Report: Remote Hearings Post Covid

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Foreword

The Covid pandemic of 2020 and 2021 brought many challenges for the legal system, not least, the need to ensure that court hearings could continue despite the risks and restrictions that were put very quickly in place. There had been some move towards online hearings prior to 2020, particularly with interim hearings for remand prisoners, and of course for the cross-examination of vulnerable witnesses who may be within the court building, but giving their evidence via video link. 2020 however brought the rapid expansion of online hearings, particularly in civil proceedings and tribunal proceedings.

This report brings together different perspectives on the effectiveness of remote hearings, and the papers present experiences from different sections of the legal professions, and academia. The papers were originally presented at an online conference titled 'The Future of Remote Hearings Post-Covid' organised by the Department of Law and Criminology at Aberystwyth University in July 2022. Accordingly this report explores the experiences of HM Courts and Tribunals Service, the judiciary, the legal professions and academics, and outlines the challenges, problems and successes of using remote hearings in family cases, immigration cases, cases involving children, tribunal hearings, civil, and criminal cases.

However, although there were challenges and issues that need careful planning and management before and during the hearing, and a number of situations where remote hearings should not be used, there were also a number of perceived advantages to remote hearings. Therefore, while remote hearings should not become routine procedures in the interests of costs savings, it should also not be presumed that reverting to pre-covid practice is necessarily desirable. Many types of cases, such as cases involving specific types of witness, such as those with mobility difficulties, or those who might feel reassured by being in a home setting benefited significantly from remote hearings or hybrid hearings.

As we move into a post-covid society therefore, we considered it valuable to disseminate these discussions, before pre-covid routines become fully re-established and hardened. The papers contained in this report represent the experiences and thoughts of individuals, and should not be regarded as representing the views of the organisations and professions they represent. However, they provide an interesting picture of the adaptations that were made during the Covid pandemic, and that these were not solely short term solutions. However, there are also many notes of caution – while some things may be gained in terms of accessibility from remote hearings for some parties and witnesses in some types of cases, there are also things that may be lost because of the limitations on communication that arise because people are not sharing the same physical space.

We hope therefore that this report will inspire further discussion and debate surrounding the fairness of legal proceedings and the suitability or otherwise of remote hearings – to encourage their continued use in cases where this is advantageous, and to require face to face hearings where this is beneficial and necessary.

CATRIN FFLÛR HUWS

Senior lecturer in law Department of Law and Criminology, Aberystwyth University, December 2022.

Biographies

HHJ Milwyn Jarman KC

HHJ Milwyn Jarman KC was called to the Bar in 1980. He undertook pupillage in 9 (formerly 34) Park Place Cardiff and continued to practice in those chambers throughout his career at the bar, specialising in chancery, planning and governmental law. He was appointed to the National Assembly of Wales Panel of Public Counsel and was appointed a Queen's Counsel in 2001. He was made a recorder of the Crown Court in 2001, a civil recorder in 2004, and a family recorder in 2006. He was appointed as a Senior Circuit Judge (Chancery Judge for Wales) in 2007. He is also authorised to sit as a Deputy High Court Judge in the Queen's Bench Division, including Mercantile, Technology and Construction, and Administrative Courts. In 2014, he was authorised to sit in the Planning Court. He also sits as a judge of the Upper Tribunal, in the Land, Property and Tax, and Immigration and Asylum Chambers. He was Chair of the panel to appoint the first president of the Welsh Language Tribunal and is able to hear cases in the Welsh language. He is currently the lead Diversity and Community Relations Judge in Wales. He has been a tutor judge on the Judicial College Specialist Civil Seminars since 2008. He was Chair of Legal Wales Foundation Board from 2011 to 2019. He is an advisory editor of Sweet & Maxwell Civil Procedure and an editor of the University of Wales series "The Public Law of Wales." In 2018 he became a member of the Civil Procedure Rule Committee. He is a Bencher of Gray's Inn.

Siân Pearce

Siân Pearce (she/they) is an Aberystwyth graduate who practised immigration law in South Wales and the South West for just over a decade, but has recently taken a break from practice to undertake a PhD based at the University of Exeter. She specialised in working with children and young people and her PhD will investigate children's experiences of legal advice in relation to their asylum claims. Siân has recently completed a series of training events for professionals working in Wales with children who have claimed asylum in conjunction with the Children's Legal Centre based at Swansea University, she also assisted in the drafting of the Centre's guides to the asylum system for children, foster carers and social workers.

Julie Doughty

Dr Julie Doughty is a senior lecturer in law, Cardiff University School of Law and Politics. She has previously worked as a solicitor and for Cafcass. Her research interests are child law and media law. She is a trustee of The Transparency Project, a public legal education charity that tries to make family law clearer. In 2021, she was appointed as the academic member of the Transparency Implementation Group set up by the President of the Family Division to take forward the proposals in his Transparency Review for more openness in family courts.

Dr Catrin Fflûr Huws, Dr Rhianedd Jewell, Dr Hanna Binks and Leonie Schwede

Dr Catrin Fflûr Huws, senior lecturer in law, Dr Rhianedd Jewell, senior lecturer in Professional Welsh, Dr Hanna Binks, lecturer in Psychology, all at Aberystwyth University are an interdisciplinary team of researchers exploring simultaneous interpretation with a particular focus on the courts. They are ably assisted in this by Non Humphries, a PhD student in the Department of Welsh and Celtic Studies, and Leonie Schwede, an undergraduate intern in the Department of Law and Criminology.

Tribunal Judge CN Jones

Tribunal Judge CN Jones is a Tribunal Judge at the Adjudication Panel, the Residential Property Tribunal and the Agricultural Property Tribunal for Wales and also an Associate Ombudsman with the Financial Ombudsman's Service. She completed her legal training with Burges Salmon, a commercial and agricultural firm in Bristol, before returning to Wales to pursue a 35-year career in public law. Music, Welsh history and Welsh wildlife are her true passions however!

Owain Rhys James

Born in Cardiff, Owain studied law at St Catharine's College, Cambridge, before returning to Cardiff to take the BPTC. He completed his pupillage at Civitas before becoming a member of the set in 2012. Owain is a bilingual practitioer, and has represented through the medium of Welsh in the Employment Tribunal, the County Courts, the High Courts and the Court of Appeal. Owain's specialisms are employment law, public law and chancery/commercial work, and is ranked across all of his practice areas in the directories. He was appointed as a Deputy District Judge of the County Court in 2020.

BACK TO THE FUTURE? ARE REMOTE HEARINGS HERE TO STAY?

HHJ Milwyn Jarman KC

INTRODUCTION

1. The focus of this summary will be the experience gained in the Business and Property Courts in Wales of remote hearings during lockdown. Any views expressed are mine alone. Remote hearings have meant that that there is no significant backlog in civil cases in Wales. In criminal cases, the position is more challenging. The need to accommodate juries during lockdown presented significant logistical problems. Nightingale courts were set up in public buildings to allow for social distancing and other precautionary measures.

PRE-PANDEMIC

2. A reform programme to modernise the workings of courts and tribunals was already underway when lockdown came into force. Recording telephone hearings had been commonplace for several years for direction hearings and short applications. In 2015 electronic working was piloted in BPC courts, which allowed for electronic filing of all documents, including trial bundles. This is now mandatory in BPC and KB cases, although not yet in the Administrative Court. Courts and tribunals have for some years being hearing some witness give evidence by video link, for example those abroad or ill or vulnerable. This was usually via a secure bridge which was not always reliable.

3. Some hearings were held entirely by video link, for example out of country appeals in immigration and asylum cases, and regard had to be had to the overall fairness of such a procedure. Observations of the courts in such cases were overtaken by lockdown. In Yilmaz v Secretary of State for the Home [2022] EWCA Civ 300, the Court of Appeal noted the advances in technology and observed that tribunals are experienced in deciding what fairness demands in such cases

4. On line case progression via website had been piloted since 2017, for example online civil money claims of less than £10,000.

LOCKDOWN – A RAPID RESPONSE

5. It was partly due to these reforms that HMCTS was able to provide a very rapid response to lockdown. On 19 March 2020 the Lord Chief Justice delivered a message in respect of civil and family courts in which he said that there was an obligation to continue with the work of the courts as a vital public service and that the rules in both the civil and family courts are flexible enough to enable telephone and video hearings of almost everything.

6. Most judges began working from home immediately, being able to do so with electronic bundles. Where there was only a paper bundle, these had to be delivered by hand. Many judges however returned to court quickly as this was a vital public service.

PROTOCOL (CIVIL JUSTICE: COVID-19: REMOTE HEARINGS)[2020] 1 W.L.R. 1334

7. The Master of the Rolls gave immediate guidance on remote hearings. Similar guidance was given in other jurisdictions. The principle of open justice remained paramount. Remote hearings should usually be public hearings, which could be achieved by conveying the video to a court room or by allowing accredited journalist to access the video hearing or by live streaming.

8. Recording of video hearings should by the commercial providers then used for the video hearing. No one else was permitted to record without permission. Electronic bundles should be prepared with only the essential documents and sent to court via CE File, must be filed on CE file or sent to the court by link to an online data room, e-mail or delivered to the court on a USB stick.

CHALLENGES

9. There were inevitably teething problems and there will, from time to time, be some glitches in the use of technology. An early example is shown in C (A Child) (Recusal), Re [2020] EWCA Civ 987 24 Jul 2020, where private remarks by the judge about one of the parties was overheard via the judge's closed (but still on) laptop.

10. HMCTS commenced using a variety of commercial providers but then moved to a system called Cloud Video Platform which is more secure and gives the court more control. More staff were recruited and trained in the use of this system.

11. One of the challenges of a remote hearing is that an impression of Informality may be given. This is dealt with by reminding everyone that although they may be at home they are still in a court room.

12. Another concern at the outset related to parties or witnesses without IT skills or equipment. This was often given as a reason by parties seeking an adjournment until an in person hearing could be arranged. However, most of these concerns were met by giving assistance from solicitors or others.

13. Assessment of credibility was also given as a reason by applicants to adjourn cases, especially where issues of honesty were central. It is now generally accepted that seeing a witness give evidence is often an unreliable tool of itself to test truthfulness and that it is important to have regard to contemporaneous documentation and inherent likelihoods, (see Leggatt LJ (as he then was) in R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 1391).

