



# Courts and Tribunals Judiciary

JUDGE M SUTHERLAND WILLIAMS

PRESIDENT

HEALTH, EDUCATION AND SOCIAL CARE CHAMBER

## PRESIDENTIAL GUIDANCE NOTE No 1 of 2024:

**TAKING ORAL EVIDENCE FROM ABROAD**

**AND**

**REPRESENTATIVES, OBSERVERS AND OTHERS**

**APPEARING FROM ABROAD**

**PRACTICE GUIDANCE ON PROCEDURE FOR APPLYING TO GIVE EVIDENCE, REPRESENT OR OBSERVE HEARING FROM ABROAD IN THE HEALTH, EDUCATION AND SOCIAL CARE CHAMBER <sup>1</sup>**

*This guidance updates and replaces Presidential Guidance Note No 1 of 2022, which shall no longer have effect from the date of this document.*

### **INDEX**

#### ***By page number***

1. *Introduction.....1*
2. *Where permission is not required.....3*
3. *Witnesses who are residents or citizens of an overseas state.....4*
4. *Witnesses who are visitors, non-citizens and non-residents of an overseas state.....6*
5. *Considerations for the Tribunal.....8*
6. *Representing and making submissions from abroad.....9*
7. *Observing from abroad.....10*
8. *Delay.....11*
9. *Judicial Office Holders.....10*

### **INTRODUCTION**

1. This Practice Guidance is issued to assist with the procedure when a party to a case wishes to rely upon oral evidence being given by video or telephone by a person (including the party themselves), who is a citizen or resident in the territory of a Nation State other than the United

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<sup>1</sup> Issued by the Chamber President under Schedule 4 of the Tribunals, Courts and Enforcement Act 2007

Kingdom.

2. This document also addresses non-residents and non-citizens wishing to give evidence from abroad, and representatives, observers and judicial office holders who may be abroad.
3. This Practice Guidance shall have immediate effect and replaces previous guidance, issued by my Office in September 2022, and follows new arrangements agreed by HM Courts and Tribunals Service ('HMCTS') and the Foreign, Commonwealth & Development Office ('FCDO') to simplify the process for citizens and residents of overseas States.

## OVERVIEW

4. Authority has now been sought from all States with whom there exists a diplomatic relationship for permission to use in tribunal proceedings live video or audio evidence taken from within a foreign State's jurisdiction. Responses from those countries are now published on the FCDO's website: <https://www.gov.uk/guidance/taking-and-giving-evidence-by-video-link-from-abroad>
5. The Tribunal's permission is still required to call evidence from overseas, even from a consenting country. This will be a decision made by the Tribunal with reference to the overriding objective found in rule 2 of the First-tier Tribunal (Health, Education and Social Care Chamber) Rules ('the TPR'), once the party seeking permission has demonstrated the oral evidence in question is necessary to the resolution of the appeal and that it is proportionate to permit it.
6. This Practice Guidance is set out in 4 parts. The first part deals with guidance relating to witnesses based abroad (page 3); the second part offers guidance to representatives and observers who are abroad (page 9); the third part focuses on the important position delay may play in the proceedings (page 11); and finally, the position for Judicial Office Holders wanting to conduct hearings from abroad is set out at the end (page 12).

### *Why is this guidance necessary?*

7. There has long been an understanding among Nation States that one State should not exercise the powers of its courts within the territory of another without having the permission of the latter State to do so. Any breach of that understanding by a court or tribunal in the UK risks damaging UK's diplomatic relations with other States and is contrary to the public interest.

### *Starting point*

8. The applicant should check the FCDO website for information about whether a country has given permission for the use, in Tribunal proceedings, of live video or audio evidence taken from within their jurisdiction. This is published on the FCDO's website using the following link: <https://www.gov.uk/guidance/taking-and-giving-evidence-by-video-link-from-abroad>.
9. If a country has expressly refused permission, then oral evidence from that country cannot be taken.
10. In all other cases the person wishing to rely on the oral evidence from abroad should apply for permission from the Tribunal, following the procedure set out below.

