

# JUDGE MICHAEL CLEMENTS

PRESIDENT OF THE FIRST-TIER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER

## Presidential Guidance Note No 4 of 2022:

### **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) 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 obtain judicial permission to do so. In the course of granting permission the First-tier Tribunal (IAC) ["the Tribunal"] will need to be satisfied 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. Each case will be considered upon its own merits, but even if there is no legal or diplomatic objection it will remain a matter of judicial discretion by reference to the overriding objective as to whether such oral evidence should be admitted.
- 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 Tribunal that there is no legal or diplomatic barrier to their doing so. Responses to Interrogatories are therefore permitted.
- C. If an appellant who is unrepresented, is situated within the territory of another state, and, wishes to speak in support of their appeal by video or telephone, rather than to simply observe the hearing of their appeal, the Tribunal will need to be satisfied that there is no legal or diplomatic objection to their doing so before this can be permitted. Each case will be considered upon its own merits, but even if there is no legal or diplomatic objection it will remain a matter of judicial discretion by reference to the overriding objective and bearing in mind that submissions may be made in writing.
- D. This guidance does not affect the ability of any individual to observe a hearing before the Tribunal from overseas by video link, which is covered by separate guidance provided by the Lord Chief Justice and Senior President of Tribunals. [Practice Guidance on remote observation \(final\).pdf \(govdelivery.com\)](#)
- E. This guidance does not affect the obligations upon the Secretary of State for the Home Department 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. 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 Tribunal, 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 Tribunal.

- G. Individuals no longer need make an application, and pay a fee to the ToE, in order to obtain confirmation of the stance of a particular state. The ToE has now contacted all overseas governments with whom the United Kingdom enjoys diplomatic relations to request permission for the use in administrative tribunal proceedings of oral evidence from within their jurisdiction. 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 any proceedings should be delayed whilst that is awaited. The Tribunal will balance the prospect of 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 Tribunal proposes to rely upon oral evidence given either by themselves or by another person, by video or telephone link, whilst that individual is situated in the territory of a state other than the United Kingdom. This guidance does not apply to a witness giving oral evidence by video or telephone link before the Tribunal from a location within the territory of the United Kingdom, ie anywhere in England, Wales, Scotland or Northern Ireland; Crown Dependencies like Jersey, Guernsey or the Isle of Man; or British Overseas Territories like Gibraltar and the Turks & Caicos Islands.<sup>1</sup>
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 Tribunal 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 so<sup>2</sup>.
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 Tribunal.
4. A party may continue to rely upon written submissions, written evidence, or responses to Interrogatories, supplied by an individual who is situated within the territory of another state in any proceedings before the Tribunal and without needing to establish that they enjoy the permission of that state to do so.
5. If an appellant who is unrepresented, is situated within the territory of another state, and, wishes to speak in support of their appeal by video or telephone, rather than to simply observe the hearing of their appeal, the Tribunal will need to be satisfied that there is no legal or diplomatic objection to their doing so before this can be permitted. Each case will be considered upon its own merits, but even if there is no legal or diplomatic objection it will remain a matter of judicial discretion by reference to the overriding objective and bearing in mind that submissions may be made in writing.
6. This guidance does not affect the ability of any individual to observe a hearing before the Tribunal from overseas by video link. This is covered by separate guidance provided by the

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<sup>1</sup> Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St Helena, Ascension and Tristan da Cunha, South Georgia and the South Sandwich Islands, The Sovereign Base Areas of Akrotiri and Dhekelia, Turks and Caicos Islands, Virgin Islands

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

Lord Chief Justice and Senior President of Tribunals. [Practice Guidance on remote observation \(final\).pdf \(govdelivery.com\)](#)

7. 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 Tribunal, should (with one exception) no longer be relied upon before the Tribunal 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 Tribunal.
8. 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 obtain judicial permission to do so. In the course of granting permission the Tribunal will need to be satisfied 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. Each case will be considered upon its own merits, but even if there is no legal or diplomatic objection it will remain a matter of judicial discretion by reference to the overriding objective as to whether such oral evidence should be admitted, so that the party will need to demonstrate that the oral evidence in question is necessary to the resolution of the appeal and that it is proportionate to admit it. For the avoidance of any doubt, the Tribunal will always need to consider the available alternatives to oral evidence, before balancing the need to avoid delay in deciding the appeal against 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 it<sup>3</sup>.
9. In any proceedings before the Tribunal 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.
10. 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 Tribunal, 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 Tribunal.
11. The ToE has now contacted all states with whom the United Kingdom enjoys diplomatic relations and requested permission for the use in administrative tribunal proceedings of oral evidence from within their jurisdiction. It is impossible to say when a particular state will

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<sup>3</sup> Rule 2; First-tier Tribunal (IAC) Procedure Rules