14. Cases where Interpreters are needed often gave rise to difficulties where they were in a different room to those for whom they were interpreting, such as talking over one another. It is better if it can be arranged for two to be in the same room, although this is not always practicable.

15. Taking instructions on the morning of the case or during it, or negotiating on the morning, is sometimes said to be problematic in a remote hearing. This can be avoided in most cases by not leaving this to the last minute. If it is necessary on the day then time can be given for this to be done electronically or by phone or via the CVP system with the judge exiting for a short time.

16. Electronic bundles not always use friendly. In TPS Investments (UK) Ltd (In Administration), Re [2020] EWHC 1135 (Ch) 11 May 2020, HHJ Hodge KC set out guidance, including the engagement of the advocate who was to conduct the hearing as to which documents the bundle should contain, and a searchable index or at least individual and sequential pagination.

OPPORTUNITIES

17. The most obvious advantages of remote hearings are the saving of costs and the increase in efficiency. Lawyers can deal with several short hearings in one day which may not be possible if the hearings were in different places. Expert evidence may be particularly suitable by remote means without the costs and inconvenience of attending court.

18. Another real benefit is the ability of witnesses who are ill or vulnerable or abroad to give evidence remotely.

19. It is now clear that remote hearings can promote access to justice. In Court of Protection[2022] EWCOP 5, 2022 WL 00413234 Hayden J, Vice President of the Court of Protection, observed that in such cases, judges have made remote visits to care homes to meet with the patient and some patients have been able to attend remote hearings where attendance in a court room would not have been possible.

20. During the time since remote hearings were first held due to lockdown, there have been significant improvements in technology and more improvement are anticipated.

THE PRESENT POSITION

21. The default position now is that any hearing of half or day or less or not involving oral evidence may be held remotely: The Chancery Guide. Hearings of longer than that should be in person unless there are good reasons for remote hearing in full or part: United Technology Holdings Ltd v Chaffe [2022] EWHC 151 (Comm) HHJ Pelling KC: Jackson v Hayes and Jarvis (Travel) Ltd [2022] EWHC 453 (QB) Eady J.

22. The illness of a witness corroborated by medical evidence can be a good reason; see Rahbarpoor v Said [2021] EWHC 3319 (Ch) Clare Ambrose as a judge of the High Court.

23. Courts and tribunals are now able to give directions to allow remote observation of in-person and hybrid hearings as well as access to fully remote hearings- section 85A of the Courts Act 2003 as inserted by section 198 of the Police, Crime, Sentencing and Courts Act 2022. The regime is implemented by the Remote Observation and Recording (Courts and Tribunals) Regulations 2022.

24. Damages Claims Online was made mandatory for legally represented claimants on 2 April 2022.

THE FUTURE

25. The reform project is due to be completed by March next year.

26. The online claims systems are expanding. The new Money Claims Online, allows for money claims up to £10,000 to be processed online. Possession Claims Online, provides a similar process for claiming the possession of property where rent or mortgage repayments are in arrears.

27. As technology improves there are likely to be more remote hearings, especially in short matters or cases where there is no evidence, for example judicial review cases, particularly at the oral renewal stage.

28. It is likely that in person hearings will remain the default position in more substantial hearings.

MILWYN JARMAN
NOVEMBER 2022

REMOTE TRIBUNAL HEARINGS POST COVID

Tribunal Judge CN Jones

INTRODUCTION

We are familiar with the metaphor; '*The wheels of justice run slow but grind fine'*. Legislative change usually takes a great deal of time and Regulations are drafted with inevitable bureaucratic precision and with inbuilt checks and balances.

In March 2020, everything changed. We could never have predicted the scale and speed of change which took place due to Covid-19. From a civil liberties perspective, who would have foreseen that within a few short weeks, we would accept only leaving our homes for specified purposes, being prohibited from driving to our favourite walks and being allowed to drive only a few short miles to buy essentials, (even though in rural Wales, our nearest shop might be 20 miles away)? *'Stay Home, Stay Safe, Save Lives'* was our new reality.

Emergency legislation was put into place at break-neck speed. The Lord Chief Justice announced on 17 March 2020 that it was unrealistic that there could be business as usual as far as the courts were concerned. He nevertheless made it clear that *'it is of vital importance that the administration of justice does not grind to a halt,'* emphasising that, without hearings, *'access to justice will become a mirage'*.

By mid-March 2020, Tribunals were already receiving queries from parties to proceedings, expressing concerns about the virus and the implications for themselves and loved ones. It became clear that the UK and Welsh Governments would soon introduce further restrictions on movement and gatherings. If physical hearings were to continue, would Tribunal members be fit and able (and permitted) to travel and participate? There was also the question of the availability of hearing venues such as hotels and function rooms. Initially a decision was made to postpone hearings due to such uncertainty. Before long however, innovative measures were adopted to keep the wheels of justice turning.

PROTOCOLS AND PRACTICE

Prior to the pandemic, there had been proposals for transformation of Welsh Tribunals, and this work continued over lockdown. The outcomes however didn't arrive in time to assist with a consolidated approach and common guidance as to remote hearings. The pandemic however made the unthinkable necessary and there was a paradigm shift to remote hearings. Judges started to take the approach that remote hearings were the default position to ensure the continued provision of access to justice and dispute resolution.

It became clear that the pandemic was not going to be over quickly, and each Court and Tribunal had to consider how to deal with what was undoubtedly a mounting back-log of cases. In the Tribunal context, this led to rapid drafting of Protocols to allow the hearing of substantive matters on a remote basis. The change was sudden and revolutionary and required a new way of thinking.

Tribunals had to dictate the contents of Protocols without the usual in-depth and lengthy consultation exercises with colleagues and service users. The Presidents of each Tribunal had to consider each of their specific statutory and regulatory contexts and draft Protocols at speed. By necessity, these were developed in ad hoc ways due to the divergence in existing technology but also because of the very different underlying legal frameworks. What they all had in common was the principle that fairness must not be sacrificed for convenience.

The Protocols provided common sense, step-by-step guides. These were extremely useful aide-memoires in unfamiliar territory and the parties were directed to them prior to hearings. Generally, those involved were well-prepared and comfortable with the technology in advance of the hearing. What I should say is that certain fora were already paperless pre-pandemic and that eased the transition to remote hearings.

After the initial flurry of public and press interest in how remote hearings would work in practice, Tribunals very quickly returned to something close to *'business as usual'* without any drama. For example, where site inspections were required in certain Tribunals, surveyor-only visits became the norm, reporting back and using photographic and video reporting where necessary.

Protocols did indeed foresee and eliminate many anticipated problems. Those who came before Tribunals usually acted with maturity and pragmatism and wanted to make remote hearings work with what was undoubtedly an imperfect process. The majority of Applicants and Respondents, simply wanted to get on with having their cases heard.

PROS AND CONS OF REMOTE HEARINGS

The pros far out-number the cons in a Tribunal context from my observations over the past two years. I'll start with the **CONS** however under 3 broad headings as follows: -

1. Technology failings

A fundamental concern had been around digital exclusion of those unable to access technology, albeit imperfect technology, to allow remote attendance. There is of course a much wider issue of whether the elderly, vulnerable or the meek and indeed the disaffected simply feel unable to engage in the justice system at all, whether by physical or remote attendance. That is the bigger issue for another day, however there is a hope that future technology and future funded legal resource may help the host of invisible individuals who do not currently seek justice through the courts and tribunals.

Increased familiarity with remote attendance hearings for Tribunal Members and staff certainly meant that there were fewer glitches such as connectivity as time went on.

Technology failure has however been one of the most frustrating features of remote hearings. Connection dropping out or freezing has been a problem. The type of issue encountered is where parties, advocates or Tribunal Members have unscheduled works thrust upon them by their internet or utility suppliers and the individuals have had to relocate or use alternative technology at very short notice. Adjournment of hearings due to technology failures can clearly cause attendant delays, stress and inconvenience for all.

What we also need to guard against is allowing technical issues to affect performance, concentration or allowing them to distract and detract from the issue to be adjudicated upon. We also need to ensure that the parties feel engaged throughout and this links in to Article 6 considerations.

Unfortunately, remote attendance has provided parties on occasions with excuses for not showing their faces at a hearing and this has applied to Respondents, Applicants and Witnesses alike. To replicate the

court setting, we need to be mindful that all involved should ideally be able to see and hear each other.

Lack of familiarity with technology is undoubtedly a challenge, not so much for the Tribunal members themselves now, but for parties encountering it for the first time. Technological issues have meant that remote hearings do invariably take longer. Not only does it require patience and an ability to deal with the unexpected, but due to the nature of on-line meetings, all individuals involved in hearings do need more frequent breaks in order to maintain concentration and the Tribunal Judge needs to build these into the timetable.

2. Loss of formality/contact

Concern has been expressed about loss of solemnity and formality of proceedings and the ability to fully observe complex and multi-layered human communications.

There had also been a concern about the loss of control of the room by the Tribunal Judge and Clerks. However, my experience has been that behaviour has generally improved rather than deteriorated. Whether this is because the environment is less daunting, alien, confrontational and intimidating, would be an interesting piece of research. It may be the case that the close-ups of parties and Tribunal Members make everyone more self-conscious about their expressions and demeanour and rather more careful as a result.

If an individual becomes unwell however, due to the sometime uncomfortably close-up views we have of each other on remote platforms, the potential embarrassment is greater, whilst accepting that this can just as easily happen in a physical setting.

As to the human element, I think we would all agree that it's far more challenging to build rapport with clients remotely. Informal conversations with the 'other side' do not occur naturally with remote hearings and the potential to resolve issues ahead of the hearing is therefore reduced. As with the research of HMRC colleagues, some Judges perhaps find remote hearings more tiring, they miss the interaction in court and find work/home boundaries more challenging.

3. Ensuring Fairness (Avoiding Potential Article 6 Challenges)

It is a fundamental ECHR principle that every individual is entitled to a fair and public hearing. It is important that the views of the parties are fully considered on the question of whether a remote hearing can fulfil the Article 6 principles in the particular circumstances of that case.

