



# Courts and Tribunals Judiciary

**Judge Barry Clarke**  
President  
Employment Tribunals  
(England and Wales)

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## Presidential Guidance

### Taking Oral Evidence by Video or Telephone from Persons Located Abroad

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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)* [2021] UKUT 286<sup>1</sup>;
  - 1.2 Reference to any numbered rules are to the rules as set out in Employment Tribunal Procedure Rules 2024<sup>2</sup>;
  - 1.3 “FCDO” means the Foreign, Commonwealth and Development Office; and
  - 1.4 “Hague Convention” means the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters<sup>3</sup>.
2. By rule 8, the President may publish guidance as to matters of practice and as to how the powers conferred by the rules may be exercised.
3. This guidance concerns the taking of oral evidence by video or telephone from persons (whether parties or witnesses) who are located abroad. It applies in respect of the Employment Tribunals in England and Wales only. The previous joint guidance (insofar as it affects England and Wales) is hereby revoked.
4. Employment Tribunals must have regard to this replacement guidance, but they are not bound by it.

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<sup>1</sup> <https://caselaw.nationalarchives.gov.uk/ukut/iac/2021/286>.

<sup>2</sup> <https://www.legislation.gov.uk/uksi/2024/1155/made>.

<sup>3</sup> <https://www.hcch.net/en/instruments/conventions/full-text/?cid=82>.

## **The general principle**

5. The Employment Tribunals offer hearings on an in-person basis, on a remote basis (by video and/or by telephone), or on a hybrid basis (a mixture of the two). In respect of remote or hybrid hearings, the default position is that the parties and their witnesses are expected to participate in the hearing from within the territory of the United Kingdom, the Crown Dependencies<sup>4</sup> or the British Overseas Territories<sup>5</sup>.
6. This guidance applies when, exceptionally, any party wishes to give oral evidence remotely from outside the United Kingdom, the Crown Dependencies or the British Overseas Territories (henceforth “abroad”). It also applies to any party who wishes to call oral evidence remotely from a witness who is abroad. The general principle is that the party must demonstrate that there is no legal or diplomatic barrier to the tribunal taking oral evidence from the nation state where that person is present.
7. The rationale for this approach is set out in *Agbabiaka*<sup>6</sup>:

**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.**

8. The position in respect of oral evidence is clear: it would harm the interests of justice for an Employment Tribunal in England and Wales to take such evidence from a person located in a nation state, even if given voluntarily, if the state has not given permission for that person to do so. This approach has since been adopted by the Court of Appeal in *Raza*<sup>7</sup>, albeit that the court decided that a hearing held in the absence of permission was lawful and not a nullity.
9. The decision in *Agbabiaka* records<sup>8</sup> – and treats as determinative – the stance of the FCDO that the state’s permission is not required for written evidence, or for submissions (whether oral or written). While a decision of the Upper Tribunal is not

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<sup>4</sup> <https://www.gov.uk/government/publications/crown-dependencies-jersey-guernsey-and-the-isle-of-man>.

<sup>5</sup> <https://www.gov.uk/government/publications/overseas-territories-governments-on-the-web>.

<sup>6</sup> *Agbabiaka*, paras. 12, 19 and 23.

<sup>7</sup> *Raza v. Secretary of State for the Home Department* [2023] [EWCA Civ 29](#) (paragraph 52).

<sup>8</sup> *Ibid.*, para. 23.

legally binding on the Employment Tribunals, I have concluded, given the rationale for the decision and its adoption in *Raza*, that it is appropriate for Employment Tribunals, and the parties who appear before them, to follow its approach.

10. The decision in *Agbabiaka* further records<sup>9</sup> the view of the Secretary of State for the Home Department that the Hague Convention does not apply to immigration proceedings in the United Kingdom, as they are administrative proceedings rather than civil or commercial proceedings. The decision does not express any view on the correctness of that stance. However, the FCDO has now acknowledged that the Employment Tribunals are a civil and commercial tribunal, not an administrative tribunal, which plainly brings them within the scope of the Hague Convention. This change in approach has prompted this revised guidance.

### **The first issue: whether the state's permission has already been given**

11. The first issue for the parties to consider is whether a form of “standing permission”, akin to blanket approval, has already been given. Notwithstanding the position as set out in the Hague Convention, some nation states have stated unequivocally that individuals can give oral evidence from within their territory. This can be checked on a webpage maintained, and regularly updated, by the FCDO<sup>10</sup>. Practitioners will find it helpful to bookmark that webpage.
12. The FCDO's webpage lists most nation states around the globe, and it confirms the position in respect of each of them. With respect to some nation states, the list confirms that individuals can voluntarily give oral evidence remotely from within their territory (although it sometimes distinguishes for this purpose between administrative tribunals and civil and commercial tribunals). With respect to other nation states, the list confirms whether permission is required on a case-by-case basis and it may indicate any conditions that apply. Where the FCDO webpage suggests that the parties contact the Employment Tribunal office handling their case for further information, they should consult this guidance.
13. Where the FCDO webpage states that the nation state in question has given standing permission for oral evidence to be given remotely from within its territory, the parties and the tribunal can assume that there is no legal or diplomatic barrier to the tribunal taking that evidence, and they should proceed to the section of this guidance dealing with the third issue, namely whether the tribunal itself gives permission. In all other cases, they should proceed to the second issue below.

