Upper Tribunal
(Immigration and Asylum Chamber)

Agbabiaka (evidence from abroad; Nare guidance) [2021] UKUT 00286 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 October 2021	
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Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE O'CONNOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MODSURUDEEN KEHINDE AGBABIAKA

Respondent

Representation:

For the appellant:	Mr J Holborn, Counsel, instructed by the Government Legal Department
For the respondent:	Mr D Bazini and Ms J Smeaton, Counsel, (*pro bono*) Instructed by David & Vine Solicitors

(1) There is 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 relationship with other States with which it has diplomatic relations

and is, thus, contrary to the public interest. The potential damage includes harm to the interests of justice.

(2) The position of the Secretary of State for Foreign, Commonwealth and Development Affairs is that it is accordingly necessary for there to be permission from such a foreign State (whether on an individual or general basis) before oral evidence can be taken from that State by a court or tribunal in the United Kingdom. Such permission is not considered necessary in the case of written evidence or oral submissions.

(3) Henceforth, it will be for the party to proceedings before the First-tier Tribunal who is seeking to have oral evidence given from abroad to make the necessary enquiries with the Taking of Evidence Unit of the Foreign, Commonwealth and Development Office (FCDO), in order to ascertain whether the government of the foreign State has any objection to the giving of evidence to the Tribunal from its territory.

(4) The First-tier Tribunal will need to be informed at an early stage of the wish to give evidence from abroad. The party concerned will need to give the Tribunal an indication of the nature of the proposed evidence (which need not, at this stage, be in the form of a witness statement).

(5) The Tribunal's duty to seek to give effect to the overriding objective may require it, in particular, to consider alternatives to the giving of oral evidence where (for example) there are delays in the FCDO obtaining an answer from the foreign State. Each case will need to be considered on its merits.

(6) The experience gained by the First-tier Tribunal in hearing oral evidence given in the United Kingdom by remote means during the Covid-19 pandemic is such that there should no longer be a general requirement for such evidence to be given from another court or tribunal hearing centre.

(7) The guidance given by the Upper Tribunal in *Nare (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC) is amended to the above extent.*

DECISION AND REASONS

A. BACKGROUND

1. Mr Agbabiaka, the respondent to this appeal, applied for entry clearance to the United Kingdom. His application constituted a human rights claim, within the meaning of section 113 of the Nationality, Immigration and Asylum Act 2002. As a result, following the Secretary of State's refusal of Mr Agbabiaka's application, he exercised his right of appeal under section 82 of that Act to the First-tier Tribunal on the ground that refusing him entry to the United Kingdom was unlawful under section 6 of the Human Rights Act 1998, which precludes a public authority from acting contrary to the ECHR.

2. At the hearing before the First-tier Tribunal, Mr Agbabiaka gave oral evidence by video from Nigeria. At the commencement of the hearing, the Home Office Presenting Officer objected to the appeal proceeding, since Mr Agbabiaka had not demonstrated that the national authorities of Nigeria had acquiesced in his participation in the appeal proceedings, whilst he was in that country. Reference was made to the decision of the Upper Tribunal in Nare (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC); [2012] Imm AR 207.

