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Remote adjudication in the US

Remote adjudication is fundamental to the concept of an online court: for most of the legal process, if not all, the parties and the judge are unlikely to be in the same building at the same time. As we have seen, the Civil Resolution Tribunal in British Columbia has, so far,¹ arranged no oral hearings of any kind: its rulings have all been made on the basis of written submissions, which by their nature are sequential rather than simultaneous.

This arrangement is better suited to low-value, civil claims where the law is clear and parties' truthfulness is not open to serious challenge. It is not likely to work so well in an appellate court that is being asked to extend or overrule existing laws: oral argument is a far better way of testing novel legal propositions. And it is likely to be much harder for a fact-finding tribunal to judge a witness's veracity without the benefit of face-to-face cross-examination.

Remote hearings are particularly unsuitable for applicants whose access to lawyers is restricted because they are in immigration detention or in custody pending a criminal trial. It is true that some prisoners in England and Wales prefer to appear in court by video link from the prisons where they are held. But this tells us more about the failure of the prison service to handle prisoner transport than it does about the attractions of a prison video suite.

Do courts and tribunals treat applicants appearing by video link differently from the way they treat applicants who are present in the courtroom? That was the question addressed in research by Ingrid Eagly, professor of law at UCLA and a specialist in immigration courts. Her report was published in the summer of 2015.² I interviewed her in Los Angeles in December 2017.

Ingrid Eagly's research was prompted by the rapidly increasing use of video links between US federal immigration courts and individuals held in prisons or detention centres. By 2012, a third of detainees appearing before immigration courts did so through video link.

Professor Eagly made a number of field trips, both to courts and to those appearing before them. She found courtrooms largely unchanged, apart from the provision of television screens. But, for most would-be immigrants, there was nothing remotely resembling a courtroom setting. At some remote locations, the detainee would be brought into a small room "that looked like a converted closet". On other occasions, groups of detainees, referred to as

“respondents”, were brought into a larger room and seated on plastic garden chairs. But “notably absent was any judge, counsel or prosecutor,” said Ingrid Eagly. “The respondents were attended by a guard, who would call them for their hearing.”³

What, I asked her, was it like for the respondents?

Overall, I saw a lot of confusion. Respondents didn’t necessarily know what was happening. It was confusing [for them] to watch what was happening in the courtroom on a television screen. It was hard at times even for me, as a trained lawyer, to understand whether it was the judge speaking or the prosecutor speaking. Or was that their own attorney speaking?

I can only imagine what it would be like for a respondent who might not speak the English language, who might not be having everything interpreted. It’s particularly difficult when – as was typically the case – the interpreters were located in the courtroom. Oftentimes, the interpreter would have to cut off the respondent or would not hear everything the respondent was saying.

But did it affect the outcome of individual cases? With the help of a specialist academic research organisation,⁴ Ingrid Eagly was able to obtain and analyse immigration court data from 2007 to 2012. She found that would-be immigrants who appeared in court through video links were more likely to be deported than those who were present in the courtroom. But that was not because of any bias on the part of the judges, she said:

Although judges were just as likely to grant relief in televideo cases, the respondents were less likely to find attorneys. And they were less likely to seek relief, in other words to file applications for asylum or other ways of staying in the United States lawfully. This raises concerns that perhaps televideo proceedings are depressing litigant engagement in the process – that the frustrations and technical difficulties experienced by respondents could result in them being less likely to engage and more likely to give up on the court process.

It’s reassuring to find that judges did not treat cases heard by video link more harshly. And it’s not surprising to find that interpreters and lawyers were unwilling to travel to detention centres, especially as these were often far from the nearest city. But why should this process deter people who had already reached the United States from pursuing their asylum claims?