Throughout remote hearings we also need to be constantly alert to ensure that the vagaries of remote attendance don't lead to a situation which compromises fairness or natural justice. A remote hearing clearly wouldn't be fair if one party became unable to access or effectively engage through the chosen technology. Potentially litigants in person can also be left behind during legal arguments and this may be less apparent on a remote link than if they were physically present.

A further concern that has been raised is that where there is conflicting witness evidence, it may be difficult to assess witness demeanour and judicial reactions. The counter argument is that we should discount witness behaviour in what is likely to be alien hearing surroundings for many witnesses, and care is always needed to avoid 'unconscious bias'. Inevitably however, something is lost in the natural communication process without a face-to-face meeting. Rather starkly, in one recent family law case, the judge was asked by the mother, a litigant in person: *'Are you going to take my child away from me on an iPad?'* The judge agreed to find a suitable court and hold a physical hearing instead.

As a final word on Article 6, remote hearings undoubtedly place additional demands on everyone, and we have to ensure that this extra burden doesn't compromise fairness. Provided adequate care is taken however, there's no reason why a remote hearing can't be fair.

I now turn to the **PROS** under two broad headings as follows: -

1. Accessibility of justice

In certain respects, this is the other side of the coin of loss of formality in Tribunal proceedings. It may be that many if not most and particularly younger people feel very comfortable and natural communicating via remote means. Although all court and tribunal proceedings may be extremely daunting, they may feel less intimidated and better able to present their evidence from home surroundings, however imperfect, rather than in a formal Court or meeting setting which will be seen as the domain of lawyers and Judges. This may also to an extent have been the case for the elderly and vulnerable who may well have felt safer at home due to Covid risks.

Formal introductions and housekeeping rules for the hearing by the Tribunal Judge and appropriately setting the tone of the hearing undoubtedly helps parties who are new to remote hearings so that they feel comfortable and understand how things will proceed. Parties need to be made aware that they will have a full opportunity to speak at the right time in the proceedings. Also, it's important that all understood when breaks will happen and that, at any time parties can request a break to speak to their advocate if necessary.

2. Efficicient Use of Resources

Inevitably the pandemic has made everyone rethink solutions. We may ask what price justice? However, if we can achieve the same level of justice at a fraction of the cost, then it's a debate we need to have. Certainly, many Tribunals will have made very significant savings by not convening physical hearings with the attendant hotel, travel and subsistence costs for Tribunal members.

At some stage agencies will inevitably need to co-ordinate resources and co-operate to consider rationalising public buildings across the board. This isn't new and for instance it's been mooted that local authorities could be required to arrange spaces where litigants could access hearings remotely.

The challenges for justice in rural areas have been the subject of much debate. We wonder whether it's fair for rural citizens to have to travel 20 or 30 miles to their nearest bank or 60 miles to hospital. Equally we need to ask whether it is fair to have to travel similar distances to achieve 'local justice' especially when rural public transport is sketchy or non-existent. Remote hearing attendance is only a part of the solution as there is no substitute for physical attendance at court in certain circumstances.

Undoubtedly remote hearings kept the wheels of justice turning at an unprecedented time, and remote hearings certainly ensured that potential backlogs were dealt with and may play a role in reducing the burden on the courts and tribunals system in the future. Parties as well as advocates may not have missed the travel and waiting times, together with the attendant costs, time off work and childcare needed to attend physical hearings.

CONCLUSIONS

In short, we may well have reached a stage where the default position for certain genres of hearing will be through remote hearings.

After the pandemic crash-course which we've all experienced, I'm reasonably certain that remote hearings are now here to stay in a Tribunal context. It will be the logical solution for Directions and Case Management Hearings, Pre-Hearing Reviews and for many Final Hearings, particularly where the key issues centre upon documentary or expert evidence and legal submissions. There are clearly imperfections associated with remote attendance, however we are all learning and hopefully improving.

In the short to medium term, there may still be a demand for physical hearings in perhaps Disciplinary, Employment and other Tribunals where there is conflicting witness evidence or there are vulnerable witnesses and where special measures are required or translators or interpreters are needed. Ultimately however, it makes sense that the decision as to whether a hearing is to take place remotely or take place face to face, should be entrusted to judicial experience and expertise in the particular field.

Should remote hearings continue post-Covid in a Tribunal setting? My own personal view is, yes, and they should be encouraged, extended and embraced where at all possible, with the safeguards which have developed at pace. If remote attendance can work anywhere, then it is in the Tribunals context. Tribunals are intended to provide swift, cost effective and proportionate means of accessing justice, adjudicating upon regulatory matters and resolving disputes between parties without an assumption of representation. From a sustainability perspective, remote meetings may well become our default position in law, business, public service and in our day-to-day lives, with the crucial caveat, that they must preserve justice and the rule of law.

Ultimately, remote hearings may play some small but important part in starting to tackle the crisis of access to justice. They may potentially reduce pressures on some parts of the justice system by resolving disputes at the right level, with the right expertise in specific areas of law, but also by building capacity. They could if handled well, help to improve the experience of parties and witnesses of the justice system.

The challenge remains however that 'home' is not necessarily the best environment in which to be able to judge upon, represent or be a party to proceedings. Not everyone lives in comfortable, quiet surroundings. Individuals may have to juggle caring for children or elderly parents at home without support and on occasions the option of having to travel to court to participate in or hear a case is the best option.

What has also been lost during the pandemic are the subtleties, unspoken signals and nuances of human contact. There are too many examples of clumsy, insensitive remote communications via e-mails and social media that lead to conflict and misunderstandings, whether in the legal context or otherwise. What is also lost is the huge benefit of the 'robing-room' and canteen conversations which are perhaps less guarded and where there may be opportunities for appropriate settlement.

To end on a positive note, this is a potentially exciting time for law and justice in Wales and there are opportunities as well as threats emerging from our experience over the past two-and-a-half years. WG research refers to the need for robust evaluation of the outcome of online hearings and refers to the risk that the developing online justice system won't offer equality of justice to all. This may be the case however the opposite may also be true. Research may reveal that justice becomes more accessible to all through remote means if it's properly supported and promoted.

It is in our nature is to wish to remain with the status quo rather than embrace the future. The reality however is that our children and grandchildren have become conditioned to being educated remotely. Those who have just taken their GCSE, A-Level exams or their final exams in university have spent more time leading up to those exams distance-learning rather than in face-to-face learning. Much of their social activity will also have been and continues to be remote. Many of us will find that notion unappealing, however this is the new reality, and the coming generations may expect on-line justice in the same way that they've come to expect on-line education, banking, entertainment and working environments.

In conclusion, my own personal view, and not that of the Tribunals upon which I sit, is that we need to embrace the change which was initially thrust upon us, and seize this opportunity to embrace and consolidate our use of technology and new ways of working, while being anchored to the central principle of ensuring that justice is done and seen to be done.

TRIBUNAL JUDGE CN JONES

SPEED BUMPS OR ROAD BLOCKS: CONSIDERING THE JUDICIAL APPROACHES TO LANGUAGES OTHER THAN WELSH.

Siân Pearce

This paper considers some of the issues arising from the use of interpreters in hearings of the Immigration Chamber of the First Tier Tribunal, with particular reference to Asylum Appeals; drawing from both research and the author's own experience as a practicing immigration solicitor. It looks at some of the issues that are raised by the use of interpreters in the Tribunal, taking as a starting point the Equal Treatment Bench Book (2021 edition), and asks whether they should be considered mere procedural 'bumps' or more substantial impediments to the fair operation of the Tribunal. The paper will also compare the guidance for Welsh interpretation with that for other languages and asks what this means for our understandings of equality and access to justice.

As a practitioner it is always interesting, often surprising and sometimes useful to look at how areas of law other than one's own deal with any given situation or problem. This paper is primarily concerned with the Judicial Guidance regarding interpreters in the First Tier Tribunal (Immigration and Asylum Chamber), however the starting point is the more general guidance given by the most recent edition of the Equal Treatment Bench Book[1]. The Bench Books approach to translation involving languages other than English and Welsh is compared to the approach specifically the Welsh[2] language is used in Court. It then gives a more detailed consideration of recent case law considering the position of interpreters in Immigration Appeals and asks what this might be said to say regarding the 'overriding objective' found in the First Tier Tribunal Rules:

The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.[3]

The conference from which this paper is drawn was gathered specifically to consider the phenomenon of remote hearings, which became a daily feature of the English and Welsh Court system during the Covid-19 Pandemic. In terms of disclosure, the writer only appeared personally in a couple of remote hearings during this period (though both required interpretation). These were drawn from a practice is centred around the most vulnerable users of the immigration system, majority of clients' hearings were in person, by explicit request and design. This may be an interesting guide to how remote hearings are viewed by immigration practitioners – as being unsuitable for the vulnerable appellant or where a case rests on the credibility of an individuals evidence[4].

1 Judicial College, 'Equal Treatment Bench Book.' <https://www.sentencingcouncil.org.uk/wp-content/uploads/Equal-Treatment-Bench-Book.pdf> accessed 6 November 2022.
2 Whilst on most occasions it might be assumed that translation is between English and Welsh, the guidance simple considers Welsh translation, which could in theory be from any other language.
3 First-tier Tribunal (Immigration and Asylum Chamber) Rules 2014, para 2 (1).
4 Jo Hynes, 'Remote Hearings in the Immigration Tribunal What Could Possibly Go Wrong.' (*Free Movement*, 27 March 2020) <https://freemovement.org.uk/remote-hearings-in-the-immigration-tribunal-what-could-possibly-go-wrong/> accessed 6 November 2022.

During the writer's Master's research a number of solicitors were interviewed on, among other things, their views regarding 'vulnerability', what it was and what it meant for immigration practitioners. No attempt will be made here to try and cover how the concept has been considered by legal theorists, but one of the responses during that research that was most striking was from a highly experienced immigration solicitor who said simply that a person is are vulnerable if they need something which must be requested from another[5]. It is obvious to say that Appellants[6] who do not speak English are vulnerable because they require translation. There however a deeper vulnerability, as Appellant's come to the Tribunal requesting Justice - which the exclusive gift of the court system. If this then is our destination, we might ask interpretation is either a speed bump on the road to justice – requiring but a little care and attention to overcome, or a road block which has the potential to prevent access entirely.

