



TRIBUNALS
JUDICIARY

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PRESIDENT OF THE Upper Tribunal, IMMIGRATION AND ASYLUM CHAMBER

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Joint Presidential Guidance Note No 2 of 2010:

Child, vulnerable adult and sensitive appellant guidance

1. This guidance, which covers appellants and witnesses, has been developed for the First Tier Immigration and Asylum Chamber following the Guidance issued by the Senior President of Tribunals regarding Child, Vulnerable Adult and Sensitive Witnesses¹. Although specific to these groups it is also a reminder of good judgecraft.
2. Although some individuals are by definition vulnerable² others are less easily identifiable. Factors to be taken into account include:
 - mental health problems
 - social or learning difficulties

¹ Issued 30th October 2008, see Annex B for full copy.

² As defined in the Senior President's guidance "Child" means a person who has not attained the age of 18; "vulnerable adult" has the same meaning as in the Safeguarding Vulnerable Groups Act 2006; "sensitive witness" means an adult witness where the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with giving evidence in the case. s59 Safeguarding Vulnerable Groups Act defines a vulnerable adult as follows:

(1) A person is a vulnerable adult if he has attained the age of 18 and—

(a) he is in residential accommodation,

(b) he is in sheltered housing,

(c) he receives domiciliary care,

(d) he receives any form of health care,

(e) he is detained in lawful custody,

(f) he is by virtue of an order of a court under supervision by a person exercising functions for the purposes of Part 1 of the Criminal Justice and Court Services Act 2000 (c. 43),

(g) he receives a welfare service of a prescribed description,

(h) he receives any service or participates in any activity provided specifically for persons who fall within subsection (9),

(i) payments are made to him (or to another on his behalf) in pursuance of arrangements under section 57 of the Health and Social Care Act 2001 (c. 15), or

(j) he requires assistance in the conduct of his own affairs.

Some individuals are vulnerable because of what has happened to them eg they are victims of trafficking or have sustained serious harm or torture or are suffering from PTSD.

Paragraph 349 of Statement of Changes of Immigration Rules HC395 as amended ("the Rules") defines child as an individual who is under 18 years of age or who appears to be under that age.

- religious beliefs and practices, sexual orientation, ethnic social and cultural background
 - domestic and employment circumstances
 - physical disability or impairment that may affect the giving of evidence
3. The consequences of such vulnerability differ according to the degree to which an individual is affected. It is a matter for you to determine the extent of an identified vulnerability, the effect on the quality of the evidence and the weight to be placed on such vulnerability in assessing the evidence before you, taking into account the evidence as a whole.

Before the substantive hearing

4. In so far as it is possible potential issues and solutions should be identified at a CMRH or pre hearing review and the casepapers noted so that the substantive hearing can proceed with minimal exposure to trauma or further trauma of vulnerable witnesses or appellants. It is important not to assume that an individual will want specific or particular arrangements made.
5. Where there has not been a pre hearing review or CMHR or the parties were inadequately prepared these matters should in any event be considered at the commencement of the substantive hearing.

5.1 Generic

- i. The primary responsibility for identifying vulnerable individuals lies with the party calling them but representatives may fail to recognise vulnerability.
- ii. Establish precise details of any potential disability or medical condition to enable appropriate arrangements to be made for the Tribunal hearing room in terms of eg mobility in the hearing room, provision of an induction loop, adequate space for carers, re-arrangement of furniture to enable a child friendly or less formal structure eg all on the same level. Ensure the room is re-arranged prior to sitting.
- iii. Ensure the time estimate provided allows for special arrangements eg frequent breaks to ensure adequate concentration levels, access to toilets to accommodate special needs at the hearing.
- iv. Record that the appeal is to be heard first in the list; it is undesirable that these cases are adjourned part heard.
- v. Identify and record potential behavioural challenges or difficulties, consider and record appropriate hearing room arrangements.
- vi. Identify and record whether the appellant is legally represented. If not consider whether an adjournment of the substantive

- hearing would enable representation to be obtained³. Bear in mind that legal aid may not be available.
- vii. Consider whether expert evidence eg as to disability, age or mental health is required, particularly if there is a dispute on an issue over ability to participate in the proceedings; consider whether an adjournment would be appropriate to enable either party to obtain reports.
 - viii. Relevant policies and practices relied upon by either party should be disclosed eg protocols for victims of trafficking⁴, interview protocols.
 - ix. Ensure adequate focussed and effective directions are issued.

