



## Chamber President's Guidance Note No. 7

### **TAKING OF ORAL EVIDENCE FROM OVERSEAS**

*This guidance updates and replaces Chamber President's Guidance Note No. 7 dated 8<sup>th</sup> June 2022, which shall no longer have effect from the date of this document. It follows new arrangements agreed by the HM Courts and Tribunals Service (HMCTS) and the Foreign, Commonwealth & Development Office (FCDO).*

#### **INTRODUCTION**

1. 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 that other 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.
2. 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 Kingdom.
3. This guidance also addresses non-residents and non-citizens wishing to give evidence from abroad, and representatives, observers and judicial office holders who may be abroad.
4. This Guidance replaces previous guidance issued by me in June 2022, and follows new arrangements being 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.
5. 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 FCDO's website: <https://www.gov.uk/guidance/taking-and-giving-evidence-by-video-link-from-abroad>
6. 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 at rule 2 of the First-tier Tribunal (Social Entitlement 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.
7. This Practice Guidance is set out in 3 parts:
  - Part 1: Guidance relating to witnesses based abroad (paragraphs 8-44);
  - Part 2: Guidance relating to making submissions from abroad (paragraph 45-51);
  - Part 3: Guidance relating to delay (paragraphs 52-54).

## PART 1: WITNESSES BASED ABROAD

### OVERVIEW

8. In some cases that come before tribunals within the Social Entitlement Chamber (SEC), one of the parties to the appeal (or someone that a party wishes to give live evidence on their behalf) may be resident overseas.
9. Where a party wishes to rely on live oral evidence by video or telephone given 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, and as part of that application the Tribunal will need to be satisfied that the State in question consents to this and that no legal or diplomatic barriers prevent the witness from doing so in the territory they are situated.<sup>1</sup>
10. This requirement applies to all nation States (including those formerly covered under EU agreements).
11. The obligation to obtain judicial permission to call oral evidence from abroad rests upon the party or person proposing to do so.
12. 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.

### WHERE PERMISSION IS NOT REQUIRED

13. 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.
14. 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.
15. 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, the Tribunal should be notified if an observer plans to attend from abroad. (See: <https://www.judiciary.UK/guidance-and-resources/practice-guidance-on-remote-observation-of-hearings-new-powers/>).
16. The above does not address the situation where the person giving evidence is located in the UK but the interpreter wishes to join the proceedings from overseas. Interpreters are not permitted under their contract to join proceedings remotely from overseas. Accordingly, if a judge has concerns during the course of a hearing that an interpreter may not be in the UK the interpreter should be asked and, if they are not in the UK, the interpreter may not continue to be involved.

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

17. Judicial or Legal Officer permission is required to call evidence from a citizen or resident of an overseas State, even from a consenting country. The following paragraphs set out the process in the Social Entitlement Chamber.

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<sup>1</sup> See Agbabiaka (evidence from abroad; Nare guidance) [2021] UKUT 286 (IAC) ([Link](#))

18. Upon receipt of notification of an application for evidence to be given from overseas by a person who is a citizen or resident of the overseas state, tribunal staff must refer the case to a Judge or Legal Officer (LO).
19. Even if a party does not specifically request to do so, their intention or possible intention to rely on oral evidence given from overseas may be indicated by a party giving an overseas address for themselves or a witness and indicating that they wish to attend the hearing remotely. Whether a party or other person intends, or might intend, to give oral evidence from overseas, may be identified by the tribunal administration without an application being made. In that circumstance, the case should be referred to a salaried Judge or LO for directions. Alternatively, the possibility of an intention to give oral evidence from overseas may be identified by a Judge or LO doing interlocutory work or during a directions hearing in which case the Judge or LO will need to address the matter.
20. If it is not clear that a party wishes to give oral evidence from overseas, the Judge or LO should issue directions to clarify the position. Suggested directions are:

*“The Tribunal understands that you [or your witness] may be a citizen of or resident in [an overseas country/or insert name of country if known]. If you [or your witness] are planning to attend the hearing from [abroad/or insert name of country if known], or any other country outside the UK, you must inform the Tribunal within 28 days and state the country from which you will be joining. The Tribunal must obtain clearance from the UK Foreign Office that the relevant foreign government has consented to individuals giving evidence in Tribunal proceedings from that country. If you attempt to join the hearing from abroad and you have not informed the Tribunal in advance, then you may not be able to participate in the hearing, and the appeal may be adjourned or decided without having heard your evidence.”*
21. Once it is known that a party or witness intends to give evidence from overseas, the following provisions apply:
  - a. HMCTS staff 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. 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> In all cases, HMCTS staff should check if there are any updates for that country, if permission for use or any further information exists, and advise the Judge/LO accordingly.
  - b. The Judge or LO may grant permission in regard to any State with which 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.
  - c. For those countries where a response from the State has not been received, HMCTS should advise the requester and Judge or LO of this.
  - d. In all cases, the Judge or LO considering whether to permit oral evidence to be given from overseas should decide whether the witness (citizen/resident) is required by reference to the overriding objective and whether the oral evidence in question is necessary to the resolution of the substantive case and that it is proportionate to permit it. Where the person wishing to give oral evidence from overseas is a party, it will almost always be proportionate to permit it. Where the person wishing to give evidence from overseas is a non-party witness, the tribunal will determine the matter according to all relevant circumstances and alternatives such as written evidence, and written responses to written questions should always be considered.
22. If it becomes apparent at a hearing that a party or witness is joining from overseas and it is not known whether the state has given permission, the Tribunal may, having considered the overriding objective, either:
  - a. adjourn the appeal with appropriate directions, and follow the above process; or

