UT Neutral citation number: [2023] UKUT 00074 (IAC)

YSA (Anonymity of Barristers)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at Field House

THE IMMIGRATION ACTS

Heard on **8 December 2022**
Promulgated on **9 December 2022**

Before

THE HONOURABLE MR JUSTICE LANE
MR C M G OCKELTON, VICE PRESIDENT

Between

YSA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

ASSOCIATED NEWSPAPERS LTD

Interested Party

Representation
Adam Speker KC for the **Applicants**
Jack Anderson for the **Defendant**
Jude Bunting KC and **Sarah Palin** for the **Interested Party**

1. *The Tribunal at both levels has power to make an order anonymising legal representatives.*

1. *The power will be exercised in accordance with the procedure set out in Re S [2004] UKHL 47, involving an 'intense scrutiny' of the prospective human rights infringements on each side of the equation, an application of s 12 of the Human Rights Act 1998, and a consideration of the interests of others who may be adversely affected by the proposed order.*

2. *The public interest in reporting of proceedings in open court remains strong.*

3. *The importance of the 'cab rank' rule does not mean that its maintenance and operation are matters for the Tribunal.*

AN APPLICATION BY TWO BARRISTERS

DECISION AND REASONS

1. This is an application by two members of the Bar, Mr Ronan Toal and Ms Ubah Dirie, who appear in an appeal, currently pending before this Tribunal. They seek an Order preventing publication of their identity as the representatives of YSA, the appellant in the appeal. We understand that a similar application is being made to the First-tier Tribunal by the (different) member of the Bar who represented the appellant before that Tribunal.

2. The Order sought is in the following terms:

> "1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, there be no disclosure or publication to the world at large or a section of the world at large of any matter likely to lead members of the public to identify the individuals named in the confidential schedule as having been instructed for the applicant in the above case.
>
> 2. All judgments or Orders in the above case be redacted to remove the names of the said individuals and replace their names with references to "Leading Counsel" or "Counsel".
>
> 3. Nothing in this Order shall prohibit any person making a complaint about any of the said individuals to the Bar Standards Board and or the First-tier Tribunal and or the Upper Tribunal.
>
> 4. This Order will cease to have effect in the following circumstances:
>
> a) After one year from the date of the order
>
> b) In respect of each Counsel separately if they identify themselves to the public or a section of the public as having been instructed for the applicant in the above case. For the avoidance of doubt, it would not affect the position of the others who had not identified themselves.
>
> 5. Any party affected by this Order may apply to the Upper Tribunal to vary or set it aside provided notice is given to the individuals identified in the schedule via [the appellant's solicitors]."

3. The “confidential schedule” identifies Mr Toal, Ms Dirie and another barrister. We are concerned only with Mr Toal and Ms Dirie.

4. Their application is the subject of supportive statements from the Bar Council, the Immigration Law Practitioners’ Association, and another member of the Bar, Mr Dunlop KC. As presented to us, it is based on a number of factors, which we characterise as follows. First, there is a basic principle, widely recognised internationally, that lawyers should be able to perform all of their professional functions without intimidation, hinderance, harassment or improper interference; and that governments must ensure that lawyers have sufficient protection to enable them to do so. Reference is made to the United Nations document *Basic Principles on the Role of Lawyers (1990),* United Nations General Assembly resolutions of June 2017 and June/July 2022, and the United Kingdom’s avowed support for lawyers defending human rights, expressed in July 2019.

5. Secondly, in this country, the “Cab Rank Rule” is of great importance. A rule that, in principle, any member of the Bar is available to any person who needs a barrister not only ensures access to justice, but preserves the independence of the Bar by providing a professional distance between the barrister and the client for whom he works. Thus, it is said, a situation which inhibited the operation of the rule by causing barristers to decline work for fear of the consequences to themselves personally, would be a serious interference with the administration of justice.

6. For the purpose of this application the applicants were represented by Mr Speker KC and the Interested Party by Mr Bunting KC and Ms Palin. The Secretary of State, represented by Mr Anderson, made no submissions.

The factual background

7. The applicants’ witness statements set out their own worries for themselves and their families, which we do not doubt. Ms Dirie in addition cites racial background and choice of dress as factors increasing the risk of ill-feeling and harm. Neither of the applicants points to any specific ill-effects to themselves of having represented YSA or any other immigration client: the burden of their statements is a complaint about the Interested Party’s reporting of YSA and his litigation. The applicants therefore rely on the factual background as sufficient to justify their individual fears and hence the making of the order they seek. It is convenient here to fill out Mr Speker’s treatment of the relevant background with our own observations and comments.

8. Mr Speker took us through a substantial number of press reports of and editorial comments on the appellant’s history and his challenges to the attempts to remove him. He characterised those reports in terms suggesting that certain features of them perhaps ought not to have been published. That is not a matter for us. We accept that the reports have

been published, and that those who read them, and those who do not read them but may be influenced either by those who do or by the feeling that appears to be behind them, may form a view adverse to the appellant and perhaps also to those acting on his behalf, who are described in some of the reports in terms suggesting that they are making money out of unmeritorious challenges to proper governmental action.

