

Guidance on taking of oral evidence from persons located overseas in tribunal proceedings

Part A: Overview

Purpose and scope

1. This guidance note sets out the steps to be taken when a party to tribunal proceedings proposes to lead oral evidence from a witness situated in a jurisdiction outside of the UK. It takes account of the UK Upper Tribunal decision in [Secretary of State for the Home Department v Agbabiaka \[2021\] UKUT 00286](#) and some jurisdictions' preference that the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters ("1970 Convention") applies to the taking of oral evidence by video link.
2. This guidance note has been designed for use by SCTS staff together with tribunal judiciary when sitting in The First-Tier Tribunal for Scotland, Upper Tribunal for Scotland, The Mental Health Tribunal for Scotland, The Pensions Appeals Tribunal and The Lands Tribunal for Scotland. This guidance note applies to the taking of oral evidence, whether that is taken by telephone or video. It applies to proceedings where it is proposed that evidence is to be taken from any witness, including a party to relevant proceedings. It was developed in collaboration with the Lord President's Private Office, Tribunal Operations, Supreme Courts and the Foreign, Commonwealth and Development Office.

Background

3. In the case of [Secretary of State for the Home Department v Agbabiaka \[2021\] UKUT 00286](#), the UK Upper Tribunal held that parties to proceedings before the First-tier Tribunal who seek to lead oral evidence from witnesses located overseas were to ascertain whether the government of that foreign state had any objection and if there were any legal objections to the giving of evidence from its territory by making enquiries with the 'Taking of Evidence Unit' of the Foreign, Commonwealth and Development Office ("FCDO").
4. The UKUT's decision was not based on any statute but rather an informal understanding of how not to damage diplomatic relations in obtaining such oral evidence (see para 12 of the decision). This case applies to tribunals only.
5. A number of signatory states to the 1970 Convention consider that the Convention applies to requests for taking of evidence by video link by foreign courts and expects letters of request to be submitted. Responses from the signatory states to the Convention are called "Country Profiles". Guidance issued by the Permanent Bureau suggests that the Convention's scope may extend to the use of video link.

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6. The Lord President's view is that the 1970 Convention does not apply in circumstances where the witness agrees to give evidence. In other words, it only applies where a witness refuses to give evidence and so needs to be compelled to do so.

Definitions of terms used within this guidance

- "Requesting jurisdiction" means the jurisdiction which wishes to take oral evidence from a witness based overseas by video link.
- "Requested jurisdiction" means the overseas jurisdiction from which it is proposed that a witness gives oral evidence.

Part B: Processes to be followed

7. It is the responsibility of the party calling the witness to ensure that permission is obtained by the tribunal in advance of a hearing at which the evidence is to be led.

Step 1 – Party makes request

8. If a party wishes to lead oral evidence from a witness located in a jurisdiction outside the UK, they should make SCTS tribunals' administration aware of this as soon as they become aware of the need for that witness to give evidence from outside the UK.

Step 2 – SCTS tribunals' administration asks party for more information

9. SCTS tribunals' administration should ask the party to clarify:
 - (a) whether the proposed witness is a citizen or a resident in the relevant jurisdiction (this information will be required in the event that the jurisdiction gives permission on a case-by-case basis);
 - (b) whether the proposed witness is spending time in the jurisdiction on a temporary basis (e.g. to visit family, attend a conference etc);
 - (c) when the witness will next be in the UK (if the witness spends part of their time in the UK, it may be more appropriate for evidence to be taken in person or by video link from another part of the UK); and
 - (d) whether the witness has any objections to the taking of evidence.
10. If a witness is spending a short period of time in another jurisdiction (e.g. on holiday) but is usually resident in the UK, it is unlikely to be appropriate to seek permission for that witness to give evidence remotely using this procedure. In many cases, this will be a disproportionate use of SCTS resources. Please note the considerations at [Step 4](#).

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Step 3 – SCTS tribunals’ administration checks whether requested jurisdiction has any objections to taking of evidence

11. On receipt of this request, SCTS tribunals’ administration should confirm whether the requested jurisdiction has made clear if it has any objections to the taking of evidence from within that jurisdiction. This should be checked using the following two-stage process.

