

Technical Difficulties: constraints on bail applications and other preliminary hearings heard via live links under the Coronavirus Act 2020

Shortly after the national lockdown was announced on 23 March, the Coronavirus Act 2020 came into force. Tucked away in a Schedule to the Act were significant changes to the use of live links in criminal hearings. One such change relates to restricting when a Court may refuse or revoke bail during remote bail applications which are made before trial. Was this deliberate, or has Parliament unintentionally tied Courts' hands in relation to bail? Either way, the problem will lead to a widespread inability on the part of magistrates and Judges in certain classes of cases to refuse bail.

Part IIIA of the Crime and Disorder Act 1998 ("CDA 98") governs the use of live links during preliminary hearings. "Preliminary hearings" include pre-trial bail applications. Section 57A CDA 98 previously referred to live links as a mechanism by which a person not in the same place as a hearing could see and hear, and be seen and heard by, the Court during the hearing. The Coronavirus Act 2020 differentiates between "live audio links" and "live video links". This distinction should, in theory, allow Courts to separate their lists into hearings which may be conducted by telephone, and those which must be conducted by video link. However, some Courts are hearing entire lists – including contested bail applications – by telephone. Hearing contested pre-trial bail applications by telephone in many cases – unbeknown to many list officers, judges and practitioners – will be unlawful.

Schedule 24, paragraph 7(3) of the Coronavirus Act 2020 inserts Schedule 3A to the CDA 98. The new Schedule 3A suggests that contested bail hearings should not be taking place at all via telephone before trial. The Defendant may not take part via live audio link, nor may any other person unless it is to give evidence – and only if there is no scope for a video link to hear that evidence, and if all parties agree (emphasis added):

Disputed bail hearings

3 (1) This paragraph applies to a preliminary hearing at which the court is deciding whether to grant or continue bail if the making of the decision is disputed (including where the court is minded to refuse or revoke bail of its own motion).

(2) The accused may not take part in the hearing through a live audio link.

(3) A person (other than the accused) may not take part in the hearing through a live audio link unless—

(a) that person's participation through the live audio link is only for the purpose of giving evidence at the hearing,

(b) there are no suitable arrangements by means of which that person could give evidence through a live video link, and

(c) the parties agree to that person giving evidence through a live audio link.

Despite this, and somewhat oddly, provision has been made elsewhere in the Coronavirus Act for contested pre-trial bail applications which do go ahead by live audio link. Schedule 24, paragraph 3(5) of the Coronavirus Act 2020 inserts the new s.57B(8) CDA 98:

(5) After subsection (7) [of the CDA 1998] there were inserted—

“(8) A court may not refuse or revoke bail for a person (P) at a preliminary hearing if—

(a) any person takes part in the hearing — other than for the purpose of giving evidence — through a live audio link, and

(b) P objects to the refusal or revocation.

The new s.57B(8) is a cause for concern. The effect of this new rule is that during a contested bail hearing before trial where any party attends via audio link, the Court **may not refuse or revoke bail**. It is important to note that “P” does not refer to the prosecution opposing bail, but to the Defendant taking objection to the Court refusing or revoking their bail. A Defendant at Court hoping to be bailed would clearly contest any refusal or revocation of bail by the Court. This amendment creates a situation where, should a contested bail application take place via telephone, the Court either has to grant the Defendant bail or adjourn pending a video hearing. Bail cannot be refused where any party including the Defendant appears through a live audio link i.e. over the phone. There is no residual discretion or other saving provision.

The wording used in Schedule 24 in relation to bail mirrors other parts of the Schedule which deal with sentencing hearings and hearings for contempt of court, where a Defendant’s attendance is near-mandated, and their ability to see and hear the other participants in the hearing is essential. However, Defendants very rarely attend their bail application hearings before a trial. Indeed there is no unqualified right for them to attend, and a Defendant’s attendance does not affect whether a Court can grant or withhold bail. This new provision is also not contingent upon the Defendant’s attendance at the hearing. If the Defendant is not present, then the indication that “P objects to the refusal or revocation” of bail

will be made by his representatives and therefore, the definition of “P” in s.57B(8) will include the Defendant’s representatives.

Under the new legislation, there is no power for a Judge to hear a contested bail application via telephone, even with the consent of the parties or where all those attending agree this would be the most expedient way to conduct the hearing. Nor can a contested telephone bail hearing be ordered under Criminal Procedure Rule 3.2. This Rule (as temporarily amended) simply refers back to s.57B CDA 98, as amended by the Coronavirus Act. The Criminal Practice Directions at 3N.1 also make clear that the Court may only exercise their powers to conduct hearings via audio link where it is lawful to do so. The severe constraint now placed on the Court’s powers during telephone bail hearings, during a period of crisis in which Defendants on remand are much more likely to make bail applications and put pressure on Court lists, are perhaps unintended consequences of hasty drafting.

