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Coronavirus Research by the European Children's Rights Unit

The Impact of COVID-19 on Children's and Families' Access to Justice

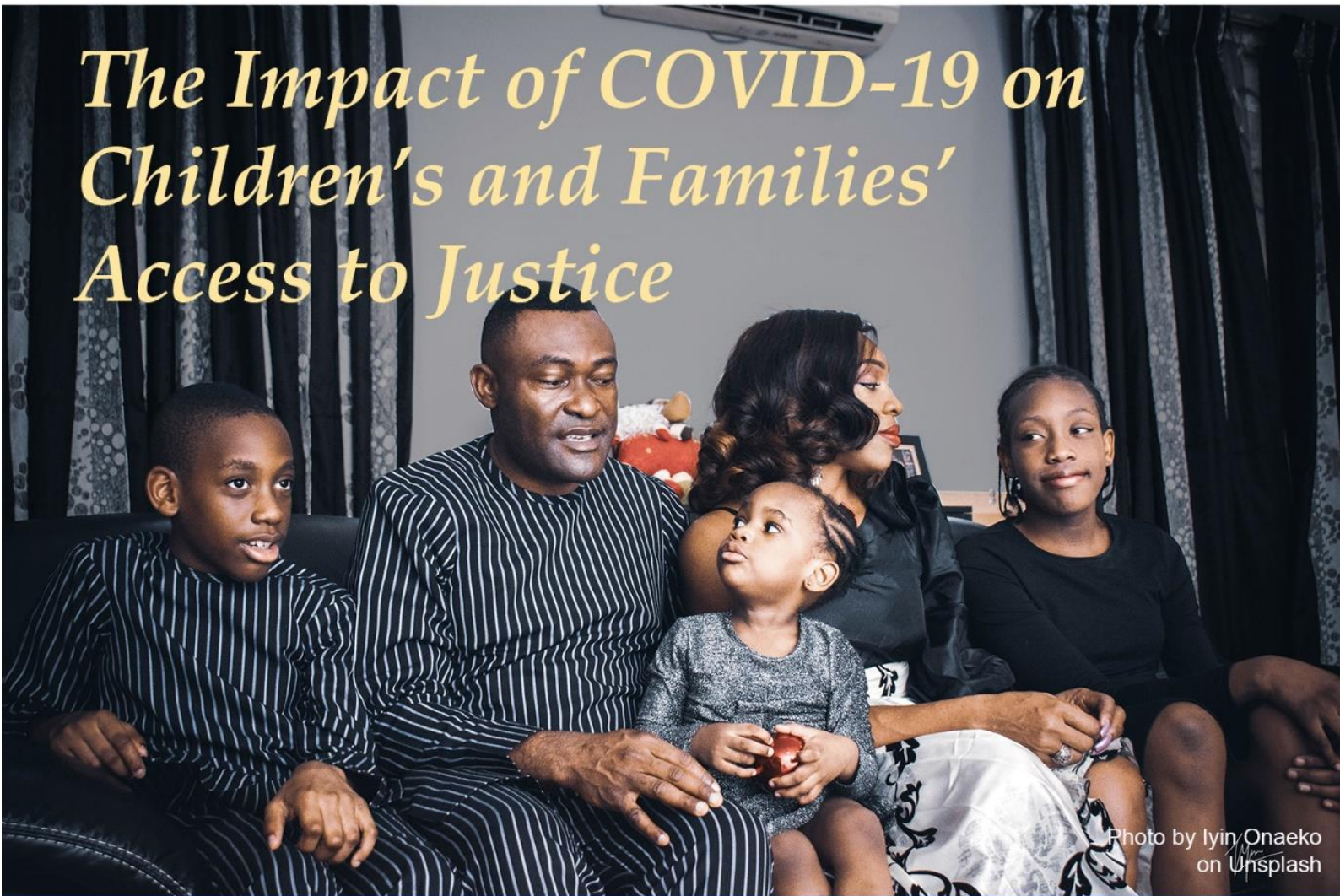


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Coronavirus (COVID-19) #LivUniCOVID
Research and response

