

Presidential Guidance Note – Taking oral evidence from abroad

Summary

- A. The decision of the Presidential Panel of the Upper Tribunal in Agbabiaka (evidence from abroad; Nare guidance) [2021]UKUT 286 (IAC) has amended the guidance previously given by the Vice Presidential Panel in Nare (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC). The obligation continues to rest upon the party proposing to adduce oral evidence from overseas by video or telephone link, to establish to the satisfaction of the First-tier Tribunal (IAC) that there is no legal or diplomatic barrier to their doing so.
- B. A party may rely upon written submissions, or, written evidence that has been supplied by an individual who is situated within the territory of another state, without needing to establish to the satisfaction of the First-tier Tribunal (IAC) that there is no legal or diplomatic barrier to their doing so.
- C. An appellant who is unrepresented, and situated within the territory of another state, and, who wishes to speak in support of their appeal by video or telephone, rather than to simply observe the hearing of their appeal, will need to establish to the satisfaction of the First-tier Tribunal (IAC) that there is no legal or diplomatic barrier to their doing so. Any submissions they wish to advance may be made in writing.
- D. Each case will be considered upon its own merits, but even if a party is able to establish that there is no legal or diplomatic objection to a witness giving oral evidence to the Tribunal by video or telephone from the territory in which they are situated, it will remain a matter of judicial discretion by reference to the overriding objective as to whether such oral evidence should be admitted.
- E. This guidance does not affect the obligations upon the Secretary of State for the Home Office in appeals certified by her under section 94B of the 2002 Act; she will continue to provide the necessary assistance for an appellant to give evidence from outside the United Kingdom, or facilitate their return to be able to pursue their appeal in-country, in accordance with the guidance to be found in R (Kiarie & Byndloss) v Secretary of State for the Home Department [2017] UKSC 42.
- F. This guidance does not affect the ability of any individual to observe a hearing before the First-tier Tribunal (IAC) from overseas by video link.
- G. On 29 November 2021 the Secretary of State for Foreign, Commonwealth and Development Affairs established a new “Taking of Evidence Unit” [“ToE”]. The ToE will establish the stance of different overseas governments to the taking of oral evidence from individuals within their jurisdiction by the First-tier Tribunal (IAC), and the response of the ToE to an enquiry made in the course of an appeal about the stance of a particular overseas government shall be determinative of the matter for the purposes of the First-tier Tribunal (IAC).
- H. In order to make the process as efficient and user-friendly as possible, from 7 April 2022 HMCTS with the ToE to assume responsibility for contacting the ToE on behalf of any party who has notified the First-tier Tribunal (IAC) that they propose to rely upon oral evidence from a person overseas.
- I. Given the potential for delay whilst the stance of a particular overseas government is determined it will always be a matter for judicial discretion by reference to the overriding objective as to whether determination of proceedings should be delayed. The First-tier Tribunal (IAC) will balance the prospect for delay against the ability of the party to rely upon detailed written evidence.

Presidential Guidance Note

Preamble

1. This guidance is issued to assist judges, and the parties, in the event that a party to an application or an appeal before the First-tier Tribunal (IAC) proposes to rely upon oral evidence given either by themselves or by another person, by video or telephone link, whilst that individual is situated outside the territory of the United Kingdom. This guidance does not apply to a witness giving oral evidence by video or telephone link before the First-tier Tribunal (IAC) from a location within the territory of the United Kingdom¹.
2. It is contrary to the diplomatic interests of the United Kingdom and to the interests of justice, and thus contrary to the public interest, for the First-tier Tribunal (IAC) to admit oral evidence from an individual who is situated within the territory of another state without ensuring that it enjoys the permission of that state to do so².
3. The interpretation of the phrase “civil or commercial matters” in the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters [“The Hague Convention”] is a matter of diplomatic process. The position of the Secretary of State for Foreign, Commonwealth and Development Affairs, which is determinative of the issue, is that the Hague Convention does not apply to any proceedings before the First-tier Tribunal (IAC).
4. A party may continue to rely upon written submissions, or written evidence, supplied by an individual who is situated within the territory of another state in any proceedings before the First-tier Tribunal (IAC) and without needing to establish that they enjoy the permission of that state to do so.
5. In the light of the evidence given on behalf of the Secretary of State for Foreign, Commonwealth and Development Affairs before the Upper Tribunal (IAC) in the course of Agbabiaka (evidence from abroad; Nare guidance) [2021] UKUT 286 (IAC), statements or representations made prior to 29 November 2021 on behalf of the Secretary of State, whether by the Foreign Process Section at the Royal Courts of Justice, or through any website or other medium, as to whether a particular government has any objection to the taking of oral evidence from an individual within their jurisdiction in the course of any proceedings before the First-tier Tribunal (IAC), should (with one exception) no longer be relied upon before the First-tier Tribunal (IAC) as an accurate representation of the stance of that government. The one exception arises when oral evidence is to be given by an appellant in the course of their own appeal, when that appeal has been certified under section 94B of the 2002 Act, since the process adopted by the Secretary of State for the Home Department in such appeals includes an individual check with the government of the territory in which the appellant is situated to confirm that there is no diplomatic or legal objection to their giving evidence to the First-tier Tribunal (IAC).
6. The decision of the Presidential Panel of the Upper Tribunal in Agbabiaka (evidence from abroad; Nare guidance) [2021]UKUT 286 (IAC) has amended the guidance previously given by the Vice Presidential Panel in Nare (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC). The obligation continues to rest upon the party proposing to adduce oral evidence from overseas by video or telephone link, to establish to the satisfaction of the First-tier Tribunal (IAC) that there is no legal or diplomatic barrier to their doing so. In any