Given the delays in listing video hearings as opposed to telephone hearings, these new rules could result in some Defendants being granted bail almost automatically via telephone, or hearings being adjourned for an all-parties video hearing, when bail would otherwise have been refused. Any refusal of bail via telephone would be *ultra vires* and liable to appeal by Defendants. Further, the new rules could make prosecution appeals of the grant of bail very difficult. If a bail hearing does go ahead by telephone, but – in recognition of the Court’s inability to refuse bail – the prosecution is not permitted to make representations opposing the grant of bail, the prosecution would be unable to appeal under s1(3) Bail (Amendment) Act 1993, which is contingent upon representations opposing bail having been made during the contested hearing. Is this really what Parliament intended?

To make matters worse, on 21 April 2020 HMCTS announced that there was a glitch affecting Skype for Business hearings attended by certain Apple Mac users. Mac users running the Catalina Operating System find that their microphone is muted during Skype for Business hearings and cannot be enabled. They therefore cannot be heard by others taking part in video hearings. In practice this has meant that many all-parties video hearings are hastily adjusted to ensure that the party using Mac OS Catalina attends via telephone instead. Where this is a contested bail hearing, what then occurs may be unlawful. Those affected by this issue who are attending contested pre-trial bail hearings must be seen and heard by all other persons taking part in the hearing for it to comply with s.57A(7) CDA 98. Until a fix can be found for this issue, Catalina users should consider using alternative devices or participating in video hearings whilst additionally and simultaneously on the phone to all other participants.

Other difficulties affecting preliminary hearings have been created by Schedule 24 to the Coronavirus Act. This includes the inability to accept guilty pleas via telephone (the new s.57B(9) of the CDA 98, also inserted by Schedule 24, paragraph 3(5)). Where a Defendant pleads guilty to an offence whilst any person attending the hearing appears via telephone, the Court may not accept the guilty plea. So

although a Defendant may have been arraigned, pleaded guilty, and obtained credit for their guilty plea, the Court is effectively prevented from sentencing the Defendant unless and until the plea is entered – again – during an all-parties video hearing or in person. A further consequence of Courts being prevented from accepting guilty pleas via telephone is that, even if a guilty plea has been entered in this manner and accepted by the prosecution, the Defendant's custody time limit will continue to run. A custody time limit does not cease until both the Crown and the Court have accepted a guilty plea, and Schedule 24 hinders the Court's ability to do so.

Similar to the constraints placed on pre-trial bail applications and plea hearings, Schedule 24 paragraph 3(5) prevents the Court from dealing with a person for contempt of Court (including enquiring into their conduct and imposing punishment) where any party attends that hearing via a live audio link. Should the Court proceed in these circumstances, any decision which is made in relation to the contemnor would be *ultra vires*.

The position in relation to applications for bail following conviction is different. Schedule 23 of the Coronavirus Act makes provision for bail applications following conviction in paragraph 2(9). These are deemed "eligible criminal proceedings" which can take place via live video link or live audio link. The amended s.51(10) Criminal Justice Act 2003 ("CJA 03") features identical wording to that used in s.57B(8) CDA 98, preventing the Court from refusing or revoking bail where any party attends via live audio link. However, s.51(11) CJA 03 goes on to state that this constraint on the Court during audio hearings does not apply if s.4 of the Bail Act 1976 does not apply to the Defendant. As s.4 of the Bail Act does not apply to convicted Defendants, the effect of the apparent constraint on the Court's powers during post-conviction bail applications in s.51(10) is effectively meaningless; these hearings can take place via audio link. Paragraphs 1 and 2 of the new Schedule 3A to the CJA 03 set out which hearings after conviction may take place as audio-only hearings and video-only hearings. It does appear that bail hearings may take place via either medium, although the drafting of paragraph 1(7) could be clearer as to whether a Court may revoke bail during an audio-only hearing when the Defendant does not agree to such revocation.

No provision is made in the Coronavirus Act for bail applications which are made during a trial. Perhaps this is deliberate, given that criminal trials are no longer taking place. But as the backlog of trials grows, and the number of people arrested and on remand increases during the pandemic, the practice of listing contested pre-trial bail applications by telephone – and all of the problems this may bring – must be addressed urgently by Courts.

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