

## Fairness and public participation in video or telephone hearings for planning appeals during the COVID-19 crisis

### Introduction

1. Due to the COVID-19 pandemic, the Planning Inspectorate (“PINS”) has postponed all planning appeal hearings and inquiries until at least the end of April. The PINS statement on this dated 17<sup>th</sup> March 2020 comments:

“We are considering whether it might be feasible to utilise technological solutions to enable events to proceed but this is not straightforward given the need to ensure fairness for all parties, especially third parties.”<sup>1</sup>
2. We explain in this paper why the legal principles concerning fairness can be complied with in a temporary procedure which would allow currently postponed planning appeals to continue by way of video or telephone hearings.
3. Broadly speaking, the model we have in mind would involve the Inspector identifying the main issues based upon the written material submitted in relation to the appeal, and then holding issue specific remote hearing sessions, using video or telephone conferencing, on each of those main issues. Anyone who has submitted representations on an issue would be invited to participate in the remote hearing session on that issue. There would also be a remote hearing session where any interested person (whether or not they have made representations) can comment on the development to which the appeal relates. As has been the case for inquiries since the reforms introduced by PINS following the Rosewell review of planning inquiries, the Inspector would have discretion to decide (having consulted the parties) which remote hearing sessions would involve cross-examination and which would follow a round-table format. The remote hearing sessions would be streamed online.<sup>2</sup>
4. We stress that this model would neither remove oral hearings nor the possibility for cross-examination; rather, both aspects are preserved, but in a flexible process which could be tailored to the particular case, as it already is done in planning inquiries following the Rosewell review. Taking a common example of a planning inquiry concerned with residential development where five-year housing land supply (“5YHLS”) is in issue, this model would preserve the essential features which normally occur at such an in-person inquiry at present, namely: cross-examination on some matters (for example the principles going to the calculation of supply or the approach to relevant planning policy), round-table sessions on other aspects (for example the site-by-site supply discussion) and consideration of other matters on the papers (for example issues raised by third parties but not within the reasons for refusal). This same approach could be easily accommodated under the model proposed above and is one which would retain the role of advocates and witnesses in familiar roles.
5. None of this is novel outside the context of planning appeals before PINS:
  - a. Remote participation using telephone or video has long been an option in the courts. A communication by the Lord Chief Justice dated 19<sup>th</sup> March 2020

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<sup>1</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/873252/170320\\_COVID-19\\_Guidance\\_for\\_site\\_visits\\_hearings\\_and\\_inquiries\\_v2\\_Draft\\_March\\_002\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873252/170320_COVID-19_Guidance_for_site_visits_hearings_and_inquiries_v2_Draft_March_002_.pdf)

<sup>2</sup> This model has been described by its proponents as ‘Written Representations Plus’ or a ‘Virtual Inquiry’.

observed that “the rules in the civil and family courts are flexible enough to hear video or telephone hearings of almost anything”. For example, one of us has experience from several years ago of a permission hearing in a judicial review claim brought by a prisoner in relation to his prison category classification (a case engaging human rights under the ECHR and Human Rights Act 1998), in which the claimant was a litigant in person and, due to his incarceration, appeared by video link. There are plentiful other examples among the planning Bar and the Bar more generally, including in high profile cases, for example the Privy Council which often uses video technology to hear cases from Commonwealth jurisdictions.