Before proceeding further some introduction to the context of immigration tribunals (remote and in person), may be useful to those unfamiliar with them to many. After which follows some brief thoughts regarding what is meant by interpretation.

The Immigration Tribunal, more correctly referred to as the Immigration and Asylum Chamber of the First Tier Tribunal, was established in its current form in 2010[7], though there have been reforms since, particularly regarding appeal rights. It is the branch of the First Tier Tribunal which deals with cases regarding people's rights to come to or stay in the UK in the form of appeals against the decisions of the Secretary of State. Even though appeal rights have narrowed considerably in recent years the Tribunal's caseload still covers a very wide range of situations – from 'Protection' Appeals which cover both Asylum and Humanitarian Protections issues, to other Human Rights based cases, to Deportation cases (ie removal after a criminal offence), to applications under the EU Settlement Scheme.

The cases before the Tribunal are often complex – as Immigration law is notoriously complicated: in 2013 Lord Justice Jackson observed that it "had … now achieved a degree of complexity which even the Byzantine emperors would have envied"[8]. It might well be said that Law is often complicated – that is what lawyers are for. However, it is also of note that of the 366 immigration appeals heard in the Newport Tribunal in the first 40 working days of 2022, 10 percent included unrepresented appellants. Of the protection appeals, 25 percent were unrepresented with a further 24 percent being represented by a small charity in Cardiff which assists those who cannot access publicly funded representation. In Manchester, across a slightly smaller period the numbers were similar with 28% of appellants in protection appeals going unrepresented[9]. In this context, where a lack of representation meets mind-bogglingly complex law it must then be asked what role is it that the interpreter must or should play? And does that bear any relation to the role they do in fact play.

This is why it is important to consider what is in fact meant by 'interpretation'. The starting points for the current paper were the Equal Treatment Bench Book, as well as the introductory words on the website *Eventbrite* for the conference from which this paper is drawn. That introduction links notes that the conference will be considering the use of 'simultaneous translation' in remote hearings. The difficulties linked to simultaneous translation are accepted by the Bench Book which notes that it will often not be possible online[10].

5 Siân Pearce, 'Insider Conflicts and a Warning to the Curious: A Consideration of a Field Research Project by a Practicing Legal Professional Considering the Asylum System' (MSc Dissertation, Cardiff University 2022).
6 Where it is common in other areas to refer to 'litigants' and 'litigants in person', this is not the convention in immigration practice. Here the convention of referring to 'Appellants and 'Unrepresented Appellants' will be followed as in the author's view this better reflects the extreme inequalities between those Appealing and the representatives of the State.
7 The Transfer of Functions of the Asylum and Immigration Tribunal Order 2010.
8 *Pokhriyal v The Secretary of State for the Home Department* [2013] EWCA Civ 1568
9 Statistics produced with the kind permission of Dr Jo Wilding
10 Judicial College (n 1) 236.

However, the general prescription for Welsh Language Translation in Courts remains that it will be simultaneous. This is made clear at Paragraph 164:

Welsh interpretation supplied via the Welsh Language Unit for the courts and tribunals will be simultaneous, and interpreters have to pass practical exams to get accredited[11].

The only reference to accreditation in relation to other languages is at paragraph 144 which notes that *'informal interpreters cannot serve as a substitute for accredited interpreters in relation to evidence'*[12]. There is no requirement or assumption that languages other than Welsh will have simultaneous translation.

Despite the differences in mode and quality assurance, the purpose for interpretation is considered to be the same in all circumstances, though the task of checking *'everyone understands each other'* to *'ensure a fair hearing'* belongs to the Judge (para 111)[13]. This seems straight forward enough – everyone understands what everyone else is saying and thus a fair hearing is achieved. This leads to the substance of the current consideration – the question of how a fair hearing (whatever that means) is achieved and is *'everyone understanding each other'* as simple as it sounds.

It is respectfully suggested that if it were then both this paper and the prior conference would have been lot shorter and much less interesting. The rest of the consideration will move away from the comparisons with the guidance pertaining to the Welsh language and concentrate exclusively on the issues present in immigration hearings. It will be suggested that the questions that hang over court interpretation in the immigration are unfortunately fundamental questions regarding what it means to have a fair hearing. Consequently anything that adds further layers of complexity to hearings– such as holding them online – cannot sensibly be considered anything but a serious threat to justice. To illustrate this bold statement the example of the 2019 Upper Tribunal case of *TS (interpreters) Eritrea*[14] was heard. The headnote reads thus:

(1) ***An appellate tribunal will usually be slow to overturn a judge's decision on the basis of alleged errors in, or other problems with, interpretation at the hearing before that judge*** *(Perera v Secretary of State for the Home Department [2004] EWCA Civ 1002). Weight will be given to the judge's own assessment of whether the interpreter and the appellant or witness understood each other.*

(2) Such an assessment by the judge should normally be undertaken at the outset of the hearing by the judge (a) putting questions to the appellant/witness and (b) considering the replies. ***Although he or she may not be able to speak the language of the appellant/witness, an experienced judge will usually be able to detect difficulties;*** *for example, an unexpected or vague reply to a specific question that lies within the area of knowledge of the appellant/witness or a suspiciously terse translation of what has plainly been a much longer reply given to the interpreter by the appellant/witness. Non-verbal reactions may also be factored into the judge's overall assessment.*

(3) Where an issue regarding interpretation arises at the hearing, the matter should be raised with the judge at the hearing so that it can be addressed there and then. Even if the representatives do not do so, the judge should act on his or her own initiative, if satisfied that an issue concerning interpretation needs to be addressed.

(4) In many cases, the issue will be capable of swift resolution, with the judge relying upon the duty of the parties under rule 2(4) of the Procedure Rules of both of the Immigration and Asylum Chambers to help the Tribunal to further the overriding objective of dealing with the case fairly and justly.

11 ibid 240.
12 ibid 237.
13 ibid 234.
14 *TS (interpreters) Eritrea* [2019] UKUT 352.

(5) A challenge by a representative to the competence of a Tribunal-appointed interpreter must not be made lightly. If made, it is a matter for the judge to address, as an aspect of the judge's overall duty to ensure a fair hearing. ***Amongst the matters to be considered will be whether the challenge appears to be motivated by a desire to have the hearing aborted, rather than by any genuine material concern over the standard of interpretation.***

(6) It will be for the judge to decide whether a challenge to the quality of interpretation necessitates a check being made with a member of the Tribunal's administrative staff who has responsibility for the booking of interpreters. Under the current arrangements for the provision of interpreters, it ***may*** *be possible for appropriate enquiries to be made by the administrative staff of the Language Shop (a quality assurance service run by the London Borough of Newham in respect of the Ministry of Justice's language contract), as to whether the interpreter is on the register and whether there is any current disclosable issue regarding the interpreter. The initiation of any such enquiries during a hearing is, however, a matter for the judge. In practice, it is unlikely that it would be necessary or appropriate to take such action. In most cases, if the standard of interpretation is such as seriously to raise an issue that needs investigating, the point will probably already have been reached where the hearing will have to be adjourned and re-heard by a different judge (using a different interpreter).*

(8) ***On an appeal against a judge's decision, even if it is established that there was or may have been inadequate interpretation at the hearing before the judge, the appeal will be unlikely to succeed if there is nothing to suggest the outcome was adversely affected by the inadequate interpretation.*** *This will be the position where the judge has made adverse findings regarding the appellant, which do not depend on the oral evidence (Perera , paragraphs 24 and 34).*

(9) It is important that Tribunal-appointed interpreters are able to discharge their functions, to the best of their abilities. It is part of the judicial function to enable an interpreter to do this by, for instance, preventing a party or representative from behaving in an intimidating or oppressive way towards the interpreter. By the same token, the Tribunal and the parties are entitled to expect that the interpreter will interpret accurately, regardless of what he or she personally thinks of the evidence they are being required to translate.[15] [Emphasis added]

TS is an appeal on a determination of the First Tier Tribunal following an asylum appeal hearing. The solicitors for the appellant had brought their own interpreter to interpret for them before the hearing and to stay for the hearing itself – something which is in immigration proceedings generally considered good practice. This interpreter raised concerns regarding the quality of interpretation during the hearing by note to the barrister at several points during the hearing. An application to adjourn was duly made which was refused. In his determination the First Tier Tribunal Judge criticised the practice of bringing a secondary interpreter.

In most cases that would have been an end to the matter, appeals on matters of judicial discretion are notoriously difficult. However, the tribunal interpreter then approached the barrister at a bus stop outside the Tribunal and proceeded to not only discuss the case just heard but give an extremely negative view of the Appellant[16]. It was this action rather than any lingering doubts over the quality of the interpretation that caused the appeal to the Upper Tribunal to ultimately be successful, albeit with some warnings to those representing appellants in similar situations not to assume they will be so fortunate.

15 *TS (interpreters) Eritrea* [2019] UKUT 352, https://www.bailii.org/uk/cases/UKUT/IAC/2019/352.html
16 Colin Yeo, 'Appeal Overturned after Bus Stop Rant by Court Interpreter' (*Free Movement*, 29 November 2019) <https://freemovement.org.uk/appeal-overturned-after-bus-stop-rant-by-court-interpreter/> accessed 7 November 2022.

The headnote in this case also gives a useful indication as to what a 'fair hearing' might be, at least in the minds of the Upper Tribunal. It is clear from the phrasing that the bar set for a fair hearing is not in fact that the proceedings were understood properly and entirely by all involved, but rather that there was, in the view of the Tribunal, no adverse impact on the Appellant caused by the poor interpretation during the hearing.

This might be considered a depressing version of justice. It gives no weight to the need of a person, who is before the Tribunal in circumstances which will massively impact the course of their life to understand and be understood. This of course includes those appellants who do not have the benefit of a representative to explain to them the meaning of the determination which will arrive some three or four weeks later, solely in English. In the writer's own practice, which includes a high number of clients needing to make further representations after an asylum appeal has been refused one of the most asked questions is why. Why was I refused, and why was I not believed.

