



COURTS AND  
TRIBUNALS JUDICIARY

**JUDGE M SUTHERLAND WILLIAMS**

**PRESIDENT**

**HEALTH, EDUCATION AND SOCIAL CARE CHAMBER**

**PRESIDENTIAL GUIDANCE NOTE No 1 of 2022:**

**TAKING ORAL EVIDENCE FROM ABROAD**

**AND**

**REPRESENTATIVES AND OBSERVERS**

**APPEARING FROM ABROAD**

## **INTRODUCTION**

1. This guidance is issued to draw to the attention of judicial office holders and parties to proceedings in the Health, Education and Social Care Chamber the decision of the Upper Tribunal in *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 286 (IAC) ([Link](#)) and 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 in the territory of a nation state other than the United Kingdom.
2. This guidance replaces interim guidance issued by this Office on 9 May 2022. It is set out in 3 parts. The first deals with guidance arising from the *Agbabiaka* decision and witnesses based abroad, the second part offers guidance to representatives and observers who are abroad, and the final part considers the important position delay may play in the proceedings.

## **WHY PERMISSION IS NEEDED IF A PARTY PROPOSES TO GIVE ORAL EVIDENCE FROM ABROAD**

3. The decision in *Agbabiaka* sets out 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.)*

4. This means that the giving of oral evidence from another nation state will require the permission of that State.
5. The obligation to obtain judicial permission to adduce oral evidence from abroad rests upon the party or person proposing to do so.
6. In the course of granting permission, the Health, Education and Social Care Chamber (HESC) 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.
7. 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 found at rule 2 of the First-tier Tribunal (Health, Education and Social Care Chamber) Rules (‘the TPR’) as to whether such oral evidence should be admitted.

## **WHERE PERMISSION IS NOT REQUIRED**

8. Permission is not required where persons wish to give oral evidence by video or telephone from England, Scotland, Wales, Northern Ireland, the Isle of Man, the Channel Islands, or from British Overseas Territories.
9. Nor is there any requirement to seek permission from the Tribunal in relation to documentary evidence or the production of a written witness statement or written evidence from abroad.
10. This means, subject to the TPR, that 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.

## **WITNESSES BASED ABROAD**

11. The obligation rests upon the party or person proposing to adduce oral evidence remotely from abroad to obtain judicial permission to do so.
12. 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.
13. 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 case and that it is proportionate to allow the witness to attend remotely.
14. 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 case, 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.

## **SEEKING PERMISSION TO GIVE ORAL EVIDENCE FROM ABROAD**

15. On 29 November 2021, the Foreign, Commonwealth & Development Office ('FCDO') established a new Taking of Evidence Unit ('ToEU'). The ToEU ascertains the stance of different overseas governments to the taking of oral evidence from individuals within their territory. The response of the ToEU about the stance of a particular overseas government will be final.
16. The ToEU has produced a list of countries already in the clearance process and Tribunals can take clearance decisions from that list. If the country is not cleared, then the Tribunal must await an outcome from the FCDO.
17. If FCDO is aware of any diplomatic or other objection from the authorities in the relevant country to the provision of evidence by video link to an administrative tribunal in the UK, then it will not be possible to accept live evidence from abroad. This means if approval is not available at the time of making the request, then permission cannot be provided by the Tribunal.
18. 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.

## **THE PROCESS TO BE FOLLOWED**

19. HESC has determined the following process:

- The request must explain what disputed issues of fact require the attendance and oral evidence of the witness, and why their written evidence would be insufficient for this purpose.
- The party or interested person applying for evidence to be given from abroad should email the relevant evidence and application for permission to the Tribunal as soon as they become aware that the person concerned will not be within the jurisdiction on the date of the hearing.
- 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, in Special Educational Needs and Disability/Care Standards/Primary Health Lists cases, a consideration of the Tribunal's powers to award costs.
- The Tribunal shall only use the following approved platforms to take oral evidence from abroad by video link: the Video Hearing Platform, CVP or in exceptional circumstances, Microsoft Teams. More information on these platforms may be obtained from the Tribunal directly.
- 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.

20. The application should be supported by:

- (i) the name of the party and case number;
- (ii) the name of the proposed witness;
- (iii) the country in which that individual is situated/ from which they will be giving evidence;
- (iv) the Time Zone applicable, and thus the time difference between the United Kingdom and the country in which the witness is situated;
- (v) confirmation that the proposed witness has the ability to access the Video Hearing Platform, CVP or in exceptional circumstances, Microsoft Teams;
- (vi) the arrangements proposed to ensure that oral evidence is given in an 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.)
- (vii) 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 is inadequate to address those issues; (A

sufficiently detailed explanation of the evidence must be provided to allow a meaningful consideration by the judge or tribunal.)

- (viii) an explanation from the individual in question that sets out why they are unable to travel to the United Kingdom to attend the hearing in person;
- (ix) a copy of the evidence being relied upon;
- (x) the date of any listed hearing.

21. This must be done as soon as it is known that a person wishes to give evidence from abroad, to avoid the risk of delaying any hearing.
22. A copy of the application must be sent at the same time to the other party to the proceedings, unless there is good reason not to do so, and that reason accompanies the application to the Tribunal.
23. Upon receipt of this information, HMCTS will contact the ToEU on behalf of the party seeking to rely on oral evidence from a person abroad.
24. If the ToEU 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.
25. Otherwise, the ToEU is likely to 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 ToEU will inform HMCTS of the outcome of its enquiry.

## **CONSIDERATIONS FOR THE TRIBUNAL**

26. 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 evidence filed in support of the application it is necessary for the witness to give oral evidence, (including circumstances in which such oral evidence would not be determinative of the appeal);
  - c) whether the witness could address the disputed issues adequately by providing written answers to questions posed by the opposing side and authorised by the Tribunal.

