Stephen Vokes: Nationality and Borders Act 2022
Adam Pipe: The New Practice Directions and Statements

No8 Chambers Immigration Webinar 27.6.22 3:30-5:00pm

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Practicalities:

- **Please feel free to keep your camera on but mute your microphone throughout;**
- **Type any questions in the chat as we proceed;**
- **There will also be time at the end to unmute and ask your questions;**
- **Adam will share the PowerPoint (a PDF copy has been emailed out);**
- **The session is <u>not</u> being recorded**

Nationality and Borders Act 2022

Stephen Vokes Head of Immigration Team No8 Chambers

87 Commencement

(1)Subject to subsections (3) to (5), this Act comes into force on such day as the Secretary of State appoints by regulations.

(2)Regulations under subsection (1) may appoint different days for different purposes or areas.

(3)The following provisions come into force on the day on which this Act is passed—

(a)section 10(1) and (6) to (8) (effect of failure to give notice of pre-commencement decision to deprive a person of citizenship);

(b)sections 70, 71 and 73 (visa penalties in relation to countries posing a risk to international peace and security etc);

(c)this Part.

(4)The following provisions come into force on the day on which this Act is passed for the purposes of making (and, where required, consulting on) regulations—

(a)section 14 (requirement to make asylum claim at “designated place”);

(b)section 27 (accelerated detained appeals);

(c)section 42 and Schedule 5 (penalty for failure to secure goods vehicle etc);

(d)section 43 (working in United Kingdom waters: arrival and entry);

(e)section 50 (persons subject to immigration control: referral or age assessment by local authority);

(f)section 52 (use of scientific methods in age assessments);

(g)section 53 (regulations about age assessments);

(h)section 69 (interpretation of Part 5);

(i)section 82 (pre-consolidation amendments of immigration legislation).

87 Commencement

(5)The following provisions come into force at the end of the period of two months beginning with the day on which this Act is passed—

(a)section 28 (claims certified as clearly unfounded: removal of right of appeal);

(b)paragraphs 5 to 19 of Schedule 4, and section 29 so far as it relates to those paragraphs (removal of asylum seeker to safe third country);

(c)section 30(1), (2) and (4) to (6) (Refugee Convention: general);

(d)sections 31 to 36 and 38 (interpretation of Refugee Convention);

(e)section 39 (interpretation of Part 2);

(f)section 44 (power to search container);

(g)section 49(1) to (4) (interpretation of Part 4);

(h)sections 72 and 74 (visa penalties in relation to uncooperative countries);

(i)section 78 (counter-terrorism questioning of detained entrants away from place of arrival).

28 Claims certified as clearly unfounded: removal of right of appeal

(1)The Nationality, Immigration and Asylum Act 2002 is amended in accordance with subsections (2) and (3).

(2)In section 92 (place from which an appeal may be brought or continued)—

(a)in each of subsections (2)(a) and (3)(a), for "94(1) or (7) (claim clearly unfounded or removal to a safe third country)" substitute "94(7) (removal to a safe country)";

(b)in each of subsections (6) and (8), for "94(1) or (7)" substitute "94(7)".

(3)In section 94 (appeal from within the United Kingdom: unfounded human rights or protection claim)—

(a)after subsection (3) insert—

"(3A)A person may not bring an appeal under section 82 against a decision if the claim to which the decision relates has been certified under subsection (1).";

(b)in subsection (4), for "Those States" substitute "The States";

(c)for the heading substitute "Certification of human rights or protection claims as unfounded or removal to safe country".

(4)The amendments made by this section do not apply in relation to a protection claim or human rights claim that was certified by the Secretary of State under section 94(1) before the coming into force of this section.

29 Removal of asylum seeker to safe country

29 Removal of asylum seeker to safe country

Schedule 4 makes amendments to—

(a)section 77 of the Nationality, Immigration and Asylum Act 2002 (no removal while claim for asylum pending), and

(b)Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (removal of asylum seeker to safe country).

30 Refugee Convention: general

(1)The following sections apply for the purposes of the determination by any person, court or tribunal whether a person (referred to in those sections as an "asylum seeker") is a refugee within the meaning of Article 1(A)(2) of the Refugee Convention—

(a)section 31 (persecution);

(b)section 32 (well-founded fear);

(c)section 33 (reasons for persecution);

(d)section 34 (protection from persecution);

(e)section 35 (internal relocation).

(2)Section 36 applies for the purposes of the determination by any person, court or tribunal whether the provisions of the Refugee Convention do not apply to a person as a result of Article 1(F) of that Convention (disapplication of Convention to serious criminals etc).

