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PRESIDENTIAL GUIDANCE

TAKING ORAL EVIDENCE BY VIDEO OR TELEPHONE FROM PERSONS LOCATED ABROAD

1. In this Presidential Guidance:
 - 1.1 “*Agbabiaka*” means the decision of the Upper Tribunal (Immigration and Asylum Chamber) in *Agbabiaka (Evidence from Abroad, Nare Guidance)* UK UT 286¹;
 - 1.2 “ET Rules” means the Employment Tribunals Rules of Procedure, as set out at Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013;
 - 1.3 “FCDO” means the Foreign, Commonwealth and Development Office;
 - 1.4 “Hague Convention” means the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters;
 - 1.5 “HMCTS” means Her Majesty’s Courts and Tribunals Service; and
 - 1.6 “ToE Unit” means the “Taking of Evidence Unit”.
2. Rule 7 of the ET Rules allows the Presidents to publish guidance as to matters of practice and as to how the powers conferred by the ET Rules may be exercised. This guidance, issued jointly, concerns the taking of oral evidence by video or telephone from persons located abroad. Employment Tribunals must have regard to this guidance, but they are not bound by it.

¹ <https://tribunalsdecisions.service.gov.uk/utiac/2021-ukut-286>.

Introduction

3. For many years Employment Tribunals have allowed persons located in the territory of a foreign state to give oral evidence by video or telephone. Until recently it was not generally considered necessary to obtain the permission of the foreign state in question where the person was giving evidence voluntarily and there was no involvement of that state's judicial system in the procurement of the evidence being given.
4. However, this matter has been the subject of judicial consideration in *Agbabiaka*. The essence of this decision is that enquiries must be made of the foreign state where the person is located to ascertain whether it objects to evidence being given orally to a Tribunal in the United Kingdom from within its territory.²
5. While a decision of the Upper Tribunal is not legally binding on the Employment Tribunals, we have concluded, given the rationale for the decision, that it is appropriate for Employment Tribunals, and the parties who appear before them, to follow the approach set out in that decision. This guidance is designed to assist them to do so.

Why permission is needed

6. *Agbabiaka* includes the following³:

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. The potential damage includes harm to the interests of justice since, if a court or tribunal acts in such a way as to damage international relations with another State, this risks permission being refused in subsequent cases, where evidence needs to be taken from within that State.

Whenever the issue arises in a tribunal about the taking of evidence from outside the United Kingdom, the question of whether it would be lawful to do so is a question of law for that country ... In all cases, therefore, 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.

... 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.

² Permission is not required where persons wish to give oral evidence by video or telephone from within the United Kingdom, (i.e., anywhere in England, Wales, Scotland or Northern Ireland); from Crown Dependencies (like Jersey, Guernsey or the Isle of Man); or from British Overseas Territories (including 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 and Virgin Islands).

³ *Agbabiaka*, paras. 12, 19 and 23.

7. The decision records⁴ – and treats as determinative – the stance of the FCDO that only the giving of oral evidence from a nation state requires the permission of that state. Permission is not required for written evidence, or for submissions (whether oral or written).
8. While *Agbabiaka* is an administrative law decision, the position with regard to the requirement for permission is no different in civil or commercial disputes, such as those dealt with in the vast majority of Employment Tribunal cases, whether or not the foreign state is a signatory to the Hague Convention.⁵

The process of obtaining permission from a foreign state

9. There have been several developments in connection with the process to be followed to obtain permission since the decision in *Agbabiaka*.
10. On 29 November 2021, the FCDO established the ToE Unit. The ToE Unit is responsible for ascertaining the stance of different overseas governments to the taking of oral evidence from persons within their territory. On that matter, the response of the ToE Unit is determinative. In the months since, the ToE Unit has collected the information it has received from different overseas governments. It is intended that, in due course, the FCDO will publish a list of responses (see paragraph 23 below).
11. Representations made prior to 29 November 2021 as to whether a particular state has any objection to the taking of oral evidence from an individual within its territory should no longer be relied on.
12. The process which should now be followed in the Employment Tribunals is set out below.
13. In any case where a party wishes to rely on oral evidence by video or telephone from a person located abroad (including evidence from the party personally), that party or their representative must notify the Employment Tribunal office which is dealing with the case of the following:
 - (a) the case number;
 - (b) confirmation that the party wishes to rely on evidence from a person located abroad;
 - (c) the dates of any listed hearing(s) in respect of which the request for the person to give evidence from abroad is being made; and
 - (d) the state from whose territory that person would, if permitted, be giving oral evidence.

