



First-tier Tribunal (General Regulatory Chamber) Presidential Guidance Note: Number 1 of 2022

TAKING ORAL EVIDENCE FROM ABROAD

INTRODUCTION

1. This guidance is issued to draw the attention of judges, and the parties, in proceedings in the General Regulatory Chamber (“GRC”) to the decision of the Upper Tribunal in Agbabiaka (evidence from abroad; Nare guidance) [2021] UKUT 286 (IAC), concerning the procedure to be followed when a party to a case wishes to rely upon oral evidence given by video or telephone by a person (including the party themselves) who is abroad i.e. in the territory of a Nation State other than the United Kingdom.

WHEN PERMISSION IS NEEDED

2. The decision in Agbabiaka includes the following:

“There has long been an understanding among Nation States that one State should not seek to exercise the powers of its courts within the territory of another, without having the permission of that other State to do so. Any breach of that understanding by a court or tribunal in the United Kingdom risks damaging this country's diplomatic relations with other States and is, thus, contrary to the public interest.” [para 12]

“Whenever the issue arises in a tribunal about the taking of evidence from outside the United Kingdom [...] what the Tribunal needs to know is whether it may take such evidence without damaging the United Kingdom's diplomatic relationship with the other country. [para 19]

[...] it is not for this (or any other) tribunal to form its own view of what may, or may not, damage the United Kingdom's relations with a foreign State.” [para 23]

3. The decision records that the giving of oral evidence from another Nation State (“the foreign State”) requires the permission of that State. Permission is not needed for written evidence, or for submissions (whether oral or written).
4. The tribunal may consider that there is too much risk that a litigant making oral submissions will stray into giving evidence, and so might decide in such a case that permission must be sought as a precaution.

THE PROCESS FOR SEEKING PERMISSION

5. On 29 November 2021, the Foreign and Commonwealth Development Office established a new Taking of Evidence Unit (“ToE Unit”). The ToE Unit will ascertain the

stance of different overseas governments to the taking of oral evidence from individuals within their territory. The response of the ToE Unit about the stance of a particular overseas government will be final for the purposes of any hearing before the GRC.

6. The position relating to whether a particular foreign State objects to the taking of oral evidence from an individual within their jurisdiction is fluid and permission is required for every case and in every hearing affected.
7. The decision in Agbabiaka states that a party wishing to rely on oral evidence from a witness in a foreign State must contact the ToE Unit. However, from 7 April 2022 HMCTS have assumed responsibility for contacting the ToE Unit on behalf of any party who has notified the GRC that they propose to rely upon oral evidence from a person overseas.
8. **In order to make the process as efficient and user-friendly as possible, the GRC has determined the following process:**
 - (i) **Any party, person or witness wishing to give evidence from a foreign State must notify the GRC of that intention as soon as possible and provide details of:**
 - (a) the name of that person
 - (b) the case number (if one has been allocated by the GRC)
 - (c) the country the person would be giving evidence from
 - (d) a brief summary of what the evidence would be about, and
 - (e) the date of any listed hearing
 - (ii) **This must be done as soon as soon as it is known that a person wishes to give evidence from abroad, to avoid the risk of delaying the hearing. Notice must be given either on the T98 form (the notice of appeal) or sent by email to GRC@Justice.gov.uk, with the subject line stating the case reference number and the words “Evidence from Abroad”.**
9. Upon receipt of this information, HMCTS will contact the ToE unit on behalf of the party seeking to rely on oral evidence from a person abroad. HMCTS will provide the ToE Unit only the information at sub-paragraphs 8(i)(c) and 8(i)(e) above.
10. If the ToE Unit is aware from previous enquiries of the stance of the state in question, it will confirm to HMCTS that the state has no objection to evidence being given orally from within its territory. Otherwise, the ToE Unit will make an enquiry of the state via the British Embassy or British High Commission in that country. HMCTS will pay any consular fee due in respect of such enquiry. The ToE Unit will inform HMCTS of the outcome of its enquiry.
11. HMCTS will inform the party that made the request of the response from the ToE Unit.

DELAY OR REFUSAL IN RECEIVING PERMISSION

12. It can take months to receive a response to an enquiry via an Embassy or High Commission. The amount of time a case has been held up at the ToE stage will be kept under review by the Tribunal.
13. It will always be a matter for judicial discretion by reference to the overriding objective as to whether the listing of a case should be delayed to allow such enquiries to proceed

or should continue to be further delayed to allow such enquiries to be concluded. If delay becomes an issue, the Tribunal may need to consider alternatives to oral evidence being given from the foreign country. This may include probing the rationale for that evidence; and considering whether the evidence could be given in writing (including by reference to written questions put by the other party); and whether the witness can travel either to the UK or to a third country where it is known there are no diplomatic objections to the giving of oral evidence.

14. Refusal of permission by the foreign State will mean that the individual will not be able to give live audio or video evidence from that State.

Judge Mark O'Connor

Chamber President

23 June 2022