(3)Section 37 applies for the purposes of the determination by any person, court or tribunal whether Article 31(1) of the Refugee Convention (immunity from certain penalties) applies in relation to a person who is a refugee within the meaning of Article 1(A)(2) of the Refugee Convention.

(4)The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (S.I. 2006/2525) are revoked.

(5)Subsections (1) and (2), and sections 31 to 36, apply only in relation to a determination relating to a claim for asylum where the claim was made on or after the day on which this section comes into force.

(6)For the purposes of subsection (5), a claim for asylum includes a claim, in any form or to any person, which falls to be determined as mentioned in subsection (1).

31 Article 1(A)(2): persecution

(1)For the purposes of Article 1(A)(2) of the Refugee Convention, persecution can be committed by any of the following (referred to in this Part as “actors of persecution”)—

(a)the State,

(b)any party or organisation controlling the State or a substantial part of the territory of the State, or

(c)any non-State actor, if it can be demonstrated that the actors mentioned in paragraphs (a) and (b), including any international organisation, are unable or unwilling to provide reasonable protection against persecution.

(2)For the purposes of that Article, the persecution must be—

(a)sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right, in particular a right from which derogation cannot be made under Article 15 of the Human Rights Convention, or

(b)an accumulation of various measures, including a violation of a human right, which is sufficiently severe as to affect an individual in a similar manner as specified in paragraph (a).

31 Article 1(A)(2): persecution

(3)The persecution may, for example, take the form of—

(a)an act of physical or mental violence, including an act of sexual violence;

(b)a legal, administrative, police or judicial measure which in itself is discriminatory or which is implemented in a discriminatory manner;

(c)prosecution or punishment which is disproportionate or discriminatory;

(d)denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e)prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts as described in Article 1(F) of the Refugee Convention (on which, see section 36).

32 Article 1(A)(2): well-founded fear

(1)In deciding for the purposes of Article 1(A)(2) of the Refugee Convention whether an asylum seeker's fear of persecution is well-founded, the following approach is to be taken.

(2)The decision-maker must first determine, on the balance of probabilities—

(a)whether the asylum seeker has a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (or has such a characteristic attributed to them by an actor of persecution), and

(b)whether the asylum seeker does in fact fear such persecution in their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence) as a result of that characteristic.

(See also section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (asylum claims etc: behaviour damaging to claimant's credibility).)

32 Article 1(A)(2): well-founded fear

(3)Subsection (4) applies if the decision-maker finds that—

(a)the asylum seeker has a characteristic mentioned in subsection (2)(a) (or has such a characteristic attributed to them), and

(b)the asylum seeker fears persecution as mentioned in subsection (2)(b).

(4)The decision-maker must determine whether there is a reasonable likelihood that, if the asylum seeker were returned to their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence)—

(a)they would be persecuted as a result of the characteristic mentioned in subsection (2)(a), and

(b)they would not be protected as mentioned in section 34.

(5)The determination under subsection (4) must also include a consideration of the matter mentioned in section 35 (internal relocation).

33 Article 1(A)(2): reasons for persecution

(1)For the purposes of Article 1(A)(2) of the Refugee Convention—

(a)the concept of race may include consideration of matters such as a person's colour, descent or membership of a particular ethnic group;

(b)the concept of religion may include consideration of matters such as—

(i)the holding of theistic, non-theistic or atheistic beliefs,

(ii)the participation in formal worship in private or public, either alone or in community with others, or the abstention from such worship,

(iii)other religious acts or expressions of view, or

(iv)forms of personal or communal conduct based on or mandated by any religious belief;

(c)the concept of nationality is not confined to citizenship (or lack of citizenship) but may include consideration of matters such as membership of a group determined by its cultural, ethnic or linguistic identity, common geographical or political origins or its relationship with the population of another State;

(d)the concept of political opinion includes the holding of an opinion, thought or belief on a matter related to a potential actor of persecution and to its policies or methods, whether or not the person holding that opinion, thought or belief has acted upon it.

33 Article 1(A)(2): reasons for persecution

(2)A group forms a particular social group for the purposes of Article 1(A)(2) of the Refugee Convention only if it meets both of the following conditions.

(3)The first condition is that members of the group share—

(a)an innate characteristic,

(b)a common background that cannot be changed, or

(c)a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.

(4)The second condition is that the group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

(5)A particular social group may include a group based on a common characteristic of sexual orientation, but for these purposes sexual orientation does not include acts that are criminal in any part of the United Kingdom.