Briefing Paper #4

Kerry Barry and Deborah Lawson

The [hastened move](#) towards remote hearings in the Family Court via telephone, email or online platforms in response to the Covid-19 pandemic and consequential [social distancing measures](#) will inevitably impact on the children at the centre of those cases. The majority of family cases involve disputes between parents (private law) or between parents and local authorities (public law) over the future living arrangements of children. From [October to December 2019](#) 7,693 children were involved in new Public law applications¹ and 20,996 children in new Private law application events². Approximately two-thirds of private law cases concern child welfare issues, with the remaining children still considered at risk of [heightened vulnerability](#).³

The welfare of the child is the paramount consideration in such cases (s.1(1) Children Act 1989) – over and above all other considerations. Decisions must also be compatible with our international human rights obligations. This includes respecting children’s right to private and family life (Article 8 European Convention on Human Rights - ECHR), upholding the right to a fair trial (Article 6 ECHR) and allowing children who are capable of forming views to express them and to give such views ‘due weight’ (Art 12 [UN Convention on the Rights of the Child](#) - UNCRC). Courts must also balance the right of children not to be separated from parents against their will and to maintain relationships (Art 9) with the need to protect their right to life (Art 6) and freedom from abuse and neglect (Art 19). The Committee on the Rights of the Child has previously raised concerns that the UK has exhibited a ‘...lack of due respect for the views of

¹ Ministry of Justice, ‘Family Court Statistics Quarterly: October to December 2019’, 26 March 2020, 5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874822/FCSQ_October_to_December_final.pdf accessed 25 May 2020

² *ibid* 7

³ Children and Family Court Advisory and Support Service, ‘CAFCASS Operating Framework’, April 2019, para 5.5 <https://www.cafcass.gov.uk/about-cafcass/policies/> accessed 22 May 2020

children in responses to violence against children and in family law proceedings.’⁴

Given the potential gravity of decisions made within the Family Court and the need to ensure the realisation of children’s rights, it is imperative that children, parents, and judges can effectively engage with the court process.

Balancing the decision to conduct remote hearings

Remote hearings are currently [the default position](#) of the Family Court. The decision whether to adjourn a hearing, hold a court hearing in person (in a limited number of urgent cases) or conduct it remotely is to be decided on a case-by-case basis and require increasingly complex considerations by a judge. This involves balancing the needs of the child with a range of new accessibility concerns to ensure that parties remain on an equal footing and remote hearings are not held ‘at [the expense of a fair and just process](#)’ [23].

In *Re P* (a child protection case) the President of the Family Division provided further clarification. Importantly, he stressed that ‘establishing that a hearing can be conducted remotely, does not in any way mean that the hearing must be conducted in that way’ [8]. Although the need to avoid delay and ‘to prevent emotional harm caused by the uncertainty concerning the child’s future’ [15] is likely to be a dominant factor in many cases, this may be contrary to the need to resolve the matter in a ‘thorough, forensically sound, fair, just and proportionate manner’ [24].

⁴ UN Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland (12 July 2016) UN Docs CRC/C/GBR/CO/5, para 42(c)

This should also balance additional current concerns such as access to technology, the expectation of parties and the technological experience of judges and magistrates [24].

While timeliness was considered essential in *Re P*, *Re B* warned against the unnecessary removal of a child due in part to the potential speed and unchecked nature of remote hearings. These were held within 'highly pressurised circumstances' and lead to a 'chain reaction in the course of which fundamental legal and procedural principles came to be compromised' [39].

To ensure access to justice for children judges must engage in a careful balancing exercise to determine whether adjourning for an in-person court hearing is fairer than the earlier convenience of a remote one. Increased technological and public health needs also require a careful understanding and balancing of unforeseen additional risks for children involved in remote court hearings.

