The Upper Tribunal
(Administrative Appeals Chamber)

UT NCN: [2025] UKUT 336 (AAC)
UT Case Number: UA-2025-000487-HRP

Summary:

Tribunal procedure and practice (including Upper Tribunal) (34.2 – fair hearing)

Fair hearing – appellant and her representative attending remotely from abroad – overriding objective – participation in proceedings – Social Entitlement Chamber President's Guidance Note No 7 does not override duty to provide a fair hearing.

Before

UPPER TRIBUNAL JUDGE JACOBS

Between

PMN **Appellant**

v

Secretary of State for Work and Pensions **Respondent**

THE UPPER TRIBUNAL ORDERS that, without the permission of this Tribunal:

No one shall publish or reveal the name or address of PMN, who is the Appellant in these proceedings, or any information that would be likely to lead to the identification of her or any member of her family in connection with these proceedings.

Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

Decided on 07 October 2025 without a hearing

Representatives

Claimant: PMN's husband

Secretary of State: DMA Leeds

DECISION OF UPPER TRIBUNAL

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Reference: SC068/20/02064
Decision date: 20 April 2023
Hearing: by telephone

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTION:

The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

REASONS FOR DECISION

A. The issue

1. The issue in this case is how a tribunal should proceed when a claimant and a representative attend a hearing from a foreign country.

2. PMN and her husband, who was representing her, attended the hearing of her appeal by telephone from Holland. Neither had applied for permission to do so. The tribunal refused to allow either PMN or her husband to give evidence or make submissions. It decided not to adjourn and proceeded with the hearing, dismissing PMN's appeal. I have set the decision aside, because the claimant did not have a fair hearing. I do not need to say anything about the substantive issue in the case, as it did not affect the procedure.

B. The Chamber President's Guidance

3. The tribunal referred to the decision in *Secretary of State for the Home Department v Agbabiaka* [2021] UKUT 286 (IAC) and relied on the Chamber President's Guidance Note No 7 on Taking of Evidence from Overseas. These are the relevant parts of the Note:

> 1. In *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 286 (IAC) the Upper Tribunal addressed the procedure to be followed when a party wishes to rely upon oral evidence given by video or telephone by a person (including the party themselves) who is situated in the territory of a Nation State other than the United Kingdom.
>
> 2. In summary, no evidence may be given by a person situated within the territory of a State other than the United Kingdom unless the First-tier Tribunal is satisfied that there is no legal or diplomatic barrier to their doing so. The requirement applies to all tribunal proceedings.
>
> 3. The Upper Tribunal said that it is for the party seeking to rely on such evidence to satisfy the tribunal of this, by contacting the Foreign and

Commonwealth Development Office (FCDO) to ask if the country has already given consent and, if not, to approach that country to obtain consent.

4. On 29 November 2021 the Secretary of State for Foreign, Commonwealth and Development Affairs established a new "Taking of Evidence Unit" ('ToE Unit'). The ToE Unit will establish the stance of different overseas governments to the taking of oral evidence from individuals within their jurisdiction by the First-tier Tribunal, and the response of the ToE Unit 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.

5. Statements or representations made prior to 29 November 2021 as to whether a particular government has any objection to the taking of oral evidence from an individual within their jurisdiction should no longer be relied upon as an accurate representation of the stance of that government.

6. The requirement to satisfy the tribunal that the state in question consents to oral evidence being given from within its territory applies to all nation states including those formerly covered under EU agreements.

7. Permission is not required where individuals wish to give video and telephone evidence from within the United Kingdom.

8. The decision in *Agbabiaka* does not require consent where a party wishes to rely upon written evidence or make written or oral submissions from overseas. However, save in the circumstances addressed at paragraph 20 below, a tribunal should not permit a party to make oral submissions from overseas without obtaining the consent of the country in question, as there is a risk that a litigant making oral submissions will stray into giving evidence.

9. Nothing in *Agbabiaka* requires permission from an overseas state from which a person wishes to be a silent observer of the proceedings.

…

20. If it becomes apparent at a hearing that a party or witness is joining from overseas and that the ToE Unit has not confirmed whether the state has given permission, the Tribunal may, having considered the overriding objective, either:

a. adjourn the appeal with appropriate directions, and follow the above process for making enquiries of the ToE Unit; or

b. decide the appeal.

