

## **Taking oral evidence via video or telephone link from Overseas States**

1. This guidance is issued in the light of the Upper Tribunal decision in *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 286 (IAC) concerning the procedure to be followed when a party to a case wishes to rely upon oral evidence given by video or telephone by a person (including the party themselves) who is in the territory of a Nation State other than the United Kingdom. This guidance is issued for the benefit of judges and parties in the War Pensions and Armed Forces Compensation Chamber.

### When permission is needed

2. The decision includes the following:

*“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”<sup>1</sup>.*

*“Whenever the issue arises in a tribunal about the taking of evidence from outside the United Kingdom [...] 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<sup>2</sup>. [...] 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”<sup>3</sup>.*
3. The decision records – and treats as determinative – the stance of the Foreign, Commonwealth and Development Office (FCDO) that only the giving of oral evidence from a Nation State requires the permission of that State. Permission is not needed for written evidence, or for submissions (whether oral or written).
4. Permission is not required where persons wish to give oral evidence by video or telephone from England, Scotland, Wales, Northern Ireland, the Isle of Man, the Channel Islands, or from British Overseas Territories such as Gibraltar, the Falklands, the British Virgin Islands and the Cayman Islands.

### The process for seeking permission

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<sup>1</sup> Para 12

<sup>2</sup> Para 19

<sup>3</sup> Para 23

5. On 29 November 2021 Foreign Commonwealth and Development Office (FCDO) established a new "Taking of Evidence Unit" ["ToE"]. The ToE will ascertain the stance of different overseas governments to the taking of oral evidence from individuals within their territory. The response of the ToE about the stance of a particular overseas government will be determinative.
6. Representations made prior to 29 November 2021 as to whether a particular government has any objection to the taking of oral evidence from an individual within their jurisdiction should no longer be relied on.
7. The decision states that a party wishing to rely on oral evidence from a witness in a Nation State other than the UK must contact the ToE. To make the process as efficient and user-friendly as possible, **HMCTS will contact the ToE on behalf of any party who notifies the tribunal that they want to rely on oral evidence from a person abroad, so all that that party needs to do is notify the tribunal of:**
  - a. the name of that person and case number;
  - b. the country the person would be giving evidence from;
  - c. if it is not the appellant what the evidence would be about;
  - d. the date of any listed hearing

**This 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.**

There is no need to copy in the other party to the proceedings.

8. Refusal by the State of permission will mean that the individual will not be able to give live audio or video evidence from that state. Also, there is a potential delay to proceedings (if the FCDO need to contact an overseas Embassy or High Commission it can take a minimum of 8 weeks). So, failure to notify the Tribunal in sufficient time to allow for the FCDO enquiries and the consequent delay may result in their inability to give live video/audio evidence at their hearing as permission may not be given in time.
9. Upon receipt of this information, HMCTS will contact the ToE Unit on behalf of the party seeking to rely on oral evidence from a person abroad. HMCTS will provide to the ToE Unit only the information at sub-paragraphs (b) and (d) of paragraph 7 above.
10. If the ToE Unit is aware from previous enquiries of the stance of the state in question, it will confirm to HMCTS that the state has no objection to evidence being given orally from within its territory. Otherwise, the ToE Unit will make an enquiry of the state via the British Embassy or British High Commission in that country. HMCTS will pay any consular fee due in respect of such enquiry. The ToE Unit will inform HMCTS of the outcome of its enquiry.

11. HMCTS will inform the party that made the request of the response from the ToE Unit.
12. The amount of time a case has been held up at the ToE stage will be kept under review by the tribunal. It will always be a matter for judicial discretion by reference to the overriding objective as to whether the listing of a case should be delayed to allow such enquiries to proceed or should continue to be further delayed to allow such enquiries to be concluded. If delay becomes an issue, the Tribunal may need to consider alternatives to oral evidence being given from the foreign country. This may include probing the rationale for that evidence; and considering whether the evidence could be given in writing (including by reference to written questions put by the other party); whether the witness can travel either to the UK or to a third country where it is known there are no diplomatic objections to the giving of oral evidence or whether the hearing should proceed 'in absence'. These matters would also need to be considered by the tribunal in the event that permission is refused by the foreign country.
13. In the longer term, the FCDO may publish and maintain a list on the internet (within the gov.uk domain) of the foreign states that have indicated that they permit the giving of oral evidence to United Kingdom Tribunals from within their territory. At this point the Presidential Guidance will be updated.

**Judge Fiona Monk**

**Chamber President**

**WPAFCC**

**May 2022**