5.2 Children

- i. A minor appellant should have been identified by the IAC centre and the file noted accordingly.
- ii. All unaccompanied asylum seeking children should have been referred to the Refugee Council's Panel of Advisors by UKBA but this may not be recorded in the papers before you; the Panel of Advisors can assist a minor appellant in finding legal representation.
- iii. Identify and record whether a minor asylum seeking appellant has a responsible adult eg parent, social worker, teacher, foster parent who will be attending the substantive hearing to provide support. A legal representative is not and cannot be a responsible adult. It is advisable that a child has someone available at all hearings but it is not possible for you to direct a third party to attend⁵.
- iv. There is no provision in our jurisdiction for a Tribunal appointed guardian, intermediary or facilitator
- v. If an appellant is 'age disputed' treat that appellant in accordance with these guidelines.

5.3 Vulnerable and sensitive witnesses

- i. Consider any request for a single gender Tribunal but bear in mind that sensitive issues may not be the subject of questions or core to the evidence.
- ii. There is no provision in our jurisdiction for support for vulnerable adults but you may consider it appropriate to suggest

³ Paragraph 21 Asylum and Immigration Tribunal (Procedure) Rules 2005, as amended. Para 352ZA the Rules

⁴ Further information on dealing with victims of trafficking can be found on the specific Victims of Trafficking policy guidance by UKBA and in the online trafficking toolkit at www.crimereduction.gov.uk/toolkits/tp00.htm Referral to the Competent Authority is made through the police or UKBA. You should talk to your RSIJ. The Record of proceedings should be noted accordingly and consideration given to an adjournment to enable further investigation.

⁵ Para 352 of the Rules requires a responsible adult to be present at all interviews conducted by UKBA.

attendance by such an individual to assist the appellant in giving evidence.

6. In the final analysis it is the Tribunal's decision whether specific arrangements are made, what those arrangements are and whether the hearing can proceed in their absence.

The Substantive Hearing

7. Enable the appellant to have adequate time prior to the commencement of the hearing to familiarise him/herself with the hearing room and give instructions to his/her representative.
8. It may only be at the substantive hearing following service of all relevant documents including witness statements that you are able to assess whether oral evidence is required.
9. Agreement between the parties in advance of oral evidence as to the matters agreed or in dispute enables questioning to be focussed, sensitive and minimises potential trauma. If the parties have not spoken to each other, identify areas of dispute and agreement prior to commencement of oral evidence.

10. Hearing evidence

10.1 At commencement of hearing

- i. Introduce all individuals in the hearing room.
- ii. Ensure there has been an adequate explanation of the hearing process and the issues at stake.
- iii. Remind the appellant's representative and supporting adult, if any, of their responsibility to identify concerns they may have during the course of the hearing as to the appellant's wellbeing although you should continue to ensure by any appropriate means that the appellant understands what is happening
- iv. Do not assume that a child or other vulnerable person wants a specific person eg parent with them during hearing
- v. Exclude members of the public when a child is giving evidence;
- vi. Consider restricting or barring members of the public/family members in other cases to enable oral evidence to be given freely and without covert intimidation. If, from reading the papers you suspect abuse or trafficking, you should consider excluding individuals not associated with the presentation of the case to enable the witness to give evidence unhindered. You may notice individuals in the Tribunal who have no apparent bearing on the hearing and you may consider closing the hearing to the public to enable evidence to be given, even if you do not suspect trauma.

10.2 During the hearing

- i. Speak clearly and directly to the appellant/witness. Demonstrate active listening.
- ii. Use plain English and avoid legal and other jargon; be sensitive to specific communication needs for reasons of language or disability,
- iii. Ensure questions asked are open ended wherever possible; broken down to avoid having more than one idea or point in each question and avoid suggesting a particular answer.
- iv. Curtail improper or aggressive cross examination; control the manner of questioning to avoid harassment, intimidation or humiliation. Ensure that questions are asked in an appropriate manner using a tone and vocabulary appropriate to the appellant's age, maturity, level of understanding and personal circumstances and attributes. Pay special attention to avoid re-traumatisation of a victim of crime, torture, sexual violence
- v. Be sensitive to the possibility that the witness/appellant has understood the question, and, if there is a risk of confusion, check this
- vi. Ensure that adequate breaks are given during the hearing; check at intervals throughout the hearing that the appellant is comfortable and understands the proceedings; don't wait to be asked.
- vii. If there is no or inadequate representation it is important that you obtain clarification of all matters of which you are unclear⁶.
- viii. If an individual is, during the course of the hearing, identified as a vulnerable adult or sensitive witness, an adjournment may be required to enable expert evidence to be called as to the effect of this on the individual's ability to give cogent evidence of the events relied upon. Allow adequate time for the representative, if there is one, to consider and take instructions.