34 Article 1(A)(2): protection from persecution

(1)For the purposes of Article 1(A)(2) of the Refugee Convention, protection from persecution can be provided by—

(a)the State, or

(b)any party or organisation, including any international organisation, controlling the State or a substantial part of the territory of the State.

(2)An asylum seeker is to be taken to be able to avail themselves of protection from persecution if—

(a)the State, party or organisation mentioned in subsection (1) takes reasonable steps to prevent the persecution by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution, and

(b)the asylum seeker is able to access the protection.

35 Article 1(A)(2): internal relocation

(1)An asylum seeker is not to be taken to be a refugee for the purposes of Article 1(A)(2) of the Refugee Convention if—

(a)they would not have a well-founded fear of being persecuted in a part of their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence), and

(b)they can reasonably be expected to travel to and remain in that part of the country.

(2)In considering whether an asylum seeker can reasonably be expected to travel to and remain in a part of a country, a decision-maker—

(a)must have regard to—

(i)the general circumstances prevailing in that part of the country, and

(ii)the personal circumstances of the asylum seeker;

(b)must disregard any technical obstacles relating to travel to that part of that country.

36 Article 1(F): disapplication of Convention in case of serious crime etc

(1)A person has committed a crime for the purposes of Article 1(F)(a) or (b) of the Refugee Convention if they have instigated or otherwise participated in the commission of the crimes specified in those provisions.

(2)In Article 1(F)(b), the reference to a serious non-political crime includes a particularly cruel action, even if it is committed with an allegedly political objective.

(3)In that Article, the reference to a crime being committed by a person outside the country of refuge prior to their admission to that country as a refugee includes a crime committed by that person at any time up to and including the day on which they are issued with a relevant biometric immigration document by the Secretary of State.

(4)For the purposes of subsection (3), a relevant biometric immigration document is a document that—

(a)records biometric information (as defined in section 15(1A) of the UK Borders Act 2007), and

(b)is evidence of leave to remain in the United Kingdom granted to a person as a result of their refugee status.

37 Article 31(1): immunity from penalties

(1)A refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country.

(2)A refugee is not to be taken to have presented themselves without delay to the authorities unless—

(a)in the case of a person who became a refugee while they were outside the United Kingdom, they made a claim for asylum as soon as reasonably practicable after their arrival in the United Kingdom;

(b)in the case of a person who became a refugee while they were in the United Kingdom—

(i)if their presence in the United Kingdom was lawful at that time, they made a claim for asylum before the time when their presence in the United Kingdom became unlawful;

(ii)if their presence in the United Kingdom was unlawful at that time, they made a claim for asylum as soon as reasonably practicable after they became aware of their need for protection under the Refugee Convention.

(3)For the purposes of subsection (2)(b), a person's presence in the United Kingdom is unlawful if they require leave to enter or remain and do not have it.

(4)A penalty is not to be taken as having been imposed on account of a refugee's illegal entry or presence in the United Kingdom where the penalty relates to anything done by the refugee in the course of an attempt to leave the United Kingdom.

37 Article 31(1): immunity from penalties

(5)In section 31 of the Immigration and Asylum Act 1999 (defences based on Art.31(1) of the Refugee Convention)—

(a)in subsection (2), for “have expected to be given” substitute “be expected to have sought”;

(b)after subsection (4) insert—

“(4A)But this section does not apply to an offence committed by a refugee in the course of an attempt to leave the United Kingdom.”

(6)In this section—

“claim for asylum” means a claim that it would be contrary to the United Kingdom’s obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom;

“country” includes any territory;

“refugee” has the same meaning as in the Refugee Convention.

38 Article 33(2): particularly serious crime

(1)Section 72 of the Nationality, Immigration and Asylum Act 2002 (serious criminal) is amended as follows.
(2)In subsection (1), for “protection” substitute “prohibition of expulsion or return”.
(3)In subsection (2)—
(a)in the words before paragraph (a)—
(i)for “shall be presumed to have been” substitute “is”;
(ii)omit “and to constitute a danger to the community of the United Kingdom”;
(b)in paragraph (b), for “two years” substitute “12 months”.
(4)In subsection (3)—
(a)in the words before paragraph (a)—
(i)for “shall be presumed to have been” substitute “is”;
(ii)omit “and to constitute a danger to the community of the United Kingdom”;
(b)in paragraph (b), for “two years” substitute “12 months”;
(c)in paragraph (c), for “two years” substitute “12 months”.

38 Article 33(2): particularly serious crime

(5)In subsection (4), in the words before paragraph (a)—

(a)for “shall be presumed to have been” substitute “is”;

(b)omit “and to constitute a danger to the community of the United Kingdom”.