- b. Since the ability for remote participation is part of the status quo in the civil and family courts, the Lord Chief Justice’s 19<sup>th</sup> March 2020 communication was able to set out, without delay, the following COVID-19 contingency measure for Court hearings: “the default position in all jurisdictions must be that hearings should be conducted with one, more than one, or all participants, attending remotely.”
  - c. In the same week that PINS postponed inquiries and hearings, the Planning Court (part of the High Court) held a hearing by telephone. A video hearing involving 8 witnesses and cross-examination took place in the Special Educational Needs and Disability Tribunal.<sup>3</sup> Remote hearings in Planning Court and Court of Appeal planning cases are listed for next week.
  - d. As for live streaming online, this has for a number of years been routine for UK Supreme Court hearings and it is also the practice for some planning committee hearings.
6. We address the following aspects of fairness and public participation below:
- a. The common law requirements of fairness;
  - b. Article 6(1) ECHR – the right to a fair trial in civil cases;
  - c. Article 6 of the Aarhus Convention (“public participation in decisions on specific activities”).
7. We do not address here the question of what, if any, temporary changes to PINS’ Guidance or the procedure rules are needed to give effect to the model we describe at paragraph 3 above. That is a separate question to the requirements of fairness. We understand that there is a willingness to make any such changes if a workable, fair interim system for progressing planning appeals can be identified. We confine ourselves to observing that no changes to primary legislation would be needed, and any necessary amendments to the PINS Guidance and/or procedure rules would not require consultation and could therefore be brought into effect swiftly.<sup>4</sup>

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<sup>3</sup> <https://www.landmarkchambers.co.uk/sen-tribunal-hears-appeal-by-videoconference/>

<sup>4</sup> We note that s.321(2) of the Town and Country Planning Act 1990 requires inquiries to be heard “in public”. We consider that the model outlined at paragraph 3 above would satisfy this requirement (given it is open to any member of the public and would be live streamed). In any event, if there were any doubt about the matter, the process described in paragraph 3 above could be treated as a hearing, rather than an inquiry, thus falling outside the scope of s.321. There is no reason why the procedure outlined in paragraph 3 could not, in PINS’ procedural discretion, be deployed within the context of a hearing rather than an inquiry.

## Common law procedural fairness

8. It is safe to proceed on the basis of a presumption that every participant in a planning appeal will have reasonable access to a means of participating in a remote hearing session unless they provide evidence to the contrary. Virtually every household has a telephone,<sup>5</sup> and the vast majority of people have access to a computer or mobile device on which video conferencing is possible.
9. Save in the most exceptional cases, therefore, all parties to a planning appeal would have equal access to a remote hearing session. A level playing field could be achieved, just as it can be for in-person inquiries and hearings.
10. The question then becomes: does fairness nonetheless require an in-person hearing?
11. We consider the answer is: plainly not.
12. The common law requirements of procedural fairness are protean: rather than a one-size-fits-all approach, they are circumstance specific. See *R. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531 (HL), where at p.560 Lord Mustill held that “*The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type*” and that “*What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.*” Put simply, “*the requirements of fairness must be tailored in a manner that has regard to all the circumstances*”: see *R (Hoffmann) v. Commissioner of Inquiry* [2012] UKPC 17, per Lord Phillips PSC at para. 38.
13. There is therefore no inherent right at common law for a hearing to be in-person rather than being conducted remotely by video or telephone. Provide that all parties can have equal access to a remote hearing (which they can: see above) which broadly follows the procedure followed at in-person inquiries and hearings,<sup>6</sup> that procedure is just as fair remotely as it is in-person.
14. Further, in the circumstances-specific analysis of what common law fairness requires, it is plainly relevant that, in the present circumstances of the COVID-19 outbreak, in-person hearings and inquiries are deemed impossible due to the public health risk and, therefore, remote hearings are the most that can be offered – and are what is now offered as the default option by the High Court, following the Lord Chief Justice’s communication of 19<sup>th</sup> March 2020.
15. The fact that, but for the COVID-19 outbreak, an in-person inquiry or hearing would be possible without the physical separation of a remote hearing, is not relevant. The case-law is clear that, in considering whether a procedure is compliant with common law fairness, the critical question is whether *that procedure* is fair – not whether some other procedure could be even better. See *R. (Durand Academy Trust) v Office for Standards in Education, Children’s Services and Skills* [2019] P.T.S.R. 1144, per Hamblen LJ (as he then was) at para. 65 “*if the conclusion reached is that the procedure for serious weakness/special measures cases is fair, the fact that the procedure in other cases may be different*

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<sup>5</sup> The mobile phone ownership figure has been consistently around 95% of households in recent years: see <https://www.statista.com/statistics/289167/mobile-phone-penetration-in-the-uk/>.