21. Although a party who is overseas may not give oral evidence in such circumstances, it would be permissible for them to make brief submissions about whether the tribunal should adjourn and the directions that might be made. Relevant factors in considering whether to adjourn or decide the appeal in the above circumstances may include the relevance and significance of the oral evidence, whether the party has failed to respond to directions asking them to inform the tribunal whether they wish to give oral evidence from overseas, and delay.

The Note has now been updated. The tribunal will apply the latest version at the rehearing.

C. Why the claimant did not have a fair hearing

4. The tribunal gave detailed attention to the terms of the Note. It also referred to its duty under the overriding objective set out in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI No 2685):

> **2. Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
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> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally.

The tribunal referred specifically to rule 2(2)(a) and (e). The tribunal did not mention rule 2(2)(c), Perhaps, if it had done so, it might have stepped back from the detail to consider whether PMN was having a fair hearing. The Note provides guidance and that is all it provides. It is not binding on a tribunal. Moreover, it does not purport to override the duty to give all parties a fair hearing and does not do so. At most, the Note provides a context in which that duty must be exercised. It makes it all the more important for the tribunal to ensure that the hearing is fair despite the restrictions.

5. It is worth repeating what the Court of Appeal recently said about the distinctive nature of tribunal procedure in social security cases and its foundation in the overriding objective. The case is *DP v London Borough of Lambeth* [2025] EWCA Civ 985:

> **The Applicable Principles**
>
> 43. One of the cardinal features of the tribunal system is the flexibility of the procedure that the Tribunal can and should adopt. As was said in Tendring DC v CD [2024] EWCA Civ 1509 at [62]:
>
> > "The rules of procedure in the tribunals permit for a wider range of representatives to support protected and vulnerable parties, including but

> not limited to litigation friends; these rules are anchored in the overriding objective to deal with all cases fairly and justly (rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, … and rule 11 ibid) There is no specific provision in the tribunal rules equivalent to Part 21 of the Civil Procedure Rules 1998. The tribunal rules concerning support for protected and vulnerable parties are applied more flexibly than in the courts; there is less formality in its processes, consistent with the quasi-inquisitorial nature and requirements of each jurisdiction (AM (Afghanistan) v SSHD [2017] EWCA Civ 1123)."

44. As this passage makes clear, and as was pointed out in AM at [41]-[42], the foundational considerations underpinning the interpretation and application of these principles, now enshrined in the terms of the overriding objective, are rooted in the general principle of the common law to provide for natural justice in tribunal procedures. In AM Ryder LJ (with whom Underhill and Gross LJJ agreed) said at [44], referring to asylum claims by children, young people or other incapacitated or vulnerable persons, but in terms that are of general application:

> "I have come to the conclusion that there is ample flexibility in the tribunal rules to permit a tribunal to appoint a litigation friend in the rare circumstance that the child or incapacitated adult would not be able to represent him/herself and obtain effective access to justice without such a step being taken. In the alternative, even if the tribunal rules are not broad enough to confer that power, the overriding objective in the context of natural justice requires the same conclusion to be reached."

Ryder LJ went on to explain that appointing a litigation friend would not be necessary in many cases because a child who is an asylum seeker in the UK will have a public authority who may exercise responsibility for him or her and who can give instructions and assistance in the provision of legal representation of the child. This explanation does not detract from the generality of the principle he had identified.

45. What was described in AM at [43] as the "accessible, flexible, specialist and innovative approach that [the rules] facilitate" is necessitated by features that are specific to Tribunals, namely:

i) The quasi-inquisitorial nature and requirements of each Tribunal's jurisdiction;

ii) The role of a respondent to (for example) a social security appeal to help the Tribunal arrive at the correct decision, there being no legitimate interest in the maintenance of the decision under appeal if that decision is incorrect: see DTM v Kettering (CTB) [2013] UKUT 625 (AAC) at [63];

iii) The significant numbers of people appearing before the Tribunal without competent representation and who are often vulnerable or compromised in their ability to represent themselves, which imposes a burden on the Tribunal that is only partially ameliorated by Tribunal Judges being used to conducting proceedings involving the vulnerable and the compromised.

