

Human Rights and Access to Justice During Covid-19

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HUMAN RIGHTS AND ACCESS TO JUSTICE DURING COVID-19

On 8th April Young Legal Aid Lawyers hosted a Zoom panel discussion on Human rights and access to justice during Covid-19, attended by nearly 200 people.

The panel discussed challenges posed by the crisis to those working in the legal sector and their clients and consisted of Steve Broach of 39 Essex Chambers, Bella Sankey of Detention Action, Jo Hynes of Public Law Project and Steven Galliver-Andrew of Garden Court Chambers and speaking of behalf of Legal Sector Workers United.

Steve Broach, who predominantly practices in disability discrimination law, described three instances where the threat of judicial review had successfully resulted in guidance being amended for the better. He emphasised the important role that social media played in these cases, connecting activists, clients and legal professionals, and enabling immediate responses to daily developments.

The first case concerned the National Institute for Health and Care Excellence (NICE) guidelines for accessing critical care in the context of Covid-19, which directs clinicians to triage patients according to a rough measure of their frailty, a concept initially introduced in relation to the care of elderly people. In its original form, people who are dependent on others, including disabled people, would be deprioritised and potentially denied intensive care. Thanks to

**by Hannah Webb
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the challenge, the guidance has been updated to highlight that an assessment of frailty 'should not be used in younger people, people with stable long-term disabilities (for example, cerebral palsy), learning disabilities or autism.'

The second challenge related to the Coronavirus Act itself. Schedule 17 of the Act allows the Secretary of State to make notices modifying and disapplying primary legislation. This includes the ability to suspend local authority duties under section 42 of the Children and Families Act for provisions relating to Special Educational Needs (SEN), which children are entitled to as of right. The first draft of the legislation strongly suggested that local authorities were already not required to provide support as of right but rather to make reasonable endeavours to do so,

'The Act has led local authorities to erroneously inform families that they are not entitled to support'

despite no such notice having yet being given. Broach's letter before claim led to a clarification in the guidance, such that notice is required, but there are fears that damage has already been done and authorities are erroneously informing families that they are not entitled to support, despite no notice having yet been given.

The final challenge concerned how the Coronavirus Act's social distancing rules indirectly discriminated against parts of the population. Government guidance complementing the Act stated that people should leave the house only for essential activities or to take 'one form of exercise a day' were being interpreted by some police forces as meaning leaving the house for exercise only once a day, a requirement that would have a disproportionately adverse effect on people with certain conditions such as autism. Again, a letter before action quickly led the government to clarify the guidance which now states that people can exercise more than once a day if due to a significant health condition.

Bella Sankey of Detention Action – which provides support services for immigration detainees based in detention centres and prisons in or close to London as well as Morton Hall in Lincolnshire – described how the organisation is seeking to ensure adequate protection from the >>>



»»» Home Office for those in immigration detention. It is not sufficiently known that the Home Office and the private companies running Immigration Removal Centres (IRCs) do not provide soap or hand sanitiser directly to detainees – they must buy it themselves – and it is frequently unavailable. Nor do they provide cleaning services – detainees must clean the centres themselves, and cleaning products are similarly scarce. These unhygienic conditions exacerbate the already significant risk faced by those detained in close quarters, many with underlying health conditions, and any Covid-19 outbreak would spread fast, as flu breakouts frequently do.

Detention Action applied for interim relief against the Home Office, seeking to require the release of those in immigration detention for the duration of the coronavirus outbreak. They were unsuccessful owing to the ‘very reasonable’ provisions disclosed on the eve of the hearing and undertakings provided by the Home Office at the hearing that they would review the case of everybody in immigration detention with a view to making releases, prioritising those with Covid-19 co-morbidities. It is clear that the Home Office has been making many releases, and individual bail applications have almost all been successful in light of the pandemic.

However, hundreds of people remain in detention, including 22 of Detention Action’s clients who have co-morbidities, despite there having been confirmed cases of Covid-19 in detention centres, including from a person who was brought into Brook House on 2nd April, well after lockdown was instigated, contrary to government guidance. Sankey asked if, in these

circumstances, where removal is impossible, anyone’s detention can be lawful. Continued collaboration between activists, campaigners, legal professionals and press will be crucial moving forward.

Jo Hynes of Public Law Project discussed the recent increased use of video technology throughout the court system and the obstacles it generates for access to justice. Drawing on her research into remote conducting of immigration tribunals, she described problems ranging from teething problems, such as the practicalities of arranging video links, last minute adjournments, and poor-quality video, to much more significant problems exacerbating traditional barriers to justice, such as being detained, unrepresented, or needing an interpreter. These existing barriers are compounded by new barriers such as not having privacy or a quiet space at home, or fast enough internet, resulting in huge difficulties for remote hearings, particularly when one considers how sensitive the information discussed might be.

She concluded with recommendations: first, immigration tribunals lack clear published guidance for judges and parties to ensure effective participation in remote proceedings, as is present in other courts such as the Court of Protection and the Family Courts. Remote justice requires significant adaptations and changes, more simply than the use of a camera and screen. Second, it may be the case that some categories of hearings are completely unsuitable for remote hearings, such as those involving complex evidence gathering.

While criminal practitioners raised parallel concerns during the question and answer session at the end of the event, Steve Broach drew attention to the fact that remote hearings have opened up access to justice for disabled clients who might be otherwise unable to attend hearing in person.

Steven Galliver-Andrew, speaking on behalf of Legal Sector Workers United (LSWU), described its work to protect legal

sector workers, especially during the Covid-19 crisis. First, it allows members to network and co-ordinate across professional divides to support each other, to build solidarity, and to fight exploitation. He highlighted how, shortly before lockdown, the union was active in helping workplaces organise to maintain reasonable working conditions and to protect their pay, particularly in response to some firms which tried to reduce salaries and make staff redundant.

The pupil barrister contingent of LSWU drafted a protocol which was soon accepted as standard practice by the profession, and the immigration workers were quick to publish a protocol calling for the release of all immigration detainees, focusing on the health and safety of those in immigration detention, but also for legal practitioners who would otherwise be forced to put themselves at risk attending immigration detention centres. Finally, he re-emphasised the concerns of other speakers that immigration detainees remained in detention at huge risk to their health and the health of others.

EXTREME P

The Government must act to prevent Covid-19 becoming a medieval form of extra punishment, or a death sentence.

The Ministry of Justice’s strategy to address coronavirus in prisons comprises a ‘mixed plan of release, extra accommodation and staffing’. However, analysis of the proposed measures indicates that they will be fatally insufficient.

The reality of the overuse of prison for petty, persistent and non-violent crime is often invisible in the public arena. Of those sent to prison in 2018, 69 per cent had committed a non-violent offence and 46 per cent were sentenced to serve six months or less. The thinktank Reform has proposed suspending sentences of six months or less.

A stark juxtaposition exists between the release of prisoners and ‘keeping criminals off our streets’, a central tenet of the Conservative election manifesto. Measures to address Covid-19 in prisons through releasing prisoners are therefore minimal. The Government will likely rely heavily on plans for the more socially palatable but untested and inadequate options of extra accommodation and staffing.

Prisons and Covid-19

The Chair of the Justice Committee has described prisons as ‘a potential hotbed for viral transmission’, stating that ‘they are overcrowded, understaffed and often dirty’. By their very nature, it is impossible to enforce social distancing in prisons. In February, 71 per cent of prisoners were living in prisons considered ‘crowded’. The wary two-metre shuffle between bystanders on the street is a luxury of which many prisoners are unaware.

‘Immigration detainees remain in detention at huge risk to their health and the health of others.’