The 'Nare' Guidance

3. The guidance in Nare is set out at paragraph 21 of the decision:-

> "21. With these observations in mind, we venture to offer the following guidance as to process. It is not intended to be comprehensive, and we expect that it will require elaboration as practice may develop. It owes a great deal to CPR 32PD. 33. Our guidance does not, we think, need to be so long or so detailed, but the following appear to us to be the minimum requirements:
>
> a. A party seeking to call evidence at an oral hearing by electronic link must notify all other parties and the Tribunal at the earliest possible stage, indicating (by way of witness statement) the content of the proposed evidence. (If the evidence is uncontested, an indication of that from the other parties may enable the witness' evidence to be taken wholly in writing.)
>
> b. An application to call evidence by electronic link must be made in sufficient time before the hearing to allow it to be dealt with properly. The application should be made to the relevant judge (normally the Resident Senior Immigration Judge) at the hearing centre at which the hearing is to take place, and must give (i) the reason why the proposed witness cannot attend the hearing; (ii) an indication of what arrangements have been made provisionally at the distant site (iii) an undertaking to be responsible for any expenses incurred.
>
> c. The expectation ought to be that the distant site will be a court or Tribunal hearing centre, and that the giving of the evidence will be subject to on-site supervision by court or Tribunal staff.
>
> d. If the proposal is to give evidence from abroad, the party seeking permission must be in a position to inform the Tribunal that the relevant foreign government raises no objection to live evidence being given from within its jurisdiction, to a Tribunal or court in the United Kingdom. The vast majority of countries with which immigration appeals (even asylum appeals) are concerned are countries with which the United Kingdom has friendly diplomatic relations, and it is not for an immigration judge to interfere with those relations by not ensuring that enquiries of this sort have been made, and that the outcome was positive. Enquiries of this nature may be addressed to the Foreign and Commonwealth Office

(International Legal Matters Unit, Consular Division). If evidence is given from abroad, a British Embassy, High Commission or Commonwealth may be able to provide suitable facilities.

e. The application must be served on all other parties, in time for them to have a proper opportunity to respond to it.

f. The decision whether to grant the application is a judicial one. The judge making the decision will take into account the reasons supporting the application, any response from other parties and the content of the proposed evidence, as well as of the overriding objective of the rules. If the application is granted, there may be further specific directions, which must be followed.

g. If there is a direction for the taking of evidence by electronic link, the Tribunal will nevertheless need to be satisfied that arrangements at the distant end are, and remain, appropriate for the giving of evidence. A video link, if available, is more likely to be suitable than a telephone link. The person presiding over the Tribunal hearing must be able to be satisfied that events at the distant site are, so far as may be, within the observation and control of the Tribunal, and that there is no reason to fear any irregularity.

h. There will need to be arrangements to ensure that all parties at the hearing, as well as the judge, have equal access to the input from the electronic link. Particular attention needs to be given to the accommodation of any interpreter.

i. In assessing any challenged evidence, the Tribunal may have to bear in mind any disadvantages arising from the fact that it was given by electronic link, and should be ready to hear and consider submissions on that issue.

j. Nothing in this guidance is intended to affect the existing arrangements for the hearing of bail applications by video link from secure video conferencing suites. Nor is this guidance intended to affect the arrangements for video linking of one Tribunal room to another for the purposes of hearing submissions by video link."

4. In the present case, the First-tier Tribunal Judge heard the evidence, which included that arising from the Presenting Officer's cross-examination of Mr Agbabiaka. So far as the Presenting Officer's objection was concerned, the First-tier Tribunal Judge subsequently received a communication from the Foreign, Commonwealth and Development Office (FCDO). This said the FCDO's information was that Nigeria had no objection at a diplomatic level to the taking of evidence by video, by a court in the United Kingdom, in a civil or commercial matter. The First-tier Tribunal Judge concluded that this information from the FCDO disposed of the Presenting Officer's objection. He allowed the appeal.

Proceedings in the Upper Tribunal

5. Permission to appeal to the Upper Tribunal was granted to the Secretary of State on the ground that the information relied upon by the First-tier Tribunal Judge did not, in fact, meet the Presenting Officer's objection.

6. The Upper Tribunal took the view that the Secretary of State's appeal presented an opportunity to examine the issue of evidence given from outside the United Kingdom in a case being heard by the Immigration and Asylum Chamber of the First-tier Tribunal or the Upper Tribunal; and that it might raise more general issues, relevant to other Chambers. A "directions" hearing was, accordingly, arranged for 11 June 2021.

7. On that day, Mr Kovats QC, for the Secretary of State, informed the Tribunal that his client no longer challenged the decision of the First-tier Tribunal to allow the appeal of Mr Agbabiaka. As a consequence, entry clearance to the United Kingdom was to be granted to him, notwithstanding the current proceedings.