Be aware

- ix. A person with special needs may be more easily influenced by the way information and choices are presented and there may be a tendency to guess an answer rather than say "don't know".
- x. People with special needs may need more time to understand and think about a question. Ensure adequate time is given to understand the question; reassure the appellant that "don't understand", "don't know" "don't remember" are acceptable answers if true
- xi. People with special needs are not always used to having their views listened to and may be more easily influenced by others even when they have a different view themselves.

⁶ Lord Woolf called for judges to take a more pro-active role in relation to unrepresented litigants; justice must not only be done but be seen to be done (Access to justice Interim Report pp99and 119)

- xii. Apparently contradictory answers may indicate a lack of understanding; a question may need to be asked in various ways to ensure understanding.
- xiii. A possible power imbalance may exist between those asking the questions and the witness/appellant.

10. As evidence progresses and you become aware of changed circumstances, a short adjournment to later in the day may be appropriate to consider the format of the hearing, for both representatives to take further instructions, possibly for social services or the police to be informed. It may be that one or other of the parties is not represented and you may consider an adjournment for a longer period with an appropriate direction to enable representation in the light of the changed circumstances

10.3 Assessing evidence

Take account of potentially corroborative evidence

Be aware:

- i. Children often do not provide as much detail as adults in recalling experiences and may often manifest their fears differently from adults;
- ii. Some forms of disability cause or result in impaired memory;
- iii. The order and manner in which evidence is given may be affected by mental, psychological or emotional trauma or disability;
- iv. Comprehension of questioning may have been impaired.

Determination

- 11. An appellant is entitled to a clear decision with reasons.
- 12. Record whether the appellant had someone there to support him or her and the role played, if any.
- 13. The weight to be placed upon factors of vulnerability may differ depending on the matter under appeal, the burden and standard of proof and whether the individual is a witness or an appellant.
- 14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which

the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.

15. The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind⁷.

Annex A

Why guidance is necessary?

16. Effective communication is the bedrock of the legal process; everyone involved in legal proceedings must understand and be understood or the process of law will be seriously impeded. Judges must reduce the impact of misunderstandings in communication. Unless all parties to proceedings understand the material before them and the meaning of questions asked and answers given, the process of law is at best seriously impeded and at worst thrown seriously off course⁸.
17. All possible steps should be taken to assist a vulnerable individual to understand and participate in the proceedings and the ordinary process should, so far as necessary, be adapted to meet those ends.
18. Documents, process and procedure which fail to take into account vulnerability may compromise the quality of the evidence produced; a failure to take into account procedural requirements may result in evidence being potentially inadmissible or unreliable⁹.

To whom does this guidance apply?

19. This guidance applies to individuals who may be appellants or witnesses. An individual may be vulnerable because of an innate characteristic (eg age), because of his or her personal characteristics

⁷ Para 351 the Rules

⁸ Chapter 1.2 Equal Treatment Bench Book

⁹ The UKBA have a number of protocols and guidance documents which set out standards to be complied with when interviewing children, victims of torture, traumatised victims, mentally disturbed individuals. These are available through the policy and law section of the UKBA website.

(eg mental health problems) or because of events over which they had or have no control eg detention or torture.

20. This guidance applies to children and young persons under the age of 18, who appear to be under the age of 18 or claim to be under the age of 18, individuals who suffer from a mental disorder within the meaning of the Mental Health Act 1983 or who have any significant impairment of intelligence or social function such as to inhibit understanding and participation in proceedings or learning disability or as defined in the Safeguarding Vulnerable Groups Act 2006 or who are vulnerable because of external factors. Some individuals may be vulnerable because of a combination of factors.
21. It may only become apparent that an individual is vulnerable at the commencement of or during the substantive hearing. Many difficulties (eg dyslexia or dyspraxia) are 'hidden' and become apparent during questioning (eg because of lack of concentration, inability to understand a question or read a document, lack of co-ordination). Evidence of, eg, trafficking, rape and torture may be given for the first time on the day of the hearing.