(6)After subsection (5) insert—

“(5A)A person convicted by a final judgment of a particularly serious crime (whether within or outside the United Kingdom) is to be presumed to constitute a danger to the community of the United Kingdom.”

(7)In subsection (6), for “(2), (3) or (4)” substitute “(5A)”.

(8)In subsection (7), for “(2), (3) or (4)” substitute “(5A)”.

(9)In subsection (8), for “mentioned in subsection (6)” substitute “under subsection (5A)”.

(10)In subsection (9)(b), for “presumptions under subsection (2), (3) or (4) apply” substitute “a presumption under subsection (5A) applies”.

(11)In subsection (10)(b), for “presumptions under subsections (2), (3) or (4) apply” substitute “a presumption under subsection (5A) applies”.

(12)In subsection (11)(b)—

(a)in the opening words, for “two years” substitute “12 months”;

(b)in sub-paragraph (ia), for “two years”, in both places it occurs, substitute “12 months”;

(c)in sub-paragraph (iii), for “two years” substitute “12 months”.

(13)The amendments made by this section apply only in relation to a person convicted on or after the date on which this section comes into force.

The New Practice Directions and Statements

Adam Pipe No8 Chambers

New practice statement by the President of the First-Tier Tribunal (Immigration and Asylum Chamber) replaces all previous practice statements: Practice Statement No 1 of 2022

3.5 Judges and Legal Officers should not normally accept that it is impractical to start an appeal online by reason of temporary difficulties, such as those involved in registering with MyHMCTS or other problems of a technical nature, even where such problems may result in non-compliance with the time limits prescribed by rule 19. To prevent any disadvantage or unfairness that may otherwise result from such temporary difficulties, the following procedure should normally be followed in such circumstances –

(i) Where an appeal against an appealable decision is started offline and the Tribunal concludes that it would be reasonably practicable to start that appeal online, the appellant shall be notified that the appeal has been stayed for a period of three months under rule 4(3)(j) in the expectation that the appeal will be recommenced online.

(ii) Where the Tribunal accepts an online appeal that is substantially the same as an earlier offline appeal, those appeals should normally be consolidated under rule 4(3)(b).

(iii) Where an offline appeal against an appealable decision is brought within the relevant time limit prescribed by rule 19 and is stayed under (i) above, the Tribunal should normally grant an application to extend the time for starting an online appeal provided that (a) the online appeal is substantially the same as the earlier offline appeal, and (b) the online appeal was started within 14 days of being sent notice of the stay of the offline appeal. For the avoidance of doubt, all other applications for an extension of time to start an appeal (whether offline or online) should be determined upon their individual merits.

(iv) Where the stay of an offline appeal under (i) above ends without an online appeal being brought under (iii) above, the offline appeal shall be decided without a hearing under rule 25(1).

Practice Statement No 1 of 2022

5. <u>Review of decision of Legal Officer</u>

5.1 Where a Legal Officer makes any decision then, in accordance with rule 3(4), the decision must include the following:

"*The decision to issue this Notice was taken by a Legal Officer in exercise of a specified power granted by the Senior President of Tribunals under rule 3(2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. You may within 14 days of the date of this notice apply to the Tribunal in writing for the matter to be considered afresh by a judge under rule 3(4) of the Tribunal Procedure Rules 2014."*

Practice Statement No 1 of 2022

6. <u>Record of proceedings</u>

6.1 Any application for access to the audio record or other written document made in its stead shall be made in writing to the President.

6.2. The application must include:

(a) the appeal reference number;

(b) the date or dates of the hearing or CMA in respect of which the application is made;

(c) the purpose for which access is sought;

(d) whether an anonymity order is in place with respect to that appeal;

(e) an undertaking that the record of proceedings will be used:

(i) only for the purpose or purposes stated in the application; and

(ii) that any conditions imposed will be adhered to;

(f) a statement as follows: *"I understand that a breach of the undertaking which I have given may result in contempt proceedings being brought against me.";*

(g) if a fee is required proof of payment of that fee.

Practice Statement No 1 of 2022

10. Where an appeal is brought online using "MyHMCTS"

10.1 Model Directions appear at Annex A and will usually apply in all online appeals using MyHMCTS where an appellant is represented.

11. Where an appeal is brought, or case managed online, not using "MyHMCTS"

11.1 Model Directions appear at Annex B and will usually apply in all online appeals not using MyHMCTS. They should ordinarily be used where the Tribunal accepts that it is not reasonably practicable for the appeal to proceed using MyHMCTS.