8. The Tribunal refused at that point to give its consent under rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to the withdrawal of the Secretary of State's case. This was because we considered that the present proceedings provided an early opportunity for the Upper Tribunal to clarify the issue of evidence/submissions given from abroad. We explained that this should not prevent the Secretary of State from granting entry clearance to Mr Agbabiaka and that, once entry clearance was granted, this fact could be acknowledged in Upper Tribunal's decision.

9. At the hearing on 13 October, Mr Bazini confirmed that Mr Agbabiaka had, indeed, been given entry clearance and was now in the United Kingdom. We accordingly now give our consent to the withdrawal of the Secretary of State's case.

10. Since June 2021, there has been no need for Mr Agbabiaka to seek to defend the decision in his favour which he received from the First-tier Tribunal. In order to assist us on the issue of evidence from abroad, Mr Bazini and, more recently, Ms Smeaton, have acted *pro bono*. We wish to record our gratitude to them. As will become apparent, their input has been invaluable.

11. For her part, the Secretary of State has, through Mr Holborn, carried out a significant amount of work, including liaison between her officials and those of the Secretary of State for Foreign, Commonwealth and Development Affairs.

B. TAKING EVIDENCE FROM ABROAD

12. 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. The potential damage includes harm to the interests of justice since, if a court or tribunal acts in such a way as to damage international relations with another State, this risks permission being refused in subsequent cases, where evidence needs to be taken from within that State.

13. As that last point indicates, it has long been accepted between Nation States that a court in one State may have a legitimate need to undertake the examination of a witness who is present in another State, or to inspect documents or other property in that State.

The Hague Convention

14. The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970), hereafter referred to as the Hague Convention, established a uniform framework of co-operation mechanisms in order to facilitate and streamline the taking of evidence, etc abroad. The Hague Convention operates by means of Letters of Request, containing specified information, sent by the judicial authority of a contracting State, to the Central Authority of the other State.

15. Article 1 provides as follows:-

> "In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.
>
> A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.
>
> The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures."

16. There is no definition of "civil or commercial matters" in Article 1 of the Hague Convention. Mr Holborn points out that some assistance in discovering its meaning is to be found in the Explanatory Report on the Convention by Ph W Amram, the Rapporteur of the Commission of the Hague Conference on International Law, which drafted the Convention.

17. Mr Amran states that "any potential disagreement on the meaning of [the words 'civil or commercial matters'] is to be settled through diplomatic channels … No further discussion is needed". Interpretation of this provision is, therefore, a matter that is ultimately settled by diplomacy rather than legal process.

18. The position of the Secretary of State is that the Hague Convention does not apply to immigration proceedings in the United Kingdom, as these are administrative, rather

than civil, proceedings. Both Mr Holborn and Mr Bazini are, however, agreed that, for present purposes, it is unnecessary for us to express any view on the correctness of that stance.

19. We agree. Not all States are signatories to the Hague Convention. Whenever the issue arises in a tribunal about the taking of evidence from outside the United Kingdom, the question of whether it would be lawful to do so is a question of law for that country, whether or not that country is a signatory to the Hague Convention: Interdigital Technology Corporation & Ors v Lenovo Group Ltd & Ors [2021] EWHC 255 (Pat). In all cases, therefore, 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.

C. THE KEY ISSUES

20. The key issues are, first, the circumstances in which the need for such an answer arises; and, secondly, the steps that are to be taken where they do.

21. It will be noted that Article 1 of the Hague Convention refers not only to obtaining evidence but also to the performing of "some other judicial act". That expression is restricted by the last paragraph of Article 1. It is also partly explained by the reference in Article 3 to the inspection of documents or other property.