9. We make no comment on the financial part of the assertions. We accept that those who have acted for YSA have done so in the pursuance of their professional duty as advocates. It is wholly incorrect to imply that they chose which cases or interests to support in carrying out that duty; and in our view it is mischievous to suggest that the lawful process of the courts and the administration of justice, in which governmental decisions and actions are tested for legality, is anything other than an essential part of the Rule of Law and the constitutional protection against arbitrary government.

10. We note the comments from certain members of the government to which Mr Speker also drew our attention, and the response from others anxious to set out the functions of legal process and the Rule of Law. We make no further comment other than to say that these statements and exchanges form part of the indisputable background against which the present application is made. That background is characterised by the applicants as one in which public feeling is whipped up by the press, the Interested Party in particular, against individual immigrants such as YSA in particular. The feeling is then spread to those acting for the immigrants in question, and even certain members of the government appear to support the criticism of the lawyers. The position appears to have escalated in the wake of discussion of, and opposition to, the government's proposals to transfer asylum seekers to Rwanda. That is our summary description of the applicant's case, and we accept the case to that extent.

11. We are, on the other hand, unable to reach any conclusion on the level of public interest in YSA's case. Naturally enough, the papers in our bundles refer to little else, but they are spread over a considerable period of time during which, no doubt, many other things, of greater and lesser importance, were the subject of press reports and editorial comment. Other than an occasion when (certainly not as a result of adverse press reports) members of the public did intervene in YSA's case, we have not been shown that YSA's history or treatment or appeals has prompted or is likely to prompt any person to commit an offence of any sort. Nor is there any suggestion that the authorities, whether government or police, would condone any such offence or do anything other than provide an appropriate level of protection to anybody at risk.

12. Mr Speker drew our attention to a number of other events, including the following. First, there are press reports that the (then) Home Secretary met the victim of a serious crime committed by YSA and gave an assurance that he would be deported. This is said to show both a high level of governmental interest in the case and perhaps governmental

unwillingness to be bound by the decisions of the courts. We attribute little weight to this in the current context. The meeting took place many months ago and it is not said that the assurance has been repeated. Following the hijacking of an Afghan plane and its landing with 151 passengers at Stansted in February 2000, Jack Straw as Home Secretary gave the even more striking assurance that he intended to take personal charge, that there should be no benefit obtained from hijacking and that he hoped that all those on the plane would be removed from the United Kingdom as soon as reasonably practicable. Nevertheless, that government and its successors have implemented the considerable number of successful appeals by those on the plane.

13. Secondly, the Attorney-General declined to initiate proceedings against the Interested Party for Contempt of Court in relation to allegations on behalf of YSA that there had been a breach of an earlier confidentiality order. Quite apart from the question of whether there had been a breach, this was a matter for the Attorney-General, taking into account all relevant factors, not merely those urged on behalf of YSA; and it does not appear to us that the decision as such gives any support to the applicants' case beyond the elements of the background that we have already indicated we accept.

14. Thirdly, there was an attack on Duncan Lewis, a firm of solicitors often acting for appellants in immigration appeals. The individual awaits trial. Ms Dirie's witness statement describes him as a racist neo Nazi, apparently adopting the well-publicised assertions of the prosecuting authorities. We cannot make any assumptions in advance of his trial, although we understand that he is charged with offences including preparation for terrorist acts, threats to kill a named solicitor, and causing racially aggravated alarm, harassment or distress.

15. Fourthly, there have been a number of incidents in which lawyers acting for immigrants have reported receiving 'hate mail' and 'hate email', including threats, and being the subject of derogatory (and worse) comment in social media. None appears to have reported actual violence; there is evidence that the police take at least some action. It is said that it is 'well-known' what has happened to charities; and two MPs have been murdered. It is not easy to connect these disgraceful events with this application, which is based firmly on the particular features of YSA's currently pending appeal.

16. Fifthly, there has been a serious incident directly related to a notorious individual immigration appeal. A barrister who represented a person who appealed against the immigration consequences of his conviction for a very serious crime was the subject of an attack on property that caused considerable and predictable terror to the barrister and the barrister's family. A judicial examination concluded that the link between the individual case and the attack was established. An order was made in the First-tier Tribunal (IAC) preventing further disclosure of the identity of any member of the appellant's legal team.

17. There is a further background factor which is of clear relevance. We derive it from the material produced by the applicants, although for obvious reasons they do not rely on it. At least three other members of the Bar acting for YSA in his immigration challenges have been named as such in critical articles published by the Interested Party. We do not need to name them here; their names are in the reports on pages 208, 217 and 219 of the application bundle. There is no evidence that any of them has as a result been subject to any harm whether by words or otherwise, and none of them is said to have sought any protection.