Things become even more problematic when the above is transposed to the context of remote hearings. . Grieshofer notes the challenges inherent in hearings which centred on narrative witness evidence which is in an interpreted format. She refers to hearings which use interpreters as '*interpreter-mediated*"[17] hearings which is an extremely useful phrase for understanding the role of the interpreter where making sure everyone understands each other perhaps assumes a deeper meaning. This role involves mediation between different cultural understandings and worldviews as well as moving words from one language to another. She describes some of the difficulties faced by interpreters in remote hearings as:

"[the] *additional distortion of power relations due to the unequal audio-visual representation of the participants … as the positioning of microphones, cameras and monitors defines the extent to which individuals would be seen and heard. Such conditions thus reduce the overall sound quality as well as image and sound synchronisation. The cognitive strain on interpreters or even other participants or difficulties with communication management are thus common problems in such settings. Furthermore, situations when interpreters face multiple images on the monitor … lead to an overflow of visual input and additional challenges, which would not occur in face-to-face interpreting*"[18]

Interpreting is a highly skilled task, and as noted at earlier there is no standardised accreditation or training for those who work in languages other than Welsh. The margin for human error therefore seems immense. However, the view of the Tribunal is that, if the Judge is swayed by something other than witness testimony of the Appellant or another requiring interpretation, such as Home Office country information, the chance of error, and any actual errors in communication to or on behalf of the Appellant do not matter. The correct decision has been reached and justice has perhaps not been done, but perhaps meted out.

In conclusion, the emergence of remote hearings forces us to consider some of the basic assumptions about how justice functions – what does it mean for something to be fair? What does it mean to participate in hearings? Why do these things matter at all?

17 Tatiana Grieshofer, 'Remote Interpreting in Immigration Tribunals: The Journey to Comprehensibility: Court Forms as the First Barrier to Accessing Justice' [2022] International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique <https://link.springer.com/10.1007/s11196-022-09908-3> accessed 7 November 2022.
18 ibid 10.

Sadly there is a dearth of research on the experiences of appellants – particularly those who are unrepresented. Therefore there is little record of the experiences of those who have had their evidence mediated by interpreters. Anecdotally however, it seems that the realisation that things have gone wrong for asylum claimants, who might have started off with a high level of trust and confidence in British Justice, can be devastating.

The Tribunal are therefore faced with a choice - whether to aim for the highest levels of justice or the highest levels of expediency, and it is perhaps less relevant to talk of speedbumps than potholes – which some can navigate with ease, but cause catastrophe for others.

REMOTE HEARINGS IN FAMILY COURTS

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In my session for the Future of Remote Hearings Post Covid Conference on 21 July, I outlined some research on the impact on court users of remote hearings, in the context of future practice in family courts. I also described some benefits to public legal education from increased opportunities to observe and report on court hearings. I included some research on the Court of Protection and the Youth Court because, although these are separate jurisdictions, there are some common features.

In July 2022, the extent to which remote hearings were still happening in the Family Court was not obvious. The President of the Family Division of the High Court, Sir Andrew McFarlane had indicated that parties and their lawyers should normally be physically present in family courts when an important decision might be takes. First hearings at High Court level were all to be attended in person, with subsequent decisions about attendance to be taken by the judge.[19]

I therefore made some enquiries which indicated that practice varied across the country from hearings being nearly all remote to nearly all in person. There were also variations according to different level of judge. My research was completely informal, through personal contacts and social media, so the picture presented here is purely impressionistic.

Some examples of responses included:

- 'I was refused remote attendance recently so had to travel for more than 9 hours for what was listed as a one hour hearing' – a QC in south Wales (now KC)
- 'unfortunately, justice can no longer be done unless everyone in the court room has travelled for at least an hour' – a junior barrister in London
- Online attendance was 'still very common. It depends on the type of case, the type of hearing, the DFJ area, the individual judge' - a junior barrister, Birmingham.

During the week I was asking the question, we had experienced extremely hot weather and some lawyers mentioned that hearings had been switched to online because of the weather conditions.

19 A View from the President's Chambers, March 2022 at https://www.judiciary.uk/guidance-and-resources/a-view-from-the-presidents-chambers-march-2022/

BILINGUAL FAMILY COURT REMOTE HEARINGS IN WALES

In the context of the themes of the conference, I also made some enquiries of local authority child care lawyers across Wales as to whether they had experience of bilingual remote hearings but only one solicitor expressed a view, which raised some interesting points –

'I have never done a Welsh/English bilingual hearing in person or remotely. I imagine the issues are the same as with any remote hearing where we have translators. We have hearings with translators into other languages … regularly of course remotely. I've also attended hybrid hearings with translators. It takes time.

Everyone's first language in which they are comfortable expressing themselves needs to be respected especially in the court arena as usually much is at stake of course.

We welcome remote hearings. They allow social workers to attend directions hearings quickly and to move on to other work which is especially important these days where there is a general shortage of social workers. This is also true of legal practitioners in family law.'

It became clear from other contributions to the discussions at the conference that court hearings conducted in Welsh and English tend to use simultaneous translation rather than sequential translation, as generally experienced with other languages.

BUILDING ON EXPERIENCES OF PARTIES AND PROFESSIONALS TO INFORM FUTURE REMOTE HEARINGS

There were understandable concerns about the effect on court users of being unable to physically attend court hearings, especially on parents where important decisions were being made about their children's welfare. The Nuffield Family Justice Observatory (NFJO) was approached by the President and conducted three investigations into remote hearings. In their third report, 'Remote hearings in the family court post-pandemic', they had identified the following particular concerns in England and Wales.[20]

There were questions about access to justice in cases where intermediaries or interpreters were required. There were often extra challenges facing litigants in person in the family courts. Self-representing parents and family members are common in private law family proceedings. Although parents in care proceedings are entitled to non-merits tested and non-means tested legal representation, in post-separation contact disputes and kinship care applications, most parties are not eligible for legal aid at all.

The NFJO also found that many hearings were conducted with lay parties just relying on a phone. There was mixed experiences of CVP (the Cloud Video Platform used by the courts). The vast majority of parents received no help in accessing technology. Although 83% parents surveyed had no concerns about how their case was dealt with, 73% had felt unsupported. About half of these parents had had no legal representation but others had communication problems with their lawyers during the hearing.

20 Ryan et al. (2021) Remote hearings in the family court post-pandemic at https://www.nuffieldfjo.org.uk/resource/remote-hearings-post-pandemic

Looking at the fairness of remote hearings, the NFJO reported that parents and professionals raised issues in all three consultations about:

- difficulties in full participation where access to technology was a problem
- lack of legal and other support before and during the hearing
- concerns about privacy and confidentiality
- that particular communication needs of some parents were not being met
- hearings being arranged at short notice
- insufficient information for parties in advance, including copies of court papers
- hearings being rushed
- maintaining the authority of the court

Suggestions made and examples of good practice included:

- deciding in advance how hearings are to be run
- supporting parents
- improving the way remote hearings are run through preparation, improved administrative and technological support
- providing better access to court bundles
- collection of data to improve performance

OBSERVING REMOTE HEARINGS

Although Covid restrictions reduced access by journalists and the public to open court hearings, there was a beneficial side effect of remote hearings being introduced into courts that are normally difficult to observe in person. The most impressive development was The Open Justice Court of Protection Project, discussed below. In family courts, opportunities to observe did also become a little easier.

Legal blogging in the Family Court under Family Procedure Rules r. 27(11)

Accusations of a 'secret Family Court' are common because hearings are usually held in private and details cannot be shared. Since 2009, the media have been able to attend family proceedings, but cannot write anything without leave of the court, under section 12 Administration of Justice Act 1960. Journalists therefore attend very rarely.[21]

Following a 'legal blogging pilot', the Family Procedure Rules now allow authorised lawyers (unconnected to the case) to attend private hearings as legal bloggers. These legal observers can be practising or academic lawyers, or lawyers who are working for an educational charity. Similarly to journalists, it is rare for one to travel to a court in the hope of getting leave to report. Because it is easier to attend a remote hearing than physically access a court, the Covid restrictions led to increased opportunities for legal blogging. Leave is required from the judge to publish a blog post and these must ensure that children are anonymised. Details about legal blogging can be found at The Transparency Project.[22]

21 For a description of the problem, see recent proposals for reform at https://www.judiciary.uk/guidance-and-resources/transparency-in-the-family-courts-report-3/

22 At https://transparencyproject.org.uk/legalbloggers/

An example of legal blogging from a case in Wales, made possible because it was entirely a remote hearing, raised some interesting issues about the appropriate use of a care order for family support.[23] In another case (in England) where remote access was possible and the judge agreed to The Transparency Project writing up, the role of an interpreter was central.[24] That case was about the correct procedures to be followed in cases of contact disputes where that are allegations of domestic abuse.

The Open Justice Court of Protection Project

Unlike the Family Court, Court of Protection (CoP) hearings are usually held in public. The identity of 'P', the person at the centre of the proceedings, is protected by a reporting restriction known as 'the transparency order'. During the lockdown, CoP hearings went online but were still open to the public. Two academics, Professor Celia Kitzinger and Gill Loomes-Quinn, who had some experience of supporting parties in the CoP seized this opportunity to establish the Project, in order to observe hearings remotely. The Project now encourages people who have an interest in the issues to join hearings for purposes of observation, learning and possibly reporting.

Regular blog posts are published by members of the Project and other guest posts from lawyers, health professionals, students etc. A useful summary of the Project's work was published in June 2022.[25] Anyone interested in finding out how to observe a hearing can find details on the Project website.

In July, I asked Professor Kitzinger for her view on the future of CoP hearings. She replied:

'In theory, the courts are back in physical courtrooms. That's nominally the "default".

In reality, there are frequently people testing positive for covid, or affected by the rail strikes, or staying home because of the heat wave. There are a great many hearings taking place remotely. My experience is that judges will only push for in-person hearings if lay people who are involved in the hearings want them to be in-person (often they don't), or if they are hearing witness evidence where credibility is an issue.

I listen to lots of these negotiations at the end of hearings when the date is being fixed for the next hearing and there's rarely any pressure to be "in-person" and sometimes some considerable pressure for at least some people to get permission to attend remotely.