Submissions and written evidence

22. The third recital to the Upper Tribunal's directions of 11 June 2021 referred to "the issue of evidence/submissions given from abroad". Both Mr Holborn and Mr Bazini addressed us on whether the giving of oral submissions to the Tribunal by a person outside the United Kingdom falls to be regarded in the same way as the giving of oral evidence. Mr Bazini considered that the making of submissions on the law or on the evidence that has been adduced in a case was likely to be regarded by the foreign State as of at least equal significance to the giving of oral evidence. Mr Holborn, however, informed us that the FCDO does not regard the making of oral submissions as akin to the giving of oral evidence. The FCDO's position is that it is taking of oral evidence, without the requisite permission, that is problematic.

23. On this issue, we find that the view of the FCDO is determinative. At least in the present context, 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. Accordingly, the steps which we describe later do not need to be taken where the Tribunal is satisfied that the person who will be speaking to it by video from abroad will be making submissions and not giving evidence.

24. However, as we were at pains to emphasise to Mr Holborn at the hearing, the dividing line between submissions and evidence may in practice not be an easy one to hold. In particular, if the person concerned is not a professional representative but the appellant, the Tribunal may need to treat with circumspection any assertion that the appellant will confine him or herself to submissions and not stray into the giving of evidence. For that reason, we believe that a tribunal is likely, in such cases, to conclude that the steps we describe will need to be taken.

25. It is also necessary to clarify the position of written evidence. As with submissions, Mr Holborn's instructions were that a written statement of evidence can be provided to the tribunal by a person outside the United Kingdom, without risk to diplomatic relations.

The proposed FCDO process

26. Sarah Broughton of the Consular Directorate, FCDO has filed a witness statement dated 1 October 2021. She confirms that the FCDO's current role in checking that overseas governments have no diplomatic or other objections to the provision of evidence by video-link from countries overseas covers only civil and commercial proceedings, as interpreted above. Such proceedings do not, therefore, include what she describes as administrative tribunals. Nor do they include criminal proceedings.

27. In June 2021, the FCDO's Consular Document Policy Team learned that there was no process within the United Kingdom government for checking that overseas governments had no diplomatic or other objections to provision of evidence by video-link from countries overseas, where the evidence was to be given to an administrative tribunal, such as in asylum and immigration appeal hearings. The Team had previously been unaware of the decision in Nare.

28. At the same time, it became apparent that a small number of previous enquiries had been replied to inaccurately, as the official dealing with Service of Process (SOP) requests made by courts pursuant to Practice Direction 32 of the Civil Procedure Rules had not appreciated that the enquiries from tribunals were not considered to be within the scope of civil or commercial proceedings. Ms Broughton says that the FCDO have "put measures in place to ensure that this mistake is not repeated". Any previous advice that specific countries do not object to their citizens or residents providing evidence by video-link to administrative tribunals in the United Kingdom should not be considered as authoritative "as administrative tribunals would not have been specified in the request to the relevant host government".

29. The FCDO has, however, now "considered how to address the identified gap and have internal agreement to set up a process to expand the checks it provides to include checking that overseas governments have no diplomatic or other objections to provision of evidence by video-link from countries overseas to Administrative Tribunals". The Senior Master at the Royal Courts of Justice who supervises the International Process Section is said to have no objection to the proposed solution.

30. Ms Broughton says it is anticipated that from November 2021 (precise date to be determined), a new "Taking of Evidence" (ToE) Unit will be established in order to cover the "likely increase from 15-20 requests per year for civil and commercial cases to several hundred for Administrative Tribunals". Ms Broughton states that the process is likely to be akin to that for civil and commercial proceedings.