Jurisdiction and similar orders

18. Mr Bunting made detailed submissions in his skeleton argument to the effect that this Tribunal does not have jurisdiction under its rules to make an order anonymising counsel. We are confident that we do have the necessary jurisdiction. It is primarily derived not from the common law or any inherent power of the Tribunal, although we remind ourselves that by s 25 of the Tribunals, Courts and Enforcement Act 2007 the Upper Tribunal has, in England and Wales, the powers of the High Court in all matters incidental to its functions. As Mr Bunting points out, s 11 of the Contempt of Court Act 1981 permits an order prohibiting publication of a name only in cases where there has been an order withholding the name in the course of the proceedings. The Tribunal jurisdiction, however, has rules of its own, which go beyond those generally available in the courts, because Tribunals often deal with matters which there is no public interest in disclosing. Some Tribunals, for example, normally sit in private, although the general rule in the Upper Tribunal is that "all hearings must be in held in public" (Tribunal Procedure (Upper Tribunal) Rules 2008, rule 37(1)). Paragraph 11 of Schedule 5 to the 2007 Act permits rules making provision for the disclosure or non-disclosure of information received in the course of proceedings before the Tribunal, and more to the point perhaps, "imposing reporting restrictions in circumstances described in Rules". Rule 14(1)(b) is as follows:

> "(1) The Upper Tribunal may make an order prohibiting the disclosure or publication of—
>
> …
>
> (b) any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified."

19. There is no restriction on the meaning of "person". We do not accept Mr Bunting's argument that such an order can be made only when the name in question is, as the matter stands, wholly inaccessible to the public. Even when the name has been disclosed in court, or at some other time, a restraint on wider publication may nevertheless hinder identification by the public, so enabling an order to have the effect envisaged by r 14(1). Other factors, in particular the wealth of authority on what sort of orders

restricting publication ought to be made and in what circumstances, may impose constraints on the judgment made in considering whether a person should not be identified; but there are no specific prohibitions on anonymising legal representatives and it follows that an order anonymising counsel can be made under r 14(1)(b). The fact that it can be made means that in a proper case such an order will be made, either on application or of the Tribunal's own motion.

20. Unlike Mr Speker, we do not derive any assistance on jurisdiction from the making of a similar order in the First-tier Tribunal, as described in paragraph [16] above, or from the fact that the order was made with the consent of the parties (which is in any event hardly a relevant factor, for "parties cannot waive the rights of the public": JIH v News Group Newspapers Ltd [2011] EWCA Civ 42 at [21 (7)]). It is right, though, to indicate here that the power in any jurisdiction to make an order such as that sought here has been exercised very sparingly. Apart from that to which we have just referred, we have been told of only one other such order made in the immigration jurisdiction. As it happened it prevented publication of Mr Toal's name and that of his opponent, a Home Office Presenting Officer, on an application made by the latter and not resisted by Mr Toal. He has not been able to trace the case, which was, according to his witness statement 'many years ago', so it cannot even be clear under what Procedure Rules the order was made or purportedly made. In a different jurisdiction in Tenke Fungurume Mining SA v Katanga Contracting Services SAS [2021] EWHC 3301 (Comm) Moulder J decided not to name counsel who had fallen ill in order to protect his 'professional interests', but it does not appear that any specific order was sought or made or that there was any argument directed to the issues before us.

21. The only other anonymisation of legal representatives cited to us or referred to in any way was in A Local Authority v X and others [2019] EWHC 2166 (Fam). Judgment was given in open court on matters of principle, following a hearing in private. There was an order preventing the identification of the children affected, and members of their family. As is apparent from the text, counsel for the father had appeared for him throughout, including in his criminal trial, at which he was convicted of murdering the mother. No doubt for this reason, the place at the top of the published judgment normally used for setting out the names of counsel has instead the entry "In the interests of maintaining anonymity the names of counsel have been omitted". There was no order anonymising counsel, and it is quite wrong to say, as Mr Speker does in his skeleton argument, that "counsel for the applicants were afforded anonymity". No counsel was "afforded anonymity": their names were omitted solely because that aided the maintenance of the anonymity of the children. No application for counsels' anonymity is recorded as having been made or granted. The treatment of counsel's names applied to all counsel, not merely the counsel for the applicant (which was the local authority, not the father). It follows that the First-tier Tribunal (IAC) order is the only one anonymising counsel in any jurisdiction of which we have any reliable information.

22. Mr Speker has argued, however, that courts are "doing more than they did in the past to protect professionals from harassment and campaigns against vilification" [sic]. He cites The Law Society v Kordowski [2011] EWHC 3185 (QB), Thompson v James and Carmarthenshire County Council [2013] EWHC 515 (QB), Coulson v Wilby [2014] EWHC 3404 (QB), Oliver v Shaikh [2019] EWHC 3389 (QB), and Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust [2021] EWHC 1699 (Fam). Of these, the first, third and fourth are cases where the court provided the necessary protection, for solicitors, police complaints casework managers, and judges respectively, by injunctions under the Protection from Harassment Act 1997. The second case was simply a defamation claim and counter-claim; the defendant was the chief executive of the local authority and his counterclaim succeeded in part. None of these decisions have any relevance to the exercise of the jurisdiction to make an order restricting publication of the names of professionals.