Stage 1 – Check whether the jurisdiction has submitted a Country Profile for video evidence under the 1970 Convention

12. This stage is only applicable in scenarios where the witness whom it is proposed gives evidence remotely from overseas refuses to give such evidence. If the witness is content to give evidence, proceed to Stage 2.
13. SCTS tribunals’ administration should check whether this jurisdiction has submitted a response to the Permanent Bureau as to their position in relation to such requests on the following webpage:

<https://www.hcch.net/en/publications-and-studies/details4/?pid=6546&dtid=42>.

Where jurisdiction has submitted a Country Profile

14. SCTS tribunals’ administration should review the Country Profile. It is likely that the preferences of the jurisdiction will either appear in Chapter I, which sets out the contact point for submitting a letter of request, or Part IV, which sets out the legal considerations which apply to the use of Video-Links under the 1970 Convention. Note should be taken of any requirements set out in the Country Profile a copy of the Country Profile should be saved to your case file.

Where jurisdiction has not submitted a Country Profile

15. If the requested jurisdiction has not submitted a Country profile on the HCCH webpage linked above, proceed to Stage 2.

Stage 2 – Check whether the country is listed on the Foreign, Commonwealth and Development Office “Taking of evidence” webpage

16. The [“Taking of evidence” webpage](#) lists jurisdictions which have confirmed either that they object to the taking of evidence or have no such objection.
 - a. **No objection:** The jurisdictions in this category have given their permission to the taking of evidence from within their jurisdiction. Permission does not require to be sought for each case in which oral evidence is to be taken from within that country.
 - b. **Objection:** The jurisdictions in this category object to the taking of evidence from within their jurisdiction in all circumstances and so any

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request by a party to the tribunal to admit oral evidence from these jurisdictions must be refused.

17. However, this webpage does not represent a complete picture. Not all jurisdictions surveyed by the FCDO have confirmed whether or not they object to the taking of evidence from overseas.

Category A: jurisdictions with no objection

18. If the jurisdiction falls under the “no objection” list, SCTS tribunals’ administration should inform the party that it is possible for evidence to be led orally from that country. Provided that tribunal operational staff and the presiding tribunal member are content that the evidence of that witness should be led in this way for these proceedings, arrangements can be taken forward for the person to give evidence using video or telephone conferencing technology.

Category B: jurisdictions with an objection

19. If the jurisdiction has expressed an objection, evidence cannot be led from inside that jurisdiction. SCTS tribunals’ administration should inform the party that they will need to consider an alternative course of action, for example, whether the witness can travel to the UK or elsewhere to lead their evidence, or provide their evidence in a written format.

20. Any costs associated with facilitating the witness’s return to the UK or to a “Category A” jurisdiction are to be met by the party who leads that witness.

Category C: jurisdiction is not listed

21. If the jurisdiction is not listed on the webpage, it may be the case that requests for evidence to be taken remotely in tribunal proceedings will be considered by the requested jurisdiction on a case by case basis. Some jurisdictions, although they are not listed, may not be content for witnesses to give evidence remotely from within their jurisdiction.

22. Proceed to Step 4.

Caveat for certain cases covered by the 1970 Convention

23. See paragraph 6 above. In circumstances where:
- (a) the requested jurisdiction is not listed on the FCDO webpage;
 - (b) the requested jurisdiction has submitted a Country Profile on the 1970 Convention webpage setting out that they wish to receive requests by letters of request;
 - (c) the witness has **no objection** to giving oral evidence by video link in tribunal proceedings; and

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- (d) the presiding tribunal member is content that evidence can be led remotely from the jurisdiction;

it is not necessary to seek permission from the requested jurisdiction.

