



## JUDGE ADVOCATE GENERAL'S PRACTICE MEMORANDUM 14

### Practice Memorandum 14: Attending Service Courts by Live Link from Outside the UK

#### Introduction

1. Whereas the Senior Courts Act 1981 and the Courts Act 2003 provide that the Crown Court and Magistrates' Courts sit in England and Wales, the Armed Forces Act 2006 states at s.154 that it "may sit in any place, whether within or outside the United Kingdom." Similarly, the Court Martial Appeal Court "shall sit at such place as such directions may provide, whether within or outside the United Kingdom" (Courts-Martial (Appeals) Act 1968, s.4(3)). Nonetheless, it is important that any operation of the Service Courts overseas is conducted in accordance with diplomatic protocols. This Practice Memorandum sets out guidance for parties who seek to call witnesses to give evidence via live link to a Service Court from an overseas location, which Judge Advocates will expect to be followed before evidence is adduced from a witness outside of the United Kingdom.
2. **The party who seeks to call a witness to give evidence by live link from an overseas location bears full responsibility for ensuring that all legal permissions have been obtained, and may be required to satisfy the Court accordingly. This process can take a considerable amount of time.**
3. Rule 18 of the Armed Forces (Court Martial) Rules 2009 provides the authority for evidence to be given in this way:

#### **18.— Live links**

*(1) Any person may (and, if in service custody, must) attend any proceedings by live link, if a judge advocate so directs.*

*(2) A person who attends any proceedings by live link, and could give oral evidence in the proceedings if he were in the place where the proceedings are being held, may give evidence by live link.*

#### **Witness Evidence from Overseas by Live Link**

4. If a witness for any party in proceedings in a Service Court is overseas at the time they are required to give their evidence, application may be made to the Court for the witness to

give their evidence via live link from their location. Such application will be subject to the same considerations as any other live link application (interests of justice, integrity of proceedings, etc) in addition to the further considerations contained in this guidance.

5. In *R v Kadir* [2022] EWCA Crim 1244, the Court of Appeal stated that, prior to approving an application for a witness to give evidence via a live link from overseas, the Judge must be assured that appropriate steps have been taken to ascertain whether the foreign State concerned has any objection to a person within its territory giving evidence to a court in England and Wales.
6. Care must be taken in applying case law from the CJS as different law and processes apply.<sup>1</sup> Nonetheless, the principle in *Kadir* applies equally in the Court Martial. This practice memorandum is intended to give further guidance on applying the principle in the Court Martial, noting that the UK has reached agreements with some States which address this point in relation to Service Court proceedings.

#### **British Overseas Territories & Crown Dependencies**

7. It may be presumed that British Overseas Territories and Crown Dependencies have no objection to participation in a UK Service Court from within their territory. This presumption applies in, for example, Gibraltar, the Sovereign Base Areas in Cyprus, the Falkland Islands, the British Indian Ocean Territory (Diego Garcia) and the Channel Islands.

#### **British Military Bases and Royal Naval Ships**

8. Participation from within a British Military Base or Royal Naval ship does not require consent of the host (or receiving) state.

#### **Diplomatic or Consular Premises**

9. Where it is proposed that evidence is given from the office or residence of a UK High Commissioner, ambassador or other diplomatic mission premises, there is no need for the consent of the host (or receiving) State.<sup>2</sup>

#### **International Agreements with Standing Authorisations: NATO and Others**

10. Where it is proposed that a witness gives evidence from within a North Atlantic Treaty Organisation (NATO) State, the NATO Status of Forces Agreement (SOFA) applies. This is a long-standing agreement in place since 1951. It contains a number of provisions in relation to the ability of one NATO State (referred to as the “sending” State) to administer (including discipline, up to and including criminal charges) their personnel in the territory of another NATO State (referred to as the “receiving State”). These arrangements are replicated in NATO “Partnership for Peace” States.
11. While the NATO SOFA does not specifically address live links, the provisions are designed to allow a “sending” State to carry out the full range of activities relating to the management and administration of their personnel present in a “receiving” State, including discipline.

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<sup>1</sup> See the judgment of the Upper Tribunal of the Immigration and Asylum Chamber in *Agbabiaka* [2021] UKUT 00286 (IAC) for processes which govern the giving of evidence from overseas in civil cases.

<sup>2</sup> 1961 Vienna Convention on Diplomatic Relations, article 22(1).

The provisions are therefore broad enough that, in most circumstances, witnesses who are abroad on duty may give evidence to a Service Court by live link from any NATO State without need of further permission being sought. However, in cases of doubt, the SOFA should be consulted and, if required, the Defence Section in the respective Embassy or High Commission may be able to advise. The Overseas Directory, or “Yellow Book”, available for MoDNet users [here](#), contains contact details for all UK Defence Sections.

- a. Where a witness is in a NATO State on duty, or in an overseas UK military establishment, there will be no need to seek further permission for them to participate from that location.
  - b. Where a witness is in that State on leave or other non-duty reasons, then a practical solution is to invite them to participate from a UK military or diplomatic premises.
  - c. These principles apply equally to military and civilian participants.
12. The UK is party to a number of other agreements with other States with provisions in respect to the administration of Service justice. Unlike the NATO SOFA, not all of these agreements are publicly available, but may be obtainable through MOD. Where the witness concerned is a prosecution witness, the Service Prosecuting Authority (SPA) will undertake these enquiries in order to provide the Judge Advocate with the reassurance required at paragraph 5.
13. Where the witness is to be called by a party other than the prosecution, the SPA may be able to assist by providing appropriate points of contact for enquiries to be made.
14. Where such assurance cannot be obtained, the process in paragraph 15 below should be followed.

#### **States where there is no enabling agreement**

15. Where it is proposed that a witness attends by live link from a State not governed by an enabling agreement, then steps will need to be taken to ensure the State in question has no objection.
  - a. In the case of a witness, including the defendant, these steps should be taken by the party wishing to call the witness, who should be in a position to assure the Judge Advocate that there is no objection when making their live link application.
  - b. In the case of participants attending in their own right, these steps should be taken by the participant.
  - c. Enquiries may be made through the Defence Section in the Embassy/High Commission responsible for Defence relations with the State in question.

#### **Informing the Court**

16. The BCM(CM) Form will be amended to include relevant information if it is anticipated by the party calling a witness that they will be overseas when giving evidence.

17. If a party becomes aware after PTPH that a witness will be overseas, the Court must be informed and information provided as to the steps being taken to comply with international obligations and this Practice Memorandum.

**CPS Guidance**

18. Some further guidance is available from the [CPS website](#), which lists arrangements currently known to be in place with other nations.

**The most commonly encountered scenario**

19. A party who wishes to call a witness who is on leave/holiday abroad or living abroad and who is not giving evidence from a UK military establishment or consular premises is likely to need to take early action to ensure that relevant permissions have been obtained. Failure to do so may prevent the court from allowing their evidence to be admitted.