## **PART 1: WITNESSES WHO ARE ABROAD**

11. Occasionally, the Health, Education and Social Care Chamber ('HESC'), conducts cases where one of the parties to the appeal, application or claim (or someone that a party wishes to give live evidence on their behalf) may be resident overseas.
12. Where a party wishes to rely on live oral evidence given by video or telephone from an overseas State from a **resident or citizen** of that country, the person seeking to rely on that evidence will need permission from the Tribunal to do so. As part of that application, the Tribunal will need to be satisfied that the State in question consents and that no legal or diplomatic barriers prevent the witness from doing so in the territory they are situated.<sup>2</sup>
13. This requirement applies to all nation States (including those formerly covered under EU agreements).
14. The obligation to obtain judicial permission to adduce oral evidence from abroad rests upon the party or person proposing to do so.
15. Each case will be considered upon its own merits. Even if there is no legal or diplomatic objection, it shall remain a matter of judicial discretion, by reference to the overriding objective, whether such oral evidence should be admitted.

### **FAILURE TO COMPLY**

16. Failure to notify the Tribunal of an individual/witness wanting to give evidence from abroad in sufficient time may result in a delay and the need for an adjournment or postponement of the hearing. Further, in Special Educational Needs and Disability/Care Standards/Primary Health Lists cases, it may lead to a costs award against the party in default.

### **WHERE PERMISSION IS NOT REQUIRED**

17. Permission is not required where an individual wishes to give video or telephone evidence from within the United Kingdom, i.e. anywhere in England, Wales, Scotland or Northern Ireland; Crown Dependencies like Jersey, Guernsey or the Isle of Man; or British Overseas Territories: 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 the British Virgin Islands.
18. Nor is there any requirement to seek permission from the Tribunal in relation to documentary

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

evidence or the production of a written witness statement or written evidence from abroad. This means 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.

19. Further, there is no need for permission to observe a remote hearing from abroad where that hearing is being held in public and is open to the public. However, in HESC, most hearings are held in private via video and the Tribunal must always be notified if an observer plans to attend or if permission to observe is going to be sought. (See Part 2 of this Guidance and: <https://www.judiciary.uk/guidance-and-resources/practice-guidance-on-remote-observation-of-hearings-new-powers/>).

## THE PROCESS TO BE FOLLOWED FOR CITIZENS AND RESIDENTS OF AN OVERSEAS STATE

20. Judicial or Legal Officer permission is required to call evidence from a citizen or resident of an overseas State, even from a consenting country. HESC has determined the following process:

- The application 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 at the date of the hearing.

21. 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) evidence of their citizenship or residence in the overseas State;
- (v) the Time Zone applicable and, thus, the time difference between the United Kingdom and the country in which the witness is situated;
- (vi) confirmation that the proposed witness has the ability to access the Video Hearing Platform, CVP, or in exceptional circumstances, Microsoft Teams;
- (vii) 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 these arrangements and the party calling the witness will be expected to bear those expenses.)
- (viii) a list of the issues of disputed facts 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 for a meaningful consideration by the Judge or Legal Officer.)
- (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.

22. The above must be done as soon as it is known that a citizen or resident of an overseas State wishes to give evidence from abroad, to avoid the risk of delaying any hearing.
23. 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.

#### UPON RECEIPT OF THE ABOVE INFORMATION

24. Upon receipt of this information, the Tribunal may grant permission with all States with whom there now exists a diplomatic relationship for permission for the use in Tribunal proceedings of live video or audio evidence taken from within their jurisdiction. Responses are now published on FCDO's website at the following link: <https://www.gov.uk/guidance/taking-and-giving-evidence-by-video-link-from-abroad>
25. In all cases, HMCTS staff should check if there are any updates for that country or if permission for use or any further information exists, and advise the Judge/Legal Officer of the request.
26. For those countries where a response from the State has not been received, HMCTS should advise the requester of this.
27. In all cases, the Judge/Legal Officer considering the application should decide whether the witness (citizen/resident) is required by reference to both the overriding objective and whether the party seeking permission has demonstrated that the oral evidence in question is necessary to the resolution of the substantive case and that it is proportionate to permit it. Alternatives such as written evidence and written responses to written questions should always be considered.

#### *Countries that have not objected*

28. Subject to the above, if the State in question has agreed and given permission for the use in Tribunal proceedings of live video or audio evidence taken from citizens and residents within their jurisdiction and the evidence is deemed necessary, then the Judge/Legal Officer may grant permission and the matter shall then proceed.

#### *Countries that have objected*

29. If a country has objected to evidence being taken, then the Tribunal must refuse to admit the proposed oral evidence.

#### *Countries that have not responded*

30. If the State/country has not responded they will be listed on the website as such. The following guidance should be considered for citizens and residents of that country:

- a) 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);
- b) 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.