24. Instead the oral evidence can be taken by video link as proposed.

Step 4 – Presiding tribunal member considers whether it is appropriate in the particular case to seek permission for evidence to be taken remotely from within another jurisdiction

25. SCTS tribunals' administration should seek permission from the requested jurisdiction where:

- (a) the jurisdiction is one which has either:
 - (i) submitted a Country Profile on the 1970 Convention webpage setting out that it expects a letter of request from a requesting jurisdiction and the witness is refusing to give evidence; or
 - (ii) is not listed on the FCDO webpage; **and**
- (b) the tribunal member presiding over a case has decided that it is appropriate, in the circumstances of the case, to seek permission from the requesting jurisdiction for a witness to give evidence remotely from that jurisdiction.

26. In considering whether it is appropriate for Tribunal Administration to seek permission, tribunal members should bear in mind the following considerations:

- (a) Is it possible for the witness's evidence to be submitted in a written format or taken by video link or in person when the witness returns to the UK (if applicable)? The responses gathered from the party at Step 2 should assist the tribunal member in considering whether the witness could give evidence in person / by video link from within the UK at another time.
- (b) Each request to the FCDO carries with it a £150 fee payable to the FCDO. Submitting responses carries financial implications for SCTS, particular as there is no guarantee of any response, positive or negative.
- (c) A number of the requests submitted by SCTS via the FCDO to date have not received a response from the foreign jurisdiction. Where a jurisdiction has not responded to FCDO's original consultation in which they asked how jurisdictions would treat requests for evidence to be led, it is unlikely that they will respond to requests for permission.

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- (d) Adjourning cases until permission is received may not be appropriate in every case and, depending on the facts and circumstances of the particular case, may have an adverse impact on the administration of justice.
 - (e) It is unlikely to be appropriate to seek permission for a witness to give evidence by video link while they are temporarily out of the UK, e.g. on holiday. Instead, consideration should be given as to whether hearings at which this witness is to give evidence should be scheduled for a date on which this person has returned from holiday / overseas travel.
 - (f) There is no process by which expedited requests can be submitted to the FCDO.
 - (g) It may be necessary, in the interests of justice, for example where evidence needs to be led on the merits of an emergency order, for the tribunal member to make a decision to proceed to take oral evidence from a witness based overseas without that jurisdiction's permission. Such occasions should be rare.
27. It is not practicable for SCTS to facilitate each and every request from parties that witnesses lead evidence remotely from another jurisdiction where the jurisdiction is not listed on the "Taking of evidence" webpage or has submitted a response to the 1970 Convention. The President of the Scottish Tribunals requests every tribunal member consider carefully considerations (a)-(g) above before making a request.

Step 5 - Inform party that evidence will require to be taken by another means or proceed to seek permission

28. If, having considered the issues outlined above, the tribunal member decides it is **not** appropriate for permission to be sought for video evidence to be taken, SCTS tribunals' administration should inform the party that they will require to consider an alternative course of action, for example, travelling to the UK to give evidence in person or to provide their evidence in a written format.
29. If, having considered the issues outlined above, the tribunal member decides it is appropriate for permission to be sought for evidence to be taken, SCTS tribunals' administration should follow Step 6A or Step 6B, depending on the circumstances.

Step 6A – Seek permission from 1970 Convention signatory via video link using a letter of request

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30. A template letter of request can be found at **Appendix A**. Please note that, although the form invites a response date and a date of the hearing(s) at which evidence is to be given, there is a risk that permission may not be granted in advance of the date fixed. The contact details of the office / individual to which the letter of request should be sent will be set out in the Country Profile.