23. The fifth decision, a recent, comprehensive and powerful judgment by Sir Andrew McFarlane P, demands more attention. There were procedural and jurisdictional issues with which we are not concerned. The relevant question was whether an order preventing publication of the names of groups of individuals, being clinical professionals involved in end-of life decisions, should be maintained, or should be discharged as sought by parents of two children who wanted to publicise their experiences. After a review of the authorities on the principles applying to the decision to make (or maintain) such an order, the President applied those principles, noting in particular that there was a very strong body of evidence tending to suggest that the naming of those involved would have a considerable impact on the functioning of the relevant clinical departments, whereas the assertions made by the parents were rather vague and not amenable to detailed examination. As Mr Speker points out, he recognised the increase of the power and quantity of largely anonymous vilification, and said this at [96]:

> "Why should the law tolerate and support a situation in which conscientious and caring professionals, who have not been found to be at fault in any manner, are at risk of harassment and vilification simply for doing their job? In my view the law should not do so, and it is wrong that the law should require those for whom the protection of anonymity is sought in a case such as this to have to establish 'compelling reasons' before the court can provide that protection."

24. The context of that was a consideration of whether there was a requirement to show "compelling reasons" for the making of an order anonymising a class rather than individuals, and we should perhaps be cautious about applying it outside that context. As is more than hinted at [89]-[91], considerations may in any event be different when the anonymity in question is that of individuals involved in a particular case rather than a larger group identified by their profession and employer. Further, as the President carefully pointed out, the starting point in his case was that the orders had been made and were in force: he was not

considering, and was not asked to consider, whether some other type of order might equally secure the protection sought.

25. We agree with Mr Speker that nothing in the judgment itself suggests that lawyers should be treated differently from doctors: the passage cited by Mr Bunting in an effort to draw that distinction was part of the judgment at first instance in another case, superseded by the decision of the Court of Appeal (Re M (Declaration of Death of a Child) [2020] EWCA Civ 164). The question is not the subject of any discussion in Abbasi. Nevertheless, there are substantial differences between the question whether to decline to revoke an existing order anonymising considerable groups of medical professionals so that they could do their job outside court and the question whether to make an order anonymising two specified legal professionals on the ground that it will enable them to do their job in court; and there are also substantial differences in the evidence deployed by the parties in the two applications. For these reasons Abbasi, like the other cases to which Mr Speker drew our attention, provides no real persuasion in favour of the order he seeks.

The principles

26. Open justice, the principle that trials are held in public with the possibility of public scrutiny of everything that happens in the trial, is a foundation of our legal system. In the classic case, Scott v Scott [1913] AC 417, Lord Atkinson explained at 463 that 'it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect', and that was generally sufficient to justify the inconveniences and occasional humiliations to which public trials may give rise. Lord Loreburn at 445, referred to the 'inveterate rule' of public hearings. There are, however, numerous exceptions, prescribed by statute or arising from the inherent jurisdiction of courts to control their own procedure. The basis of many of the exceptions has been the need to ensure that publicity did not interfere with the administration of justice either directly (for example by making public something that needed to be kept confidential until a later date or a later trial) or indirectly (for example by discouraging involvement in the process, or by marking those involved, particularly children, in a way that might affect their future). Other justifications for exceptions to the principle may be found, for example in cases raising issues of national security.

27. The principle of open justice is closely allied to the principle allowing fair, accurate and complete press reporting of court proceedings. The link between the two is expressed by Lord Diplock in Attorney-General v Leveller Magazine [1979] AC 440 at 450 as follows:

> "The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that,

in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

28. The two aspects are, however, different: it may be that even though everything was disclosed in court, and thereby subject to scrutiny by the members of the public present and by the press, wider reporting should be inhibited. This is undoubtedly censorship of the press, but it may be justified. We return to this distinction later.

29. The common-law rules and the exercise of statutory discretion in this area are overlaid by the European Convention on Human Rights as enacted in the Human Rights Act 1998. Article 6 entitles those affected to a trial in public. (For technical reasons (Maaouia v France [2000] ECHR 455) this does not apply to the determination of immigration appeals, but the general national law principle remains applicable, and the procedure rules of both the First-tier Tribunal and the Upper Tribunal require hearings to be open to the public, subject to specified exceptions.) Articles 8 and 10 guarantee respect for private and family life, and freedom of expression, as follows:

"Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

…

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

30. Where anonymity is sought, the question will typically require a balancing of the rights under these two articles: the individual's rights under article 8 need to be set against the rights of others, often the press, who seek to exercise rights under article 10. In cases where there is no attempt by the state itself to secure confidentiality for its own purposes, as in national security cases, the process is the purely 'horizontal' one of assessing the balance between the competing interests and reaching a conclusion having taken into account all relevant factors. In these circumstances neither article, and neither interest, has, as such, precedence over the other. These propositions we draw from the decision of the speech of Lord Steyn in Re S [2004] UKHL 47 at [17], (himself citing Campbell v MGN Limited [2004] UKHL 22 as his source), where he also set out the process to be followed, which has been applied in numerous subsequent cases, up to and including Abbasi. The rival Convention rights and the actual or prospective interference with them must be identified. There must be 'intense focus' on the comparative importance of the individual rights being claimed in the specific case. The justifications for interfering with or restricting each right must be taken into account. Then, in an "ultimate balancing test", each must be subject to a test of proportionality in the light of the other.