<sup>6</sup> i.e. issue specific sessions with, in the case of inquiries, the opportunity for cross-examination on issues for which the inspector considers it appropriate: see paragraph 3 above.

does not undermine that conclusion. Fairness does not require equivalence...” and para. 66: “the fairness of the procedure stands or falls according to its own lights”.

16. For these reasons, we conclude that the model outlined at paragraph 3 above would be consistent with common law fairness in the current COVID-19 crisis.

### Article 6 ECHR

17. Article 6(1) provides:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

18. On the assumption that all planning appeals to which the model described in paragraph 3 above will involve a “*determination of civil rights*” within the meaning Article 6(1), and thus engage this provision, the model is fully compliant. The model in paragraph 3 above does not involve dispensing with a hearing – it concerns the *format* of that hearing. We have explained above that there is nothing inherently unfair about a hearing taking place by video or telephone. There is nothing in the wording of Article 6(1) which requires a hearing to take place in person.
19. The European Court of Human Rights has specifically addressed this point in *Pönkä v. Estonia* (Application 61640/11, judgment of 8<sup>th</sup> February 2017), in the context of a civil claim brought by a man in prison. His claim had been determined without a hearing. The European Court held at paragraph 39 of its judgment:

“The Court has also taken account of the practical problem of the applicant serving his prison sentence in Finland at the material time, whereas the civil proceedings against him took place in Estonia. It notes that “hearing” the applicant did not necessarily have to take the form of an oral hearing in a court room in Estonia. However, it does not appear that the domestic court considered other alternative procedural options (such as the use of modern communications technology) with a view to ensuring the applicant’s right to be heard orally.”

20. This is clear authority for the proposition that the right to be heard under Article 6(1) ECHR can be satisfied by means of participation by a video or telephone hearing.
21. PINS can take further comfort in this respect from the fact that, as noted in the Lord Chief Justice’s recent communication quoted above, it has long been the practice of the High Court to entertain the scope in civil and family court cases (to which Article 6(1) ECHR applies) for participation by video or telephone, and this is currently its *default* practice during the COVID-19 crisis. There is no tenable basis for holding that a procedure which is Article 6 compliant for Court cases (including judicial reviews concerning fundamental rights and family cases of profound personal consequence for the parties, as well as Planning Court challenges to PINS appeal decisions) would not be Article 6 compliant for planning appeals before PINS.

22. We therefore conclude that the model outlined at paragraph 3 above would be consistent with Article 6 ECHR; indeed, to conclude otherwise would be inconsistent with the case-law of the European Court of Human Rights.

### **Article 6 of the Aarhus Convention**

23. Article 6 of the Aarhus Convention makes provision for public participation in relation to consenting decisions on specific projects. This includes, at Article 6(7), the following:

“Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.”

24. As is clear from the wording, Article 6(7) is not prescriptive concerning the procedure to be adopted for public participation in the decision-making process. There is nothing in this provision that is inconsistent with the use of remote hearing sessions by video telephone conference, provided that interested members of the public are able to participate in those sessions. What matters is that *“the public are provided with the means to comment on the proposal that they are being consulted on”*.<sup>7</sup> The model outlined at paragraph 3 above would therefore be consistent with the Aarhus Convention.

### **Conclusion**

25. We consider that the model outlined at paragraph 3 above is consistent with the relevant legal requirements relating to fairness and public participation, both under common law, under the ECHR and under the Aarhus Convention. Therefore, whilst such a model is less preferable to in-person inquiries and hearings, nevertheless it represents a temporary approach to the current exceptional situation which would be both lawful and practically feasible in the current COVID-19 crisis

**CHRISTOPHER KATKOWSKI Q.C.**

**CHARLES BANNER Q.C.**

**KATHERINE OLLEY**

**MATTHEW FRASER**

**MATTHEW HENDERSON**

**Landmark Chambers, 21<sup>st</sup> March 2020**

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<sup>7</sup> See C. Banner (ed.), *The Aarhus Convention – A Guide for UK Lawyers* (Oxford: Hart Publishing, 2015), p.135.