There is no need for the party to provide either the name of the person located abroad or any summary of what their oral evidence, if given, will be about.

14. This is a purely administrative process to establish whether permission is required for evidence to be given from abroad and, if it is required, to gain

⁴ *Ibid.*, para. 23.

⁵ *Ibid.*, para. 19.

permission from the foreign state in question. It is not an application for judicial consideration. **Accordingly, unless such correspondence also covers other matters requiring judicial consideration, it need not be copied to the other parties under rule 92 of the ET Rules.**

15. 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. For this purpose, HMCTS will provide to the ToE Unit only the information at subparagraphs (c) and (d) of paragraph 13 above. In substitution of this process, it will be open to HMCTS to consult any list, published or otherwise, produced by the FCDO.
16. The ToE Unit will often be aware of the stance of the state in question from previous enquiries it has made. If the stance of the state is that it has no objection to evidence being given orally from within its territory, the ToE Unit will confirm that fact to HMCTS. If the stance of the state is that permission is given subject to certain conditions, the ToE Unit will confirm those conditions to HMCTS. If the stance of the state in question remains unknown or unclear, for example because it has not yet responded to a request already made of it, the position of the ToE Unit will be that permission has yet to be given. In substitution of this process, it will be open to the FCDO to produce a list, published or otherwise, that HMCTS may consult.
17. In cases where no such request has yet been made, 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. **It can take months for the ToE Unit to receive a response to an enquiry via an Embassy or High Commission, so the tribunal must be notified as soon as it is apparent that oral evidence from a person abroad may be needed.** The ToE Unit will inform HMCTS of the outcome of its enquiry.
18. HMCTS will inform the party that made the request of the position, regardless of whether it received a response directly from the ToE Unit or consulted any list, published or otherwise, produced by the FCDO.
19. The response from the ToE Unit, as communicated via HMCTS, has no bearing on matters arising for judicial decision, such as whether the evidence of the person located abroad is relevant to the issues the tribunal must decide, whether the tribunal permits evidence to be given at all by that person, whether the tribunal will grant an order under rule 32 of the ET Rules requiring a person to attend a hearing to give evidence⁶, what weight should be attached to such evidence, and whether the conditions attached by the state to the giving of permission are such that taking oral evidence from a person located abroad would be contrary to the interests of justice.

⁶ In any event, orders under rule 32 can only be made in respect of persons in Great Britain.

If permission is delayed or refused

20. **It is the responsibility of parties or their representatives to alert the tribunal if they are concerned about the amount of time these enquiries are taking, an absence of a response from a state, or any conditions that the state has imposed, or if they consider that the matter should be discussed with a judge at a preliminary hearing for case management purposes.**
21. It will always be a matter for judicial discretion, by reference to the overriding objective in rule 2 of the ET Rules, whether the listing of a hearing should be delayed to allow such enquiries to proceed or should continue to be further delayed to allow such enquiries to be concluded.
22. To avoid delay when engaged in case management or considering an application by a party to postpone a hearing, the tribunal may need to examine alternatives to oral evidence being given from abroad. This may include probing why the person's evidence is relevant to the issues the tribunal must decide, and why the person cannot attend the hearing in person or otherwise give evidence by video or telephone from within the United Kingdom. Among other matters, the tribunal may consider whether the evidence could be given in like terms by a person located within the United Kingdom; whether the evidence could be given in writing (including by reference to written questions put by the other party); whether the evidence of the person abroad can be taken at a later date or by adjusting the timetable for the hearing; and whether the person can travel either to the United Kingdom or to a third country where it is known there are no diplomatic objections to the giving of oral evidence. The tribunal may also consider the consequences of a failure by the party to inform the tribunal in a timely manner that it wishes to rely on evidence from a person located abroad. Similar matters will also need to be considered judicially in the event that permission is refused by the foreign state.
23. As noted, in the longer term, the FCDO intends to 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 (including Employment Tribunals) from within their territory, and any conditions that are attached. When this is in place updated Presidential Guidance will be provided.



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25 July 2022