31. The process envisaged is as follows:-

    "i) The requestor, usually a party to the proceedings or their representative, sends a request to the FCDO by email (TOE.Enquiries@fcdo.gov.uk) asking if the FCDO is aware of any diplomatic or other objection from the authorities in Country X to them providing evidence by video link to an administrative tribunal in the UK.

    ii) FCDO ToE Unit processes enquiries on a case-by-case basis. The ToE Unit check their records to see if a check has previously been made on Country X position or if the last check was made more than five years ago.

    iii) If a check has been made in the last five years, the requestor is informed of this by the ToE Unit and the outcome.

    iv) If a check has not been made in the past five years, the ToE Unit ask the requestor if they wish FCDO to raise an enquiry with British Embassy or British High Commission in Country X.

    v) If the requestor wishes such a check to be made, the ToE Unit will collect the Consular Fee, currently £150, from the requestor.

    vi) At the request of the ToE Unit, the relevant British Embassy or High Commission will check with its local Honorary Legal Adviser if there is any law which explicitly prevents residents or nationals of Country X providing evidence by video link from Country X to Administrative Tribunals in the UK.

    vii) If there is no such law, The Embassy or High Commission will check with the Ministry of Foreign Affairs by Note Verbale if the Government of Country X has any objection to residents or nationals of Country X providing evidence by video link from Country X to Administrative Tribunals in the UK.

    viii) The Embassy or High Commission will inform the ToE Unit of the outcome of the enquiries at vi) and vii) above.

    ix) The FCDO's ToE Unit will respond to the initial enquirer."

32. Ms Broughton concludes her statement by saying that, where the query is passed to a British Embassy or High Commission overseas and the host government needs to be consulted (i.e. at stage (iv) above), it can take "weeks or even months" to receive a reply. On some, albeit rare, occasions "host governments fail to reply, even after reminders". This applies to the current SOP process; and Ms Broughton has "no reason to believe that the situation will be materially different for Administrative Tribunal enquiries".

The Home Office and section 94B appeals

33. Andrew Bennett has produced a witness statement dated 15 July 2021. Mr Bennett is the Assistant Director – Overseas Video Appeal Project (OVAP) lead in the Home Office. As such, he has had responsibility for the provision of video facilities to facilitate appeals from outside the United Kingdom by appellants whose appeals were certified by the Secretary of State under section 94B of the 2002 Act. In the light of the judgment of the Supreme Court in R (Kiarie & Byndloss) v Secretary of State for the Home Department [2017] UKSC 42; [2017] Imm AR 1299, the Home Office considers itself to be under a duty to provide such appellants with a video facility to conduct their appeals.

34. The process adopted by the Home Office in section 94B appeals includes checking whether an appeal from outside the United Kingdom would be lawful, according to the laws of the country in which the appellant is located. HMG staff at the relevant diplomatic post check the local law in the country concerned to confirm whether there are any impediments or prohibitions which would prevent a national of that country from lawfully participating in the appeal via a video-link. Following receipt of written confirmation that there is no such provision, HMG staff then notify the authorities of that country of the Home Office's intention to provide video facilities. The OVAP team defer to colleagues at Post on the most appropriate method of notifying the authorities of the country concerned. Importantly, "no information is provided about the individual appellants themselves".

35. Mr Bennett states that the Home Office policy has been to proceed on the basis that a country has raised no objections when (i) the notified authorities state they have no objections; or (ii) when no response is received within a reasonable time for the notification to have been considered and responded to. This is on the basis that, where the authorities have been notified, they would have raised an objection, were they minded to do so; or at least to have asked for more information. Mr Bennett continues:-

> "My team has been informed by colleagues working overseas that, in the wider perspective of diplomatic relations, notifications do not always receive a response. If we had instead adopted a different approach of only proceeding once a substantive positive response had been received that would undoubtedly have introduced delay which we wish to avoid given that overseas appeals had already been lodged, particularly as the delay could have been lengthy in in some countries."

Handling appeals where oral evidence is proposed to be given from abroad

36. Both in their skeleton argument and their oral submissions, Mr Bazini and Ms Smeaton made a number of observations about the Nare guidance, in the light of the ToE process described by Ms Broughton. Mr Holborn made submissions in response.

37. Building on the observation at paragraph 21(f) of Nare that the decision whether to grant an application to give evidence by video-link (whether or not from abroad) is a judicial one, Mr Bazini and Ms Smeaton put forward a number of proposals regarding the way in which the First-tier Tribunal should proceed in cases where there is a proposal to call evidence from abroad. They submit, and we agree, that an early indication of such an intention is desirable. Consideration should, therefore, be given to amending the relevant IAFT forms to provide for an appellant to indicate whether he or she intends to give or call evidence from abroad and, if so, from which country.