The convention rights and the prospective interference

31. We have already set out the relevant articles of the Convention. Mr Toal and Ms Dirie say that their rights to private and family life will be interfered with if their names are published; the Interested Party says that its freedom of expression will be interfered with if it is not allowed to publish their names.

32. Specifically, Mr Toal and Ms Dirie both say that they are worried that there may be repercussions if it becomes known that it is they who have represented YSA in what has been portrayed by the press, specifically the Interested Party, as a case of no merit, pursued by lawyers in their own financial or political interests, thus delaying the removal of a person who, as portrayed by the press, should be removed as soon as possible, and increasing the expense to the public of carrying out that process. Mr Toal and Ms Dirie also say that the danger of an interference is increased by what they see as governmental support for the position taken by the press, and lack of governmental support for the Rule of Law and the procedures of the courts. They rely on the material to which we have already referred as demonstrating that those responsible for representing immigration appellants may be subject to vilification and in one case a specific attack.

33. Despite that material, it is far from easy to discover any specific interference that Mr Toal and Ms Dirie fear, or why they fear it. They are both, as they indicate in their witness statements, already known as barristers working in the field; and we do not understand them to say that

they have been subjected to interference in their private or family lives by anything that has happened to them so far. It follows that any interference that might be prevented by the proposed order would be interference arising specifically out of the knowledge that they had acted for YSA. But, as we have said, those who are on record as having acted for YSA in the past do not appear to have suffered as a result.

34. Mr Toal and Ms Dirie give, in their witness statements, examples of various types of hate mail sent to other practitioners. But neither of them says that they are reliant on or even use the social media and other forms of communication by which such messages have been sent. It would therefore appear highly unlikely that they would receive them unless they sought them out. There is, in fact, no evidence showing that Mr Toal or Ms Dirie could be directly abused by this means.

35. General abuse might be posted on websites and perhaps even published by the Interested Party or others, and might come to their attention; but as right-thinking members of society with right-thinking colleagues and friends there is no identified way in which they would be likely to be seriously affected by that. Anybody with any sort of public profile has to learn to treat general abuse with the contempt it deserves. It could not damage their reputation in any real way; and it is difficult to see that any relevant conduct might not equally arise from any other case or cases they took part in.

36. The single act of serious criminal action against a barrister to which we have referred simply cannot in our view be taken as establishing a risk to immigration barristers in general. And there is nothing to show that the features of that case were sufficiently close to YSA's case to think that a similar offence or any offence might be committed against his counsel if only their identity were known.

37. The serious incident that took place at the offices of Duncan Lews Solicitors was not so far as is known consequential on any specific case, and was not directed against barristers. It does not seem to be suggested in the present case that there is any risk to those instructing Mr Toal and Ms Dirie, or that they have suffered in any way despite being on the record as YSA's legal representatives. The same applies to any and all the previous solicitors who have acted for him.

38. Nothing that we say here is intended to condone any of the acts to which Mr Toal and Ms Dirie refer in their applications, nor, as we have said, do we doubt the genuineness of what they say about their own fears. But in our view they have failed to demonstrate that their fears of specific consequences of their being identified as YSA's counsel are well-founded, save in relation to the possibility of generalised verbal written abuse published by, and to, others. The views of the government, or of members of the government, do not affect the nature or substance of what Mr Toal and Ms Dirie fear; there is no reason at all to suppose that those views

would deprive them of the protection of the forces of law and order if required.

39. The interference that Mr Toal and Ms Dirie have established as a prospective consequence of their being named is thus their own largely unsubstantiated fears of violence and of direct abuse, and their own fears of generalised abuse which could not affect the judgment of right-minded people and would not damage their reputation.

40. The interference with the Interested Party and others' right to freedom of expression is clear in the sense that if the order is made there will be to that extent an interference with freedom of expression. The question is then of the effect of that interference. There are two particular factors to which our attention is drawn. The first is that a story reads less freshly and compellingly without the names of those involved, and that communication of news to the public is therefore inhibited by anonymity in a way that goes beyond the literal effect of the order. The law recognises that "within the limits imposed by the law of defamation, the way in which the story is presented is a matter of editorial judgment, in which the desire to increase the interest of the story by giving it a human face is a legitimate consideration" (per Lord Sumption in Khuja v Times Newspapers Ltd and others [2017] UKSC 49 at [34(5)]). The second is the converse of part of the argument put on behalf of Mr Toal and Ms Dirie: the fact that YSA's litigation has become, or been made, a matter of public interest means that there is a particular interest in the identity of the lawyers involved, meaning that an anonymity order would strike harder than in some other cases, such as where it might be said that the identity of particular individuals adds little or nothing to the story. (There is, however, no rule favouring the concealing of matters that might be regarded as unimportant to the press account of litigation: it is always the restriction, not the publication, that requires to be justified. See Lu v Solicitors' Regulation Authority [2022] EWHC 1729 (Admin) at [6].)

