

To: Members of GDC Statutory Committees
Legal Advisers

Cc: GDC In-house Legal Presentation Service
GDC In-house Legal Advisory Service
GDC External Legal Providers
GDC Committee Secretaries
Defence Organisations

Re: ***Secretary of State for the Home Department v Modsurudeen Kehinde Agbabiaka [2021] UKUT 00286 (IAC)***

1. The judgment in the above case was handed down by the Upper Tribunal of the Immigration and Asylum Chamber on 26 October 2021.
2. More recently, there has been some debate as to whether the Upper Tribunal's decision is applicable to regulatory proceedings. This note has been prepared to make you aware of the judgment and to confirm the GDC's position on the impact of the judgment on its own proceedings.

Background

3. Mr Agbabiaka ("the Respondent") appealed against a decision to refuse entry clearance to the UK. At the appeal the Respondent gave oral evidence from Nigeria, but the Home Office objected on the basis that the Respondent had not demonstrated that the national authorities of Nigeria had acquiesced to his participation in the appeal proceedings, whilst he was in that country (as per *Nare Zimbabwe* [2011] UKUT 00443 (IAC); [2012] Imm AR 207). The issues under consideration on appeal were whether or not evidence could be provided remotely from abroad, the requirements of doing so and the applicability of those requirements.
4. The decision of the Upper Tribunal was that the giving of oral evidence, but not written evidence or submissions (whether oral or written), from another Nation State requires the permission of that State. The Upper Tribunal relied on the long-standing acceptance that one State would not seek to exercise its judicial powers within the territory of another State without the permission of that State to do so. Lane J (for the Tribunal) put the matter in the following terms:

"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.

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.”

5. On 29 November 2021, as a result of the Upper Tribunal's judgment, the Foreign and Commonwealth Development Office established a Taking of Evidence Unit (“the Unit”).
6. Any party to proceedings before the First-tier Tribunal who is seeking to have oral evidence given from abroad is required to make a request of the Unit to ascertain the stance of different overseas governments to the taking of oral evidence from individuals within their territory. The response of the Unit is required in each instance of an individual providing evidence from another Nation State.

GDC’s position

7. It is the GDC’s position that the decision in *Agbabiaka* does not bind the GDC’s Statutory Committees, for the following reasons:
 - a) The decision was made in the context of preserving diplomatic relations with foreign states, and courts or tribunals exercising the judicial power of the state.
 - b) This is distinguishable and separate from members of a profession, who upon joining, voluntarily accept being subject to the disciplinary and fitness to practise processes of the relevant professional body, such as the GDC.
 - c) The GDC’s Statutory Committees are not part of the judicial system of the state, and this distinction is clearly supported by the authority of *General Medical Council v British Broadcasting Corporation* [1998] 1 WLR 1573.
8. As such, the GDC’s position is that permission does not need to be sought from an overseas country before one of its Statutory Committees receives remote evidence from an individual in another jurisdiction.
9. The decision to receive remote evidence from abroad is therefore a matter for the Statutory Committee hearing the case, subject to the application of Rule 57 of the General Dental Council (Fitness to Practise) Rules 2016.
10. The GDC does not intend to deal with this issue proactively at each hearing where it is intended that evidence is called from another jurisdiction.
11. The GDC however acknowledges that not all parties will adopt the same position. Therefore, a Statutory Committee may find itself being addressed on this issue regardless of the GDC’s position. In these circumstances, members of that Statutory Committee may seek to invite submissions from the parties and seek advice from the Legal Adviser prior to making their decision.
12. Where possible, if an issue is taken on this point, parties should seek to raise and have this issue resolved at a Preliminary Meeting.

9 November 2023