38. We agree with Mr Bazini and Ms Smeaton that the requirement in paragraph 21(a) of Nare that the indication of the content of the proposed evidence should be by way of witness statement is too prescriptive. It is sufficient for this purpose that the nature of the evidence is identified, such as by gisting. At this stage, time and effort spent in producing an actual witness statement may turn out to be unnecessary.

39. It is, on the other hand, essential that the First-tier Tribunal understands the nature of the proposed evidence, since this will inform it in due course whether, having regard to the overriding objective, the evidence is such that it must be given orally from abroad.

40. Mr Bazini and Ms Smeaton submit that the request to the ToE Unit should not have to come from the appellant. It should be for the Secretary of State for the Home Department to provide the relevant assurance, via the ToE process.

41. We do not accept this submission. As with the position in civil proceedings in the courts, it should be for the party making the request to go through the necessary FCDO process. The procedure in section 94B cases, described by Mr Bennett, is different because, as a result of Kiarie & Byndloss, the Secretary of State has to provide the necessary facilities for an appellant to give evidence from outside the United Kingdom; otherwise, that person should be returned in order to pursue the appeal in-country.

42. We have had occasion to refer to the overriding objective. The obligation on the First-tier Tribunal to seek to give effect to the overriding objective is a dynamic one. This is particularly important because of the undoubted tension that exists between the aspect of the overriding objective which concerns "avoiding delay" and ensuring that, insofar as practicable, the best evidence is put before the Tribunal.

43. A concern arises from Ms Broughton's evidence about the potential for delay in cases that are referred to ToE. As the process becomes established, the more likely it is that requests can be dealt with at stage (iii); that is to say, by reference to checks made on Country X in the past five years. Nevertheless, the amount of time a case has been held up at the ToE stage will need to be kept under review by the First-tier Tribunal, as part of its case management function. One can well see that if delay becomes an issue, the Tribunal may need to consider alternatives to oral evidence being given from the foreign country. If not already examined, this may include probing the

rationale for that evidence; and considering whether the evidence could, in fact, be given in writing (including by reference to written questions put by the other party) or by the person concerned going to a neighbouring State where it is known there are no diplomatic or other objections to the giving of oral evidence. Mr Bazini submitted that another possibility would be admitting the appellant or witness to the United Kingdom for the purposes of giving evidence. We do not rule that out; but, depending on the nature of the case, it may be that this would be in the nature of a last resort.

44. Both here and elsewhere, we wish to make it clear that we do not intend to be prescriptive. Each case will need to be examined by First-tier Tribunal on its merits.

Observations on the proposed FCDO process

45. We turn to the ToE process itself. In view of what we have just said about delay, it is convenient to begin with the position where, as Ms Broughton says, "host governments fail to reply, even after reminders". Mr Holborn was cautious in this regard. It did, however, appear that the FCDO's stance will be that, if no response is forthcoming after reminders have been sent, silence should be treated as if it were a refusal by the State concerned to give its permission.

46. Were that to be the FCDO's stance, it stands in stark contrast to the approach described by Mr Bennett in the section 94B cases, whereby the Secretary of State regards a lack of response as indicative of approval. The thrust of Mr Bennett's evidence is that the Secretary of State takes this view because she does not want there to be undue delay in the First-tier Tribunal's consideration of the section 94B appeal. So far as the Tribunal is concerned, however, equal consideration may need to be given to the position of an appellant who, for example, has made an application for entry clearance to the United Kingdom and who wishes their appeal to be speedily resolved.

47. We do not consider that this is a matter which can properly be resolved in the context of the present proceedings. We do, however, expect the FCDO and the Home Office to consider it further in due course. Meanwhile, important though the matter is, we do not regard it as a reason to delay the implementation of the ToE process described by Ms Broughton. On the contrary, any such delay is to be avoided.