Step 6B – Submit request for permission to FCDO

31. SCTS tribunals' administration should contact the Foreign, Commonwealth and Development Office Taking of Evidence team (TOE.Enquiries@fcdo.gov.uk) using the template at **Appendix B**. **N.B.** The exception to this is where it is proposed that evidence be led from Singapore or Sweden. The governments of those states ask to be contacted directly with requests. See **Category D: Singapore and Sweden** below for more details. Although the form invites a response date and a date of the hearing(s) at which evidence is to be given, there is a risk that permission may not be granted in advance of the hearing.
32. From the date on which SCTS tribunals' administration contact the FCDO, it can take **at least** 25 working days for the FCDO to confirm receipt. The FCDO will ask SCTS for information about the tribunal proceedings such as the nature of the proceedings, the date of the hearing(s) and whether the witness is a resident or citizen of the relevant jurisdiction.
33. The FCDO will use this information to submit a specific request to the Ministry of Foreign Affairs in the jurisdiction in which evidence is sought to be led. The FCDO charge a fee of £150 for this service. This fee will be paid by SCTS.
34. The template email to the FCDO, found at **Appendix B**, asks the FCDO to confirm receipt of the SCTS request and notify SCTS that such a request has been made to the requested jurisdiction on the date that it is so made.
35. The FCDO allows a foreign jurisdiction 20 working days, "the waiting period", to respond to a request for permission.
36. The FCDO had initially indicated that, in the event that the FCDO receives no response from the foreign jurisdiction within the waiting period, the FCDO would respond and recommend to SCTS that the taking of evidence does not take place.
37. Since the roll-out of this guidance in November 2023, there have been a number of tribunal cases in which the FCDO did not confirm to SCTS whether the foreign

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jurisdiction had responded to the request within the waiting period. The following approach is recommended if the following scenarios arise.

Scenario A - FCDO does not confirm receipt of the request or confirms receipt but does not confirm when it sends the request onto the requested jurisdiction

38. In these circumstances, it is for the presiding tribunal member to determine whether evidence could still be taken from within that jurisdiction, bearing in mind the considerations set out at Step 4 above. The template email to the FCDO, found at Appendix B, informs the FCDO of this approach.

39. Please note that the 27 day time period begins to run on the date on which SCTS sends a request for permission to the FCDO (meaning that it includes the date of the request).

Scenario B - FCDO does not respond to confirm whether permission was given or not

40. In these circumstances, it is for the presiding tribunal member to determine whether evidence should be taken from within that jurisdiction, bearing in mind the considerations set out at Step 4 above. The template email to the FCDO, found at Appendix B, informs the FCDO of this approach.

41. Please note that the 27 day time period begins to run on the date on which FCDO sends a request for permission to the requested jurisdiction (meaning that it includes the date the request is sent to the requested jurisdiction).

If permission is granted

42. Arrangements can be taken forward for the person to give evidence using video or telephone conferencing technology, provided that tribunal operational staff and the tribunal member(s) presiding over the proceedings are content that the evidence of that witness should be led in this way for these proceedings.

If permission is refused

43. SCTS tribunals' administration should inform the party that they will need to consider an alternative course of action, for example, whether the witness can travel to the UK or elsewhere to give evidence in person or to provide their evidence in a written format.

44. Any costs associated with facilitating the witness's return to the UK or to a "Category A" jurisdiction are to be met by the party who leads that witness.

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Category D: Singapore and Sweden

45. Both Singapore and Sweden ask that requests for oral evidence which is to be taken from within their jurisdictions be considered on a case by case basis but that their officials are contacted **directly** to request permission.
46. SCTS tribunals' administration should make contact with the authorities in these jurisdictions using the email address provided below to confirm whether the requested jurisdiction consents to the taking of that evidence from their jurisdiction at diplomatic level. The Singaporean / Swedish government will consider the request and confirm whether it grants or refuses the request.
- Singapore: [MLAW Intl Legal@mlaw.gov.sg](mailto:MLAW_Intl_Legal@mlaw.gov.sg) Sweden: ju.birs@gov.se

If permission is granted

47. Arrangements can be taken forward for the person to give evidence using video or telephone conferencing technology, provided that tribunal operational staff and the tribunal member(s) presiding over the proceedings are content that the evidence of that witness should be led in this way for these proceedings.

If permission is refused

48. SCTS tribunals' administration should inform the party that they will need to consider an alternative course of action, for example, whether the witness can travel to the UK or elsewhere to lead their evidence in person or to provide their evidence in a written format.
49. Any costs associated with facilitating the witness's return to the UK or to a "Category A" jurisdiction are to be met by the party who leads that witness.