Practice Statement No 1 of 2022

14. Child, vulnerable adult and sensitive appellants

14.1 In the case of a child, vulnerable adult and/or sensitive appellant, regard is to be had in the first instance to the latest version of the Equal Treatment Bench Book. Where it appears to the Tribunal that a Litigation Friend (in Scotland, Curator ad Litem), an Intermediary or a ground rules hearing may be required the matter shall be referred to the Resident Judge.

https://www.judiciary.uk/publications/december-interim-revision-of-the-equal-treatment-bench-book-issued/

15. Anonymity directions and orders

15.1 When considering if an anonymity direction should be made, guidance issued by the President should be followed.

https://www.judiciary.uk/wp-content/uploads/2022/03/Anonymity-Guidance-MAC-March-2022.pdf

16 Granting of bail

16.1 When considering an application for bail, guidance issued by the President should be followed.

https://www.judiciary.uk/wp-content/uploads/2018/05/bail-guidance-2018-final.pdf

Practice Statement No 1 of 2022: ANNEX A

A.2 Grounds of appeal are not required when a Notice of Appeal is provided to the Tribunal in the online procedure.

A.3 *Respondent's Bundle.* Not later than 28 days after the Notice of Appeal is provided, the respondent must provide a bundle compliant with rule 24(1) of the Tribunal Procedure (First- tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. This bundle must include the refusal decision and any material submitted in support of the application.

A.4 *Appeal Skeleton Argument.* Not later than 28 days after the respondent's bundle is provided, or 42 days after the Notice of Appeal, whichever is the later, the appellant must provide an Appeal Skeleton Argument ("ASA").

A.5 The ASA must contain three sections: (1) a brief summary of the appellant's factual case; (2) a schedule of issues; (3) the appellant's brief submissions on those issues which should state why the appellant disagrees with the respondent's decision with sufficient detail to enable the reasons for the challenge to be understood. A template is available online.

A.6 The ASA must:

(a) be concise;

(b) be set out in numbered paragraphs;

(c) engage with the decision letter under challenge;

(d) not include extensive quotations from documents or authorities;

(e) identify but not quote from any evidence or principle of law that will enable the basis of challenge to be understood.

A.7 *Appellant's Bundle.* Where the ASA refers to material which is not included in the respondent's bundle, that material must be provided in an indexed and paginated bundle at the same time.

A.8 *Respondent's Response.* Within fourteen days of the ASA being provided the respondent must undertake a meaningful review of the appellant's case, taking into account the ASA and appellant's bundle, providing the result of that review and particularising the grounds of refusal relied upon.

Practice Statement No 1 of 2022: ANNEX A

A.13 Any material provided outside the time limits may not be relied upon without leave.

A.14 Where any material is provided after 5 working days prior to the hearing, including on the day of the hearing, the Judge must deal with the admissibility of that material at the hearing as a preliminary matter.

A.15 A party may not rely on material which has not been provided.

A.16 If an application is made to admit material and

(a) the material is ruled inadmissible the material shall not be uploaded, though the Judge must give reasons in the Decision and Reasons for the exclusion of that material and identify the material excluded, and

(b) the material is admitted the Judge must stand the appeal down and cause the material to be uploaded as soon as reasonably practicable and will not proceed with the appeal until the material has been uploaded. The original material uploaded shall be returned to the party who provided it unless there is a good reason for not doing so.

A.17 A party may apply to adduce material after the hearing has concluded but only in exceptional circumstances. Such material will only be admissible upon application unless the Judge has directed the provision of that material. The application must be made using the online procedure, unless it is made orally at the hearing. Any material ruled admissible **must** be uploaded.

A.18 The Tribunal may not accept any material after the Decision and Reasons has been promulgated. This direction does not apply to any application for permission to appeal to the Upper Tribunal.

Practice Statement No 1 of 2022: ANNEX B

Provision of Information by the Parties

B.1 Within 5 working days of the date of this Notice parties must provide a direct contact number and dedicated email address to the Tribunal and to the other party to enable the Tribunal and the parties to communicate online and to take part in such remote hearings as are required.

Provision of Documents

B.2 These Directions refer throughout to material being 'provided'. Material must be provided by email to the email address which appears at the foot of this Notice and to the other party or made available in such remote hearings as are required.

Practice Statement No 1 of 2022: ANNEX B

Appeal Skeleton Argument

B.4 Not later than 28 days after the respondent's bundle is provided, or 42 days after the Notice of Appeal, whichever is the later the appellant must provide an Appeal Skeleton Argument ("ASA").

B.5 The ASA must contain three sections:

(a) a brief summary of the appellant's factual case;

(b) a schedule of issues;

(c) the appellant's brief submissions on those issues which should state why the appellant disagrees with the respondent' s decision with sufficient detail to enable the reasons for the challenge to be understood.