Family representation

In determining children's living and contact arrangements, Section 1(3) of the Children Act 1989 requires the court to have regard, among other things, to the child's developmental needs including the impact of changes on their social and educational needs, the risk of harm and the capability of their parents to care for them. Decisions should, therefore, be based on evidence which builds a holistic picture of each child's unique context and family relations. This should include the wishes and views of the child themselves, as well as submissions by parents/carers and others involved in the child's life.

i) Children's representation in court proceedings

The Children and Family Court Advisory and Support Service ([CAFCASS](#)) provide an independent representation of the 'ascertainable wishes and feelings of the child'⁵, which alongside welfare considerations, inform the court's decision in the [majority of cases](#). After closing its offices to the public on 23rd March 2020 CAFCASS began working remotely to assess the welfare needs and views of children in family court proceedings.

Remote welfare assessments raise several concerns about such unchartered and under-researched areas of practice. Like adults, children's online activity and familiarity with 'digital citizenship' are [increasing at a rapid rate](#). However, while a Nuffield [evidence review](#) highlights the benefits of online communication for children currently separated from family members, there is little research available to inform our understanding of the benefits and limitations of remote engagement with court and children's social care professionals.

Alternative methods may exclude or disadvantage young children, or those with communication or learning difficulties from the participation process, limiting creative real-world approaches to eliciting children's views. Households may not have access to the most beneficial technology. With children at risk of hearing distressing information at home during [remote hearings](#), we should also recognise the potential restrictions on children's freedom to speak freely, particularly in shared living spaces. Recognising that children may not wish to upset family members and that unfavourable views may negatively impact family relationships or, indeed, a child's safety should be seriously considered. Obtaining input from other relevant parties in the child's life, such as teachers or other family members, is also likely to be restricted at this

⁵ Children Act 1989 s1(3)(a)

time.

ii) **Adult participation in court proceedings**

Ensuring that all adult parties, witnesses, legal representatives and judges or magistrates can engage adequately is essential to determine the best interests of the child.

In [Re A](#) the Court of Appeal confirmed that parties must be able to engage in the process to an 'adequate degree' and be able to instruct their lawyers in an 'adequate and timely manner' [55]. A lack of access to technology and the party's learning difficulties were seen in *Re A* as factors restricting parental engagement with the process, but the definition of 'adequate' remains vague and potentially a low threshold for many applications.

Even if parents are unaffected by the [digital divide that exists between the rich and the poor](#), being an internet user does not equate to being able to effectively understand or participate in [legal processes online](#). A rapid consultation by [Nuffield](#) on remote hearings in the family justice system raises concerns about access to appropriate technology for parties and professionals and their technological capabilities as well as the limited IT support and training available to the court and judges. In some contexts, technology is simply not effective or appropriate; judges may require in-person interaction to fully engage with and assess serious safeguarding allegations against parents, as considered in [Re P](#) [26].

Being at home alone without court assistance may also exacerbate the challenges faced by unrepresented parents (litigants in person) and the [confusion and isolation](#) that is often felt in the courtroom. It may be that, for many, hearings in the courtroom will remain the appropriate forum to

ensure a fair and just resolution of issues involving children. For some young people, this will involve lengthy adjournments - and with that, acute mental anguish - until access to the Family Court is fully reinstated and backlogs are cleared.

Conclusion

In a time of unprecedented upheaval, children should remain at the centre of Private and Public hearings. However, it is becoming increasingly evident that cases concerning children now require the balance of an increasing number of factors, including the accessibility of remote courts for their parents. Such nuanced decisions around the effectiveness of remote hearings must be recognised as relatively uncharted territory for judges and naturally involve an element of 'trial and error'. But steps need to be taken to minimise the impact of any 'errors' on children. Efforts to engage the views of sufficiently mature children should not be compromised if their welfare is to be assessed properly. Critically, this is the time in which children's views should be harnessed in the evaluation of current judicial practice. The Family Court can make life-altering decisions for children. As such they are themselves well placed to contribute to the development of procedural practice and policy measures for remote hearings of the Family Court.

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Kerry Barry



Deborah Lawson

Kerry Barry is a Postdoctoral Derby Research Fellow and Deborah Lawson is a PhD student at the School of Law and Social Justice, University of Liverpool.

For further details of their work, contact: K.A.Barry@liverpool.ac.uk or Deborah.Lawson@liverpool.ac.uk

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