Upper Tribunal
(Immigration and Asylum Chamber)

Cokaj (anonymity orders: jurisdiction and ambit) [2021] UKUT 0202 (IAC)

THE IMMIGRATION ACTS

Heard at Field House by Skype	**Decision & Reasons Promulgated**
On 30 November 2020	**On 31 December 2020**
	[Addendum inserted 19 July 2021]

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

NEWS GROUP NEWSPAPERS LTD

Applicant

and

SELAMI COKAJ

Respondent

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested Party

Representation:

For the applicant:	Mr J Bunting, Counsel, instructed by NGN Legal
For the respondent:	Mr Z Malik, instructed by Bond Adam LLP Solicitors
For the interested party:	Mr M Gullick, Counsel, instructed by Government Legal Department

1. *A court or tribunal retains jurisdiction to deal with 'open justice' aspects arising from a case, after that case has concluded before it.*

2. *A higher court or tribunal may impose an anonymity order that has effect in respect of the entirety of the proceedings under section 82 of the Nationality, Immigration and Asylum Act 2002; and, conversely, may discharge such an order, whether expressly or by necessary implication.*

DECISION ON APPLICATION TO DISCHARGE ANONYMITY ORDER

A. INTRODUCTION

1. On 23 April 2020, the Upper Tribunal promulgated its decision in the case of SC v Secretary of State for the Home Department. The decision involved the re-making of the Article 8 ECHR aspect of SC's appeal against the refusal by the Secretary of State of SC's human rights claim. On 9 May 2019, the Upper Tribunal (Upper Tribunal Judge Pitt) had set aside the part of the First-tier Tribunal's decision that related to Article 8.

2. Upper Tribunal Judge Pitt had, however, found no error of law in the part of the decision of the First-tier Tribunal that related to SC's protection claim, which was based upon an alleged fear of harm on return to Albania as a result of a blood feud. The blood feud was said to have been occasioned by the killing by SC of a man in Albania.

3. In the 9 May decision, the Upper Tribunal made an anonymity order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The order stated that SC was granted anonymity and that no report of these proceedings shall directly or indirectly identify him or any member of their family. The direction applied both to SC and to the Secretary of State. Failure to comply with it could lead to contempt of court proceedings.

4. Rule 14(1) provides that the Upper Tribunal may make an order prohibiting the disclosure or publication of (a) specified documents or information relating to the proceedings or (b) any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified.

5. On 19 June 2019, the case came before the Upper Tribunal for re-making on the Article 8 issue. The Tribunal, however, adjourned the matter, following submissions by leading Counsel for SC that it was necessary for the Tribunal to consider the safety of the murder conviction, which had been imposed upon SC as a result of the killing. An anonymity order was also made by the Tribunal on that occasion.

6. With the promulgation of the Upper Tribunal's decision of 23 April 2020, the Upper Tribunal's appellate function had been discharged. The Upper Tribunal's decision of 23 April 2020 also contains an anonymity order.

7. SC applied for permission to appeal to the Court of Appeal. He did so only in respect of the Article 8 decision of 23 April, not in respect of the refusal by the Upper Tribunal to set aside such part of the First-tier Tribunal's decision as concerned the protection claim.

8. SC has renewed his application for permission to appeal to the Court of Appeal. His grounds relate to the refusal of the Tribunal to accept the late production of a document; and to the conclusions reached in respect of the effect of SC's removal on his children.

B. THE PARTIES' POSITIONS IN OUTLINE

9. The application of News Group Newspapers Ltd ("NGN") dated 25 October 2020 invites the Upper Tribunal to discharge the order giving SC anonymity, on the basis that it represents a serious interference with the principle of open justice and with the media's right of freedom of expression. As developed by Mr Bunting in written and oral argument, NGN's position can be summarised as follows. The identity of SC is, it is said, already firmly in the public domain, since he was subject to extensive press coverage in 2007, which named him, and identified his business and the town in which he lived. The press coverage included photographs of SC, captioning his name, as well as photographs of his business and his residence. There was also a description of SC's abuse of the United Kingdom's immigration laws, including returning illegally to the United Kingdom after he had been extradited to Albania in connection with his conviction for the murder of the person to whom reference has been made (as well as another conviction, which was set aside subsequently in Albania). Mr Bunting submits that, had the Upper Tribunal known about this press reporting, it is unlikely that the anonymity order would have been made. Mr Bunting also submits that it is possible to discover the identity of SC by reading the judgment of the Divisional Court, which dismissed his appeal against extradition.