27. When considering the application for permission to rely upon oral evidence from an individual abroad, the Tribunal shall only rely upon current information provided by the ToEU to HMCTS in terms of the stance taken by the country in question.
28. In the event the ToEU has notified HMCTS that permission is refused then the Tribunal must refuse to admit the proposed oral evidence.
29. In the event the ToEU 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.
30. The application will be considered by a District Tribunal Judge as soon as possible after receipt of the application. The decision will be recorded in an order confirming the evidence upon which it is based.
31. If the Tribunal refuses to admit the proposed oral evidence, then the party may rely upon the written evidence of the individual who is abroad.
32. In the event that the Tribunal is notified by the ToEU 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 will consider whether in the circumstances it is appropriate for such an application to continue, and by reference to the overriding objective, whether permission to admit such evidence should instead be refused.
33. In the event that the ToEU informs the Tribunal that it has received no response to its request for permission then it is a matter for the ToEU 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 ToEU, the Tribunal must refuse to admit the proposed oral evidence.

## **II. MAKING SUBMISSIONS FROM ABROAD AND OBSERVERS**

### **MAKING SUBMISSIONS FROM ABROAD**

34. HESC deals with different types of cases and that sometimes requires different procedures to be applied. In Mental Health, for example, almost all the applicants/referrals have legal representation. Whereas in Special Educational Needs and Disability there is a very high proportion of unrepresented parties.

35. On that basis, the guidance for making submissions from abroad is as follows:

#### **(a) Legal representatives**

In appropriate cases, consideration will be given to permit a legal representative to make submissions from abroad. If a party is being represented by a legal representative who is abroad, that legal representative should apply for permission to appear before the Tribunal from abroad in each case. The Tribunal will want assurances that the privacy of the proceedings will be protected and details of the arrangements that are in place.

Further, legal representatives should include an explanation for why it is not possible or practicable for the matter to be dealt with by a representative in the United Kingdom. The process is set out below.

#### **(b) In unrepresented cases, litigants in person, or cases where the representative is not legally qualified**

In compliance with the overriding objective set out in rule 2 of the TPR, and bearing in mind the risk that a litigant in person or unrepresented party may stray into the giving of evidence rather than making pure submissions, only in exceptional circumstances will participation from abroad be permitted.

Unrepresented cases, litigants in person, or cases where the representative is not legally qualified, are unlikely to be permitted to join a hearing from abroad unless there are genuine and exceptional reasons for so allowing. Permission will only be considered where a judge has evaluated the individual circumstances of the case. The process is set out below.

36. It should be borne in mind that submissions may also be made in writing or in some cases the parties may elect for their case to be considered on the papers alone.

## **OBSERVERS**

37. The majority of the hearings in HESC are held in private. This means they are closed to the public. Any observer who wishes to attend a hearing must ask for the Tribunal's permission, whether they are in the jurisdiction or abroad.
38. The usual reporting restrictions are likely to apply. The Tribunal will want assurances that the privacy of the proceedings will be protected. Observers should therefore provide information that goes to maintaining the privacy of the hearing as part of their request.
39. If the Tribunal is satisfied and/or the party (or patient) agrees to the individual observing, then permission may be given.

## **PROCESS FOR OBSERVERS AND REPRESENTATIVES**

40. Any party or person wishing to join a hearing from abroad must notify the relevant Tribunal of that intention as soon as possible, providing an explanation for why it is not possible or practicable for the person to attend from within the jurisdiction.
41. The application and relevant information must be received by the Tribunal in a timely fashion in order to give a judge sufficient opportunity to consider the individual circumstances of the case well in advance of the hearing.
42. To make the process as efficient and user-friendly as possible, the individual needs to notify the tribunal of:
  - a. the name of the case and case number;
  - b. the date of any listed hearing;
  - c. the reason for the request;
  - d. an explanation for why the individual cannot attend in the jurisdiction;
  - e. what efforts have been made to arrange for an alternative person within the jurisdiction to cover or attend the hearing/ why it is not possible or practicable for the matter to be dealt with by someone else;
  - f. an assurance that the privacy of the proceedings will be protected and details of the arrangements that are in place to achieve this.
43. 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.



### **III. IN ALL CASES: DELAY**

44. It will always be a matter for judicial discretion, with reference to the overriding objective, to determine whether the listing of a case should be delayed allowing enquiries to proceed (or should continue to be further delayed while enquiries are concluded). This is of particular importance in the Mental Health jurisdiction, where the liberty of the patient is often under consideration.
45. The issues addressed in this Practice Guidance give rise to potential delays in the proceedings (for example, if the FCDO need to contact an overseas Embassy or High Commission it can take a minimum of 8 weeks).
46. As has been observed above, it is important therefore to notify the Tribunal in plenty of time to allow a judge to consider an application for attendance from abroad.
47. The Tribunal will balance the prospect of delay while seeking to ensure that insofar as is reasonably practicable the best evidence is before the Tribunal in accordance with the overriding objective set out in Rule 2 of the Tribunal Procedure Rules.
48. However if delay or the short notice of the application become the issue, the Tribunal will need to consider refusing the application, in accordance with the overriding objective.

#### **Conclusion**

49. This position may change in the future. The FCDO may publish and maintain a list on the internet (within the gov.uk domain) of the foreign states that have indicated that they permit the giving of oral evidence to United Kingdom Tribunals from within their territory.
50. Judicial office holders and users will be notified of any further changes as they become effective.



**Judge M Sutherland Williams**

**President**

**Health, Education and Social Care Chamber**

September 2022