UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER

GUIDANCE NOTE 2022 No 2: Anonymity Orders and Hearings in Private

This Guidance Note is issued under paragraph 7 of Schedule 4 to the Tribunals, Courts and Enforcement Act 2007. It replaces Guidance Note 2013 No 1: Anonymity Orders.

I Introduction

> "Open justice…requires, as a general rule, that the courts must conduct their business publicly unless this would result in injustice. Open justice is an important safeguard against judicial bias, unfairness and incompetence, ensuring that judges are accountable in the performance of their judicial duties. It maintains public confidence in the impartial administration of justice by ensuring that judicial hearings are subject to public scrutiny, and that 'Justice should not only be done, but should manifestly and undoubtedly be seen to be done' ".
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> R (Guardian News & Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening) [2012] EWCA Civ 420 ("Guardian News") per Toulson LJ, quoting the Law Commission of New Zealand on Access to Court Records, 2006, Report 93

1. Exceptions to that rule must be justified by some more important principle, most often where the circumstances are such that that openness would put at risk the achievement of justice which is the very purpose of the proceedings[1].

2. The relationship between open justice and the need to protect the rights of individuals who may be harmed by disclosure of personal details was examined in A v British Broadcasting Corporation (Scotland) [2014] UKSC 25 which provides important guidance on the importance of the principle of open justice, and the relationship between the common law, the European Convention on Human Rights and section 11 of the Contempt of Court Act 1981.

3. In appeals and judicial reviews in the Upper Tribunal, Immigration and Asylum Chamber ("UTIAC"), issues frequently arise regarding human rights protected by the European Convention on Human Rights. Those most commonly encountered are Article 8 (right to respect for private and family life), and, in protection appeals, Article 2 (right to life) and Article 3 (prohibition of torture/inhuman or degrading treatment or punishment). The Supreme Court emphasised in Av BBC that the common law principle of open justice remains "in vigour", even where Convention rights are also applicable.

[1] Guardian News at [4], per Toulson LJ

4. It is for a UTIAC judge to determine the extent, if any, to which a human right necessitates a departure from the principle of open justice. Restrictions on open justice must be justified and proportionate; any restriction imposed must be no more extensive than is necessary to protect the interests of justice. Care may need to be taken such that information which is protected is not disclosed in open court in such a manner as could lead to its dissemination.

5. The judge's decision to anonymise will be fact-specific. As was noted in A v BBC at [32] where the interests of justice require some qualification of the principle of open justice, it may not be necessary to exclude the public or the press from the hearing: it may be sufficient for particular information to be withheld.

6. Central to the Tribunal's evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others[2].

II Powers of the Upper Tribunal

7. Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "UT Procedure Rules") contains a power to make an order prohibiting the disclosure or publication of specified documents or information relating to the proceedings or of any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified. The effect of such an "anonymity order" may therefore be to prohibit anyone (not merely the parties in the case) from disclosing relevant information. Breach of the order may be punishable as a contempt of court (see further paragraph 40 below).

8. The usual anonymity order to be used by the Upper Tribunal is as follows: -

> **"Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant/respondent is granted anonymity.**
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> **No-one shall publish or reveal any information, including the name or address of the appellant/respondent, likely to lead members of the public to identify the appellant/respondent. Failure to comply with this order could amount to a contempt of court."**

This form of order will be adapted in cases where anonymity is ordered in respect of some other individual (such as a witness).

9. Rule 14 (2) of the UT Procedure Rules provides that the Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if the Tribunal is satisfied that disclosure 'would be likely to cause that

[2] See A v BBC at [41]

person or some other person serious harm' and that it is proportionate having regard to the interests of justice to give such a direction[3].

10. The work of the UTIAC makes it appropriate in certain classes of cases to exercise rule 14 powers to prevent certain information from entering the public domain.

11. All determinations of UTIAC are available on its web site, but in the past only Reported Decisions of the Upper Tribunal could be searched for by name, subject and other indicators. This has now changed. All Unreported Decisions made after 1 June 2013 can be searched for on the web site. It is important to remember that the web site has been configured in such a way that it is indexed by search engines. This means that simply searching a name in, for example, Google, will show a UTIAC decision as a "hit" if that name appears in a UTIAC decision without anyone having to search the UTIAC database. It is not just an appellant's name that will be found; family members and witnesses will also be found which may have serious consequences dependent on what is said about them.