### **The second issue: obtaining the state's permission where it has not already been given**

14. If the FCDO webpage confirms that the nation state from which it is proposed that the person gives oral evidence has not given standing permission, or if the state in question is not listed on the FCDO webpage, then – by virtue of the status of the Employment Tribunals as a civil and commercial tribunal – the next matter to check is whether the state in question is a contracting party and signatory to the Hague Convention<sup>11</sup>.

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<sup>9</sup> *Ibid.*, para 18-19.

<sup>10</sup> <https://www.gov.uk/guidance/taking-and-giving-evidence-by-video-link-from-abroad>.

<sup>11</sup> A list of signatory states is available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=82>.

### ***Where the state is a signatory to the Hague Convention***

15. Where the state is a signatory to the Hague Convention, the party must contact the relevant authorities of that state to ask whether they require permission from that state to give oral evidence from within its territory<sup>12</sup>. The state authorities will tell the party whether they can proceed to give such evidence or whether additional information is required.
16. If the state authorities require a so-called “letter of request”, the party will need to contact the relevant authority in England and Wales for the taking of evidence under the Hague Convention<sup>13</sup>. This is the Foreign Process Section located in the Royal Courts of Justice<sup>14</sup>. The Foreign Process Section will advise whether any formal arrangements need to be made and answer any questions. The party may be required to pay a consular fee.

### ***Where the state is not a signatory to the Hague Convention***

17. Where the state is not a signatory to the Hague Convention (and has not otherwise given approval, as confirmed on the FCDO webpage), a letter of request will be required. As above, this means that the party must contact the Foreign Process Section located in the Royal Courts of Justice, and they may be required to pay a consular fee.

### **Other matters of note**

18. It is immaterial for these purposes whether the state in question is a member of the Commonwealth<sup>15</sup>.
19. Some states may provide that they will only give permission for a person to give evidence from within their territory if the tribunal undertakes that the person to whom the request relates shall not be subjected to any penalty or liability, or otherwise prejudiced in law, by reason only of their refusal to give evidence or their failure to consent to attend as requested. It is a judicial decision whether to give any such undertaking in an individual case.

### **Consequence of the absence of state permission**

20. Where a party fails to demonstrate that there is no legal or diplomatic barrier to them calling oral evidence from abroad, the tribunal should not take that evidence. Following *Agbabiaka* and *Raza*, to do otherwise when the state in question has not given permission would risk damaging the United Kingdom’s diplomatic relations with that state; such a risk would be contrary to the public interest and harmful to the interests of justice, even if the subsequent hearing would not necessarily be a nullity.

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<sup>12</sup> A list of the authorities to contact for each signatory state to the Hague Convention is provided on the HCCH website here: <https://www.hcch.net/en/instruments/conventions/authorities1/?cid=82>.

<sup>13</sup> <https://www.hcch.net/en/states/authorities/details3/?aid=526>.

<sup>14</sup> Foreign Process Section, Room E16, Royal Courts of Justice, Strand, London WC2A 2LL. Telephone: 020 3936 8957. Email [Foreignprocess.rcj@justice.gov.uk](mailto:Foreignprocess.rcj@justice.gov.uk).

<sup>15</sup> <https://thecommonwealth.org>.

### **The third issue: permission of the tribunal**

21. Even where a party demonstrates that there is no legal or diplomatic barrier to them calling oral evidence from abroad, this will not necessarily mean that the tribunal will then take that evidence. The tribunal must still be satisfied that it is in the interests of justice to permit oral evidence from abroad, in the same way as the tribunal must be satisfied that it is in the interests of justice to enable a person to participate generally in a hearing from abroad (such as by way of acting as a representative or making submissions) or to observe a hearing from abroad<sup>16</sup>.
22. Whether to allow a person to participate in the hearing from abroad is a case management decision. It involves a discretion, which will be exercised judicially. The tribunal will seek to give effect to the overriding objective to deal with cases fairly and justly, as set out in rule 3, and this includes avoiding delay and saving expense. It will always be a matter for judicial discretion, by reference to the overriding objective, whether the listing of a hearing should be delayed to allow a party to take the steps set out in this guidance, or should continue to be further delayed to allow such steps to be concluded.
23. 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 proposed 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, the Crown Dependencies or the British Overseas Territories. 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; whether the person can travel to the United Kingdom; what issues of procedural fairness may arise if there is a substantial time difference; and what arrangements the party proposes to make to ensure that the oral evidence can be taken in a formal and appropriate manner without interference.
24. 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, for example by reference to the sanction of costs. Additional sanctions may be imposed if it transpires that a party has called oral evidence from abroad without permission from the state in question and without the permission of the tribunal.

### **Summary**

25. For many years Employment Tribunals allowed persons located in the territory of a foreign state to give oral evidence remotely, usually by video link, with no concern for whether that state had given permission to do so. That position is no longer sustainable.

