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PRESIDENT OF THE FIRST-TIER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER

Presidential Guidance Note No 2 of 2022:

Anonymity Orders and Directions regarding the use of documents and information in the First-tier Tribunal (Immigration and Asylum Chamber)

Introduction and general principles

1. Rule 13(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the Procedure Rules") contains a power to make an order prohibiting the disclosure or publication of specified documents or information relating to the proceedings or any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified. The effect of such an "anonymity order" may be to prohibit *anyone*, and not merely the parties in the case from disclosing relevant information. The power is therefore broader in scope than the previous power found in rule 45(4)(i) of the 2005 Procedure Rules. Breach of the order may be punishable as a contempt of court, either by the Upper Tribunal exercising the powers of the High Court under section 25(2)(c) of the Tribunals, Courts and Enforcement Act 2007 or by any other court of competent jurisdiction.

2. Judges should consider the issue of anonymity when considering and deciding appeals. The Tribunal may make an anonymity order on its own initiative. A party may apply for anonymity at the outset when lodging notice of appeal or at a later stage. It should be borne in mind that protection appeals are anonymised at their inception and so in these cases judges must consider whether anonymity should be maintained or any order varied or discharged (see the guidance on protection appeals at paragraphs 22 and 23 below).

3. The starting point for consideration of anonymity orders is open justice. The relationship between the principle of open justice and the need to protect the rights of individuals who may be harmed by disclosure of personal details was examined by the Supreme Court in A v British Broadcasting Corporation (Scotland) [2014] UKSC 25. The judgment in A provides valuable guidance on the importance of the principle of open justice, the rights that might be engaged and the relationship between the common law and the European Convention on Human Rights ("the Convention"). The Supreme Court described the general principle that justice is administered by the courts in public and open to public scrutiny as an aspect of the rule of law in a democracy. So far as the press are concerned, the principle of open justice is inextricably linked to the freedom of the media to report on court proceedings. Although the common law principle of open justice may be departed from in rare

cases, such a course might be taken only where it is strictly necessary to achieve justice. In some cases, for example, anonymity may be necessary in view of the risks to safety of a party or witness.

4. The Convention rights likely to be engaged are Article 6(1) (although the conventional view is that deciding protection claims in the Immigration and Asylum Chamber does not amount to the determination of a person's "civil rights and obligations"), Article 8 and Article 10 (as the right to receive and impart information, guaranteed by Article 10, is relevant to the principle of open justice). Articles 2 and 3 may also be engaged where a real risk of violence or ill-treatment would arise should a person's identity become known in connection with the proceedings. The Supreme Court emphasised in A that the common law principle of open justice remains "in vigour", even where Convention rights are also applicable.

5. The Supreme Court emphasised in Kambadzi [2011] UKSC 23 that anonymity must be justified on a case by case basis. An anonymity order made in the courts below was lifted by the Supreme Court, which held that courts or tribunals have power to restrain publication to ensure safety (described in the judgment as "an extreme case") or to secure that other persons or the press show respect for private or family life. However, "it is no longer the case that all asylum seekers as a class are entitled to anonymity in this court. The making of an order has to be justified."

6. Further clear guidance on the fundamental importance of open justice is found in Cape Intermediate Holdings v Dring [2019] UKSC 38, a case concerning how much of the written material placed before the court in a civil action should be accessible to non-parties. The guidance given is intended to apply to all courts and tribunals. At paragraph 41 of the judgment there is the following: "The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state." The principal purposes of the open justice principle are two-fold. The first is to enable public scrutiny of the way in which courts decide cases, to hold judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. The second is to enable the public to understand how the justice system works and why decisions are taken.

7. Although courts and tribunals have power to allow access to written submissions and arguments and also documents placed before the court and referred to during the hearing, a person seeking access must explain why it is sought and how granting access will advance the open justice principle. Applications for access should be directed to the Resident Judge at the particular hearing centre. Where the explanation is insufficient, the application for documents is likely to be refused. In this respect, the media may be better placed than others to demonstrate a good reason for allowing access. Balanced against the purposes of the open justice principle will be any risk of harm which disclosure may cause to the maintenance of an effective judicial process or the legitimate interests of others. The Supreme Court identified as good reasons for denying access national security, the protection of the interests of children or mentally disabled adults and the protection of private interests more generally (paragraph 46 of the judgment).

8. There are relevant practical concerns. The non-party who seeks access may be expected to pay the reasonable costs of granting that access and those who seek access after the proceedings are over may find that it is not practicable to provide the

material because the court or tribunal may not have retained it or the burdens of retrieving it may be out of all proportion to any benefit derived from the open justice principle. There can be no question of ordering disclosure of a marked-up bundle without the consent of the person holding it.