Step 7 – Take the relevant evidence (by video link, if so granted, or by other means)

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Appendix A – Template letter of request for evidence to be taken by video link under the 1970 Convention

1. Applicant

[Name of tribunal staff member, Chamber / Tribunal, Scottish Courts and Tribunals Service]

2. Central Authority of the Requested State

[Central Authority of country from which it is proposed video evidence is taken as shown on their Country Profile]

3. Person to whom the executed request is to be returned

[Name of tribunal staff member, Chamber / Tribunal, Scottish Courts and Tribunals Service]

4. Date by which requesting authority requires response to letter of request and

[DD MONTH YYYY - Please spell out the name of the month in each date.]

5. Reasons response is requested by this date

[Reasons for requesting response by this date e.g. hearing scheduled.]

As required by the Central Authority of the Requested State in conformity with Article 3 of the convention, the undersigned applicant has the honour to submit the following request for evidence to be taken directly by the requesting judicial authority via video link:

6. Requesting judicial authority

[Name of Chamber / Tribunal, Scottish Courts and Tribunals Service]

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7. Competent authority of
- [Jurisdiction from which it is requested evidence is taken by video link]
8. Case name
- [insert case name and reference number]
9. Names and address of each party and their representatives (if any)
- [insert names and addresses of parties and representatives]
10. Nature of proceedings
- [please insert some details of the nature of the tribunal proceedings]
11. Summary of both parties' positions
- [insert high level detail as to parties' positions in relation to the case]
12. Evidence to be obtained by video link and purpose of such evidence
- [insert details]
13. Identity and address of witness to give evidence by video link
- [insert name and address]

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14. Issues about which witness is to be examined

[XXXXXX]

15. Whether it will be necessary for evidence to be given on oath or affirmation

[confirm whether this is the case]

16. Method by which evidence will be taken

[confirm that evidence will be led orally and whether there will be cross-examination]

17. Video-conferencing platform to be used

[confirm whether evidence will be taken via WebEx or Teams]

18. Judges presiding over the hearing(s)

[confirm which tribunal member(s) will be presiding over the case via hyperlink]

19. I confirm that there will be no cost implications for the requested state arising from taking the evidence of this witness by video link (please tick to confirm).

20. I confirm that the witness does not consent to giving evidence in these proceedings by video link and therefore we request that they are compelled to do so.

21. Date of request

[DD MONTH YYYY - Please spell out the name of the month in each date.]

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22. Signature of applicant
(Tribunal staff member)

23. Signature of judge(s)
presiding over case

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Appendix B – Template email to FCDO requesting permission for evidence to be taken by video link

Good *[morning/afternoon]*,

A party to proceedings in the *[specify chamber if applicable and Tribunal]* indicates that a witness proposes to give evidence by video link at *[a]* hearing(s) on *[DD MONTH YYYY]* from *[specify foreign jurisdiction]*. The presiding judge has agreed that this request should be made.

The witness is *[resident in / a citizen of / working in]* the requested jurisdiction.

As the requested jurisdiction has not submitted a Country Profile stating that it agrees that the Hague Convention 1970 on the Taking of Evidence in Civil and Commercial Proceedings applies to the taking of evidence by video link, we have not submitted a letter of request seeking permission to lead such evidence. We kindly ask that you request permission from the Ministry of Justice of *[specify requested jurisdiction]* for this witness to give evidence remotely at the aforementioned hearing.

Please confirm receipt of this email and, on the date that you send the request to the foreign jurisdiction, “the FCDO request date”, notify us that such a request has been made.

From the date of the FCDO request date, SCTS will wait 27 working days for a response from the FCDO. If we do not receive a response confirming whether permission has or has not been received during that time period, the tribunal judge will take a decision about whether to postpone the hearing or take the evidence having regard to the interests of justice.

If we do not receive confirmation of receipt of this email or confirmation of the date on which you send the request to the foreign jurisdiction within 27 days of submitting our response to the FCDO, the tribunal judge will take a decision about whether to postpone the hearing or take the evidence having regard to the interests of justice.

Thank you for your assistance with this request.

Yours sincerely,

[staff name, title and email signature]

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Appendix C – Process map