46. The flexible approach to be adopted by the FtT and UT is enshrined in the relevant rules. For both the FtT (Social Entitlement Chamber) and the Upper Tribunal, the obligation under the overriding objective to deal with a case fairly

and justly includes avoiding unnecessary formality and seeking flexibility in the proceedings (the tribunal being the master of its own procedure) and ensuring, so far as practicable, that the parties are able to participate fully in the proceedings. The flexibility and the determination to achieve a just result is widely reflected in the rules. Thus, for example, Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 permits the FtT to set aside a decision if the Tribunal considers that it is in the interests of justice to do so and one or more conditions are satisfied. The conditions are broadly drafted and include that there has been a "procedural irregularity" in the proceedings. Similarly, both the FtT and the UT have wide ranging powers about the evidence that they will admit or exclude, including (at both levels) whether the parties are permitted or required to provide expert evidence.

47. It is entirely in keeping with this flexible approach that there is no equivalent in the Tribunal Procedure Rules to CPR Part 21. In particular, there is no equivalent in the Tribunal Procedure Rules to CPR Parts 21.2(1) and 21.3.4, which in civil litigation provide that a person who lacks capacity must have a litigation friend to conduct proceedings on their behalf and that, as least as the default position, any step taken before a person who lacks capacity has a litigation friend has no effect. What matters in the exercise of the Tribunals' jurisdiction where a person is either vulnerable or compromised in their ability to participate fully in the proceedings is that procedural unfairness must be avoided. In my judgment, the concerns expressed in the first sentence of the footnote to Ground 1, which I have set out at [23] above, are misplaced; and I did not understand the Appellant to be contending for a principle that any and every mistake as to capacity would amount to procedural unfairness. In my judgment, where a litigant in Tribunal proceedings is found to have lacked capacity (or to have been compromised in their ability to participate fully in the proceedings) after the event, it may be relatively easy to conclude that there has been a mistake of fact. However, it will always be necessary to decide what, if any, impact their lack of capacity (or compromised state) has had or may have had upon the fairness of the proceedings, applying the criteria I have briefly summarised above. Only once that issue has been resolved can it be decided whether or not there has been procedural unfairness that requires the Tribunal or the Court on an appeal from the Tribunal to intervene. There is an almost limitless spectrum of potential procedural unfairness and the response of the Tribunal to it should be proportionate to the facts of the case and guided by the overriding objective. These principles are not confined to a formal finding of lack of capacity: they apply with suitable calibration to any case where a litigant's ability to participate fully in proceedings is compromised or adversely affected in other ways.

48. There will be cases where the experience of Tribunal Judges will enable them to recognise the inability of the litigant to participate in proceedings fully. Where it is recognised, the Tribunal Judge will be well placed to decide what, if any, provision must be made to enable full and fair participation. However, there may be other cases where even a specialist Tribunal Judge will not be alerted to the difficulties that the litigant is facing. Where that is recognised at a later date, either on a set aside application or on an appeal, the full extent of the Tribunal's powers is available, up to and including setting aside or allowing the appeal, to ensure that the final outcome is fair.

49. What is not in doubt on established principles is that procedural unfairness may found a discrete head of challenge in an appeal on a point of law. In E & R v SSHD [2004] QB 1044 the Court of Appeal addressed the issue of procedural unfairness at [66]:

> "In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of the Criminal Injuries Compensation Board case. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning."

50. The parties made submissions about what is meant by the words "'established', in the sense that it was uncontentious and objectively verifiable". Since there was no dispute before us about the admission of Dr Kumar's first report and certificate before the FtT on the application to set aside and the subsequent appeals that have brought the case to this court, and because of the view I take on the basis of that report and certificate, the question is in my view of academic interest only. However, in case it matters (and because it has been argued before us), I consider that it is plainly inadequate for a party simply to rely upon a bare denial of the correctness of the evidence in question and, on the basis of that bare denial, to assert that the evidence is "contentious". It must be controverted or put in issue either by other evidence or by principled and rational argument or by both. Equally, the requirement that the fresh evidence be "objectively verifiable" should not be understood to mean that opinion evidence is automatically excluded.