41. The process of intense focus has to be conducted in the context of the prospective interferences identified. The question of necessity will be informed by considerations of alternative ways of protecting the rights engaged: see JIH at [21 (4)].

42. Although neither of the competing rights has as such any primacy over the other, the article 10 rights of the Interested Party have specific statutory protection in s 12 of the Human Rights Act 1998:

> "Freedom of expression.
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression."
>
> …
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or

which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section—

"court" includes a tribunal; and

"relief" includes any remedy or order (other than in criminal proceedings)."

43. Of the factors mentioned in paragraphs (a) and (b) of subsection (4), only (a)(ii) is of relevance here, and is the focus of Mr Bunting's general submissions; but overall the requirement to have "particular regard to the importance" of the article 10 right prevents the right to freedom of expression in the public interest from being regarded as of less importance than the individual interests of applicants such as Mr Toal and Ms Dirie. As Lord Sumption said in Khuja at [23]:

> "[I]n deciding what weight to give to the right of the press to publish proceedings in open court, the courts cannot, simply because the issues arise under the heading "private and family life", part company with principles governing the pre-emptive restraint of media publication which have been accepted by the common law for many years in the cognate areas of contempt of court and defamation, and are reflected in a substantial and consistent body of statute law as well as in the jurisprudence on article 10 of the Human Rights Convention."

44. In the context of press reports, s 12 gives statutory force to the common-law principle of open justice, the restrictions on which thus remain limited, as authoritatively stated by the Lord Chief Justice in In re BBC [2018] 1 WLR 6023 at [29]. We accept Mr Bunting's analysis of the exceptional cases in which restrictions have been granted as dividing into those where the order was necessary in order to maintain the interests of justice and those where the order protected some other legitimate interest. The application before us, however, has aspects of both.

45. In looking at the comparative importance of the rights of Mr Toal and Ms Dirie on the one hand and those of the Interested Party on the other we have to bear in mind that, as we have indicated, the applicants have not established interference to the extent they claim. Nevertheless, we accept that it is important that anybody be able to go about their lawful business and do their job without interference, and it is perhaps especially important in the case of barristers. That is because it is in the highest degree important that those who come before, or need to bring themselves before, the courts have proper and unfettered access to members of the legal profession to represent their interests. The

applicants themselves have said that they will or may not be able to continue to act for YSA if their identity is made known, and we cannot exclude the possibility that press interest would similarly have the effect of dissuading them from taking part in other cases. There is a more general issue here.

The cab-rank rule

46. The argument is made that the order is needed in order to maintain the cab-rank rule: if barristers may be exposed to risk by being identified as the source of arguments raised in a particular case, it will not be possible to expect them to adhere strictly to the principle that they are available to represent any person who calls on their services. This is a general point; and as a general point it is wholly answered by the existence of the possibility of an order for counsel's anonymity in an individual case. It is not an argument that can contribute very much to the question whether an order should be made in an individual case.

47. In the present case there has to date been no inhibition on the operation of the cab-rank rule. For certain there is no suggestion that Mr Toal or Ms Dirie accepted instructions only on condition they would be the beneficiaries of an order such as is sought; and we doubt whether it would have been proper to attempt to impose such a condition. Ms Dirie, however, now says that unless the order is made, she will withdraw as representative.

48. The responsibility for the maintenance of the rule rests with the Bar Standards Board, not with this Tribunal, and the relevant provisions (Rules C29-C30 of the Conduct Rules part 2C of the BSB Handbook) do not obviously admit of an exception of the nature that would be required. There is an exception to the cab-rank rule where "there is a conflict of interest, or real risk of conflict of interest, between [the barrister's] own personal interests and the interests of the prospective client in respect of the particular matter"; but it only amounts to an exception where the conflict is such as to require the barrister not to act: this is not a matter of choice (See Rule C30.1 and C21.2). A barrister whose circumstances in relation to a particular case are such as to create a real risk of danger may make an application for an anonymity order, which in a proper case may be granted. A barrister who declines to accept instructions because of fear of the consequences may, as well as infringing Rules C28-29, be in breach of Rule C28, which prohibits discrimination and requires a barrister not to refuse instructions on grounds including that the nature of the case, or the conduct of the client "is objectionable to … any section of the public".

49. The Bar Council's assertion, in its memorandum to us, that a barrister who thinks there is a real prospect of being distracted from unswerving pursuit of a case by a fear that being named will expose him- or herself or family members to an unacceptable risk of personal harm has to be read in the context of the Conduct Rules, and, in addition, in the context of a power to

make an anonymity order when it is justified by the circumstances of the case. It does not follow that an order should be made in cases where a barrister's fear, however genuine, is not well founded. If such cases arise, the Bar Standards Board will have to deal with them, and it and the Bar Council, as the Bar's representative body, may decide that the cab rank rule requires modification or enforcement. That cannot be a matter for us, and it is unlikely to be attached to substantive proceedings, where a court or tribunal would be dealing with an application for anonymity by the barristers who are appearing (as distinct from those who have declined to appear) in an individual case.

