

Preserving Diplomatic Relations – Updated Guidance on hearing evidence from individuals who are abroad

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Introduction

1. In April of this year, the Presidents of the Employment Tribunals in both England and Wales and Scotland issued joint guidance (the Guidance) on hearing oral evidence from witnesses who are abroad.
2. The Guidance followed on from a recent ruling of the Upper Tribunal of the Immigration and Asylum Chamber, *Agbabiaka*, which recorded that where an individual will give evidence from abroad to a UK Tribunal hearing remotely, permission of the foreign state where the witness is located is necessary.
3. Since issuing that initial Guidance, the Presidents have produced an updated version on 25 July 2022, which makes adjustments to the process that should be followed.

Background to the Guidance – 3PB’s May Article

4. The original Guidance was issued following the decision of the Upper Tribunal of the Immigration and Asylum Chamber in *Agbabiaka (evidence from abroad, Nare guidance) [2021] UKUT 286*, and was set in the context of the need to sustain relations with Foreign States.
5. Simon Tibbits, of 3PB’s Employment and Discrimination Group, wrote an article in May setting out the background to, and effect of, the original Presidential Guidance. His article can be found [here](#).

Updated version of the Guidance

6. The Guidance, originally published in April, noted the steps that should be taken when a party recognises the need for an individual to give evidence from abroad.
7. The initial version placed emphasis on enquiries being made of the relevant foreign state, noting the involvement of the newly established Taking of Evidence Unit (ToE Unit), which was set up last year to deal with requests.
8. As the April version recorded that the ToE Unit would make appropriate enquiries through relevant diplomatic channels, the Guidance also noted the potential for delay.
9. The updated Guidance adapts the process, responding to progress that has been made by the ToE.
10. The updated version can be found [here](#).

Countries covered

11. The Guidance continues to record that permission is **not** required where persons wish to give oral evidence by video or telephone from within the United Kingdom, or from British Overseas Territories.
12. Originally, the Guidance noted that *“Permission is not required where persons wish to give oral evidence by video or telephone from within the United Kingdom, including for this purpose: England, Scotland, Wales, Northern Ireland, Isle of Man, Isle of Wight, the Channel Islands, or from British Overseas Territories such as Gibraltar, the Falklands, the British Virgin Islands and the Cayman Islands.”*
13. The updated version adds to that list, recording now that *“Permission is not required where persons wish to give oral evidence by video or telephone from within the United Kingdom, (i.e., anywhere in England, Wales, Scotland or Northern Ireland); from Crown Dependencies (like Jersey, Guernsey or the Isle of Man); or from British Overseas Territories (including Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St Helena, Ascension and Tristan da Cunha, South Georgia and*

the South Sandwich Islands, The Sovereign Base Areas of Akrotiri and Dhekelia, Turks and Caicos Islands and Virgin Islands).”

14. It remains that parties calling evidence from individuals located elsewhere would need to follow the Guidance.

Steps to take

15. In terms of the process, the obligations on parties remain largely as they were in April – namely to ensure that enquiries have been made of a foreign state (where the person is located) to ascertain whether it objects to evidence being given orally to an employment tribunal in the United Kingdom from within its territory.

16. Permission is not required for written evidence or for submissions (whether oral or written).

17. As before, a party wishing to rely on oral evidence to be given by someone in an affected foreign state must notify the tribunal of:

- a) The case number.
- b) Confirmation that the party wishes to rely on evidence from a person located abroad.
- c) The dates of any listed hearings in respect of which the request is being made.
- d) The nation state in question.

18. The request does not need to be copied to other parties under rule 92 of the Employment Tribunal Rules (unless it also covers other matters).

19. The Foreign Commonwealth and Development Office (FCDO) had set up the ToE Unit to deal with requests in November 2021. Parties may not rely on representations by any state as to whether they have any objection to the taking of oral evidence made before the ToE Unit was established.

20. The July version of the Presidential Guidance notes that ToE has now collated information which it has received from different overseas governments. In due course, a list of the responses will be published, noting any conditions that would attach to consent. The Presidential Guidance will be updated again when that list is available.

21. The updated Guidance notes that HMCTS may, in substitution of the ToE process, consult any list (published or otherwise) which has been produced by FCDO.
22. However, where a response is needed from the ToE, HMCTS will contact the Unit on behalf of the party. HMCTS will only share with the ToE Unit the dates of the hearings, and the nation state in question.
23. Accordingly, and in light of the activity that has taken place since its establishment in November last year, where the ToE Unit is already aware of the relevant state's position from previous enquiries, it will confirm this to HMCTS. The updated Guidance stipulates what those responses will be:
 - a. If there is no objection to evidence being given orally from within its territory, ToE will confirm that fact to HMCTS;
 - b. If the stance is that permission is given subject to certain conditions, the ToE Unit will confirm those conditions to HMCTS;
 - c. If the stance of the state in question remains unknown or unclear, for example because it has not yet responded to a request already made of it, the position of the ToE Unit will be that permission has yet to be given.
24. Otherwise, the ToE Unit will make diplomatic enquiries of the relevant state via the British Embassy or British High Commission there. HMCTS will pay any consular fee that may be due, and will confirm to HMCTS the outcome of its enquiry.
25. The ToE Unit's response is determinative.
26. It remains the case that the response from the ToE Unit is irrelevant to any other matters that may arise for the tribunal's consideration, including whether the evidence from the person in question is relevant, whether the tribunal permits evidence to be given by that person at all, whether the tribunal may grant an order under rule 32 requiring that person to attend a hearing to give evidence, what weight should be attached to that evidence and whether any conditions attached by a state to the giving of permission are such that taking the evidence would be contrary to the interests of justice.

Delays and the impact on case management

27. The Presidential Guidance continues to emphasise that it may take several months to receive a response to a request for permission made through diplomatic channels. Accordingly, as per the original Guidance issued in April, parties are urged to notify the tribunal as soon as it becomes apparent that oral evidence may be needed from a person located abroad or if a party is concerned about the amount of time enquiries are taking or any conditions that a state has imposed on the granting of permission.
28. Whether a hearing already listed should be delayed while enquiries are underway remains a matter for judicial discretion noting the Overriding Objective in Rule 2.
29. The considerations noted in the previous version of the Guidance reappear in the updated version, noting that the tribunal may need to consider more closely issues such as –
- a. Why the person's evidence is relevant.
 - b. Why the person cannot attend the hearing in person or give evidence by video or telephone from within the UK.
 - c. Whether the evidence could be given in like terms by a person located within the UK.
 - d. Whether the evidence could be given in writing, including by reference to written questions put by the other party.
 - e. Whether the evidence of the person abroad can be taken at a later date or by adjusting the timetable for the hearing.
 - f. Whether the person can travel either to the UK or a third country where there are no diplomatic objections to the giving of oral evidence.
30. In making a determination on the issue of case management, the tribunal may also consider any failure by a party to notify the tribunal in a timely manner that it wishes to rely on oral evidence from abroad.
31. The guidance further notes that similar factors will also need to be considered if the relevant nation state refuses permission.

Conclusions

32. It remains that parties wishing to call oral evidence from an individual based abroad must ensure that appropriate enquiries have been made concerning the issue of permission.
33. The steps do not on their face appear onerous, however they could lead to delay, and the July version of the Guidance notes two developments since the issue was first addressed which could make the procedure more manageable. These are the option for HMCTS to consult the FCDO list themselves, and secondly for the ToE Unit to make a determination based on previous enquiries.
34. The concluding reference to the Guidance being updated further suggests that the process will remain under review with amendments being made to reflect progress made by the ToE Unit.

07 September 2022

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