12. For that reason, it is particularly important that UTIAC judges follow a consistent practice where anonymity has been granted and that parties and others are aware of the practice to be adopted.

III Principles to be applied

13. The starting point for consideration of anonymity orders in UTIAC, as in all courts and tribunals, is the principle of open justice, described in the Introduction to this Guidance Note. This principle promotes the rule of law and public confidence in the legal system. UTIAC sits in open court with the public and press able to attend and, as a general matter, nothing should be done to discourage the publication to the wider public of fair and accurate reports of proceedings that have taken place.

14. Given the importance of open justice, the general principle is that an anonymity order should only be made by UTIAC to the extent that the law requires it or it is found necessary to do so.

15. It should be borne in mind that an anonymity order can be lifted. It is, however, much harder effectively to anonymise at a later stage once the information has been made public and there may have been a breach of the duty of confidence. To that end, at least in the earlier stages, it may be sensible, particularly in protection cases, and cases involving children, to err on the side of caution.

16. In order to achieve the required degree of anonymisation, it may be necessary to do more than just using letters for a party's name in the decision or judgment.

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[3] In addition to rule 14, the Upper Tribunal has, by virtue of section 25 of the TCEA, the same powers etc as the High Court (or, in Scotland, the Court of Session) as regards certain specified matters, which include all "matters incidental to the Upper Tribunal's functions". In certain circumstances, it may be appropriate for the Tribunal to utilise these powers, in cases with which this guidance note is concerned, instead of, or in addition to, rule 14.

Care must also be taken to ensure that the person in question is not identifiable by, for example, giving precise details of family, place of origin or specific details that may permit that person to be identified.

17. Care must also be taken to ensure, if appropriate, that witnesses and others referred to in a decision are anonymised.

Situations where the law requires anonymity

18. This applies **not just to the parties, but also to witnesses and other persons referred to in a decision, particularly children**, for the reasons set out below.

19. The law requires anonymity to be respected in certain circumstances, whether or not the Tribunal has made an order. These circumstances include:

    a. Allegations of sexual offences: Section 1 of the Sexual Offences (Amendment) Act 1992, as amended, requires anonymity for a victim or alleged victim of a sexual offence listed in section 2 of that Act. 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". Equally it is unlawful to publish details which may allow jigsaw identification.

    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 Act was extended to the whole of the United Kingdom by paragraph 14 of Schedule 2 to the Youth Justice and Criminal Evidence Act 1999.

    b. Allegations of trafficking: under section 2(1) (db) of the Sexual Offences (Amendment) Act 1992, 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 life-long anonymity as an alleged victim of a sexual offence. It should be noted that offences under section 2 of the 2015 Act have a wide extra-territorial reach as do investigations carried out by the competent authority. This provision may require anonymising a judicial review application.

    c. Children subject to family law proceedings: 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 article 170 of the Children (Northern Ireland) Order 1995. There are also protections for children involved in children's hearings in Scotland under section 182 of the Children's Hearings (Scotland) Act 2011.

d. Children subject to proceedings before Youth Courts: Section 49 of 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 witness or defendant. Similar provisions exist in Northern Ireland and in Scotland.

e. Female Genital Mutilation

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. Where there is an FGM prevention order made by the Family Court in place, the guidance applicable to material supplied by the Family Court should be applied.

f. Orders made by another jurisdiction: there may be an order forbidding disclosure of certain information, for example a temporary restraint on publication under section 4 of the Contempt of Court Act 1981.

Situations where the law permits anonymisation

General

20. UTIAC will make an anonymity order or otherwise direct that information be not revealed, where it is satisfied such an order is necessary to protect human rights, whether (for example) the private life of a party subject to the jurisdiction or the life, liberty and bodily integrity of a witness or a person referred to in proceedings. The Tribunal will also make such an order where it considers this necessary in the interests of the welfare of a child or if the interests of justice would otherwise be frustrated.

