Upper Tribunal, Immigration and Asylum Chamber
ILPA comments on Anonymity in Determinations

ILPA reiterates the apologies given by Mark Henderson at the last Tribunal 'stakeholder' meeting that no submission was made within the time-frame at the time requested by the Tribunal.

ILPA corresponded with the Honourable Sir Andrew Collins, then President of the Immigration Appeals Tribunal on the topic of anonymity in 2002. ILPA, the Medical Foundation for the Care of Victims of Torture, NACAB (now Citizens Advice) and Asylum Aid wrote to Sir Andrew on 28 May 2002 asking him to give consideration to a standard practice of anonymising appellants, highlighting a case of a Zimbabwean put at risk in the UK.

Sir Andrew wrote in his letter to ILPA of 31 May 2002

> *"I am conscious of the possible dangers and as you know if we are asked to do so in an individual case we will always agree that a person should be referred to by a letter only."*

He went on to note some of the difficulties, including the one highlighted by the in your letter, that substituting letters for a name may not suffice to render an individual anonymous, noting that this could put them at risk or their family members at risk. Although nothing in the correspondence confines it to asylum cases, the comments of all parties appear to be about asylum cases.

ILPA agrees that judges in recent cases, in particular the comments of Lord Brown in Lord Brown in *Ahmed Mahad v ECO [*2009] UKSC 16 at 42 have highlighted the need for a proper reason for anonymity of parties. We also recall the debate in the family courts, triggered by the judgment in *Clayton v Clayton* [2006] EWCA Civ 878. The then Government set out its proposals to reverse the effect of the judgment and the fruits of this consultation were summarised *in Family Justice in View* Cm 7502 December 2008. This cited the evidence of the Association of Lawyers for Children:

> *"The ALC wholeheartedly agrees with the proposal set out in the consultation paper that the identity of the child continues to be protected after the conclusion of proceedings unless there is an order to the contrary."*

and of the Principal Registry of the Family Division

> *"The child's identity should always be protected unless there are very good reasons why his identity should be disclosed. There can be very few cases where exposing a child to the media can be justified as in the public interest. The necessity to protect a child in this way may mean protecting the identity of other less deserving individuals, e.g. the abusive parent."*

Part 2 of the Children, Schools and Families Act 2010 makes provision for the new

regime in the family courts (Restriction on publication of information relating to family proceedings).

ILPA has made reference to the Court of Appeal's *Practice Note on Anonymisation in Asylum and Immigration Cases in the Court of Appeal* [2006] EWCA Civ 1359:

> *"The Court of Appeal has decided to follow the universal practice observed by other European jurisdictions and to anonymise its judgments in cases involving asylum-seekers. It is satisfied that the publication of the names of appellants may create avoidable risks for them in the countries from which they have come.*
>
> …
> *Hearings will continue to take place in open court (unless the court otherwise directs). If judgment is given in an asylum appeal (or a permission to appeal application, where the judgment is released from the usual restriction on citation), there will be a presumption that the asylum-seeker's anonymity will be preserved unless the court gives a direction to contrary effect. On the other hand, there will be a presumption that judgments in immigration appeals will identify the name of the person seeking relief under the immigration laws unless the court gives a direction requiring anonymity."*

ILPA considers that the approach adopted by the Court of Appeal would be the proper approach to adopt in the Tribunal. The presumption of anonymity should remain in asylum/protection cases, for the reasons given by the Court of Appeal, that

> *"It is satisfied that the publication of the names of appellants may create avoidable risks for them in the countries from which they have come."*

It would be line with the Court of Appeal *Practice Note* and the comments in *Mahad* that the presumption should be a presumption and that there will be cases where the appellant and his/her circumstances are well and widely known in the country of origin where the presumption would be displaced, following argument, on the facts of the case.

ILPA accepts that the presumption in other immigration cases should be against anonymity, although it will ordinarily be required in appeals that centre on children or involve discussion about private matters or where there is some other risk to the appellant and/or family members. The Tribunal should be able to give a direction requiring anonymity and children should enjoy no less protection in the Immigration and Asylum Chamber of the Upper Tribunal than they enjoy in the family courts.

As to asylum cases, asylum cases for these purposes should encompass all cases in which the application is for 'international protection' as defined in Article 2 of the Council Directive 2004/83/EC of 29 April 2004 *on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection*

granted. [1]

As to immigration cases, there should be a presumption of anonymity in all cases in which children could otherwise be identified for reasons of child protection. There will be a number of immigration cases in which the presumption that the appellant will be named should properly be displaced. These include cases involving human trafficking and other exploitation (where there is no claim for international protection so that they do not fall under the asylum exception above), cases involving domestic violence, cases where the appellant is mentally ill or that otherwise involve discussion of matters inherently private and other cases where the appellant, or in some cases a dependant, is at risk because of external factors or his/her mental state. In a number of these cases, of which human trafficking and domestic violence are two examples, the risks to the appellant may be as immediate and acute as the risks in asylum cases.

The challenge in immigration cases, and in protection cases where it is argued that the presumption should be displaced, is to ensure that the views and arguments of the appellant can be heard. The question as to whether anonymity is required, where the appellant has not indicated a desire for anonymity prior to the hearing, should always be put by the immigration judge.

Those unrepresented at the hearing present a particular challenge and those wholly unrepresented even more so. ILPA would propose that there be a question on the appeal form asking if anonymity is required. Names should not be published without a specific decision to that effect from the Tribunal. The matter should always be canvassed at the hearing; it should not be incumbent upon an immigration appellant unrepresented at the hearing to raise this matter of his/her own motion. In asking for the appellant's views as to publication it will be important for the immigration judge to be satisfied that the appellant understands what publication means and in particular that material published on the internet may be accessed from anywhere in the world, and may be saved and stored for an indefinite period.

ILPA does consider that the removal of a person's name and its replacement can provide a measure of protection. While it may not protect the person against someone determined to track them down, it decreases the likelihood of persons with an animus against them coming across their name and the details of their case by chance. ILPA concurs that in international protection cases and the types of immigration case described above, the replacement of a name by initials is unlikely to provide sufficient protection.

This prospect of reviewing draft judgments to ensure that they have been anonymised does present significant challenges. There is no provision for this in the current legal aid scheme and a legal aid impact assessment would be most helpful, as well as discussions with the Ministry of Justice and the Legal Services Commission to ensure that provision is made for this. Consideration must also be given to the situation of privately paying appellants. Although most persons seeking asylum may qualify for legal aid, this does not mean that they have been able to find free legal representation. Some, but not all, appellants in immigration cases will be represented under the Legal Aid Scheme.

[1] The 'Qualification Directive, *Official Journal L 304 , 30/09/2004 P. 0012 - 0023*

For an unrepresented appellant to review a draft judgment is also difficult, particularly where they do not speak English, or do not speak it well.

It may be that the unrepresented and legal representatives under instruction, will seek to have more information excised from the judgment than the immigration judge, while concurring in the need for anonymity, thinks appropriate. The resolution of such disagreements in a timely manner, and without excessive costs being incurred, also presents challenges.

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ILPA
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