Other Sources of Guidance

22. Chapter 5 of the Equal Treatment Bench Book¹⁰ provides an overview of disability and sets out the requirement that the judiciary should be able to recognise disabilities when they exist, identify the implications, know what powers they have to compensate for the resulting disadvantage and understand how to use these powers without causing prejudice to other parties.
23. Practice Directions have been issued for Criminal Proceedings setting out the special arrangements to be made for vulnerable defendants. A Vulnerable Witnesses Guidance Pack was issued in Scotland in 2005 following the Vulnerable Witnesses (Scotland) Act 2004¹¹.
24. Section 55 Borders Citizen and Immigration Act 2009 sets out a statutory duty to ensure that UKBA functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK¹².
25. The Council of Europe¹³ has draft guidelines (May 2010) to ensure the effective implementation of existing binding European and international standards to protect and promote children's rights taking into account

¹⁰ www.jsboard.co.uk/etac/etbb/index.htm

¹¹ www.scotland.gov.uk/topics/justice

¹² The UKBA approach is set out in Arrangements to Safeguard and Promote the Welfare of Children for those Exercising UK Border Agency Functions and outlines the key principles: the best interests of the child will be a primary consideration; no child should be discriminated against through being a child, or on grounds of gender, race religion, disability, sexual orientation or culture; the views and wishes of the child should be sought and taken into account whenever decisions affecting them are made. This should be done in a way that takes account of the child's age and maturity.

¹³ www.coe.int/t/dghl/standardsetting/childjustice/CJ-S-CH%20_2010_%209%20E%20-%2025TH%20DRAFT%20COE%20GUIDELINES%20ON%20CHILD-FRIENDLY%20JUSTICE.pdf

26. The United Nations Convention on the Rights of the Child 1989 (CRC) provides a comprehensive framework for the responsibilities of States for all children within its borders and provides that in all actions concerning children the best interests of the child 'be a primary consideration'¹⁴.
27. The UNHCR recognises the importance of States promoting an age, gender and diversity sensitive approach and emphasises the importance of particular attention being given to the vulnerability of women and children and those with disabilities¹⁵; affirm that children because of their age social status and physical and mental development are often more vulnerable than adults in situations of forced displacement and the principle that the best interest of the child shall be a primary consideration; recognise that sexual abuse and exploitation are a consequence of unequal power relationships.

Annex B



Tribunals Judiciary

PRACTICE DIRECTION FIRST TIER AND UPPER TRIBUNAL CHILD, VULNERABLE ADULT AND SENSITIVE WITNESSES

1. In this Practice Direction:
 - a. "child" means a person who has not attained the age of 18;
 - b. "vulnerable adult" has the same meaning as in the Safeguarding Vulnerable Groups Act 2006;
 - c. "sensitive witness" means an adult witness where the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with giving evidence in the case.

CIRCUMSTANCES UNDER WHICH A CHILD, VULNERABLE ADULT OR SENSITIVE WITNESS MAY GIVE EVIDENCE

2. A child, vulnerable adult or sensitive witness will only be required to attend as a witness and give evidence at a hearing where the Tribunal determines that the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so.
3. In determining whether it is necessary for a child, vulnerable adult or sensitive witness to give evidence to enable the fair hearing of a case the Tribunal should have regard to all the available evidence and any representations made by the parties.

¹⁴ Article 3 CRC, ratified by every country in the world except the USA and Somalia.

¹⁵ Ex Comm No 98 of 2003, 107 of 2007, 108 of 2008

4. In determining whether the welfare of the child, vulnerable adult or sensitive witness would be prejudiced it may be appropriate for the Tribunal to invite submissions from interested persons, such as a child's parents.
5. The Tribunal may decline to issue a witness summons under the Tribunal Procedure Rules or to permit a child, vulnerable adult or sensitive witness to give evidence where it is satisfied that the evidence is not necessary to enable the fair hearing of the case and must decline to do so where the witness's welfare would be prejudiced by them giving evidence.

MANNER IN WHICH EVIDENCE IS GIVEN

6. The Tribunal must consider how to facilitate the giving of any evidence by a child, vulnerable adult or sensitive witness.
7. It may be appropriate for the Tribunal to direct that the evidence should be given by telephone, video link or other means directed by the Tribunal, or to direct that a person be appointed for the purpose of the hearing who has the appropriate skills or experience in facilitating the giving of evidence by a child, vulnerable adult or sensitive witness.
8. This Practice Direction is made by the Senior President of Tribunals with the agreement of the Lord Chancellor. It is made in the exercise of powers conferred by the Tribunals, Courts and Enforcement Act 2007.

LORD JUSTICE CARNWATH
SENIOR PRESIDENT OF TRIBUNALS
30 October 2008