21. Parties may apply for an anonymity order or UTIAC may make one of its own volition where, for example, it has not been previously noted that one of the circumstances where anonymity is required by law (see paragraphs 18 and 19 above).

22. A decision to make an anonymity order where not required by law may require the weighing of the competing interests of an individual and their rights (for example, under Articles 3 or 8 of the ECHR or their ability to present their case in full without hindrance) against the need for open justice.

23. The factors to be taken into account by UTIAC in deciding whether to make or continue an anonymity order may well not be the same as those taken into account by the First-tier Tribunal.

24. An anonymity order will not be made merely because an appellant or witness has engaged in conduct that is considered socially embarrassing to reveal.

Deportation

25. The fact that someone has committed a criminal offence will not 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.

26. Where, for example, an appellant faces deportation for a "section 2" sexual offence committed against a partner, or an offence against a child of the family who has subsequently been the subject of a care order, the fact that the law requires anonymity of the partner or child (see paragraph 19 above) may, however, make it necessary to anonymise the appellant. Where the law does not so require, but a third party's rights are engaged, UTIAC will undertake the balancing exercise described in paragraph 24 above. In many cases effective anonymity can be achieved by careful drafting of decisions.

Asylum and other protection claims

27. In Kambadzi v SSHD [2011] UKSC 23, the Supreme Court emphasised 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. The Court held that the court or tribunal has power to restrain publication to ensure safety ("an extreme case") or to secure that other persons or the press show respect for private or family life but that "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"[4]

28. In deciding whether to make an anonymity order where there has been an asylum claim, a judge should bear in mind that the information and documents in such a claim were supplied to the Home Office on a confidential basis. Whether or not information should be disclosed, requires a balancing exercise in which the confidential nature of the material submitted in support of an asylum claim, and the public interest in maintaining public confidence in the asylum system by ensuring vulnerable people are willing to provide candid and complete information in support of their applications, will attract significant weight. Feared harm to an applicant or third parties and "harm to the public interest in the operational integrity of the asylum system more widely as the result of the disclosure of material that is confidential to that system, such confidentiality being the very foundation of the system's efficacy" are factors which militate against disclosure. See R v G [2019] EWHC Fam 3147 as approved by the Court of Appeal in SSHD & G v R & Anor [2020] EWCA Civ 1001

29. An appellant will be identified by initial (and country if selected for reporting) in such cases unless and until a judge has decided that anonymity is not necessary.

30. Where details of witnesses or relatives abroad form part of a protection case, particular consideration should also be given as to whether publication of those

[4] Kambadzi v SSHD at [6], per Lord Hope

details would be likely to cause serious harm. Given the manner in which decisions database is constructed this is a serious issue.

Medical issues

31. 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 in the rare case where UTIAC has required confidential medical details to be provided to it such as a request for a medical/psychiatric report.

32. Frequently, however, it is not just in respect of appellants that such medical evidence is adduced. It often also occurs in Article 8 cases and where the vulnerabilities of children, partners, and other family members, some of whom may be witnesses, are in issue. It will not normally be necessary for the Tribunal to disclose intimate medical or other information about a witness or third party, but if it is then consideration should be given to whether the identity of the person concerned should not be disclosed, even if the name of the appellant is disclosed.

Children etc

33. The names of children, whether they are appellants or the children of an appellant (or otherwise concerned with the proceedings), will not normally be disclosed nor will their school, the names of their teacher or any social worker or health professional with whom they are concerned, unless there are good reasons in the interests of justice to do so. Such good reasons will normally exist if a criminal court has, unusually, directed that the identity of a child offender be disclosed.

34. 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.

Orders by the Family Court

35. In other cases, UTIAC may need to make an order to protect the identity of a child or vulnerable person where there is good reason to do so. It will be necessary to do so where information about the child or family proceedings concerning a child has been supplied by the Family Court under the terms of the Joint Protocol between the President Family Division and the Senior President of Tribunals dated 19 July 2013.

IV UTIAC Practice when making an Anonymity Order

36. Where an anonymity order is made the title page of the UTIAC determination will refer to this immediately after the names of the parties as **ANONYMITY**

ORDER MADE and a footnote or paragraph in the determination will explain the reasons for the order and its scope[5] including any time limit.