10. So far as protection issues are concerned, Mr Bunting submits that these have fallen away, as a reason for anonymity, in the light of the fact that SC has not sought permission to appeal to the Court of Appeal against the Upper Tribunal's decision not to set aside the protection claim aspect of the First-tier Tribunal's decision.

11. As for any adverse effect upon the children of SC, which may be occasioned by the lifting of the order, Mr Bunting submits that the balance of competing rights as between Article 10 (Freedom of expression) and Article 8 (Right to respect for private and family life) of the ECHR falls to be struck firmly in favour of Article 10. There is no reliable evidence that naming SC would have a significantly detrimental impact upon his minor children, particularly in light of the fact that SC's identity is in the public domain. The Tribunal can expect news organisations to follow the Editors' Code of Practice, whereby family members of an individual are not to be identified except in circumstances where they are "genuinely relevant" to the story (Clause 9 of the Code).

12. For SC, Mr Malik submits that, although SC's underlying appeal is "pending" for the purposes of section 104 of the Nationality, Immigration and Asylum Act 2002, the appeal is not presently before the Upper Tribunal. The Tribunals, Courts and Enforcement Act 2007 comprises a carefully constructed scheme to segregate proceedings of the First-tier Tribunal, the Upper Tribunal and the Court of Appeal. It is tolerably clear, says Mr Malik, that Parliament's intention is that all matters which are incidental to the appeal proceedings should be dealt with by the specific tribunal or court that is dealing with the appeal at the given time. It would be contrary to the general statutory scheme for the First-tier Tribunal to intervene in respect of an anonymity order, when the appeal was before the Upper Tribunal. In the same way, it is for the Court of Appeal exclusively to deal with the matter, once it reaches that court. It would, therefore, be open to NGN to apply to the Court of Appeal to discharge the anonymity granted to SC. The Court of Appeal is, in any event, the most convenient forum to consider the issue of anonymity.

13. In any event, Mr Malik says, the anonymity order should be preserved. The Upper Tribunal's Guidance Note 2013 No. 1: Anonymity Orders states at paragraph 18 that the identities of children, whether they are appellants or not, will not normally be disclosed; and that 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, so as to preserve the anonymity of the child.

14. Witness statements filed by SC in respect of the present application explain how the previous adverse publicity has affected the family and the welfare of the children. Furthermore, in June 2020, a firearm was discharged in the street, apparently targeting SC's residence.

15. In addition, Mr Malik raises a new argument in support of anonymity. Unlike the position before the Upper Tribunal, SC's present stance is that, if he loses his appeal, he will return to Albania with his wife and minor children. The publicity which would result in the United Kingdom from lifting the anonymity order would place SC and his family at risk from kidnappers.

16. For the Secretary of State, Mr Gullick adopts a neutral stance. Mr Gullick draws attention to the judgment of Lord Neuberger MR in Pink Floyd Music Ltd v EMI Records Ltd [2010] EWCA Civ 1429, which discusses the relationship, in cases of anonymity etc, between the Court of Appeal and a lower court. Mr Gullick submits that if the Upper Tribunal considers the application by NGN has merit (or that it is not clearly unmeritorious), then the Tribunal may wish either to defer consideration of the application until the Court of Appeal has considered the issue (if it ever does), or to determine the application but to provide (in the event the Tribunal is minded to discharge the anonymity order) for its order not to take effect until SC has had the opportunity to bring the matter before the Court of Appeal, whether by way of appeal against the order for its discharge, or application for anonymisation before the Court of Appeal, or both. What procedural course to take is, Mr Gullick says, a matter for the Upper Tribunal.

C. PRACTICE AND GUIDANCE

17. Presidential Guidance Note No. 2 of 2011 of the First-tier Tribunal (Anonymity Directions) says:-

> "4. The power to direct anonymity is derived from article 8 ECHR and such directions should be made where public knowledge of the person or the case might impact on that person's protected rights. An interim anonymity direction is more likely to be appropriate during initial stages of an appeal to enable the parties to prepare their cases without interference or hindrance. At the CMR or at the substantive hearing the Immigration Judge should review the application for anonymity and direct whether the appellant should be granted anonymity. There may well be appeals where no application is made by either party but the court will self direct that anonymity should be granted.
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> 5. Anonymity directions will often, if not always, be made where the appeal involves:-
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> i) a child or vulnerable person
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> ii) evidence that the appeal concerns personal information about the lives of those under 18 and their welfare may be injured if such details are revealed and their names are known
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> iii) there is highly personal evidence in the appeal that should remain confidential
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> iv) there is a claim that the appellant would be at risk of harm and that by publishing their names and details it may cause them harm or put others at real risk of harm
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> v) publication of the determination may be used subsequently to support a *sur place* claim.
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> First tier
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> It is unusual, (but not unknown) for the determinations of the first tier to be published. If anonymity is granted the determination should give brief reasons why anonymity is granted with fuller reasons if either party objects."