¹ Section 26; TCEA 2007

² Agbabiaka (evidence from abroad; Nare guidance) [2021]UKUT 286 (IAC)

proceedings before the First-tier Tribunal (IAC) it will be a matter for judicial discretion as to the weight to be attached to such evidence, bearing in mind the quality of that evidence, the medium by which it is to be given, and the circumstances in which it is given, which shall include the degree of supervision of the witness (if any) in the location from which it is taken.

7. On 29 November 2021 the Secretary of State for Foreign, Commonwealth and Development Affairs established a new “Taking of Evidence Unit” [“ToE”]. The ToE will establish the stance of different overseas governments to the taking of oral evidence from individuals within their jurisdiction by the First-tier Tribunal (IAC), and the response of the ToE to an enquiry made in the course of an appeal about the stance of a particular overseas government shall be determinative of the matter for the purposes of the First-tier Tribunal (IAC).
8. Each case will be considered upon its own merits, but even if a party is able to establish that there is no legal or diplomatic objection to a witness giving oral evidence to the First-tier Tribunal (IAC) by video or telephone from the territory in which they are situated, it will remain a matter of judicial discretion by reference to the overriding objective as to whether such oral evidence should be admitted, balancing the need to avoid delay and the need to ensure that insofar as is practicable the best evidence is before the Tribunal on the issues that are central to the proceedings before it³. The Tribunal will always need to consider the alternatives available.

Procedure

9. The First-tier Tribunal (IAC) shall not admit oral evidence from outside the territory of the United Kingdom by video or telephone in the course of hearing any proceedings unless the judge hearing the application or appeal in question is satisfied that the party wishing to rely upon that oral evidence has established that there is no legal or diplomatic objection to the witness doing so from the territory in which they are situated.
10. The First-tier Tribunal (IAC) will not rely upon statements or representations made by the Foreign Process Section at the Royal Courts of Justice, or through any website or other medium, made prior to 29 November 2021 as to whether a particular government has any objection to the taking of oral evidence from an individual within their jurisdiction in the course of an application or appeal before the First-tier Tribunal (IAC). The exception is oral evidence that an appellant wishes to give in their own appeal when that appeal has been certified under s94B of the 2002 Act, since the process adopted by the Secretary of State for the Home Department in such appeals already involved an individual check with the government of the territory in which the appellant is situated, to confirm that there is no diplomatic or legal objection to their doing so.
11. Parties to proceedings in which a party may wish to rely upon oral evidence given by an individual from outside the territory of the United Kingdom by video or telephone in the course of an appeal that has not been certified under s94B of the 2002 Act, must follow this procedure:
 - a) The party wishing to rely upon oral evidence from overseas must inform the First-tier Tribunal (IAC) and the other party, of their intention to do so at the earliest possible date. They should notify the Tribunal and the opposing party of;
 - (i) the name of the proposed witness,
 - (ii) the country in which that individual is situated, and,