Deciding whether to make an anonymity order or an order prohibiting disclosure or publication of documents or information

9. In deciding whether to make an anonymity order under rule 13(1)(b), judges will need to weigh the need for open justice against any competing interests. An anonymity order ought not to be made because an appellant or a witness has engaged in conduct that is considered socially embarrassing to reveal. In particular, the fact that someone has committed a criminal offence (criminal proceedings are not likely to have been subject to anonymity) will not usually justify the making of an anonymity order, even if it is known that such a person has children who may be more readily identified if the details of the person are known. Where details of witnesses or relatives abroad form part of a protection case, particular care will be required in assessing whether publication of those details would be likely to cause serious harm (see the guidance on protection appeals below). The revelation of the medical condition of an appellant will not normally require the making of an anonymity order unless disclosure of the fact of such a condition gives rise to a real likelihood of harm to a person or the Tribunal has required confidential medical details to be provided to it. Judges may also consider the use of rule 27, which permits the Tribunal to direct that a hearing, or part of it, is to be held in private. Where a hearing, or part of it, is to be held in private, rule 27(3) provides that the Tribunal may determine who is permitted to attend and by rule 27(4) the Tribunal may direct that a person be excluded from it if his or her conduct is disruptive or is likely to disrupt the hearing or if the Tribunal considers that his or her presence is likely to prevent another person from giving evidence or making submissions freely. The power may be exercised in relation to witnesses of fact or, in exceptional cases, experts concerned that giving evidence in open court might inhibit their work in the relevant country. The Supreme Court has commented on the usefulness of the power, while emphasising that "openness is the norm": MN and KY (Somalia) [2014] UKSC 30. Judges will need to make a similar, careful assessment when considering whether to make an order prohibiting the disclosure or publication of documents or information relating to the proceedings, under rule 13(1)(a) of the Procedure Rules.

10. There is a need for caution where the Tribunal is considering making an order of its own motion, where neither party has made an application. There is a risk that such an order might prevent a party, likely to be the appellant, from discussing his or her case with the media (in some circumstances the appellant and his or her representatives might see this as a desirable step).

11. There has been some concern in recent years that more anonymity orders are made by the Tribunal than are necessary and that the terms of these orders are wider in scope than they need to be. This may cause difficulties for the parties as it is far from clear that the Tribunal has the power to vary or amend such a direction after appeal proceedings are completed. Proceedings are completed when all onward appeals, or the time allowed for bringing an onward appeal, have come to an end or appeals are abandoned, withdrawn (or treated as withdrawn) or lapse. The Tribunal no longer has jurisdiction and would seem to have no power to amend or vary an anonymity order.

For this reason, an anonymity order for an indefinite period (one that continues beyond completion of the proceedings) should be made only exceptionally and where there is strong justification for doing so.

Children

12. The identity of children, whether they are appellants, the children of an appellant or a witness or otherwise concerned in the appeal, will not normally need to be disclosed nor will their school, the names of their teachers or any social worker or, in exceptional cases, health professional with whom they are concerned, unless there are good reasons to do so in the interests of open justice. Where the identity of a child is not to be revealed, the name and address of a parent other than the appellant may also need to be withheld to preserve the anonymity of a child.

13. There may be other cases where the Tribunal should make an anonymity order to protect the identity of a child or vulnerable person. It will be necessary to do so, for example, where information about a child or family proceedings concerning a child has been supplied by the family court under the terms of the joint protocol between the President of the Family Division and the Senior President of Tribunals, dated 19th July 2013. Section 97(2) of the Children Act 1989 requires anonymity for a child subject to family law proceedings and includes a prohibition on the disclosure of any information that might identify the address or school of that child. There are equivalent provisions under section 170 of the Children (Northern Ireland) Order 1995. Similar protection for children in Scotland is found under section 182 of the Children's Hearings (Scotland) Act 2011. Section 49 of the Children and Young Persons Act 1933 prohibits publication of the name, address, school or any other matter likely to identify a person under 18 as being concerned in proceedings before the youth courts. A child or young person is concerned in proceedings if they are a victim, witness or defendant.

Allegations of sexual offences; allegations of trafficking; female genital mutilation

14. Section 1 of the Sexual Offences (Amendment) Act 1992 (as amended) ("the 1992 Act") requires anonymity for a victim or alleged victim of a sexual offence listed in section 2 of that Act. The list includes rape and many offences under the provisions of the Sexual Offences Act 1965, including indecent assault on a woman and indecent assault on a man. Section 1 of the Act provides that "no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed." It is also unlawful to publish details which may allow jigsaw identification.