The future is hybrid - of that I'm sure!'

23 https://transparencyproject.org.uk/the-necessity-for-a-care-order/
24 https://transparencyproject.org.uk/b-v-p-an-appeal-against-findings-where-the-court-did-not-follow-correct-procedures-about-abuse-allegations/
25 https://openjusticecourtofprotection.org/2022/06/15/happy-second-birthday-to-the-open-justice-court-of-protection-project/

REMOTE HEARINGS IN THE YOUTH COURT

The people who the court proceedings are concerned with, children in family courts and 'P' in the CoP, rarely actually attend court. However, defendants in criminal proceedings are expected to appear before the judge or magistrate in person.[26]

Research available on the 'Transform Justice' website in July 2022 features interviews with adult defendants about remote hearings, who saw no advantage to video hearings apart from perhaps saving time and travel. Almost all defendants in the samples felt that opting for video involved a trade-off, since the experience of the video linked court hearing was inferior to the in-person hearing. Transform Justice concludes that all the evidence suggests video leads to more punitive, liberty-limiting decisions, but we need hard data.[27]

A pre-Covid report on remote hearings for child defendants by the Alliance for Youth Justice had called for the use of video links for child defendants to be urgently reviewed. Children were already struggling to understand and engage with court proceedings and this was exacerbated by the use video links. The report recommended that the expansion of video links should be halted until there was appropriate analysis available on the impact of video links on a child defendant. Video links should be used only in exceptional cases, with appropriate adjustments and Criminal Practice Directions around the use of video with children should be tightened to prevent widespread video link sentencing and remand hearings. If all relevant parties deem the use of video link preferable for a child's welfare and outcomes, thorough assessments should be carried out to determine any vulnerabilities, and adjustments should be made to ensure the child is able to participate effectively.[28]

More recently the Alliance for Youth Justice reported that the Coronavirus Act 2020 had temporarily expanded the situations in which live video and audio links might legally be used in criminal court proceedings, allowing for hearings to be conducted entirely by video or telephone in certain circumstances. Section 200 of the Police, Crime, Sentencing and Courts Act 2022 made these temporary live link provisions permanent from June 2022.[29]

Figures specific to use of remote hearings with children were not available. However, virtual arrangements had meant many children spend longer held in police custody awaiting their hearing. Concerns were raised that children appearing over video link may be less likely to be granted bail, more likely to be remanded to custody, and more likely to receive custodial sentences. There was a lack of any evaluation of how children had been involved in virtual hearings.[30]

26 Many thanks to Penelope Gibbs of Transform Justice for directing me to the sources in this section.
27 'Out of Sight, Out of Mind: defendants' experiences of video hearings' Transform Justice at https://www.transformjustice.org.uk/out-of-sight-out-of-mind-defendants-experiences-of-video-court-hearings/
28 M Harris 'They Just Don't Understand What's Happened or Why' (Standing Committee for Youth Justice, 2018)
29 M Harris and P Goodfellow, The Youth Justice System's Response to the Covid Epidemic (Alliance of Youth Justice 2021)
30 ibid

On a more positive note, research for the Magistrates Association in 2022 found that youth courts had changed much less in the pandemic than adults' magistrates' courts. Despite the Coronavirus Act 2020 bringing in temporary amendments expanding the circumstances in which remote links could be used in youth court hearings, remote links were consciously avoided in youth courts where possible. Magistrates were alive to the challenges children would face in effectively participating in youth court proceedings where a remote link was used. It was recognised that the various issues with remote links identified by magistrates threatened the ability of defendants under the age of 18 to effectively participate in proceedings.[31]

CONCLUSION

While the speedy introduction of remote hearings raised questions about access to justice, it now appears that the skills and experience built into the system have offered new opportunities for flexibility and for public legal education. There are clearly serious ongoing problems in effective communication and access to justice for children and families involved in family courts and in youth courts, highlighted by issues in remote hearings. These seem, however, to arise from pre-existing systemic failings to meet individuals' needs for advice and representation.

31 Magistrates Association, *Magistrates Courts and Covid 19* (2022) at https://www.magistrates-association.org.uk/News-and-comments/new-ma-report-highlights-magistrates-experience-in-criminal-courts-during-covid-19

REMOTE HEARINGS AND LEGISLATIVE THEATRE

C.F. Huws, R.M. Jewell, H. Binks, L. Schwede

This paper explores the operation of remote hearings involving simultaneous interpretation, and illustrates some specific considerations when conducting remote hearings in this way. Although consecutive interpetation is the most common model in cases involving an interpreter,[32] some territories, including Wales use the simultaneous model,[33] many of our findings also apply to consecutive interpretation and also to interpretation involving sign-language interpreters.

THE USE OF REMOTE HEARINGS

Although the widespread use of remote hearings became common during the Covid 19 pandemic of 2020,[34] they were being used in a number of cases prior to this, e.g. for pre-trial hearings involving remand prisoners, but also for the cross-examination of vulnerable witnesses who could be interviewed by video link from another location within the court building.[35] Remote hearings introduce specific considerations and challenges; the reliability of the technology,[36] the scope for the witness to participate effectively in the process;[37] and the extent to which it is possible to evaluate the credibility of the evidence[38] have all been highlighted as concerns. However, cases involving interpreters add further complexity to the process because:

- not all platforms allow for there to be a separate interpretation channels for simultaneous interpretation which is used in cases involving Welsh/English interpretation.[39]
- The limited size of the display window on an online platform means that it is difficult to see the face and body of the BSL interpreter.[40]

32 Vranjes, J and Brône G (2021) Interpreters as laminated speakers: gaze and gesture as interpersonal deixis in consecutive dialogue interpreting. *Journal of Pragmatics* 181: 83-99.
33 Jewell, R. M, Huws, C.F. and Binks H. (2022) Just Bilingual Cases? The Impact of Simultaneous Interpretation in Welsh Courts. (Forthcoming).
34 Judiciary of England and Wales (2020) Civil justice in England and Wales: Protocol Regarding Remote Hearings https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-24_03_20-1.pdf Accessed 3 November 2022.
35 *Criminal Practice Direction I, General Matters* *3N: Use of live link and telephone facilities* ([2017] EWCA Crim 30
36 Lord Chancellor, Lord Chief Justice and Senior President of Tribunals, 'Transforming Our Justice System' (*Ministry of Justice*, September 2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf accessed 6 August 2022
37 Re A (Children) (Remote Hearing: Care and Placement Orders) [2020] EWCA Civ 583
38 Stone, M (1991), 'Instant lie detection? Demeanour and credibility in criminal trials' (1991) Crim.L.R. 821, 822
39 Comment by an interpreter in our research study.
40 Clarke, J. (2021) Evaluation of remote hearings during the Covid 19 Pandemic. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040183/Evaluation_of_remote_hearings_v23.pdf Accessed November 3rd, 2022 p14.

- Interpretation into other languages, which would rely on chuchotage in a face-to-face setting is heard by all the participants, even if they do not understand the target language.[41]

SIMULTANEOUS AND CONSECUTIVE INTERPRETATION

Remote hearings created some challenges that were similar to both simultaneous and consecutive interpretation. namely;

- The need to ensure that the interpreter was able to see and hear the speaker.[42]
- The need to see all the participants on screen, while simultaneously focusing on the speaker in order to gauge tone, pace, and to read the speaker's facial expressions as well as translating the words.[43]
- The absence of visual cues from the speaker, particularly in cases where having cameras switched on overloaded the processors on computers.[44]

Research conducted at Aberystwyth University in 2022 sought to explore how legal proceedings responded to these challenges, and investigated how participants respond to proceedings conducted via interpretation.

LEGISLATIVE THEATRE AND REMOTE HEARINGS

We explored these challenges, specifically with reference to simultaneous interpretation, using the legislative theatre techniques of Augusto Boal.[45] Boal's approach, also known as theatre of the oppressed, uses theatre to simulate current processes, and then allows the participants to explore variations to these processes, by suggesting changes and playing them out. Boal explains his approach as being:

It is not the place of the theatre to show the correct path, but only to offer the means by which all possible paths may be examined.[46]

41 Clarke, J. (2021) Evaluation of remote hearings during the Covid 19 Pandemic. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040183/Evaluation_of_remote_hearings_v23.pdf Accessed November 3rd, 2022 p61.
42 Clarke, J. (2021) Evaluation of remote hearings during the Covid 19 Pandemic. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040183/Evaluation_of_remote_hearings_v23.pdf Accessed November 3rd, 2022.
43 Clarke, J. (2021) Evaluation of remote hearings during the Covid 19 Pandemic. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040183/Evaluation_of_remote_hearings_v23.pdf Accessed November 3rd, 2022 p14.
44 In earlier work on interpretation in court hearings, one of the interpreters emphasised the need to be able to see the speaker in order to be able to interpret what they say. This is discussed further in Jewell, R. M, Huws, C.F. and Binks H. (2022) Just Bilingual Cases? The Impact of Simultaneous Interpretation in Welsh Courts. (Forthcoming).
45 Further discussion of Boal's work and how it is applied to out study may be found in Huws, C.F. Jewell, R.M, and Binks H. (2022) 'A legislative theatre study of simultaneous interpretation in legal proceedings' International Journal of Speech Language and the Law (In Press).
46 Boal, A. (1979 and 2000) Theatre of the Oppressed. London, Pluto Press p144.

We therefore staged the cross-examination of a witness in a personal injury case, where a barrister conducted the cross-examination, and an actor assumed the role of the witness, and the case was interpreted by two qualified court interpreters. The scenario involved examples of interruptions, because the witness disagreed with the barrister regarding aspects of the testimony, and also the barrister suspecting the witness of concealing the truth. However, it also involved conversational pauses and hesitations, false starts and stumbles – all of which of course needed to be interpreted by the interpreter. Another variable was to explore participants' response to interpreted proceedings both in cases where counsel and the witness are speaking the same language, with one interpreter therefore needing to interpret for both participants, and in cases where counsel was asking the questions in English and the witness was responding in Welsh. Both of these situations occur frequently in the courts in Wales, because in some cases a person who desires to use Welsh will instruct Welsh-speaking counsel, but in other cases counsel will speak English, even though the party or witness speaks Welsh.