18. The Practice Note of the Court of Appeal (Anonymisation in Asylum and Immigration Cases in the Court of Appeal) [2006] EWCA Civ 1359 states:-

> "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**." (Emphasis supplied)

19. We have already made mention of the Guidance Note 2013 of the Upper Tribunal. So far as relevant this provides as follows:-

> "6. The starting point for consideration of anonymity orders in UTIAC, as in all courts and tribunals, is open justice. 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 nothing should be done to discourage the publication to the wider public of fair and accurate reports of proceedings that have taken place.
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> 7. 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.
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> …
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> 9. UTIAC has power to make an anonymity order or otherwise direct that information be not revealed, where 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 may also make such an order where it is necessary in the interests of the welfare of a child or the interests of justice would otherwise be frustrated.
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> 10. Parties may apply for an anonymity order or UTIAC may consider making one of its own volition. Where anonymity is an issue, the UTIAC judge should deal with the matter as a preliminary issue and decide, first, the extent of any anonymity order made, if any.
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> 11. 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.
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> 12. An anonymity order will not be made because an appellant or witness has engaged in conduct that is considered socially embarrassing to reveal. In particular, that 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.
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> 13. It is the present practice of the First-tier Tribunal, Immigration and Asylum Chamber that an anonymity order is made in all appeals raising asylum or other international protection claims. An appellant will be identified by initial and country in such cases unless and until a judge has decided that anonymity is not necessary. UTIAC will follow the same general practice, with the result that anonymity will remain, unless a UT judge decides it is unnecessary.
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> 14. 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 details would be likely to cause serious harm."

D. CASE LAW

20. In re Guardian News and Media Ltd and Others [2010] UKSC 1, the Supreme Court held that, where both Articles 8 and 10 of the ECHR are in play, it is for the court to weigh the competing claims under each Article. Since both Article 8 and Article 10 are qualified rights, the weight to be attached to the respective interests of the parties will depend on the facts. Amongst the factual matters will be whether the person concerned has already been identified in relevant publications.

21. Having analysed the Article 8 arguments in favour of anonymity, Lord Rodger went on to examine the position under Article 10:-

> "63. What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: *News Verlags GmbH & Co KG v Austria* (2000) 31 EHRR 246, 256, para 39, quoted at para 35 above. More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [2004] 2 AC 457, 474, para 59, "judges are not newspaper editors". See also Lord Hope of Craighead in *In re British Broadcasting Corpn* [2010] 1 AC 145, para 25. This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.
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> …
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> 65. On the other hand, if newspapers can identify the people concerned, they may be able to give a more vivid and compelling account which will stimulate discussion about the use of freezing orders and their impact on the communities in which the individuals live. Concealing their identities simply casts a shadow over entire communities.
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> …
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> 68. Certainly, the identities of the claimants cannot affect the answers that this court gives to the legal questions in the substantive appeals. So those identities may not matter particularly to the judges. But the legitimate interest of the public is wider than the interest of judges qua judges or of lawyers qua lawyers. Irrespective of the outcome, the public has a legitimate interest in not being kept in the dark about who are challenging the TOs and the AQO. The case of HAY is instructive in this respect. Most people will be astonished, for example, to learn

that, up until now, the courts have prevented them from discovering that one of the claimants, Mr Youssef, has already successfully sued the Home Secretary for wrongful detention after a failed attempt to deport him to Egypt. Equally importantly, even while the Treasury is defending these proceedings brought by him, the Government are trying to have his name removed from the 1267 Committee list. Meanwhile, he is busy writing and broadcasting from London on Middle East matters.

