



JUDICIARY OF
ENGLAND AND WALES

MR JUSTICE JAY
HIGH COURT JUDGE
CHAIRMAN OF THE SPECIAL IMMIGRATION APPEALS COMMISSION

**PRACTICE DIRECTION: TAKING EVIDENCE FROM OVERSEAS IN CASES
BEFORE THE SPECIAL IMMIGRATION APPEALS COMMISSION**

Introduction

1. The Special Immigration Appeals Commission (“SIAC”) hears appeals and reviews against deprivation, exclusion, asylum, deportation and nationality decisions made by the Secretary of State for the Home Department (“SSHD”). National security and serious organised crime are the common themes. Under the SIAC (Procedure) Rules 2003, as amended, SIAC has power to permit a party or a witness to give oral evidence.
2. In those cases in which a party is entitled or has been granted permission to give or call evidence but cannot do so from within the United Kingdom, or the Special Advocates wish to call evidence from a witness who is overseas, the following guidance applies. It largely follows the approach of the Upper Tribunal (Immigration and Asylum Chamber) 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 in the territory of a Nation State other than the United Kingdom (“a/the Nation State”).

When permission is needed

3. The decision in *Agbakiaka* 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 ...

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. [...] 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.”

4. *Agbakiaka* reflects the stance of the Foreign, Commonwealth and Development Office (“FCDO”) that the giving of oral evidence from a Nation State requires the permission of that State. This is because, essentially, the process entails the exercise of the jurisdiction of the United Kingdom in another sovereign state. Permission is not needed for written evidence, or for submissions (whether oral or written).

The process for seeking permission

5. On 29 November 2021 FCDO established a new “Taking of Evidence Unit” (“ToE”). The ToE will ascertain the stance of different Nation States to the taking of oral evidence from individuals within their territory. The response of the ToE about the stance of a Nation State will be highly persuasive.
6. Representations made prior to 29 November 2021 as to whether a particular Nation State has any objection to the taking of oral evidence from an individual within its jurisdiction should no longer be relied on.
7. Particular questions arise in SIAC proceedings given the nature of the issues being litigated and – on occasion at least - the countries in which the party or witness is presently situated. There may, for example, be personal safety concerns which the FCDO would need to consider. It may be impossible for the individual in question to travel to any third country where there is no difficulty. Each case will naturally turn on its own facts. There may also be national security concerns bearing on the desirability or otherwise of the FCDO making an approach to the Nation State in question, either generally or in the circumstances of the particular case.
8. In order to avoid delay (it can take months to receive a response to an enquiry via an embassy or high commission), it is incumbent on the open representatives of the appellant or applicant, as the case may be, to inform the SIAC office at the earliest possible moment whether it is proposed that a party or a witness give oral evidence from a Nation State. The SIAC office will then make contact with the ToE and the Chair of SIAC will then be able to keep a weather eye on progress.
9. All that that party needs to do is notify the SIAC office of:
 - (a) the name of the person who will be testifying (it will not necessarily be or be limited to the appellant or applicant);
 - (b) the country the person would be giving evidence from; and
 - (c) in very general terms what the evidence will be about.
10. SIAC is aware of which countries have informed the ToE that they have no objection to evidence being given from within their jurisdiction, and in what circumstances. This may obviate the need for an approach to be made by SIAC to the FCDO in any given case and the open representatives will be informed accordingly. However, the working assumption must be that permission is

required, particularly so in circumstances where the witness is not a national or resident of the Nation State concerned.

11. If the ToE does not already hold information on the country in question, the ToE will need to raise an enquiry with the British Embassy or British High Commission in that country.
12. The amount of time a case has been held up at the ToE stage will need to be kept under review by SIAC. 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.
13. If delay becomes an issue, SIAC may need to consider alternatives to oral evidence being given from the Nation State in question. This may include probing the rationale for that evidence, considering whether the evidence could be given in writing (including by reference to written questions put by the other party or by the Commission), and whether the witness can travel to a third country where it is known there are no diplomatic objections to the giving of oral evidence. It should be understood, however, that the position in relation to such third countries is that the absence of a diplomatic objection applies to nationals and residents of that country. The taking of evidence from an individual who is not a national or resident of the third country under contemplation will require following the procedures set out in this Practice Note, and may therefore not be reasonably practicable.
14. In the event that permission is not forthcoming within a reasonable time, or is refused, the possibility of SIAC deciding to proceed to receive the evidence in any event will always be considered. SIAC would not consider doing so without (i) notifying the FCDO and the SSHD, and giving each of them the opportunity to make representations; and (ii) affording the appellant/applicant and the Special Advocates (in CLOSED) an opportunity to make representations in reply. The factors that SIAC will take into account in deciding whether to proceed in the face of a diplomatic objection will include, but not be limited to, the following:
 - (a) the nature of the proceedings;
 - (b) the importance of the evidence in question to the issues arising in the proceedings;
 - (c) all the steps that the FCDO have taken to date to obtain consent, and the likelihood or otherwise of consent being obtained within a reasonable time;
 - (d) the impact of any further delay on the appellant or applicant;
 - (e) the existence or otherwise of all other alternative measures for giving the evidence and testing it fairly;
 - (f) the impact of adjourning cases on SIAC's lists generally.
 - (g) access to justice and the rule of law.
 - (h) the representations made by the FCDO, parties and the Special Advocates in connection with the case under consideration.

- (i) any relevant national security considerations (but SIAC would not take these into account before giving the Special Advocates a full opportunity to make representations).

MR JUSTICE JAY
SIAC Chairman

1st September 2023