31. Subject to the above, if the Judge/Legal Officer is satisfied as to the relevance of the evidence and the nature of the request in relation to the resident or citizen of a country that has not responded, the following process should be followed:

- a. The Judge/Legal Officer should refer the matter back to HMCTS administration with directions that reflect the process below.
- b. HMCTS administration should tell the requester to contact the Taking of Evidence from Abroad Unit ('TOEU') on [toe.enquiries@fcdo.gov.uk](mailto:toe.enquiries@fcdo.gov.uk) with the relevant details of the case (nationality, type of tribunal and date etc). (The ToEU will send details on how to pay the Consular Fee, currently £150, for the service. This fee is payable directly to FCDO. HMCTS do not have the power to reduce or remit this fee. Requesters pay the same fee for the service, no matter where they are in the world. The fees are approved by the Privy Council and laid before Parliament.<sup>3</sup>)
- c. The FCDO will need the relevant details of the case including: date of the hearing; whether the witness is a resident or citizen of Country X, and the type of tribunal.
- d. The requester should be contacted directly by the ToEU if further details are required.

32. Once the ToEU receive payment confirmation, they will send the requester a holding reply to acknowledge receipt of payment and advise them of next steps.

33. The ToEU will contact the Embassy or High Commission who will check with the Ministry of Foreign Affairs ('MFA') if the Government of Country X has any objection to residents or nationals of Country X providing evidence by video link from Country X to Administrative tribunals in the UK. The MFA will be given a deadline of **six weeks** to respond.

34. If the Government of Country X responds before the six-week deadline, then the ToEU will inform the requester of the outcome. The requester should inform the Tribunal of this.

35. If the Government of Country X does not respond by the six-week deadline, then the ToEU will inform the requester that given the lack of response, the FCDO recommends that taking of evidence should not take place at this time. The requester should inform the Tribunal of this.<sup>4</sup>

## THE PROCESS TO BE FOLLOWED FOR VISITORS, NON-CITIZENS AND NON-RESIDENTS OF AN OVERSEAS STATE

36. There is no specific process for a UK national wishing to give evidence from abroad as the Taking of Evidence policy only covers residents or nationals giving evidence from the country in which they hold residence or citizenship.

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<sup>3</sup> Please note this fee is non-refundable and will allow the team to facilitate the request only. It is not dependent on the response as this is not within FCDO's control. The requester can [pay online for taking of evidence](#) by debit or credit card.

<sup>4</sup> There is a separate process for Civil and Commercial Tribunal cases. The only exceptions to this are for Hong Kong, Singapore and Tuvalu where specific processes have already been agreed.

37. If a UK national (or other national) is working abroad, they may have a visa that could mean they are considered a temporary resident, however this would depend on the country in question.
38. Therefore, if a non-resident or non-citizen in the country in question e.g. a UK or other national temporarily visiting or on holiday in a foreign State wanted to give evidence, the FCDO would need to send a separate request to the country seeking permission.
39. In such circumstances, a similar process to no-response countries (above) will need to be adopted.
40. Judicial or Legal Officer permission would be required and an application made:
- The application must explain what disputed issues of fact require the attendance and oral evidence of the witness abroad, 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 at the date of the hearing.
41. The application should be supported by:
- (i) the name of the party and case number;
  - (ii) the name of the proposed witness and their nationality;
  - (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 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 these 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 Legal Officer);
  - (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;
  - (xi) confirmation that the individual is not a resident or citizen of the country in question.
42. The above 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.
43. Subject to the above, if the Judge/Legal Officer is satisfied as to the relevance of the evidence

and the nature of the request in relation to the country in question, the following process should be followed:

- a. The Judge/Legal Officer should refer the matter back to HMCTS administration with directions that reflect the below.
- b. HMCTS administration should tell the requester to contact the Taking of Evidence from Abroad Unit ('ToEU') on [toe.enquiries@fcdo.gov.uk](mailto:toe.enquiries@fcdo.gov.uk) with the relevant details of the case (nationality, type of tribunal and date etc). (The ToEU will send details on how to pay the Consular Fee, currently £150, for the service. This fee is payable directly to FCDO. HMCTS do not have the power to reduce or remit this fee.)
- c. The requester should be contacted directly by the ToEU if further details are required.

44. Once the ToEU receive payment confirmation, they will send the requester a holding reply to acknowledge receipt of payment and advise them of next steps.

#### IN ALL CASES: CONSIDERATIONS FOR THE TRIBUNAL ONCE THE REQUESTER NOTIFIES THE TOEU REPLY

45. 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 in terms of the stance taken by the country in question.