37. Where an anonymity order has been applied for or previously made, but it has been decided that no such order should be made, the title page will refer to this fact with the words **NO ANONYMITY ORDER MADE** and a footnote or paragraph in the determination will give any explanation.

38. Where an anonymity order has been made the decision will refer to the person who is the subject of the order by initial or pseudonym.

39. Where an anonymity order has been made the judge will then be responsible for ensuring that decisions do not reveal information contrary to the terms of the order made (rule 14(11)).

40. Where an anonymity order has been made but a person with knowledge of the order has breached it by putting the information in the public domain, such conduct 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.

41. Where an anonymity order has been made but any party contends that the order should not have been made or should be varied, an application can be made to the Office of the Chamber President giving reasons why the order should be set aside in whole or in part.

V Requests for documents from the court file

Court documents

42. 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.

43. 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."

44. Any request by a non-party for documents from the file should first be directed to the party or parties. If disclosure is refused then any application must be made in writing to the Principal Resident Judge who will consider application.

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[5] Unusually, UTIAC may decide to make an order under rule 14, the purpose of which is not to confer anonymity on a party or other person but merely to prohibit disclosure of specified information

VI Conducting hearings where anonymity issues arise

45. At present it is usual practice where a case is anonymised to use only initials in listing and to state that "reporting restrictions apply".

46. Reporting restrictions imposed in criminal cases do not prevent journalists from attending but they do put limits on what can be said: certain persons must not be identified. That would appear to extend to cases where there must be anonymity such as where there is an allegation that an individual has been trafficked or sexually assaulted and where orders of the Family Court are in issue.

47. In any event, sensitivity must be shown where issues of personal health, sexual assaults and issues about children are raised.

48. Given, however, the ban on disclosure of Family Court documents and the difficulty of having to clear a hearing room while they are being discussed, it is in most cases appropriate for such hearings to be heard in private.

VII Conducting hearings in private

49. The UTIAC may give a direction under rule 37 of the UT Procedure Rules that a hearing, or part of it, is to be held in private. It is for the UTIAC judge to determine who is entitled to attend the hearing or part of it. In practice, this will usually mean that the public is excluded from the hearing, as well as any witness, except when giving their evidence.

50. A hearing in private may be necessary when Family Court proceedings are discussed, or where sensitive matters, including medical matters, are discussed. While that will not usually apply to the whole of a hearing, there is always a risk of matters being accidentally disclosed in a public session and so unless it is possible to have clearly defined public and private sessions, it may be preferable to conduct the whole hearing in private. That does not, however, mean that matters which arise in private sessions may not be referred to in a decision, or that the subsequent decision must always be anonymised; those are issues which must be considered separately. For example, it may be that sensitive issues can be referred to obliquely or not at all; or, as a result of evidence, some matters may no longer be in issue.

51. Any application for a hearing to be heard in private must be held in private, as the party requesting it would not otherwise be able properly to explain why it is needed.

VIII Writing decisions

52. In many non-asylum cases, it may not be necessary to make an anonymity order if specific information is omitted. There is rarely, if ever, a reason for giving addresses, bank account details or, in the case of children, precise dates of birth, names of schools and so on. Sensitive medical evidence relating to a witness may be addressed simply by not naming the individual concerned in the decision or judgment.

53. In very rare cases, it may be necessary for the UTIAC judge to write two decisions - one confidential to the parties, and an open one for promulgation. An example of where that might arise is where certain facts which could not be omitted from a decision are to be withheld from a family member who has been a witness and so anonymisation would not be sufficient. This may be achieved by making the confidential decision an annexe to the shorter open decision subject to a direction prohibiting the disclosure of the annexe. Such a course of action will not be lightly undertaken and not without canvassing the views of the parties.

Other useful links:

Presidential Guidance Note No 2 of 2011: Anonymity Directions in the FtT(IAC)
The Family Courts: Media Access & Reporting – July 2011
CPS Guidance on Contempt of Court and Reporting Restrictions
Family Court Practice Guidance issued by President of the Family Division - 16 January 2014

Lane J
President

4 February 2022
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