69. By lifting the anonymity order in HAY's case the court allows members of the public to receive relevant information about him which they can then use to make connexions between items of information in the public domain which otherwise appear to be unrelated. In this way the true position is revealed and the public can make an informed judgment. There may well, of course, be no similar revelations in the case of M. But, assuming that is so, this would, in itself, be important, since it would contribute to showing how the freezing-order system affects different people in different situations - a point to be considered in any debate on the merits of the system. At present, the courts are denying the public information which is relevant to that debate, even though the whole freezing-order system has been created and operated in their name.

…

72. Of course, allowing the press to identify M and the other appellants would not be risk-free. It is conceivable that some of the press coverage might be outrageously hostile to M and the other appellants - even though nothing particularly significant appears to have been published when Mr al-Ghabra's identity was revealed. But the possibility of some sectors of the press abusing their freedom to report cannot, of itself, be a sufficient reason for curtailing that freedom for all members of the press. James Madison long ago pointed out that "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press": "Report on the Virginia Resolutions" (1800), in *Letters and Other Writings of James Madison* (1865) Vol 4, p 544. The Press Complaints Commission is the appropriate body for dealing with any lapses in behaviour by the press. The possibility of abuse is therefore simply one factor to be taken into account when considering whether an anonymity order is a proportionate restriction on press freedom in this situation."

22. Where the argument for anonymity depends upon an unqualified right, such as Article 2 (right to life), the approach is not one of balancing competing interests. Nevertheless, there needs to be a "real and immediate" risk of an Article 2 breach. That is a high threshold, with the requirement that the risk be real, meaning that it has to be objectively well-founded. These propositions derive from In re Officer L and Others [2007] UKHL 36. The issue in that case was whether serving or former police officers in Northern Ireland should be able to give evidence anonymously on the ground that they would be in fear for their lives due to exposure to terrorist attack if they were publicly identified. (Paragraphs 24 to 29; Lord Carswell).

23. In A v British Broadcasting Corporation [2014] UKSC 25, A claimed that he would suffer treatment contrary to Article 2 and Article 3 (inhuman and degrading treatment or punishment), if he were returned to his country of origin and publicity had been given to the fact that he was a sex offender. The Supreme Court held it was

a general principle that justice is to be determined by the courts in public so as to be open to public scrutiny. This was an aspect of the rule of law in a democracy and, furthermore, a constitutional principle to be found in the common law. The courts, however, had an inherent power to make exceptions to the principle by withholding certain information, including the identity of an individual, from public disclosure where this was necessary in the interests of justice. Whether that was so would depend on the facts of each case. The principle of open justice was expressly protected by Article 6 of the ECHR. Article 6, is, however, a qualified right, unlike Articles 2 and 3. Where an unqualified right is in conflict with a qualified right, there can be derogation from the unqualified right. Nevertheless, care has to be taken to ensure that the extent of interference is no more than is necessary (paragraphs 41, 46 to 49). In the event, the House of Lords upheld the anonymity order in respect of A on the basis that there was a real risk of Article 2/3 harm if his identity as a sex offender became known. The media did not have the right to publish information at the known potential cost of an individual being maimed or killed.

24. In LLD v Secretary of State for the Home Department [2020] NICA 38, the Court of Appeal in Northern Ireland considered an immigration appeal by an individual aged 16 who wished to enter the United Kingdom for family reunification purposes. No anonymisation had taken place in the First-tier Tribunal; but the Upper Tribunal had made an anonymity order, together with its decision disposing of proceedings. McCloskey LJ, giving the judgment of the court said:-

> "[13]. We determine the issue of the Appellant's anonymity in the following way. In so doing we adopt as our point of departure the overarching principle of open justice. We note further the absence of any mandatory statutory provision or binding judicial authority mandating this court to adopt any particular course. We also take into account the general rule promulgated in the two aforementioned tribunal instruments, in relatively strong terms, that neither the identity of a child nor information which could identify a child should be published. While it is not for this court to question the wisdom of this general rule in the forum of specialised tribunals and we understand it to be one of some longevity, we conceive our primary duty to be to apply the common law principles and Arts 6 and 8 ECHR.
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> In summary, the principle of open justice, vouchsafed by both the common law and Art 6(1) ECHR, falls to be applied in conjunction with the Art 8 ECHR private life rights of the Appellant and other family members in the context of the duty owed by the court *qua* public authority under s 6 of the Human rights Act 1998. In Article 8 cases, it is incumbent on the court to conduct a balancing exercise, weighing the extent of the interference with the individual's privacy on the one hand against the general interest at issue on the other hand. In cases of the present type, the public interest in play is the imperative for justice to be transacted in public in all respects. Every case in which some degree of anonymity is permitted by the court involves an adjustment of this public interest, with the individual's right prevailing.
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> [14] It follows from the foregoing that the Appellant should have been anonymised in like manner in the application to this court and in all documents generated thereby, with an accompanying application for continuing anonymity. This did