³ Rule 2; First-tier Tribunal (IAC) Procedure Rules

- (iii) identify the issues upon which it is proposed that individual should offer evidence, with an indication of what evidence they are able to offer on those issues that is sufficient to allow a meaningful response from the opposing party.
 - b) The opposing party should respond within 14 days of receipt of such information to indicate what (if any) aspects of the evidence of the witness are likely to be in dispute.
 - c) If no aspect of the evidence is likely to be in dispute, it will in most cases be most appropriate for the party wishing to rely on the oral evidence from an individual overseas simply to rely on a detailed witness statement and not call the witness to give evidence.
 - d) Upon the party informing the First-tier Tribunal (IAC) of their intention to rely upon oral evidence from overseas, HMCTS will contact the ToE on their behalf and enquire whether the FCDO is aware of any diplomatic or other objection from the authorities in the country in which the witness is situated to their providing oral evidence by video or telephone to an administrative tribunal in the United Kingdom. That request will not identify the nature of the proceedings before the Tribunal, the appellant, or, the witness.
 - e) If the FCDO's response is that the country in which the witness is located has given its consent to oral evidence being given to an administrative tribunal in the United Kingdom, then the party wishing to rely on the oral evidence from an individual who is overseas must apply, on notice to the opposing party, to the Resident Judge of the Hearing Centre to which the application or appeal has been allocated for permission to call oral evidence from the individual in question from the country in question, supported by:
 - (i) an explanation of the practical steps proposed for the individual in question to give oral evidence, and circumstances in which they would do so, bearing in mind the time zones involved,
 - (ii) an undertaking to be responsible for any expenses incurred in the course of implementing those practical steps,
 - (iii) a witness statement from the individual in question that explains why they are unable to attend the hearing in person, and provides their detailed written evidence upon the issues that remain in dispute in the proceedings,
 - (iv) copies of the correspondence with the opposing party upon the proposal to call such evidence, and any attempts to narrow the relevant disputed issues in the proceedings
 - f) If the FCDO's response is that the country in which the witness is located has not given its consent then the party wishing to rely on the evidence from an individual who is overseas may nevertheless rely on a witness statement of such an individual. The weight to be given to such evidence when the author cannot be cross-examined will be a decision for the judge hearing the appeal.
12. In the event that the ToE receives no response to an enquiry made through the British Embassy or British High Commission it will be a matter for the FCDO, alone, to determine whether, and if so when, the inference may be drawn that the country in question raises no objection to the proposed oral evidence being taken.
13. Since there is the obvious potential for the determination of an application or an appeal to be significantly delayed whilst enquiries are made into whether there is an objection against reliance upon oral evidence from abroad it will always be a matter for judicial discretion by reference to the Overriding Objective as to whether the listing of the application or appeal should be delayed to allow such enquiries to proceed, or should continue to be further delayed to allow such enquiries to be concluded. The Tribunal will balance the prospect for delay against the ability of the party to rely upon the detailed written evidence filed upon the

relevant disputed issues, when seeking to ensure that insofar as is reasonably practicable the best evidence is before the Tribunal upon the disputed issues that are central to the proceedings⁴. This guidance should not be taken to be prescriptive or exhaustive, but the following are likely to be relevant considerations;

- a) if delay could be avoided altogether by the witness travelling to a third country where it is known there are no diplomatic objections to the giving of oral evidence,
 - b) if the Tribunal is not satisfied in the light of the detailed witness statement filed in support of the application that it is necessary for the witness to give oral evidence, (including those circumstances in which such oral evidence would not be determinative of the appeal),
 - c) if the Tribunal is not satisfied that oral evidence from the witness in question will be likely to materially add to the content of the detailed witness statement filed in support of the application, and,
 - d) if the Tribunal is satisfied that the witness could address the disputed issues adequately by providing written answers to questions posed by the opposing party and authorised by the Tribunal.
14. This guidance does not affect the obligations upon the Secretary of State for the Home Office in appeals certified by her under section 94B of the 2002 Act; she will continue to provide the necessary assistance for an appellant to give evidence from outside the United Kingdom, or facilitate their return to be able to pursue their appeal in-country, in accordance with the guidance to be found in R (Kiarie & Byndloss) v Secretary of State for the Home Department [2017] UKSC 42.
15. A party may rely upon written submissions, or, written evidence that has been supplied by an individual who is situated within the territory of another state, without needing to establish to the satisfaction of the First-tier Tribunal (IAC) that there is no legal or diplomatic barrier to their doing so.
16. An appellant who is unrepresented, and situated within the territory of another state, and, who wishes to speak in support of their appeal by video or telephone, rather than to simply observe the hearing of their appeal, will need to establish to the satisfaction of the First-tier Tribunal (IAC) that there is no legal or diplomatic barrier to their doing so. Any submissions they wish to advance may be made in writing.

Michael Clements

President FtTIAC

12 May 2022

⁴ Rule 2; First-tier Tribunal (IAC) Procedure Rules