



EMPLOYMENT TRIBUNALS (SCOTLAND)

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 Tribunal Procedure Rules 2024 (SI 2024/1155);
 - 1.3 “FCDO” means the Foreign, Commonwealth and Development Office;
 - 1.4 “HMCTS” means Her Majesty’s Courts and Tribunals Service; and
 - 1.5 “ToE Unit” means the “Taking of Evidence Unit”.

Introduction

- 2 Rule 8 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 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.
- 3 For many years, employment tribunals allowed persons located in the territory of a foreign state to give oral evidence by video and telephone. It was not considered necessary to obtain the permission of the foreign state in question where the person was giving evidence voluntarily. The Upper Tribunal considered the matter in *Agbabiaka*. The essence of their decision was 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.

- 4 The reason given for the decision was as follows:

“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. This decision was not based on statute or other legal principle but on an assessment of the potential damage to diplomatic relations.”

- 5 While a decision of the Upper Tribunal is not legally binding on employment tribunals, the Presidents of Employment Tribunals (Scotland and Employment Tribunals (England and Wales)) issued Joint Presidential Guidance (“the Joint Guidance”) to assist employment tribunals and the parties that appear before them. This has been updated on a number of occasions and the latest version of the Joint Guidance was issued on 25 July 2022.
- 6 The ToE Unit was set up by the FCDO to ascertain the stance of different overseas governments to the taking of oral evidence from persons within their territory. The Joint Guidance set out the agreed administrative process whereby HMCTS would contact the ToE Unit on behalf of a party seeking to rely on oral evidence from a person abroad. The ToE would make enquiries and confirm the position to HMCTS who would, in turn, advise the party. This process (for which no fee was payable by the party) was available to all tribunals.

Change in approach

- 7 The FCDO has now indicated that it considers that an employment tribunal is a civil and commercial court for the purposes of the Hague Convention and that employment tribunals should follow the processes of the civil courts in its jurisdiction and not the administrative process set out in the Joint Guidance.

- 8 There is currently no requirement that parties appearing in the civil courts in Scotland must seek the approval from the country where a witness is based before leading oral evidence from a witness located overseas. The Lord President is the head of the judiciary in Scotland. He considers that the approach in *Agbabiaka* is only appropriate where a country is seeking “to exercise the powers of its courts within the territory of another” and that in the ordinary court or tribunal case, where the witness is giving evidence voluntarily, the court is not exercising any such powers.
- 9 Employment tribunals in Scotland should now follow the approach of the civil courts in Scotland. A party should not be required to seek permission from another country where it is proposed that a person will give evidence voluntarily from that country by video or telephone. It will be a matter for the employment tribunal in any individual case to decide whether a party or other witness will be permitted to give oral evidence while located overseas. A party who anticipates this situation arising should seek permission from the employment tribunal as soon as possible to avoid any disruption to the hearing.
- 10 This guidance takes effect from 27 January 2025. The Joint Guidance is revoked for Scotland with effect from that date. The President of Employment Tribunals (England & Wales) will issue separate Presidential Guidance that will apply to employment tribunals in England and Wales.



Judge Susan Walker KC

President,

Employment Tribunals (Scotland)

