



Re P (A Child: Remote Hearing) [2020] EWFC 32

The family courts, and professionals who work in them, have adapted swiftly to the ever-changing situation presented by the Covid-19 pandemic with many cases being heard remotely. However, cases often turn on a Judge's assessment of a witness' behaviour in court and this level of human connection has proven very difficult to achieve remotely. With the difficulties of remote hearings balanced against the need to avoid delay for the children concerned, the question is posed, *should final hearings be conducted remotely?*

The President of the Family Division, Sir Andrew McFarlane has set out his stance in *Re P (A Child: Remote Hearing) [2020] EWFC 32* handed down in the High Court on 16 April 2020.

The Decision: A Snapshot

Sir Andrew McFarlane stated it was “*very clear that this hearing has to be adjourned...it simply seems to me impossible to contemplate a final hearing of this nature, where at issue are a whole series of allegations of factitious illness, being conducted remotely*”. The main body of the decision is found at paragraph 26 of the Judgment.

- “*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, part of which is to ensure that parties are ‘on an equal footing’ In pushing forward to achieve Remote Hearings, this must not be at the expense of a fair and just process.*”[para 23].
- A judge’s ability to cope with cross examination and assimilation of the detailed evidence from the e-bundle and witnesses appearing over Skype is only one part of the judicial function.
- The judge needs to see all the parties in the case when they are in the courtroom, to experience the behaviour of the parent who is the focus of the allegations throughout the oral court process; not only when they are in the witness box being examined in-chief and cross-examined, but equally when they are sitting in the well of the court and reacting.
- It is possible over Skype to keep the postage stamp image of any particular attendee at the hearing it is a very poor substitute to seeing that person fully present before the court.
- Remote hearings assume that the person’s link with the court hearing is maintained at all times and that they choose to have their video camera on.
- To contemplate a remote hearing of issues such as this is wholly out-with any process which gives the judge a proper basis upon which to make a full judgment.
- A remote hearing for a final hearing of this sort would not allow effective participation for the parent and effective engagement either by the parent with the court or the court with the parent.
- There is a significant risk that the process as a whole would not be fair.
- A prerequisite for the mother to take an effective part in a fair process is that the mother needs a real time ability to instruct her legal team throughout the hearing not just by phone call at the end of each piece of evidence.
- This is irrespective of the parties agreement or opposition to a remote hearing [para 29]

Background

As part of ongoing care proceedings relating to a seven-year-old girl, a fifteen-day final hearing had been listed. It came to the President’s attention that the hearing was due to take place remotely and he asked the Judge concerned to adjourn the matter. Parties expressed concern and therefore the matter was listed for a decision on this issue to be made. The Local Authority alleges significant harm caused by “fabricated or induced illness – FII”. There are “sixteen or so” [para 14] witnesses to give evidence including three experts. The issues are fully contested. There had been one previous attempt at a final hearing which had to be aborted, but the child was aware that her long-term care



arrangements were to be decided imminently. An electric bundle had been compiled and the hearing was set to be conducted over the Skype for Business platform.

Parties' Positions

The crux of the debate was whether or not the child's welfare demanded the hearing to be conducted remotely, in order for her to have a decision sooner rather than later. As is so commonly the case, these interests must be balanced with the ability of the parents to have a fair opportunity to present their case. With the introduction of the Covid-19 pandemic and the technological element it brings, this balance has become harder to equate.

The mother was due to take part in the process alone, at home, and was intending to buy a wi-fi dongle to improve internet access. There was discussion of whether the mother could go to a neutral venue and be assisted by an individual from the solicitors' firm to assist her involvement. However, there was concern that she may have contracted Covid-19 and Sir Andrew held, "finding a member of the solicitors staff or asking a member of the solicitors staff to sit in a room with someone who thinks that they have had or are getting over Covid-19 is more than can be properly asked of anyone in that position" [para 20].

The Mother had not objected initially to the hearing being held remotely, as in the "early days following the lockdown the profession was "feeling its way" (sic) and there was an understanding that many family hearings would be undertaken remotely". Upon further thought, it was considered by the Mother's team that "this is a case that falls outside the category of hearings that could be contemplated as being able to be conducted over a remote platform in a manner that meets the requirements of fairness and justice" [para 19].

The Local Authority, Father and Guardian sought for the hearing to go ahead remotely. They argued that :

- the allegations against the Mother had been "well-rehearsed in the documents...and [were] well known to the mother" [para 14].
- the child was "already suffering, on their view, significant emotional harm by being held in limbo...
- "technical matters" should not be a "reason of itself for the hearing to be adjourned" [para 18].

In the alternative the Local Authority and Guardian urged the court to hear the professional witnesses now with the mother's evidence being adjourned until later.

The role of FII in this case

The President formed a view at "first blush" [para 11] that this case was not suitable for a remote hearing, and it was a "surprise" [para 13] that it had been listed as such. This was due to the main issue of the case being FII. He held that FII is "*a particular form of child abuse which requires exquisite sensitivity and skill on the part of the court*" [para 11]. He later refers to the paediatric expert witness' description of the case as "an extremely complicated case" and the task of investigating FII as being "incredibly challenging" [para 12]. As referred to in the introduction of this article, Sir Andrew McFarlane held that the judge's assessment of the human character is a "crucial element in the judge's analysis". This includes "for the judge to be able to experience the behaviour of the parent who is the focus of the allegations throughout the oral court process; not only when they are in the witness box being examined in-chief and cross-examined, but equally when they are sitting in the well of the court and reacting" [para 12].



Factors to consider in future cases

The President stresses 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”*. At paragraph 24, he identifies a range of important factors that parties and judges should consider:

- avoiding delay;
- resolving issues for the child;
- ensuring proceedings are forensically sound, fair, just and proportionate;
- the seriousness of the decision;
- nature of local facilities;
- availability of technology;
- personalities and expectations of the key family members, and
- the experience of the judge/magistrates in remote working.

Impact

This decision acts as a precedent for those involved in similar cases, those with FII and a significant number of witnesses. It also assists Judges and practitioners with the key factors to be considered when deciding whether or not to conduct a hearing remotely. This decision is a strong indication that cases of this level of complexity should not be being heard remotely, and that doing so would be risking the fairness of the whole process. How many, and what other forms of harm will be included in this category, is yet to be seen.

Ellena Forman
Fenners Chambers
21 April 2020