Lawyers practising in the immigration courts told Ingrid Eagly that their clients regarded remote hearings as unfair. “They felt the judge was not taking their case seriously,” she said. “They felt the process was dehumanising. They felt they were not going to be heard when they tried to present their case.” And one support worker told her that immigrants regarded video hearings as less “real”:

[T]he way that [the detainees] were approaching the [court]room with the video was very different than what you see with detainees before the judge here... I would say the detainees [in the video court] had more of a nonchalant attitude – that it wasn’t, like I said, real. Whereas when you watch detainees generally they get into a courtroom and they act pretty sombre. I guess you’d say that they realize the seriousness of the proceedings. But I don’t think that gets translated well when it’s on a video.⁵

An immigration judge put the problem even more starkly. She said:

If you come into the courtroom and you see it's a courtroom and you see the judge at a big desk wearing a black robe, then you realize it's a court. If you take that same person and you put him in the video room... they see me basically as a big, disembodied head on the television. How is that any different than watching *People's Court* or *Judge Judy* or something like that? They don't really, really get it sometimes. We get it because we do it all the time – that's our job. But I'm not sure with the particular respondents whether they realise sometimes what goes on.⁶

Is that what their lawyers think? I interviewed Cheryl David, an immigration lawyer specialising in deportation cases, at her office in downtown New York City⁷. She confirmed that clients had not understood they were taking part in legal proceedings:

I have had clients who have been detained criminally and who have come to talk to me about their immigration status. I learn that they have been ordered [to be] removed. I ask them about it and they don't recall or didn't know that were actually in a court hearing before an immigration judge. I explain to them that they had a case in 2012 or 2013... I don't know if they didn't understand what was going on or didn't understand the consequences of what was going on.

Cheryl David accepted that there was a need to process cases quickly when clients were in detention. Remote hearings might be acceptable for the preliminary stages of a case. But when a judge had to take a decision on the merits of a case, she preferred the hearing to be in person. She understood that detainees preferred to avoid the disruption inherent in a court visit. But due process and an accurate assessment of a witness's credibility depended on having all parties in the same room at the same time.

For some observers, this is a matter of resources. Wendy Young heads Kids in Need of Defense, a legal services organisation based in Washington DC. She told me⁸ the US had not invested enough in its courts system to keep up with the number of immigrants in deportation proceedings. There was a backlog of 650,000 cases and hearings were being scheduled "many years" in advance. Video links had been introduced because the Department of Justice had been chronically underfunded, she said:

It's putting a Band-Aid on what is a broken system. Ideally, you want an individual who is requesting protection in the United States to be in the courtroom, facing the judge, with their attorney at their side, able to articulate their case adequately – so that a true decision can be reached on whether that person should be allowed to remain in the US or be deported back to their home country.

Wendy Young believed that a video-conferencing process created distance between the would-be immigrant and others involved in the case:

The attorney may not be in the same room as the immigrant. The immigrant is certainly not in the same room as the immigration judge. So that spontaneous communication – that, as a lawyer representing a client, you would like – is not possible.

She agreed with Cheryl David that video links should be reserved for procedural rather than substantive hearings.

I asked Ingrid Eagly about the broader lessons she drew from her research. She said there was value in bringing people to courtrooms:

People are able to hear other cases, they see judges grappling with the facts and making decisions, they see lawyers handling cases and they learn through that process. If we divorce people from the courtroom process – the public process that teaches people to trust the decisions that judges are delivering – we may not see the same kind of trust from litigants in the future.

But surely remote hearings are a more efficient way of deciding cases involving prisoners and detainees? The cost of bringing prisoners to court can be substantial.

Not necessarily, Ingrid Eagly told me. We should not just assume that video links will make courts more efficient and save money. Sometimes, the video link may be to another courtroom a block away. “The judge could simply have to the ‘remote’ courtroom and held the hearing in person.”

References

1. January 2018

2. Remote Adjudication in Immigration, 109 Northwestern University Law Review 933 (2015), available at <http://ssrn.com/abstract=2581175>

3. Interview with the author, Los Angeles, 4 December 2017.

4. The Transactional Records Access Clearinghouse (TRAC) at Syracuse University – <http://trac.syr.edu/aboutTRACgeneral.html> – made Freedom of Information Act requests for information collected by the Executive Office for Immigration Review, a division of the US Justice Department.

5. Remote Adjudication in Immigration, above, at page 979. Eagly undertook not to identify any of her interviewees.

6. Remote Adjudication in Immigration, above, at page 934.

7. <http://www.cheryldavidlaw.com/> 11 December 2017.

8. Interview, London, 14 December 2017.