50. For these reasons it appears to us that the general issue of access to the Bar is in truth unlikely to be affected by our decision in this case. The availability of expert legal representation will be maintained by the professional organisations.

Impact on other barristers

51. A further factor we ought to consider is the impact on others. It is asserted that there is a risk that the applicants will be subjected to harm as having represented the appellant, and that the risk to them will be increased if they are named in press reports. But the appellant's counsel must in any event come from a quite small group of identifiable individuals, all of whom are (a) members of the Bar, (b) in practice in the immigration field, and probably with an established practice in that field, and (c) likely to be thought of as appellants' (rather than the Secretary of State's) counsel, and likely to be seen (although because of the cab-rank rule unjustifiably seen) as ready to oppose the government. Those who are said to pose the risk are not thought to be law-abiding thinking members of society, but lawless and irrational people looking for a target or a scapegoat. It can readily be seen that if (as it is said to be) the danger arises from the present appellant's case alone, those who have not taken part in it are not at risk. But if the actual barristers' names are made confidential, the whole of the group may come under suspicion, and may therefore all be subject to the risk of harm. That consideration is not, by itself, a ground for making, or for not making the order. But it is of importance for two separate reasons. The first is that we are being asked to make an order which, if the basis upon which it is sought is correct, will expose a group of others to a danger, and we are asked to make the order without hearing from those others. The second is that although the group is relatively small, it is larger than the applicants alone, and if it is necessary to provide protection against the harm feared, it will clearly be more difficult to do so, the larger the group needing protection. Protection (if required) of the barristers actually involved is surely achievable; protection of every member (or perceived member) of the group of which they are a part is much less likely to be realistic. What is more, preserving the anonymity of Mr Toal and Ms Dirie may for these reasons cause an interference with the article 8 rights of their colleagues.

Justifying interference

52. The only apparent justification for interference with the right of freedom of expression in the present case is that it will prevent the interference with the article 8 rights of Mr Toal and Ms Dirie that we have identified.

53. The justification for the interference with the rights of Mr Toal and Ms Dirie is the nature of the job they have chosen, which, because justice is done in public, entails working in public. There are two aspects to this. The first is that, unlike for the medical professionals in Abbasi, the glare of publicity is an inherent part of their chosen profession, not something to which they happen to have been exposed by somebody else's concerns or litigiousness. The second is that there may be a lesson to be drawn from one case cited by Mr Bunting, R v Felixstowe Justices ex parte Leigh [1987] QB 582. As its citation shows, this decision predates the Human Rights Act 1998; and perhaps it is for that reason that it is dismissed by Mr Speker as "old"; but its authority has not been challenged. The Bench had adopted a policy of declining to disclose the names of the Justices sitting on any particular occasion. There was a challenge by a reporter. Watkins LJ, giving the judgment of the Divisional Court, after considering the authorities and the principles relating to open justice, held that despite the risk of intrusion into the magistrates' private lives there could be no justification for withholding their identity.

54. Barristers are not the same as judges and we do not say that the rule enunciated in this case applies to barristers without more. But we note that the group of cases we mentioned in paragraph [22] above includes people involved with the administration of justice in various ways including judges; and the remedy in each case was injunction, not anonymity. In addition it seems to us that although an application such as the present can properly be made, and could succeed, purely on the personal position and apprehension of the applicant, the more public interests connected with the administration of justice (such as the cab-rank rule) are summoned on the applicants' side, the more the matter has to be considered as an aspect of the public interest in open justice, potentially with the result that the names of those involved must be available.

Striking the balance

55. The decision whether to grant anonymity is not a matter of discretion. It is a matter of weighing up and balancing the competing Convention rights: AMM v HXW [2010] EWHC 2457 (QB) at [30] – [32].

56. There has to be a fact-sensitive approach to the competing issues, but the weight to be given to the principle of open justice is considerable. We take that from the decision of the Court of Appeal in R (Rai) v Crown Court at Winchester [2021] EWCA Civ 604 at [26], which related to reporting of a criminal case, but no authority has been cited to us suggesting that there should be a distinction in principle between the operation of the rules in

different jurisdictions (although, as we have said, the procedure rules applying to Tribunals may allow a greater measure of anonymity).

57. On the other side, on the facts of the present case, the actual interference with the applicants' article 8 rights is for the reasons we have given unlikely to be considerable and can be dealt with in other ways. As Nicklin J said in refusing anonymity orders in Various Claimants v Independent Parliamentary Standards Authority [2021] EWHC 2020 (QB) at [52],

> "The civil justice system and the principles of open justice cannot be calibrated upon the risk of irrational actions of a handful of people engaging in what would be likely to amount to criminal behaviour. If it did, most litigation in this country would have to be conducted behind closed doors and under a cloak of almost total anonymity. As a democracy, we put our faith and confidence in our belief that people will abide by the law. We deal with those who do not, not by cowering in the shadows, but by taking action against them as and when required."