15. Section 2 of the 1992 Act limits the offences which are included to offences under the law of England and Wales. Separate provisions are made for offences under the law of Northern Ireland. The Act does not directly apply to offences under Scots law but the 1992 Act was extended to the whole of the United Kingdom by paragraph 14 of the Schedule to the Youth Justice and Criminal Evidence Act 1999.

16. A person who has made an allegation that he or she has been trafficked contrary to section 2 of the Modern Slavery Act 2015 is entitled to the same lifelong anonymity as an alleged victim of a sexual offence, by virtue of section 2 (1) (db) of the 1992 Act.

17. Under section 4A of and schedule 1 to the Female Genital Mutilation Act 2003, no matter likely to lead members of the public to identify a person as the person against whom a female genital mutilation offence is alleged to have been committed may be included in any publication during the person's lifetime.

18. A careful assessment will be required in all cases concerning victims or alleged victims of sexual offences falling within scope and cases where an allegation of trafficking is made and anonymity may well be required.

Prohibiting disclosure of a document or information

19. The power to make an anonymity order contained in rule 13(1)(b) is distinct from the power contained in rule 13(2) to give a direction prohibiting the disclosure of a document or information *to a person* if the Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm and the Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction. In assessing the interests of justice in this context, judges must take into account the principle of open justice.

Orders under rule 13 (1)(b)

20. A suitable formulation when making an anonymity order is as follows:

> "**Pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, until this appeal is finally determined the appellant (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.**
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> **No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court**."

21. It will also usually be appropriate to include, drawing on case management powers under rule 4 of the Procedure Rules, the following:

> "**This order does not restrict disclosure of information relating to this appeal to law enforcement or regulatory agencies, the Bar Council, the Solicitors Regulatory Authority, the Law Society, OISC, or where disclosure is otherwise required by law**."

Protection appeals

22. All protection appeals are given anonymity at case creation at the National Business Centre, to avoid any risk to an appellant arising from publication of details of the protection claim. The effect of this anonymity order, which may be described as an interim order, is that the appellant's name is removed from any published documents relating to the case, including the published court lists, to which there is access on the internet or worldwide web. It is important for judges to consider whether the interim

anonymity order made at case creation should be continued. The Upper Tribunal (Immigration and Asylum Chamber) follows the same general practice, with the result that an anonymity order will generally remain in protection appeals, unless a judge decides that anonymity is no longer necessary. Even where a protection appeal is dismissed, it may be necessary to continue an anonymity order, in case of an onward appeal. A suitable formulation to be added to the suggestions in paragraphs 20 and 21 above, which may be useful in all cases where an anonymity order is made (and not just protection appeals) is as follows:

> "**Unless the Upper Tribunal or a court directs otherwise, this order expires when the appeal is finally determined i.e. when the appellant becomes appeals rights exhausted at the conclusion of the proceedings, including any onward appeal to the Upper Tribunal or court, or when the appeal is abandoned, withdrawn (or treated as withdrawn) or lapses. If there is an onward appeal or challenge, an application to amend or vary the anonymity order must be made to the Upper Tribunal or court concerned**."

23. Reasons should be given for either making or not making an anonymity order but these may be brief. Occasionally, one of the parties might raise a particular issue or objection to an order which will need to be addressed. If judges decide in the course of the hearing to make an anonymity order under rule 13(1), or to make an order prohibiting disclosure under rule 13(2), brief reasons must be given there and then, with an explanation of the impact of the order to those present. If there are members of the public present, or members of the press, they should be informed or reminded of any existing anonymity order and its terms. It is important to read out any anonymity order in place at the beginning of a hearing, so that the terms and scope are clear.

"Remote" hearings

24. The use of remote technology in legal proceedings, including hearing evidence by phone or computer link, became ubiquitous in all jurisdictions during the Covid pandemic. In future, bails applications, case management review hearings and substantive hearings are all likely to be conducted remotely in many, and perhaps the majority, of cases.

25. Where the remote hearing is conducted using audio means only, for example using BT MeetMe, the proceedings will be recorded and the recording will be available for uploading to the Tribunal for a month. The administrative teams at hearing centres will make the necessary arrangements. Judges will need to bear in mind that members of the public, the press, academics or other researchers may seek to observe such a hearing by joining in the telephone conference. The Tribunal is able to make arrangements to enable this to happen and judges should have no difficulty in conducting the hearing with the observer listening to events as they occur. The guidance at paragraph 23 above will apply, and judges should ensure that they know the identities of all those present and that all are aware of the terms of any anonymity order in place. Judges should also make it clear to all that no private recording of the hearing is permitted (and unauthorised recording is a criminal offence) and that the Tribunal's recording will constitute the record of proceedings.