A theatre director facilitated the study by eliciting and provoking the responses of the participants, as well as the responses of a mock jury comprising of members of the public, who responded to a public call-out for people to take part in the project. The jury comprised of 12 people – 3 men and 9 women, and from a diverse age range. Counsel and the witness performed the cross examination, and they, the interpreters, and the jury were asked to respond; to suggest what they felt worked well, and what was difficult or unsatisfactory. The advantage of Augusto Boal's theatre of the oppressed technique is that all the participants are permitted to articulate their response, but also to suggest how the situation may be improved. The scene is then replayed with those changes, and the partipants are again asked to evaluate their response to the situation. The theatricalised content makes it easier for participants to comment on whether they find something to be problematic, distracting, confusing, and even annoying – all of which matters of course will affect how they respond to the witness, and how they evaluate his or her evidence. Their observations also enabled us to consider whether the jurors were evaluating the witness or the interpreter – and again this also has an effect on the fairness of the proceedings, because the witness's evidence is necessary mediated by the interpreter. If the jurors are evaluating the interpreter, rather than the witness, there are considerable potential impacts on the fairness of the proceedings, and a need to consider how to mitigate this situation.

INTERPRETATION AND REMOTE HEARINGS

Our findings demonstrated that there are many clear advantages to using remote hearings for cases involving an interpreter. The placing of the interpreter in a courtroom is often problematic – some courts (e.g. the Crown Court at Cardiff) have an interpretation booth, and the interpreter is separated from the other court users. However, in other courts, the simultaneous interpreter is situated wherever there is space in the court, or where chuchotage is used (whispered translation for one person only) the interpreter will be situated next to the person for whom they are interpreting. The placing of the interpreter however, may be problematic, because it may signal that the interpreter is either allied to the party, or in opposition to the party even though they are, and must be neutral intermediaries.[47] This problem is eliminated in remote hearings because the interpreter may have their camera off and will therefore be less visible in the court process. The other advantage is that interpreters can be obtained from further away, which may allow for a larger pool of interpreters. This is of course particularly valuable for languages that are not widely spoken, or interpreted for within a locality or even a jurisdiction, or languages that have a wide range of dialectical variations. The scope for the interpreter to participate remotely means that a wider range of appropriate interpreters may be sought, and this will ensure that cases can proceed more quickly, without having to rely on an individual interpreter's availability. It also means that an interpreter can be obtained who can translate cultural terminology and slang more effectively. For example a Spanish-speaker from Spain will speak Spanish differently from a Spanish-speaker from Latin America – colloquialisms, nuances, and speech patterns can be translated more effectively where the interpreter is more attuned to the cultural significance of the terms used.[48]

47 Wadensjö, C (2008) *Interpretation as Interaction.* Harlow; Addison Wesley Longman.
48 Hale, S. (2002). How faithfully do court interpreters render the style of non-English speaking witnesses' testimonies? A data-based study of Spanish-English bilingual proceedings. *Discourse Studies*, 4(1): 25-47.

Where simultaneous interpretation is used, it is also possible to set up multiple interpretation channels, allowing the participants to choose whether to listen to the source language or to the interpretation. This is important for the judge who may wish to listen to the speaker in order to detect their emotional tone, and for participants who have some understanding of the source language to listen to both the source language and the interpretation. This may be useful in terms of enabling the participants to compare the speaker and the interpreter, and to hear the speaker giving evidence in the source language, rather than relying solely on the interpreter.

Remote hearings also makes it easier for the speaker to feel that they are part of the proceedings, because, in face-to-face hearings where everyone else is listening via headphones to the interpreter, the witness can feel as though nobody is truly listening to the evidence they give.

Nevertheless, our study also demonstrated that there were issues to consider with remote hearings involving interpreters, and matters that need to be considered before the hearing, as well as issues that need to be brought to the participants' attention.

ISSUES TO CONSIDER WITH SIMULTANEOUS INTERPRETATION IN REMOTE HEARINGS

The responses to our study yielded the following issues:

a. in online hearings, it is less easy to see who is speaking, particularly when listeners have set their screens to gallery view rather than speaker view. Accordingly, some of the participants indicated a preference for hearing the cross-examination in one language and the response in the other language. However, it was also considered that this was more difficult for the barrister and the witness, as the flow of discussion between them was restricted, especially as they had to listen to the information in one language and respond in another. It is accepted therefore that, although requires a greater degree of concentration, it was preferable for the cross-examination to take place in one language rather than two. Of course, this will depend on the whether or not the person conducting the cross examination is able to understand Welsh.
b. It was preferable for the interpreters to have their cameras switched off, particularly if the listeners were viewing the online hearing in gallery view, as having two simultaneous speakers was regarded as distracting.
c. It was preferable to have a different interpreter for each speaker, but it was conceded that this was unlikely to be permitted in most instances because of cost.
d. It was generally considered preferable for the interpreter to replicate the speaker's tone and emotional content. However, some listeners expressed a preference for greater neutrality in the interpretation. Further work is needed on the extent to which the interpreter is able to assume the personality of the speaker, and to do so accurately, as shouting or speaking quickly may be attributable to a number of emotions – anger, nervousness, or simply the speaker's natural timbre.
e. In an online hearing in particular, the fact that one interpreter interprets for both the barrister and the witness means that it is more difficult for the listener to distinguish which of them is speaking. This is resolved in part by the interpreter will often vary the pitch of their voice in order to emphasise difference, but because the sound is coming from one source, and with less scope for the interpreter to indicate e.g. by the positioning of their body, who they are interpreting for, the issue of whether the interpreter is interpreting for counsel or for the witness can be problematic. Guidance therefore needs to be given by the judge and the interpreter to how interpreting for multiple speakers is conveyed in remote hearings. One of the suggestions in our study was that the speakers should be instructed to pause for longer between each interaction to allow for the interpreter also to pause to delineate that there is a change of speaker.
f. In hearings involving multiple witnesses using an interpreter, there is a risk that the listener will conflate the evidence of different witnesses because they are hearing the same voice. Again, the court must give directions in order to make listeners aware of this.

g. In face to face hearings the interpreter's presence – and involvement - is more in evidence – by the fact that they are physically in the room, and by the fact that the listener must use headphones. However, in online proceedings this is less apparent – as the interpreter will not even be visible, and the listeners need to maintain an awareness that they are listening to interpreted evidence.
h. In online hearings, the speakers are also less likely to be aware of the interpreter, and therefore they also need to maintain an awareness that there needs to be more definite pauses between interactions, so that the interpreter is able to end one speaker's conversational turn, before the other begins to speak.

CONCLUSIONS

Our study demonstrated that remote hearings involving an interpreter can work well, and there may even be advantages to the remote presence of the interpreter. It need not be assumed therefore that simply because the Covid restrictions have been removed that hearings involving an interpreter MUST take place face to face. Nevertheless, there are additional considerations that need to be put in place for remote hearings involving an interpreter, in order to ensure that the proceedings are fair for the speaking participants (counsel, witnesses), user-friendly for the listening participants (the judge, and possibly the jury in cases involving evidence given by video link), and operating in a way that makes it possible for the interpreter to fulfil their role effectively.

WELSH AS A LANGUAGE OF LAW:

An analysis of bilingual Legislation; and the use of Welsh in our Courts and Tribunals

[49]Owain Rhys James

1. With the growth of the body of legislation that has received Royal Assent and become an Act of the Senedd or Welsh Parliament, the ability to interpret bilingual legislation is increasing in importance. The role of Welsh as a language of law is now a matter not only of the right to use Welsh in our courts but also an integral part of the meaning of the law in Wales.

STATUS OF THE WELSH LANGUAGE TEXT

2. By section 156 of the Government of Wales Act 2006 ("GoWA") the Welsh and English texts of an Assembly Measure or Act of the Senedd, where available in both Welsh and English when enacted, are to be treated as being of equal standing.
3. There is provision in an identical way, so that all Acts of the Senedd or Welsh secondary legislation made after 1 January 2020 "have equal status for all purposes"[50] under section 5 of the Legislation (Wales) Act 2019.
4. There is no distinction between the use of "diben"(to use the language of the 2019 Act) and "pwrpas" (to use the language of the 2006 Act) where a court is interpreting legislation.
5. There are broad principles that should not be controversial:
    a. Welsh is not a foreign language in the courts of England and Wales; pause here to note that there is one legal jurisdiction – England and Wales. Therefore:
    b. An Act (in this case the relevant sections of the Act) must have only one meaning;
    c. This meaning must be consistent in *both languages*. However, this is not always necessarily true;
    d. This meaning must be derived by interpreting the text in both languages;[51]
    e. There must be no threshold, or need for ambiguity in the text, before the Court can *look at the Welsh language* text since both languages are of equal standing;
    f. The usual principles of statutory interpretation must apply in Welsh as in English;

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50 The "purpose" intended here is the interpretation of legislation. There is therefore no distinction between the effect of the two statutes and, as such, any assistance given by the Court on s156 GoWA applies to legislation receiving Royal Assent on or after 1 January 2020.

51 See the Law Commission Report (366) Form and Accessibility of the Law Applicable to Wales at 12.3: We considered that the starting point must be that the bilingual texts of Welsh legislation are intended to bear a single meaning. We also considered that it will be necessary to develop a body of rules concerning the approach to the identification of that meaning. It seemed to us that the principal objectives of interpretation of bilingual legislation in English and Welsh should be to ascertain and to give effect to the intention of the legislature and to maintain the equal status of the two languages.

g. The meaning of the Welsh text should not be interpreted by looking at the English text; it should be interpreted independently on the basis of the Welsh language text.