b. decide the appeal without taking the evidence from overseas.

23. Although a party who is overseas may not give oral evidence in such circumstances, it would be permissible for them to make brief submissions about whether the tribunal should adjourn and the directions that might be made. Relevant factors in considering whether to adjourn or decide the appeal in the above circumstances may include the relevance and significance of the oral evidence, whether the party has failed to respond to directions asking them to inform the tribunal whether they wish to give oral evidence from overseas, and delay.

#### *Countries which have consented*

24. 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/LO may grant permission and the matter shall then proceed.

#### *Countries which have objected*

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

#### *Countries which have not responded to the FCDO*

26. If the State/country has not responded they will be listed on the website as such.

27. The following guidance should be considered by the person seeking to rely on calling oral evidence from abroad bearing in mind that if they wish to make their own enquiry for permission from the relevant overseas state, they will have to pay a fee:

- a. whether it is necessary for the witness/party to give oral evidence;
- b. whether the witness/party could address the disputed issues adequately by providing a written statement;
- c. whether the appeal could be heard in the absence of the witness/party or on the papers.

28. If the party does still wish to seek permission to call oral evidence and if the Judge/Legal Officer is satisfied as to the relevance of the evidence and that it is appropriate for it to be given from the relevant overseas state, the Judge/Legal Officer should refer the matter back to HMCTS administration with directions that reflect the process below.

- a. 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>2</sup>)
- b. 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.
- c. The requester should be contacted directly by the ToEU if further details are required.

29. Once the ToEU receive payment confirmation, they will send the requester a holding reply to

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<sup>2</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.

acknowledge receipt of payment and advise them of next steps.

30. 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.
31. 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.
32. 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.

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

33. If a non-resident or non-citizen in the country in question e.g. a UK national temporarily visiting or on holiday in a foreign State wanted to give evidence, the same procedure to that for non-listed countries (above) will apply.
34. If a United Kingdom national is working abroad, they may have a visa that could possibly mean they are considered a temporary resident, however this would depend on the country in question.
35. In any event, Judicial or Legal Officer permission would be required. In many cases, the simpler course will be to wait until the person returns to the UK.

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

36. 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.
37. In the event the ToEU has notified the requester that permission is refused, then the Tribunal must refuse to admit the proposed oral evidence.
38. 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.
39. 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.
40. The Tribunal 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.
41. 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.

#### *No reply within 6 weeks*

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

43. 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

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

- a. 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.
- b. 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.
- c. 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

45. The guidance for making submissions from abroad is as follows:

### *(a) Legal representatives*

46. 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.

47. 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. While oral submissions and representations are possible, *in no circumstances shall a representative be able to give evidence from abroad.*

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

48. Bearing in mind the risk that a litigant in person or a non-legally qualified representative may stray into the giving of evidence rather than making pure submissions, only in exceptional circumstances will participation from abroad be permitted. Permission will only be considered where a judge has evaluated the individual circumstances of the case. This does not prevent the person from observing the hearing, unless there is good reason to preclude them.

49. 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.

### *(c) Observers*

50. A person may be permitted to join a hearing from abroad as an observer. The Judge or LO will first enquire of the relationship between the observer and any parties, the reason for their wishing to observe, and the reason why they cannot attend in the jurisdiction.

51. Each case will be considered upon its own merits, but it will remain a matter of judicial discretion by reference to the overriding objective.

### PART 3: IN ALL CASES – DELAY

52. 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).
53. 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.
54. However, if delay or the short notice of the application become the issue, the Tribunal may need to consider alternatives to oral evidence being given from overseas. This may include probing the rationale for that evidence, considering whether the evidence could be given in writing, and whether the witness can travel either to the UK within a reasonable time. These matters would also need to be considered by the tribunal in the event that permission is refused by the foreign state.

**Judge Kate Markus KC**

**President**

**First-tier Tribunal (Social Entitlement Chamber)**

**5<sup>th</sup> September 2024**