



UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

GUIDANCE NOTE ORAL EVIDENCE FROM ABROAD

1. The Upper Tribunal (Administrative Appeals Chamber) (“AAC”) is primarily concerned with appeals on questions of law and so its judges do not regularly take evidence from a party or a witness.
2. In those cases in which a party is entitled or has been granted permission to give or call evidence, the following guidance applies. It follows the approach of the Upper Tribunal (Immigration and Asylum Chamber) 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.

When permission is needed

3. 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”¹.

“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 country². [...] 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”³.

¹ Para 12

² Para 19

³ Para 23

4. 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).
5. The AAC may consider that there is too much risk that a litigant making oral submissions will stray into giving evidence, and so may decide in such a case that permission must be sought as a precaution.

The process for seeking permission

6. On 29 November 2021 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.
7. 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.
8. 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. In order to make the process as efficient and user-friendly as possible, HMCTS will contact the ToE on behalf of any party who notifies the AAC that they want to rely on oral evidence from a person abroad, so all that that party needs to do is notify the AAC of:
 - a. the name of that person;
 - b. the country the person would be giving evidence from; and
 - c. what the evidence would be about.
9. If the ToE does not already hold information on the country in question, the ToE will need to raise an enquiry with the British Embassy or British High Commission in that country.
10. It can take months to receive a response to an enquiry via an embassy or high commission, so the AAC must be notified as soon as it is apparent that oral evidence from a witness abroad may be needed.

If permission is delayed or refused

11. The amount of time a case has been held up at the ToE stage will need to be kept under review by the AAC. 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.

12. If delay becomes an issue, the AAC 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 or by the Judge); and 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. These matters would also need to be considered by the AAC in the event that permission is refused by the foreign country.

THE HON MRS JUSTICE FARBEY

CHAMBER PRESIDENT

2 August 2022