a case per case basis if a hearing that concerns a child can be properly undertaken over the remote system. Sometimes the proceedings prior to this moment are supporting the judge in allowing the hearing to go remotely – the allegations have been well articulated in documents, they are well known to the parties, the witnesses – members of the medical profession, school staff, social workers – gave or can give their evidence remotely over the video link and for the process of examination and cross-examination to take place. What normally goes wrong is the technology rather than the professional interaction of the lawyers and the professional witnesses. In this sense the case might be ready for hearing and the parties are sufficiently aware of all of the issues to be able to have already instructed their legal teams with the points they to make.

IV. The right of the child to be heard in the context of remote proceedings

It is natural that remote hearings and all means of online communication unavoidably affect the proceedings itself. The current situation, unprecedented as it is and with all the challenges described above, raises the question of specifically how the child should be heard, if at all, and is this an absolute right, considering that providing a genuine and effective opportunity for the child to express their views requires the court to take all measures which are appropriate to the arrangement of the hearing, having regard to the best interests of the child and the circumstances of each individual case?

To explore this right in the light of the COVID-19 pandemic, some background should be provided. As it is pointed in the UN General comment No. 12 (2009) on the right of the child to be heard, the right itself imposes a clear legal obligation on States' parties to recognize it and ensure its implementation by listening to the views of the child and according them due weight. This obligation requires that States' parties, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child. Something more – in par. 19 it says that *"Article 12, paragraph 1, provides that States parties "shall assure" the right of the child to freely express her or his views. "Shall assure" is a legal term of special strength, which leaves no leeway for State parties' discretion. Accordingly, States parties are under strict obligation to undertake appropriate measures to fully implement this right for all children."*

The right of the child to be heard is regulated in the same sense in Article 24(1) of the Charter of the Fundamental Rights of the EU and Article 42(2)(a) of Regulation No. 2201/2003 (Brussels II bis). The Hague convention of 25 October 1980 on the Civil Aspects of International Child Abduction also provides in Article 13 that the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Brussels IIa recast (Regulation 1111/2019, in force as of August 2022) pays special attention to the strengthening of the right of the child to express his or her view, reinforcing it with special provision – Article 26 in Chapter III "International child abduction", in compliance with a detailed Recital 39. It states that the court may use "all means available to it under national law as well as the speci?c instruments of international judicial cooperation, including, when appropriate, those provided for by Council Regulation (EC) No 1206/2001" but "in

so far as possible and always taking into consideration the best interests of the child" thus retaining some degree of discretion also in this regard.

In Joseba Andoni Aguirre Zarraga v. Simone Pelz (case C-491/10 PPU) however CJEU held that hearing a child is not an absolute right, but that if a court decides it is necessary, it must offer the child a genuine and effective opportunity to express his or her views. It also held that the right of the child to be heard, as provided in the Charter and Brussels II bis Regulation, requires legal procedures and conditions which enable children to express their views freely to be available to them, and the court to obtain those views. The court also needs to take all appropriate measures to arrange such hearings, with regard to the children's best interests and the circumstances of each individual case.

It is worth noting that in some cases the hearing of the child can be conducted indirectly or via representative, or where it is considered as harmful for the child it can be dispensed with altogether. In the case of Sahin v. Germany, on the question of hearing the child in court, the ECtHR referred to the expert's explanation before the regional court in Germany. The expert stated that after several meetings with the child, her mother and the applicant, he considered that the process of questioning the child could have entailed a risk for her, which could not have been avoided by special arrangements in court. The ECtHR found that, in these circumstances, the procedural requirements implicit in Article 8 of the ECHR – to hear a child in court – did not amount to requiring the direct questioning of the child on her relationship with her father.

So far, the question how the right of the child to be heard is regarded in the remote hearings, that had to take place recently, is not widely discussed. Therefore, at this moment we should draw some conclusions from the available case-law and emergency rules. Naturally, this right itself cannot be waived and the views of children and young people should be taken into account when emergency placements are first made; the decision at any given time must take into account the best interests of the child. The most appropriate approach would be adjusting the available domestic proceedings, and at all times the local authorities should provide pertinent information to inform this decision and the child must be at the center of all decision making, which includes the social work team listening to the child's views.

How this might look in practice? First of all, the children as a rule should be

offered the opportunity to join their hearing virtually and securely. Testing and monitoring are crucial in order to get as many children as possible able to attend. Good suggestion would be a letter giving them more information about how they can participate via their tablet laptop/PC or mobile phone, information sheet which will explain how they can join a virtual hearing, instructions to help them with the set up. This should be followed by a test to make sure everyone is prepared for the day of the hearing. In accordance with the domestic procedural rules, information about rights and reminder for the children and young people that they have the right to have a trusted adult, an advocate or lawyer attend the virtual hearing to provide support might be also useful.

However, it for sure would not be possible for every child to join its hearing remotely. In this case, they should still provide their views – e.g. by emailing the information to the local team mailbox and the judge will then ensure this information is given to the respective professionals involved in the procedure.

V. Conclusion

The rapid onset of the Covid-19 pandemic has been a shock to most existing justice systems These are times unlike any other, and extraordinary measures are being taken across the world. Many of us are already asking ourselves – why not earlier? And with those changes in place, can things go back to the way they were? Should a regular framework for the development of virtual courtrooms and remote hearings that enables all concerned, including the judges, to operate remotely and efficiently be created, and was it due even before the pandemic? There are no easy answers – but it is well-worth analyzing the options of applying and making full use of the existing online tools and resources in child-related proceedings in the future. Well summarized by Justice A. Pazaratz in *Ribeiro v Wright*: “None of us have ever experienced anything like this. We are all going to have to try a bit harder – for the sake of our children.”

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