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<sup>16</sup> The [Remote Observation and Recording \(Courts and Tribunals\) Regulations 2022](#) apply; see especially Regulation 4(e). See also paragraph 20 and footnote 16 of the [Practice Guidance on Remote Observation of Hearings](#) issued in June 2022 by the Lord Chief Justice and the Senior President of Tribunals.

26. The four main messages of this guidance are:
- 26.1 Parties to Employment Tribunal proceedings in England and Wales who wish to call oral evidence from abroad – especially those who are professionally represented – must plan ahead and be organised, and not wait until the hearing is imminent. The first thing to check, by reference to FCDO webpage, is whether the state has given standing permission. If it has not, parties must then make further enquiries of the state in question and/or the Foreign Process Section (which may be simpler if the state in question is a signatory to the Hague Convention), a process that may attract a consular fee.
  - 26.2 Parties must understand that it is their responsibility to demonstrate that there is no legal or diplomatic barrier to the tribunal taking oral evidence from the nation state where that person is present. It is not the tribunal's responsibility to ascertain the position for them. That means they, not the tribunal, are responsible for making the necessary enquiries (including, where appropriate, seeking permission from the state). If parties delay in doing so without good reason, it may be likelier that the tribunal itself either refuses permission or sanctions them for causing a postponement.
  - 26.3 Parties should not assume, even where a state has given permission, that the tribunal will then permit oral evidence to be given from abroad. This will always be a case management decision for the tribunal, having regard to the overriding objective and the interests of justice.
  - 26.4 Taking oral evidence from abroad can involve procedural and technical complexity. It carries a risk of derailing a listed hearing. The parties should reflect carefully on whether the giving of oral evidence in this manner serves the interests of justice or accords with their own duty under rule 3(4) to further the overriding objective.
27. The annexe to this guidance provides six worked examples to assist users and to promote their understanding of this guidance<sup>17</sup>.
28. Different arrangements operate for Singapore and Hong Kong. Contact HMCTS at [nationaltribunalssupportunit@justice.gov.uk](mailto:nationaltribunalssupportunit@justice.gov.uk) for details.
29. This guidance has effect from 27 January 2025. The President of Employment Tribunals in Scotland will issue separate guidance in that jurisdiction.



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<sup>17</sup> These examples are based on information available at the date of promulgation of this guidance and should not be relied on as correct after that date. The online resources mentioned in this guidance should always be checked to ascertain the position at the relevant time.



## Annexe: worked examples

- (1) Witness located in the USA. Check [FCDO webpage](#); scroll down to “Civil and commercial tribunals” and then to “United States of America”. Standing permission given, applies to civil, commercial and administrative tribunals. Therefore the only issue is whether the tribunal will permit the witness to give evidence from the USA.
- (2) Witness located in Poland. Check [FCDO webpage](#); scroll down to “Civil and commercial tribunals” and then to “Poland”. Standing permission given, but for civil and commercial tribunals, not administrative tribunals – this is satisfactory for the Employment Tribunals. Therefore the only issue is whether the tribunal will permit the witness to give evidence from Poland.
- (3) Witness located in Kuwait. Check [FCDO webpage](#); Kuwait not listed. Check [list of Hague countries](#). Country in italics, meaning that it is a signatory but not a member of the HCCH. Check the [HCCH website](#) for details of how to contact the relevant authorities in Kuwait; details [here](#). Contact the Foreign Process Section for further advice. A consular fee may be payable. Even if permission is given, the tribunal must still decide whether to permit the witness to give evidence from Kuwait, both generally and in the light of any conditions that may be imposed..
- (4) Witness located in Switzerland. Check [FCDO webpage](#); scroll down to “Civil and commercial tribunals” and then to “Switzerland”. Permission required on a case-by-case basis. Check [list of Hague countries](#). Country in bold, meaning that it is a signatory and a member of the HCCH. Check the [HCCH website](#) for details of how to contact the relevant authorities in Switzerland; details [here](#). Contact the Foreign Process Section for further advice. A consular fee may be payable. Even if permission is given, the tribunal must still decide whether to permit the witness to give evidence from Switzerland, both generally and in the light of any conditions that may be imposed.
- (5) Witness located in the Republic of Ireland. Check [FCDO webpage](#); scroll down to “Civil and commercial tribunals” and then to “Ireland”. Standing permission given, applies to civil, commercial and administrative tribunals. Therefore it is immaterial that Ireland is not a signatory to the Hague Convention. The only issue is whether the tribunal will permit the witness to give evidence from the Republic of Ireland.
- (6) Witness located in Belgium. Check [FCDO webpage](#); scroll down to “Civil and commercial tribunals” and then to “Belgium”. No agreement in place, therefore assume state’s permission not given. Belgium is not a signatory to the Hague Convention. Letter of request required. Contact the Foreign Process Section for further advice, but FCDO cannot guarantee a response (and a lack of response should be treated as a lack of permission). A consular fee may be payable. Even if permission is given, the tribunal must still decide whether to permit the witness to give evidence from Belgium.