- respond, but until the ToE has confirmed to the Tribunal that permission has been granted, the Tribunal may not take oral evidence from within their jurisdiction.
12. A party no longer needs to make an application, and pay a fee, to the ToE in order to obtain confirmation of the stance of a particular state. Instead the Tribunal will through HMCTS ascertain from the ToE whether permission has been granted, and if so, on what terms.
  13. Refusal by a state of permission means that the Tribunal must refuse to admit oral evidence from within their jurisdiction.
  14. In the event that a state has granted conditional permission the Tribunal must be satisfied that the conditions are met, and otherwise must refuse to admit oral evidence from within their jurisdiction.
  15. A party wishing to rely upon oral evidence from overseas by video or telephone link must notify the Tribunal of their desire to do so at the earliest opportunity, and request judicial permission to do so. Failure to notify the Tribunal of that intention in sufficient time may result in the need for an adjournment of the hearing and in consequence a consideration of the Tribunal's powers to award costs.
  16. 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 any proceedings should be delayed whilst that is awaited. The Tribunal will balance the prospect of delay against the ability of the party to rely upon detailed written evidence and respond to Interrogatories.
  17. The Tribunal shall only use the following approved platforms to take oral evidence from overseas by video link: the Video Hearing Platform, CVP, VHS, or, Microsoft Teams. In the event that the arrangements for taking the oral evidence should fail, then the Tribunal will need to reconsider, and may withdraw by reference to the overriding objective the judicial grant of permission.

## **Procedure**

18. 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, should follow this procedure. An appellant who is unrepresented, is situated within the territory of another state, and, wishes to speak in support of their appeal by video or telephone, rather than to simply observe the hearing of their appeal, should also follow this procedure.
19. The party wishing to rely on the oral evidence from an individual who is overseas should 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.
20. The application should be supported by a statement that provides:
  - (i) the name of the proposed witness,
  - (ii) the country in which that individual is situated,
  - (iii) the Time Zone applicable, and thus the time difference between the United Kingdom and the country in which the witness is situated,
  - (iv) confirmation that the proposed witness has the ability to access the Video Hearing Platform, CVP, VHS, or, Microsoft Teams.
  - (v) the arrangements proposed to ensure that oral evidence is given in a formal and appropriate manner without interference, bearing in mind the time difference involved. (For the avoidance of any doubt HMCTS will not be

- responsible for any expenses incurred in implementing those arrangements, and the party calling the witness will be expected to bear those expenses.)
- (vi) a list of the issues of disputed fact that are said to require the oral evidence of the witness, explaining in relation to each, why it is said that written evidence supplemented by Interrogatories is inadequate to address those issues. A sufficiently detailed explanation of the evidence must be provided to allow a meaningful response from the opposing party.
  - (vii) a witness statement from the individual in question that explains why they are unable to travel to the United Kingdom to attend the hearing in person, and provides their detailed written evidence upon the issues that remain in dispute in the proceedings,
  - (viii) copies of the correspondence with the opposing party upon the proposal to call the oral evidence from overseas, and any attempts to narrow the relevant disputed issues in the proceedings so as to reduce the necessity for it.
21. The opposing party should respond within 14 days of the application to indicate what (if any) aspects of the evidence of the witness remain in dispute, and whether they consider the disputed evidence can be dealt with by way of Interrogatories, giving their reasons.
  22. If no aspect of the evidence of the witness is in dispute, it will usually be appropriate for the Tribunal to refuse permission to rely on the proposed oral evidence.
  23. When considering the application for permission to rely upon oral evidence from an individual overseas the Tribunal shall only rely upon current information provided by the ToE to HMCTS as to the stance taken by the country in question. In the event the ToE has notified HMCTS that permission is refused then the Tribunal must refuse to admit the proposed oral evidence. In the event the ToE has notified HMCTS that the country in question has offered a conditional grant of permission, then the Tribunal may only admit the proposed oral evidence if satisfied that the party in question has met the conditions imposed. In either case there should be a record of the judicial decision, and the evidence upon which it is based.
  24. If the Tribunal refuses to admit the proposed oral evidence then the party may rely upon the written evidence of the individual who is overseas, which if it remains in dispute may be supplemented with their responses to Interrogatories. 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.
  25. In the event that the Tribunal is notified by the ToE through HMCTS that the country in question requires information about either of the parties, the witness, the proceedings, or, the evidence, in support of an application for an individual grant of permission, then the Tribunal should consider with both parties whether in the circumstances it is appropriate for such an application to be made, and by reference to the overriding objective, whether permission to admit such evidence should instead be refused. In some cases it may be inappropriate to identify details of the proceedings or the disputed evidence before the Tribunal, the appellant, or, the witness, and in those cases an application should not be made. In that event the Tribunal must refuse to admit the proposed oral evidence.
  26. In the event that the ToE informs the Tribunal that it has received no response to its request for permission then it is a matter for the ToE, 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. In the absence of any such inference by the ToE, the Tribunal must refuse to admit the proposed oral evidence.
  27. Since there is the obvious potential for the determination of an application or an appeal to be significantly delayed whilst the ToE awaits a reply, 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 await that reply. The Tribunal will balance the prospect of 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 proceedings<sup>4</sup>. This guidance should not be taken to be prescriptive or exhaustive, but the following are likely to be relevant considerations for the Tribunal:

- a) whether 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) whether in the light of the detailed witness statement filed in support of the application 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) whether 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) whether the witness could address the disputed issues adequately by providing written answers to questions posed by the opposing party and authorised by the Tribunal.
28. This guidance does not affect the obligations upon the Secretary of State for the Home Department 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.

Michael Clements

President FtTIAC

12 July 2022

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<sup>4</sup> Rule 2; First-tier Tribunal (IAC) Procedure Rules