B.6 The ASA must:

(a) be concise;

(b) be set out in numbered paragraphs;

(c) engage with the decision letter under challenge;

(d) not include extensive quotations from documents or authorities;

(e) Identify but not quote from any evidence or principle of law that will enable the basis of challenge to be understood.

Appellant's Bundle

B.7 Where the ASA refers to material, which is not included in the respondent's bundle, that material must be provided in an indexed and paginated bundle at the same time.

Practice Statement No 1 of 2022: ANNEX B

Late Material

B.12 Any material provided to the Tribunal outside the time limits provided for in paragraph 8 may not be relied upon without leave.

B.13 Where any material is provided after 5 working days prior to the hearing, including on the day of the hearing, the Judge must deal with the admissibility of that material at the hearing of the appeal as a preliminary matter.

Updated guidance on taking oral evidence from abroad issued by the First-Tier Tribunal (Immigration and Asylum Chamber): Presidential Guidance Note No 2 of 2022

Summary

A. The decision of the Presidential Panel of the Upper Tribunal in Agbabiaka (evidence from abroad; Nare guidance) [2021] UKUT 286 (IAC) has amended the guidance previously given by the Vice Presidential Panel in Nare (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC). The obligation continues to rest upon the party proposing to adduce oral evidence from overseas by video or telephone link, to establish to the satisfaction of the First- tier Tribunal (IAC) that there is no legal or diplomatic barrier to their doing so.

B. A party may rely upon written submissions, or, written evidence that has been supplied by an individual who is situated within the territory of another state, without needing to establish to the satisfaction of the First-tier Tribunal (IAC) that there is no legal or diplomatic barrier to their doing so.

C. An appellant who is unrepresented, and situated within the territory of another state, and, who wishes to speak in support of their appeal by video or telephone, rather than to simply observe the hearing of their appeal, will need to establish to the satisfaction of the First-tier Tribunal (IAC) that there is no legal or diplomatic barrier to their doing so. Any submissions they wish to advance may be made in writing.

D. Each case will be considered upon its own merits, but even if a party is able to establish that there is no legal or diplomatic objection to a witness giving oral evidence to the Tribunal by video or telephone from the territory in which they are situated, it will remain a matter of judicial discretion by reference to the overriding objective as to whether such oral evidence should be admitted.

Presidential Guidance Note No 2 of 2022

E. This guidance does not affect the obligations upon the Secretary of State for the Home Office in appeals certified by her under section 94B of the 2002 Act; she will continue to provide the necessary assistance for an appellant to give evidence from outside the United Kingdom, or facilitate their return to be able to pursue their appeal in-country, in accordance with the guidance to be found in R (Kiarie & Byndloss) v Secretary of State for the Home Department [2017] UKSC 42.

F. This guidance does not affect the ability of any individual to observe a hearing before the First- tier Tribunal (IAC) from overseas by video link.

G. On 29 November 2021 the Secretary of State for Foreign, Commonwealth and Development Affairs established a new "Taking of Evidence Unit" ["ToE"]. The ToE will establish the stance of different overseas governments to the taking of oral evidence from individuals within their jurisdiction by the First-tier Tribunal (IAC), and the response of the ToE to an enquiry made in the course of an appeal about the stance of a particular overseas government shall be determinative of the matter for the purposes of the First-tier Tribunal (IAC).

Presidential Guidance Note No 2 of 2022

H. In order to make the process as efficient and user-friendly as possible, from 7 April 2022 HMCTS with the ToE to assume responsibility for contacting the ToE on behalf of any party who has notified the First-tier Tribunal (IAC) that they propose to rely upon oral evidence from a person overseas.

I. Given the potential for delay whilst the stance of a particular overseas government is determined it will always be a matter for judicial discretion by reference to the overriding objective as to whether determination of proceedings should be delayed. The First-tier Tribunal (IAC) will balance the prospect for delay against the ability of the party to rely upon detailed written evidence.

Presidential Guidance Note No 2 of 2022

11. Parties to proceedings in which a party may wish to rely upon oral evidence given by an individual from outside the territory of the United Kingdom by video or telephone in the course of an appeal that has not been certified under s94B of the 2002 Act, must follow this procedure:

a) The party wishing to rely upon oral evidence from overseas must inform the First-tier Tribunal (IAC) and the other party, of their intention to do so at the earliest possible date. They should notify the Tribunal and the opposing party of;

(i) the name of the proposed witness,

(ii) the country in which that individual is situated, and,

(iii) identify the issues upon which it is proposed that individual should offer evidence, with an indication of what evidence they are able to offer on those issues that is sufficient to allow a meaningful response from the opposing party.

b) The opposing party should respond within 14 days of receipt of such information to indicate what (if any) aspects of the evidence of the witness are likely to be in dispute.

c) If no aspect of the evidence is likely to be in dispute, it will in most cases be most appropriate for the party wishing to rely on the oral evidence from an individual overseas simply to rely on a detailed witness statement and not call the witness to give evidence.