58. Similarly, the public interest in litigants' access to the Bar falls to be maintained as a matter of professional standards, and in the present case we are confident it can be. For these reasons we can attribute very little weight to the two factors identified by Mr Speker in support of the application. The balance very clearly falls to be struck in against the applicants. We conclude that the proposed order is not necessary to protect the applicants and would be a disproportionate interference with the article 10 rights of the Interested Party.

Two further points

Anonymity in the proceedings

59. Mr Bunting drew careful distinctions between the rules applying to anonymising parties and others before the court during the proceedings, and the rules applying to restraint on press reporting of matters that were disclosed in open court. That distinction is clearly present in the authorities. We have not needed to refer to it in detail in our assessment of the issues raised in the application before us. The position is, however, that in the present case the appeal before the First-tier Tribunal and the appeal before this Tribunal were both heard in public, with counsel present arguing the appellant's case and addressed and referred to by name. No application was made for their identity to be concealed during the hearings at the time that they were actually carrying out the functions that they now say causes them to fear for their safety. It is, however, worth pointing out that an application made on that basis would be extraordinarily difficult to countenance. As we have observed, the applicants are members of a relatively small group of practitioners, and even if not named in open court might well be recognised facially or by their voices. The idea that counsel should be protected by screens or have the timbre of their voices obscured, or that proceedings should take place

wholly in private solely for the protection of counsel appears to us to be deeply unattractive.

The form of the proposed order

60. We close by saying that even if we had decided to make an order of the sort requested, we have considerable doubt about whether it would be right to make it in the form sought. Apart from the difficulty of providing a rational basis for the selection of one year, rather than any other period, for the duration of the order, there are two principal reasons.

61. First, it is very unlikely that an order in the form sought would be effective in concealing the identity of Mr Toal and Ms Dirie. We recognise that the authorities are clear in saying that the fact that there may have been previous publication of the fact that is the subject of a confidentiality order is not of itself a reason why the order cannot or should not be made so as to prevent future publication or republication: see Re Times Newspapers Ltd [2016] EWCA Crim 887; X v Y [2021] ICR 147; TYU v ILA Spa Ltd [2022] ICR 287. But here the position sought for the future is not confidentiality. The order would not prevent open discussion of the identity of the barristers in professional contexts, nor would it prevent their identity being revealed in any context where the addressees were not (at least) "a section of the world at large". Even without entering into the hazards of interpretation of that phrase, with or without a contra proferentem principle, the order would be likely to bind only those with access to the public. The followers of an ordinary person's social media account would not in all circumstances be a section of the world at large, nor would the audience at a conference of the members of any society, whatever its aims or interests. In any event there would be speculation about the identity of Mr Toal and Ms Dirie, given that they must both be members of the relatively small group of barristers who have developed immigration practices and are likely to be perceived as opposing the government. (This is the other face of the point we made at paragraph [51] above.) The result would be likely to be that the identity of Mr Toal and Ms Dirie would become an open secret, if a secret at all, with the press as the only agents genuinely prohibited from publishing it. Of course we do not suggest that any of the groups mentioned above to whom communication might be made would themselves contain individuals who might pose a risk to Mr Toal and Ms Dirie, but each of those individuals would have their own network of contacts of various sorts, and anybody with a malevolent intention would realistically have no difficulty in discovering their identity without the ghost of a breach of the order.

62. In effect, therefore, the order would operate not as protection to Mr Toal and Ms Dirie but as a pure restraint on the press as a whole, derived apparently from the barristers' perception that a case in which they took part had been unfairly reported by one newspaper company. The remedy, if there be one, for unfair reporting or inflammatory comment lies elsewhere. It is not a proper motive for an order of the sort we are asked to make; and if that is the only result of the order, it should not be made.

63. Secondly, we do not think it would be appropriate to include a provision such as that at paragraph 4(b) of the draft order. That would have the effect that although the Tribunal was persuaded that an in mundum order was justified, it could be varied or lifted by the unilateral act of any one of those named in it. In our judgment the contrary is correct: if the order were to be made against the world, it would need to bind the world, including those named in it, unless or until it was varied by this Tribunal or a Court. After all, if the applicants' case had been established, self-revelation by one of them might lead to a wave of public order and other offences, which it would not be for that individual to condone.

64. In the case of 'Colonel B' (Attorney-General v Leveller Magazine), the real question was what order if any had lawfully been made by the magistrates. The fact that the Colonel had during his evidence given sufficient information to enable his identification, had an impact on the interpretation of what had happened at the hearing and what reporting of it was allowed, but there is no suggestion that if an anonymity order had been made it was open to anybody in court or, more to the point, after the proceedings had concluded, to breach it with impunity. That was no doubt a more complex case, because of the invocation of the interests of national security, but it is the only case to which our attention has been drawn that could provide support for paragraph 4(b). If a court or tribunal makes an in mundum order, that is because it has reasons, which may be complex, for doing so, and it should remain in force in mundum unless a court or tribunal varies it.

CONCLUSION

65. For the reasons we have given, we refuse the applications for anonymity.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 8 December 2022