46. In the event the ToEU has notified the requester that permission is refused, then the Tribunal must refuse to admit the proposed oral evidence.

47. In the event the ToEU has notified the requester 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.

48. A District Tribunal Judge will consider the application as soon as possible after receipt of the ToEU information. The decision will be recorded in an order confirming the evidence upon which it is based.

49. 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.

50. In the event that the Tribunal is notified by the ToEU through the requester 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.

#### *No reply within 6 weeks*

51. In the event that the ToEU/requester informs the Tribunal that it has received no response within 6 weeks, then the recommendation is that the taking of evidence should not take place at this time.



52. The Tribunal should then decide how to proceed, working on the assumption that the evidence cannot be taken from the country in question.

## IF PERMISSION IS GRANTED

53. If the Judge/Legal Officer grants permission for the witness/individual to appear from abroad, then:

- 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 (CVP also has a telephone/audio facility which may be used in appropriate cases).
- In the event that the arrangements for taking the oral evidence should fail then the Tribunal on the day will need to reconsider, and may withdraw, by reference to the overriding objective, the judicial grant of permission.
- To ensure the taking of evidence from overseas is completed effectively, HMCTS staff/ the clerk should undertake a pre-hearing check with the person giving evidence to ensure the proposed arrangements work. If they do not, then the issue should be referred to the Judge/Tribunal as permission may need to be withdrawn by reference to the overriding objective as not practical.

## **PART 2: MAKING SUBMISSIONS FROM ABROAD AND OBSERVERS**

### OVERVIEW

54. HESC deals with distinct types of cases, which sometimes require 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 high proportion of unrepresented parties.

55. 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 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 about why it is not possible

or practicable for the matter to be dealt with by a representative in the United Kingdom. While oral submissions and representations are possible, *in no circumstances will a representative be able to give evidence from abroad.* (See the process 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 make representations 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. This does not prevent the individual from observing the hearing, unless there is good reason to preclude them. (See the process set out below.)

56. 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

57. The majority of hearings in HESC are held in private. This means they are closed to the public. Any observer who wishes to attend a hearing held in private must ask for the Tribunal's permission, whether they are in the jurisdiction or abroad.

58. 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.

59. If the Tribunal is satisfied and/or the party (or patient) agrees to the individual observing, then permission may be given.

60. This restriction shall not apply to hearings being held in public or in open court.

## PROCESS FOR OBSERVERS AND REPRESENTATIVES

61. Any party or person wishing to join a private hearing from abroad as an observer or representative must notify the relevant Tribunal of that intention as soon as possible. The application and relevant information must be received by the Judge/Legal Officer in a timely fashion in order to give a Judge/Legal Officer sufficient opportunity to consider the individual circumstances of the case well in advance of the hearing.

62. To make the process as efficient as possible, the representative or observer 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.

63. 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.

### **PART 3: IN ALL CASES - DELAY**

64. 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 to allow 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 under consideration.

65. The issues addressed in this Practice Guidance give rise to potential delays to the proceedings (for example, if the FCDO need to contact an overseas Embassy or High Commission, this may take several weeks).

66. As has been observed herein, it is important, therefore, to notify the Tribunal in plenty of time to allow a Judge/Legal Officer to consider an application for attendance from abroad.

67. 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 TPR.

68. 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.

## **PART 4: JUDICIAL OFFICE HOLDERS**

69. The above restrictions also apply to judicial office holders ('JOH') within HESC. Hearings may not be conducted from abroad unless there are exceptional circumstances and the arrangement has been permitted by the Chamber President and Senior President of Tribunals.
70. Before granting such a request, the President must be satisfied that there is a genuine need for the JOH to conduct the hearing from abroad, that there are no significant risks to them doing so, and that the requisite permissions have been obtained, bearing in mind:
- a. Whether it would be reasonably practicable for the hearing to be conducted by a different JOH who is not abroad. If so, that should usually be treated as meaning there is no such genuine need.
  - b. If, in truly exceptional circumstances, and after considering a request in accordance with this Guidance, the President is minded to grant that request, the request should be referred to the Senior President for him/her to consider.
  - c. Factors shall also include whether the country is on the permitted list, FCDO permission, and what security and privacy can be guaranteed in terms of the hearing room set up.



**JUDGE M SUTHERLAND WILLIAMS**

**PRESIDENT**

**HEALTH, EDUCATION AND SOCIAL CARE CHAMBER**

**16 August 2024**