Presidential Guidance Note No 2 of 2022

d) Upon the party informing the First-tier Tribunal (IAC) of their intention to rely upon oral evidence from overseas, HMCTS will contact the ToE on their behalf and enquire whether the FCDO is aware of any diplomatic or other objection from the authorities in the country in which the witness is situated to their providing oral evidence by video or telephone to an administrative tribunal in the United Kingdom. That request will not identify the nature of the proceedings before the Tribunal, the appellant, or, the witness.

e) If the FCDO's response is that the country in which the witness is located has given its consent to oral evidence being given to an administrative tribunal in the United Kingdom, then the party wishing to rely on the oral evidence from an individual who is overseas must apply, on notice to the opposing party, to the Resident Judge of the Hearing Centre to which the application or appeal has been allocated for permission to call oral evidence from the individual in question from the country in question, supported by:

(i) an explanation of the practical steps proposed for the individual in question to give oral evidence, and circumstances in which they would do so, bearing in mind the time zones involved,

(ii) an undertaking to be responsible for any expenses incurred in the course of implementing those practical steps,

(iii) a witness statement from the individual in question that explains why they are unable to attend the hearing in person, and provides their detailed written evidence upon the issues that remain in dispute in the proceedings,

(iv) copies of the correspondence with the opposing party upon the proposal to call such evidence, and any attempts to narrow the relevant disputed issues in the proceedings

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12. In the event that the ToE receives no response to an enquiry made through the British Embassy or British High Commission it will be a matter for the FCDO, alone, to determine whether, and if so when, the inference may be drawn that the country in question raises no objection to the proposed oral evidence being taken.

13. Since there is the obvious potential for the determination of an application or an appeal to be significantly delayed whilst enquiries are made into whether there is an objection against reliance upon oral evidence from abroad it will always be a matter for judicial discretion by reference to the Overriding Objective as to whether the listing of the application or appeal should be delayed to allow such enquiries to proceed, or should continue to be further delayed to allow such enquiries to be concluded. The Tribunal will balance the prospect for delay against the ability of the party to rely upon the detailed written evidence filed upon the relevant disputed issues, when seeking to ensure that insofar as is reasonably practicable the best evidence is before the Tribunal upon the disputed issues that are central to the proceedings [4]. This guidance should not be taken to be prescriptive or exhaustive, but the following are likely to be relevant considerations;

a) if delay could be avoided altogether by the witness travelling to a third country where it is known there are no diplomatic objections to the giving of oral evidence,

b) if the Tribunal is not satisfied in the light of the detailed witness statement filed in support of the application that it is necessary for the witness to give oral evidence, (including those circumstances in which such oral evidence would not be determinative of the appeal),

c) if the Tribunal is not satisfied that oral evidence from the witness in question will be likely to materially add to the content of the detailed witness statement filed in support of the application, and,

d) if the Tribunal is satisfied that the witness could address the disputed issues adequately by providing written answers to questions posed by the opposing party and authorised by the Tribunal.

Presidential Guidance Note No 2 of 2022

14. This guidance does not affect the obligations upon the Secretary of State for the Home Office in appeals certified by her under section 94B of the 2002 Act; she will continue to provide the necessary assistance for an appellant to give evidence from outside the United Kingdom, or facilitate their return to be able to pursue their appeal in-country, in accordance with the guidance to be found in R (Kiarie & Byndloss) v Secretary of State for the Home Department [2017] UKSC 42.

15. A party may rely upon written submissions, or, written evidence that has been supplied by an individual who is situated within the territory of another state, without needing to establish to the satisfaction of the First-tier Tribunal (IAC) that there is no legal or diplomatic barrier to their doing so.

16. An appellant who is unrepresented, and situated within the territory of another state, and, who wishes to speak in support of their appeal by video or telephone, rather than to simply observe the hearing of their appeal, will need to establish to the satisfaction of the First-tier Tribunal (IAC) that there is no legal or diplomatic barrier to their doing so. Any submissions they wish to advance may be made in writing.

Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal

3.2 The Tribunal will hold a CMA or CMR whenever it considers it necessary to do so in order to further the overriding objective of dealing with cases fairly and justly under rule 2. This will include (but will not be limited to) holding a CMA or CMR for the purpose of –

(a) identifying and/or narrowing the issues, and consequentially the evidence necessary to decide the appeal;

(b) dealing with preliminary issues;

(c) deciding any applications made by either party;

(d) giving case management directions;

(e) deciding the mode of hearing;

(f) fixing a date for the final hearing.

3.3 It is important that the parties and their representatives understand that a CMR is a hearing in the appeal and that the appeal may be decided if a party does not appear and is not represented at that hearing.

3.4 In addition to the directions referred to above, at the end of a CMA or CMR the Tribunal will also give to the parties written confirmation of:

(a) any issues that have been agreed at a CMA or CMR as being relevant to the appeal; and

(b) any concessions made by a party.

Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal

4. *Adjournments*

4.1. An application for the adjournment of an appeal must be made no later than 16:00 one clear working day before the date of the hearing.

4.2. For the avoidance of doubt, where a case is listed for hearing on, for example, a Monday, the application must be received by 16:00 on the previous Thursday.

4.3. An application for an adjournment must be supported by full reasons.

4.4. Any application made later than the end of the period mentioned in paragraph 4.1 must be made at the hearing and will, save in exceptional circumstances, require the attendance of the party or the representative of the party seeking the adjournment.

4.5. **Parties must not assume that an application will be successful even if made in accordance with paragraph 4.1.**

4.6 If an adjournment is not granted and the party fails to attend the hearing, the Tribunal may proceed with the hearing in that party's absence.

Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal

5. Evidence Generally

5.1 A witness statement should be capable of standing as the totality of the evidence in chief of the person giving that statement.

5.2 A witness statement may be added to by the provision of a supplementary statement provided that the supplementary statement is filed and served in accordance with any directions given in the appeal.

5.3 Only in exceptional circumstances and with the leave of the Tribunal, will a witness be permitted to provide additional evidence in chief.

5.4 Where a hearing is adjourned because of the introduction of late evidence the Tribunal will consider whether to exercise its costs powers.

Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal

Body of witness statement

5.5 The witness statement must, if practicable, be in the intended witness's own words and must in any event be drafted in a language they understand. The statement should be expressed in the first person and should also state:

(a) the full name of the witness,

(b) their place of residence or, if they are making the statement in their professional, business or other occupational capacity, the address at which they work, the position they hold and the name of their firm or employer,

(c) their occupation, if they have one,

(d) the fact that they are a party to the proceedings or are the employee of such a party if it be the case, and

(e) the process by which it has been prepared, for example, face-to-face, over the telephone, and/or through an interpreter.

5.6 A witness statement must indicate:

(a) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and

(b) the source for any matters of information or belief.

Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal

5.7 An exhibit used in conjunction with a witness statement should be verified and identified by the witness and remain separate from the witness statement.

5.8 Where a witness refers to an exhibit or exhibits, they should state 'I refer to the (description of exhibit) marked…''.

5.9 Where a witness makes more than one witness statement to which there are exhibits, in the same proceedings, the numbering of the exhibits should run consecutively throughout and not start again with each witness statement.

Statement of Truth

5.10 A witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence. It must include a statement by the intended witness in their own language that they believe the facts in it are true.

5.11 To verify a witness statement the statement of truth is as follows:

'I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.'

Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal

5.12 Where a witness statement is in a language other than English—

(a) the party wishing to rely on it must—

(i) have it translated; and

(ii) file the translation and the foreign language witness statement with the tribunal; and

(b) the translator must sign the original statement and must certify that the translation is accurate.

Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal

6. Expert evidence

6.1 An expert's report should be addressed to the Tribunal and not to the party from whom the expert has received instructions.

6.2. An expert's report must:

(a) give details of the expert's qualifications;

(b) give details of any literature or other material which the expert has relied on in making the report;

(c) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;

(d) make clear which of the facts stated in the report are within the expert's own knowledge;

(e) say who carried out any examination, measurement or other procedure which the expert has used for the report, give the qualifications of that person, and say whether or not the procedure has been carried out under the expert's supervision;

Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal

7.2 A child, vulnerable adult or sensitive witness will only be required to attend as a witness and give evidence at a hearing where the Tribunal determines that the evidence is necessary to enable the fair hearing of the appeal and their welfare would not be prejudiced by doing so.

7.3 In determining whether it is necessary for a child, vulnerable adult or sensitive witness to give evidence to enable the fair hearing of an appeal the Tribunal should have regard to all the available evidence and any representations made by the parties.

Questions?

Please type your questions in the chat or unmute yourself and speak up!