51. This leads to consideration of the status of expert evidence and when it may be disregarded. That was addressed in detail by Lord Hodge DPSC (with whom the other members of the Court agreed) in Griffiths v TUI (UK) Ltd [2023] UKSC 48, [2025] AC 374 . In particular, at [61] the Supreme Court reaffirmed that, as a general and flexible rule, the evidence of a suitably qualified expert should be accepted if it is unchallenged. There may be exceptions to the general rule, such as where the evidence of the expert is manifestly incredible; or where there may be a bold assertion of opinion in the expert's report without any reasoning to support it (as opposed to the case where there is reasoning but it may appear to be inadequate) so that all that supports the assertion is the fact of the "bare ipse dixit"; or where there is an obvious mistake on the face of the experts report; or where the witnesses' evidence about the facts is contrary to the factual basis on which the expert has expressed their expert view; or where the expert has been given, but has not taken, the opportunity to respond to criticism of their report or otherwise clarify it. It should be borne in mind that Griffiths v Tui was a case concerning fully adversarial court litigation; but it should come as no surprise that

the Supreme Court based its exposition of principle on the need to preserve the fairness of the trial: see [70].

52. Although as a general and starting proposition, the admission of fresh evidence on an appeal asserting a mistake of fact by the Tribunal below is subject to Ladd v Marshall principles, consideration of the issue whether the material could and should have been made available before the impugned decision inevitably overlaps with the question of "unfairness", because "a claimant who had the opportunity to produce evidence and failed to take it may not be able to say that he has not had "a fair crack of the whip": see E & R at [68]-[69]. That said, the Court should bear in mind the observation of Bean LJ at [27] of Hussain v SSWP [2016] EWCA Civ 1428:

> "27. There are cases in which an over strict application of the first principle against a party who appeared without representation, as Mr Hussain did in the First-tier Tribunal, can be contrary to the overriding objective of dealing with cases justly. I prefer, therefore, rather than asking whether a consultant's report could have been obtained with reasonable diligence before the hearing in the FTT, to concentrate on the question of whether it would have been potentially decisive in Mr Hussain's favour or at least have had an important influence on the result of the appeal. In my view, it would not."

53. Procedural unfairness may have an additional importance when applying the second appeals test. In Uphill v BRB (Residuary) Ltd [2005] EWCA Civ 60, 2005 1 WLR 2070 the Court said, at [24(3)]:

> "There may be circumstances where there is a compelling reason to grant permission to appeal even where the prospects of success are not very high. The court may be satisfied that there are good grounds for believing that the hearing was tainted by some procedural irregularity so as to render the first appeal unfair. Suppose, for example, that the judge did not allow the appellant to present his or her case. In such a situation, the court might conclude that there was a compelling reason to give permission for a second appeal, even though the appellant had no more than a real, as opposed to fanciful, prospect of success. It would be plainly unjust to deny an appellant a second appeal in such a case, since to do so might, in effect, deny him a right of appeal altogether."

6. The context of this case is different from *DP*, but the principles are the same. The tribunal in this case could and should have found a way for PMN and her husband to take part in the proceedings. Paragraph 8 of the Note provides a possible starting point. The tribunal could have given directions telling the claimant the sort of evidence that was required and the evidence could have been provided in writing. As the Note says, no consent is required to rely on written evidence. The tribunal could have taken the same approach to submissions. The tribunal was concerned that oral submissions, especially from PMN's husband who was connected with the circumstances of the case, might drift into evidence. The answer to that concern was for the judge at the hearing to retain control over what was being said and to be alert to any possible drift from submission to evidence. I am not directing the tribunal how to proceed at the rehearing, merely identifying one possibility to show how the tribunal could have allowed PMN and her husband to take part effectively.

D. Finally

7. We now know, although the First-tier Tribunal judge did not, that the Court of Appeal has decided in *Raza v Secretary of State for the Home Department* [2023] EWCA Civ 29 that it is lawful to hear evidence from abroad:

> 76. The primary question for this Court is whether there is any provision or rule of domestic law which shows that the FtT hearing was unlawful and a nullity. There is none. The 2002 Act expressly requires some appeals to be made from, and some to be continued from, abroad. The 2002 Act does not provide that the lawfulness of such appeals depends on any condition, such as the obtaining of permission from a foreign state. The Rules assume that a hearing can be conducted partly by video link. The Rules do not provide for any further conditions in relation to the taking of evidence from abroad. Neither *Nare* nor *Agbabiaka* suggests that the taking of video evidence from abroad without the permission of the state concerned is unlawful, or that it makes the hearing a nullity. *Agbabiaka* suggests that such a hearing might be contrary to the public interest because of its potential to damage international relations, and, thus contrary to the interests of justice, but that is a different point. I accept Mr Kovats's submission that the sanctions for such conduct are diplomatic, not legal.

Authorised for issue
on 07 October 2025

Edward Jacobs
Upper Tribunal Judge