26. Open justice requires the Tribunal to consider applications made after a remote hearing by audio means, by members of the public or others, for access to the recording of the hearing. Judges must be aware of this possibility and bear it in mind when preparing for the hearing. Reading out any anonymity order at the outset ensures that it appears in a recording of the hearing and will be apparent to anyone listening to the recording or reading a transcript of it. In a protection appeal, where an appellant fears that agents of the state he has fled (or similar agents) may seek to obtain a recording of the hearing, so that they might become aware of the details of his case, judges should consider how best to deal with this issue. Rule 27 (paragraph 9 of this guidance) permits an appeal to be conducted in private (and conventionally, case management review hearings are routinely conducted in private) but this has an obvious impact on the application of the open justice principle in the particular case.

27. In protection appeals, judges might consider applying a protocol to the remote hearing by audio means to ensure that details of the appellant's case are not disclosed inappropriately, while maintaining open justice. The use of initials to refer to witnesses, the omission of full details of addresses or the precise location of events and similar measures during the hearing should ensure that any recording provides sufficient information to achieve open justice while protecting the interests of appellants and family members. This is a similar approach to that suggested in relation to written decisions (see paragraphs 32 and 33 below).

28. Where a remote hearing is conducted by video or other means where there are audio and visual signals, similar considerations will apply. The Cloud Video Platform ("CVP") will include a recording facility and judges should emphasise that recording by this means will constitute the record of proceedings and that no private recording (audio, visual or both) is permitted (and private recording will be a criminal offence). As with audio recordings, the open justice principle will require the Tribunal to consider providing access to the video recording on application. As appears at paragraph 7 above, any such application should be referred to the Resident Judge at the hearing centre concerned, so that the appropriate means by which access may be provided can be considered. Practice Direction 51Y of the Civil Procedure Rules ("Video or audio hearings during the Coronavirus pandemic"), which will cease to have effect on the date on which the Coronavirus Act 2020 ceases to have effect in accordance with section 75 of that Act, provides (in relation to hearings held in private) that any recording "is to be accessed in a court building, with the consent of the court". It will be for the Tribunal to consider whether a similar approach is merited in any particular case, once all the circumstances have been taken into account.

Requests for documents from the court file

Court documents

29. The transparency required by open justice is not confined to what is written in a judgment. It also includes the court being open for members of the public and the press to attend.

30. Open justice may also make it necessary for some court documents to be disclosed, as can be seen from Guardian News (see above) and more recently from Cape Intermediate Holdings v Dring [2019] UKSC 38. That is because the practice of representatives preparing skeleton arguments, chronologies, and witness statements which are not read out may result in a case being heard in such a way

that "even an intelligent and well-informed member of the public, present throughout every hearing in open court, would be unable to obtain a full understanding of the documentary evidence and the arguments on which the case was to be decided."

31. Any request by a non-party for documents from the file must be made in writing and referred to the President who will consider the application.

Impact on writing the decision in the appeal

32. Rule 13(10) of the Procedure Rules is important. It provides that the Tribunal

> "**must conduct proceedings and record its decision and reasons appropriately so as not to undermine the effect of an order made under paragraph (1) (or) a direction under paragraph (2)** …"

If an anonymity order is made, initials should be used to replace the name of the appellant and any others involved in the case, such as family members or witnesses. The approach to an application for permission to appeal should reflect any anonymity order made. The guidance in the following paragraph may also be applied where anonymity has been ordered, so as to further reduce the risk of identification.

33. In many cases, there may be alternatives to making an anonymity order. It may be possible, for example, to remove sensitive information from the decision. There may be no need to include the names and precise dates of birth of any children and places of residence, names of schools, bank accounts and so forth need not be specified unless there is a particular reason for doing so. It may be possible, having replaced an appellant's name with initials, to describe him or her as "having formally resided in a city in (country of nationality)" or as "currently residing in a city in England, where the family has lived since arrival in the United Kingdom". Medical details may be summarised without identifying the location of a surgery, clinic or hospital.

34. As an alternative, it may be possible in a suitable case to separate the detailed evidence and findings into an appendix which accompanies the decision and make a direction under rule 13(2) prohibiting the disclosure of the appendix. The decision itself may then be written in short form, with a brief summary of the evidence and the conclusions reached in relation to the matters in issue but omitting details which might identify the appellant or others,

35. It should be borne in mind that the power to make an anonymity order under rule 13(1) is different from the power to hold a hearing in private, under rule 27(2). Similar considerations may arise in relation to this power as arise in relation to anonymity orders. However, it does not necessarily follow that because a hearing is held in private, an anonymity order is necessary. It may be sufficient to protect the interests of the appellant by means of a hearing held in private and a suitably drafted decision, as suggested in paragraphs 32 to 34 above.

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