48. Although the FCDO has expressly stated that no reliance is to be placed upon any list of the kind recently seen (and perhaps acted upon) by judges of the First-tier Tribunal, and although Ms Broughton's proposed scheme makes no provision for publication of a list, we agree with Mr Bazini that it should be practicable at an early stage for such a list to be produced and, thereafter, maintained. This is particularly so, given the five year period referred in paragraph (ii) of Ms Broughton's description of the outline process. In reply, Mr Holborn was sympathetic to this suggestion.

49. In similar vein, Mr Bazini and Ms Smeaton's skeleton argument submits that the procedure for making requests under ToE should be published in a manner that can be easily understood by an individual appellant who is seeking permission to rely on video evidence from abroad. That is a clearly desirable aim, which the FCDO will no doubt pursue.

50. Mr Bazini and Ms Smeaton queried the justification for charging a fee of £150 if and when stage (v) of the ToE process is reached; that is to say, where the requestor wishes a check to be made with the British Embassy or British High Commission (if one has not been made in the past five years). Mr Holborn told us that, under the CPR process, the Consular Fees Order 2016 provides (by way of amendment to the Consular Fees Order 2012) for a fee of that sum to be charged, in a case of civil proceedings. The proposed fee for administrative tribunals would be levied under the Consular Fees Regulations 1981. Mr Holborn says there is provision for fee remission in certain cases.

51. Although we consider it helpful to record this position, we do not consider it is appropriate for us, in these proceedings, to opine on the issue of fees.

52. Lastly and importantly, Mr Bazini and Ms Smeaton submit that any request made to a foreign country must proceed on a general basis; that is to say, the individual appellant or witness is not to be identified in any such request. This is particularly necessary, given the potential safety and/or privacy implications. We understood Mr Holborn to assent to this submission, with which we in any event agree. We note that, in the section 94B context, Mr Bennett is categoric that no information is provided to the foreign State about the individual appellants.

53. Although we have set out paragraph 21 of Nare in its entirety, the focus of our attention has, of course, been on sub-paragraph (d), which concerns the proposal to give evidence from abroad by video. What is there said now needs to be read in the light of what we have recorded in this decision. It will be for the President of the First-tier Tribunal (Immigration and Asylum Chamber) to decide whether and, if so, what guidance needs to be given in the light of the introduction of the ToE system and the matters that led up to it.

D. OTHER 'NARE' ISSUES

54. Other sub-paragraphs of the guidance in Nare need to be read in the light of the improvements in video technology that have occurred since 2013 (as to which, see the remarks of Lord Burnett CJ in FB (Afghanistan) and Anor v Secretary of State for the Home Department [2020] EWCA Civ 1338; [2021] Imm AR 134) and the use made of remote hearings since the onset of the Covid-19 pandemic in 2020.

55. In that regard, Mr Bazini and Ms Smeaton submit that paragraph 21(c) of Nare ought no longer to be followed. At least during the pandemic, there has been no expectation that the "distant site" would be a court or tribunal hearing centre or that

the giving of the evidence would be subject to "on-site supervision by court or tribunal staff". Mr Bazini is, in our view, correct to describe this as representing the "gold standard", in that such an environment will provide a tribunal with the requisite assurance that the witness is not being distracted by extraneous factors or being improperly assisted in the giving of his or her evidence. Judges hearing cases during the Covid-19 emergency have, however, become adept at minimising the risks of such problems, where evidence is being given remotely from a place that is not a court or tribunal hearing centre. We therefore agree that paragraph 21(c) needs to be qualified. It will be for the First-tier Tribunal to have regard to the risks to the quality and weight of the evidence, if it is given from a place where supervision of the kind envisaged in Nare is unavailable.

Notice of Decision

Pursuant to rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we consent to the withdrawal of the Secretary of State's case before the Upper Tribunal.

No anonymity direction is made.

Mr Justice Lane

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber

20 October 2021