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Professional discipline: evidence from abroad

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Healthcare in the UK is a diverse, international, and mobile profession. In June 2022, nearly a quarter of nurses and nearly a third of hospital doctors in the NHS reported having a non-British nationality. Statistics for GP's countries of origin are not routinely collected however we do know that 29% of GPs practising in the UK in August 2022 qualified in countries other than the UK.

UK-based healthcare professionals are in demand internationally. Ongoing disputes about pay and working conditions in the NHS, lifestyle factors, and (for non-UK citizens) the hostile immigration environment are all reported as factors encouraging healthcare professionals to seek to leave the UK. A recent poll of junior doctors found that a third intended to work abroad in the coming year.

In addition to the above, case law makes clear that a registrant's conduct abroad can be as relevant to their fitness to practise as their conduct inside the UK.

In these circumstances, it is unsurprising that regulators regularly find themselves liaising with

registrants and witnesses who are either temporarily or permanently outside of the UK. However, little thought and certainly no guidance appears to have been given as to whether and how live evidence from abroad should be dealt with at fitness to practise hearings.

The position in the criminal and civil courts

Recent decisions in civil and criminal cases have made clear that hearing witness evidence from abroad can have diplomatic implications and must be done with care.

In *Agbabiaka* [2021] UKUT 00286 (IAC) the Upper Tribunal set out the factors to consider and the checks that must be made when calling witness evidence from abroad:

> *(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.*

> *[…]*

Agbabiaka was an immigration case, but its impact has been felt throughout the courts and tribunals system.

In April 2022, the various chambers of the Tribunals Service issued guidance on the taking of oral evidence abroad. In each case the guidance makes clear that evidence should not be admitted without the Tribunal being satisfied that the relevant foreign state is content for a witness to give evidence from their territory.

Agbabiaka was cited and its principles followed by the Court of Appeal (Criminal Division) in *R v Abdul Kadir* [2022] EWCA Crim 1244.

In civil cases, the taking of witness evidence from abroad is dealt with in Annex 3 to Practice Direction 32. Paragraph 4 deals specifically with the need to obtain permission from the relevant foreign court or authority.

In practical terms, the effect of the above guidance is that where a party seeks to call a witness to give live evidence from outside the UK, they (or HM Courts and Tribunals Service on their behalf) must make enquiries in good time with the Taking of Evidence Unit at the Foreign Office.

Is the position the same in professional discipline?

Anecdotal evidence suggests that participants in fitness to practise hearings give evidence from abroad relatively frequently, without any consideration having been given to potential

diplomatic consequences.

So far as statutory regulators are concerned there is no obvious reason why the position should be different from that in civil courts and tribunals. Statutory regulators such as the General Medical Council and Nursing and Midwifery Council exercise the powers of the state. Witnesses give sworn evidence and are at risk of being publicly criticised in a tribunal decision. Furthermore, there is a right of appeal to the High Court, where the registrant or the witness is at risk of judicial criticism.

This article has focused on healthcare regulation but the above would equally apply to other statutory regulators e.g. the Teaching Regulation Agency.

Arguably non-statutory regulators are not caught by the need to make enquiries when seeking to call witness evidence from abroad.

Difficulties specific to professional discipline

As described above, healthcare is a mobile profession and regulators are expected to take an interest in their registrants' conduct abroad. Therefore the likelihood of relevant parties to a hearing being abroad is high.

Healthcare regulators have embraced virtual hearings and the giving of evidence over live link is not generally subject to any restriction. This means that unlike HMCTS and the judiciary, regulators do not necessarily even *know* where a participant in a hearing is located. In my opinion this will need to change. Regulators should check where participants plan to give evidence from, so that the inadvertent calling of witness evidence from abroad can be avoided.

Healthcare regulation is split across multiple regulators, which vary hugely in size and resources. Whilst regulators exercise the powers of the state, they are not a part of the state in the same way that HMCTS are. They are likely to find it more difficult to engage with the practicalities of making arrangements to deal with witness evidence from abroad. Given the universal challenge, but also the important role that evidence from abroad can play in protecting the public in the UK, there is perhaps a role for the Professional Standards Authority

to give overarching guidance to healthcare regulators.

Conclusion

The calling of witness evidence from abroad is a topic the senior courts are taking an active interest in. If regulators do not take care with this, it will be only a matter of time before one or more comes in for criticism in the High Court.

Amy Woolfson is a barrister with extensive experience of professional discipline and regulatory cases. She acts for regulators and regulated persons in cases concerning criminal convictions, lack of competence, and misconduct – including serious sexual misconduct.