6. While the right to use Welsh in Court is limited to "legal proceedings in Wales",[52] it must be correct to state that parties have an integral right to rely on either language version of the legislation when legal proceedings are heard.
7. The practical effect of s156 GoWA is that both languages must be treated the same. While it is accepted that equality does not necessarily mean that they must be treated in exactly the same way (that is, always referring to a legislative text bilingually) within the context of having to interpret the legislation it is proposed that if the parties refer to both languages both must be given equal weight and importance.
8. If alternative arrangements are made in relation to the Welsh language text, it is therefore inevitable that Welsh and English are not being treated as being of equal standing.
9. There are a number of options available to the Courts, but some problems are seen to arise

WELSH SPEAKING JUDGE

10. The only way in which a Welsh language version of the statute can be fully interpreted, unsupported, is to have a Welsh-speaking Judge hear all (or part of) the claim.[53]
11. Only someone who speaks Welsh well enough to interpret the text independently can have the linguistic and legal expertise required. The interpretation process is, at its core, a judicial function. The only way to ensure that the process is properly conducted, therefore, necessitates the matter to be heard before a Welsh-speaking Judge.
12. A literal translation cannot properly reflect the syntactic structure of both languages, and therefore the reasons why the word order of the Welsh text may be different. The words, and their order, are both important: whether a particular meaning is being conveyed or a grammatical or syntactic structure is being used. Without knowing and understanding this, a Court cannot understand its meaning. It is not therefore in position to interpret the Act.
13. It is a matter of importance that the Law Commission (in its report on the Form and Accessibility of the Law Applicable in Wales) has stated that it does not favour the creation of a role for non-judicial personnel in the interpretation process. The conclusion notes that:

    We conclude that, in the circumstances where an issue of possible divergence of the language versions arises, the solution is for rules of court to require a party to give advance notice of an intention to raise such an issue. The case should be listed before an appropriate Welsh speaking judge.[54]

EXPERT EVIDENCE

14. One option would be for the parties, or the Court voluntarily, to obtain expert testimony on the meaning of the text.
15. Multilingual legislation is neither a new nor unique phenomenon (although the difference in Wales is of course that the source is purely domestic). However, it remains unclear when expert testimony might be acceptable, or when it is needed.[55] Similarly, in cases where the Court is required to interpret contractual words in a foreign language expert evidence may be required.[56]

52 Section 22 of the Welsh Language Act 1998; Williams v. Cowell [2000] 1 WLR 187

53 See Law Commission Report, ibid., at 12.53.

54 Ibid at 12.56

55 See Bennion on Statutory Interpretation (7th Ed.) at 24.16.

56 See Chitty on Contracts (33rd Ed.) at 13.31 and *Shore v Wilson (1842) 9 Cl. & Fin 355, 555-556*; *Di Sora v Phillips (1863) 10 H.L. Cas. 624, 633, 638*.

16. However, it is proposed that recourse to expert evidence on the question of meaning would be defective. Welsh is not a foreign language. Welsh-speaking judges are available. It is proposed that allowing expert testimony that would replace this judicial function is, in all circumstances, a mistake.
17. Since it is a judicial function, and despite the fact that the decision itself would ultimately be one for the Court itself to make, the practical effect of allowing expert evidence would be to usurp the role of the Judge. It would be difficult, if not impossible, to distinguish between questions of linguistic fact, and questions of legal interpretation.
18. It is inconceivable that expert testimony would be allowed on the question of the meaning of any English language statute. This answers the question of whether such an approach places the two languages on equal standing: it does not.

SIMULTANEOUS TRANSLATOR

19. The role of a simultaneous translator is to translate what is said in Court. This is a purely linguistic role. It does not require any legal expertise. It is this legal understanding which is essential to the judicial function of statutory interpretation. It follows not only that it is undesirable as a matter of principle for a simultaneous translator to assist the Court on a question of meaning but that they do not have the capacity to do so.[57]
20. It is inappropriate for the role of a simultaneous translator in any case where the Welsh language text of a statute is used to include translation of that text. It would be wrong for the Court to assume that the words of the simultaneous translator reflected the meaning of the Welsh language text.
21. In the First-tier Tribunal (Immigration and Asylum Chamber), for example, the boundaries of the role are clear. The role of the simultaneous translator may not be extended to include giving, or being asked to give, evidence on a matter being argued.[58] Their role is to translate for the Court or Tribunal.[59]

AGREED TRANSLATION

22. Only in limited circumstances can an agreed translation of the Welsh language text be appropriate, which is where both sides agree that the English and Welsh language texts mean something different, and agree on the respective meanings. The issue then is what approach the Court should take in establishing the true meaning of the statute.

23. However, care must be taken to ensure that both languages are treated equally when, for example, the Court assesses the relative clarity of the two texts.

24. In order to treat both languages equally it follows that the Court should, as a matter of principle, accept a literal translation of the English language text into Welsh. Not doing so would mean placing the two languages on an unequal standing. It is submitted that allowing the parties to paraphrase the English language text would be quite remarkable (since all Welsh-speaking Judges are of course also able to speak English). The Law Commission would go so far as to say that it is inconceivable that such a thing be permitted.

25. In any case, what would happen would be to attribute meaning to the English language words or phrases. This is clearly wrong. The meaning of the Welsh language text is derived from its own text and of necessity requires to be interpreted in its own right.

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57 That is not to say, of course, that simultaneous translators cannot also have the skills and knowledge to act as expert translators in a different capacity.
58 See AA (Language diagnosis: use of interpreters) [2008] UKAIT 29
https://tribunalsdecisions.service.gov.uk/utiac/2008-ukait-29
59 Mohamed (role of interpreter) [2011] UKUT 337
https://tribunalsdecisions.service.gov.uk/utiac/2011-ukut-337

COURT-APPOINTED ASSESSOR

26. The High Court may appoint an assessor *"if it thinks it expedient to do so"* and to *"hear and dispose of the cause or matter wholly or partially with their assistance"* (section 70, Senior Courts Act 1981). This provision applies to the Court of Appeal (section 54 (8)) as it also applies in the Supreme Court (section 44 of the Constitutional Reform Act 2005).
27. Specific provision is made for the Court to consider such an appointment on the basis of language in the Practice Direction on Devolution Matters.[60] As with expert testimony, however, the effect of appointing an assessor is that the judicial role of interpreting a statute is entrusted to the assessor. The points made above regarding expert testimony are reiterated here.

STATUTORY ASSISTANCE

28. It is worth noting that s156(2) GoWA[61] specifically provides for a word or phrase incapable of translation:

    *(2)*The Welsh Ministers may by order provide in respect of any Welsh word or phrase that, when it appears in the Welsh text of any Assembly Measure or Act of the Assembly, or any subordinate legislation made under an Assembly Measure or Act of the Assembly or by the Welsh Ministers, it is to be taken as having the same meaning as the English word or phrase specified in relation to it in the order.

29. Such an order applies to enactments made by the Senedd subject to anything to the contrary contained in the enactment (s156(4)). This is significant. Parliament has provided a specific solution to a situation where, as a matter of language, both texts cannot read the same. Since there is no such Order in respect of any part of s50 of the Act the Court has to proceed on the basis that the Act is subject to the usual rules of interpretation.

R (DRIVER) V RCTCBC [2020] EWCA CIV 1759

30. It can be argued that the decision of the Appeal Court in the case of Driver fell short of what has been set out above. While there is a clear statement of principle from the Court which makes it clear that English and Welsh are of equal standing, it is not clear that this is what the Court's ruling in that case did.
31. At paragraph 12 the Chancellor notes:

12. "The aim of interpreting legislation is to determine the intention of the legislature. Where legislation is enacted in two languages of equal standing, and the parties submit that there is, or may be, a conflict, difference or distinction between the two language versions, detailed analysis of each version may be necessary. Where it is not suggested that the different language versions differ in meaning, the court can be sure that either version reflects the intention of the legislature. Counsel for the Welsh Language Commissioner accepted that this was the position. The approach is also consistent with the principle of ensuring equal standing for both languages, and accords with the position adopted by the Law Commission. We accept that there may be cases where it would be highly desirable for the court to have Welsh language expertise. In this case, however, we did not feel we were handicapped in deciding the question of construction that arose. The court was able to engage in oral debate with counsel about the proper meaning of the Welsh text. The questions of interpretation of the Welsh text of section 50 that arose were accessible to non-Welsh speakers, as the judge's judgment at first instance amply demonstrated. We agree that the use of expert evidence or translations of the Welsh language is inadequate. The court must engage with the Welsh text and Welsh rules of syntax. But we believe, as this judgment will demonstrate, that we have been able to do so fully and competently in this case."

60 Paragraph 12.2

61 There is a similar measure in accordance with section 6 of the Legislation (Wales) Act 2019. Annex I to the Act quotes words and phrases. The Act applies to statutes with effect after 6 May 2020 and therefore does not apply to the Act before the Court in this case.

32. However, at paragraph 14, the Court decided that a Welsh-speaking judge was not required. It stated:
14 In this case, however, we did not feel we were handicapped in deciding the question of construction that arose. The court was able to engage in oral debate with counsel about the proper meaning of the Welsh text. The questions of interpretation of the Welsh text of section 50 that arose were accessible to non-Welsh speakers, as the judge's judgment at first instance amply demonstrated. We agree that the use of expert evidence or translations of the Welsh language is inadequate. The court must engage with the Welsh text and Welsh rules of syntax. But we believe, as this judgment will demonstrate, that we have been able to do so fully and competently in this case.
33. Furthermore:
15 We do not rule out the possibility that there may be other cases where greater levels of Welsh language expertise within the court would be desirable. But there will also be many cases where it is not imperative. There will be a spectrum from the simple construction of one word or a short sub-section or phrase on the one hand, to the need to delve into an entire Welsh language statutory regime on the other hand. This case is at one end of that spectrum and we have felt confident that the comprehensive submissions we received as to the proper construction of the Welsh text have enabled us to apply the rules we have set out, and reach an appropriate conclusion, according equal status to both texts as the legislation requires."

CONCLUSION

34. The interpretation of statutory text is a judicial function: a judge who speaks Welsh well enough to understand the meaning of the text independently is the only true way to respect the text bilingually. It is difficult to see how a legal argument can convey a statutory text in another language. While it is true to point out that there is a spectrum, it is very difficult to see how there can be a case where a judge does not require any Welsh (or any linguistic support, albeit undesirable for the reasons given above) in order to interpret legislation.
35. With more and more cases involving Senedd legislation, and increasing Senedd legislation in areas of law such as public and housing law, it is inevitable that the courts will face these problems again. It will be interesting to see what route the courts in Wales will take and whether senior courts will provide more advice in the coming years.