> not occur. The likely explanation would appear to be human error. We need enquire no further. The question for this court, which must form its own independent view and make a fresh assessment and ruling, is whether there are grounds for differing from the UT. Having considered all of the material evidence and submissions, including the recently provided affidavit, we are satisfied that the Appellant should continue to benefit from anonymity. In a nutshell, the intimate and sensitive details and features of her private and family life and that of other family members outweigh the public interest in open justice in this discrete respect. Accordingly, we replicate the anonymity order of the UT. The principle of open justice will prevail otherwise."

25. In re S (a child) (identification: restrictions on publication) [2004] UKHL 47 concerned the question of whether a mother, who had been prosecuted for the murder of one of her children, should be anonymised in connection with the criminal proceedings, on the basis that publicity would have a seriously detrimental effect upon S, a boy of 5 who was the sibling of the deceased. The House of Lords held that the foundation of the jurisdiction to restrain publicity to protect the child's private and family life was now derived from the ECHR rather than the inherent jurisdiction of the High Court. Again, it was emphasised that where Article 8 is in conflict with Article 10, neither article as such has precedence over the other. The correct approach is to focus on the comparative importance of the specific rights claimed in the individual case, with the justifications for interfering or restricting each right being taken into account and the proportionality test applied to each. There was a report from a child psychiatrist who opined that if there were a long period of adverse name publicity, the effect on S would, in her opinion, be significantly harmful.

26. The House of Lords, however, held that the balance fell to be struck in favour of Article 10, given the importance of open justice in the sphere of criminal law. By contrast, the effect on S would be "essentially indirect", in that he would not be involved in the trial as a witness and it would not be necessary to refer to him (paragraphs 24 to 31).

27. In HA (Iraq) [2020] EWCA Civ 1176; [2021] Imm AR 59, the Court of Appeal was concerned with deportation of a foreign criminal who had a child in the United Kingdom. At paragraph 5, Underhill LJ said:-

> "I confess to some concern about the over-use of anonymisation in this field, and I am not entirely persuaded that the mere fact that a foreign criminal has minor children is sufficient to justify not using his or her full name. However, it seems that most of the appeals concerning deportation of foreign criminals have been anonymised, not only in the UT but in this Court and the Supreme Court; and in all the circumstances I am contend not to seek to go behind the order of the UT."

28. In re Trinity Mirror plc [2008] EWCA Crim 50 concerned an order in a criminal trial restraining the media from identifying the defendant, who had pleaded guilty to child pornography offences, on the basis that the order was necessary to protect the rights and interests of the defendant's children, notwithstanding that they had been neither witnesses in the proceedings as against the defendant nor victims of his offences. A five judge Court of Appeal held that the proper balance between the rights of the children under Article 8 and the freedom of the public and media under

Article 10 did not justify granting the order. A judge who granted the order in the Crown Court had been concerned that the defendant's children were "vulnerable, of school age and liable to the risk of social exclusion by their peers, teasing and taunting, harassment, intimidation, bullying and violence" if their father were identified. Although the appeal in the Court of Appeal succeeded on a jurisdictional argument, the court disagreed with the way in which the trial judge had struck the balance between the rights of the children and the rights of the media and the public:-

> "33. It is sad, but true, that the criminal activities of a parent can bring misery, shame and disadvantage to their innocent children. Innocent parents suffer from the criminal activities of their sons and daughters. Husbands and wives and partners all suffer in the same way. All this represents the further consequences of crime, adding to the list of its victims. Everyone appreciates the risk that innocent children may suffer prejudice and damage when a parent is convicted of a serious offence. … If the court were to uphold this ruling so as to protect the rights of the defendant's children under article 8, it would be countenancing a substantial erosion of the principle of open justice, to the overwhelming disadvantage of public confidence in the criminal justice system, the free reporting of criminal trials and the proper identification of those convicted and sentenced in them. Such an order cannot begin to be contemplated unless the circumstances are indeed properly to be described as exceptional."

E. JURISDICTION

29. Before we embark upon our analysis of the facts by reference to the relevant case law, it is necessary to deal with two matters. The first concerns jurisdiction. All the parties were agreed that the Upper Tribunal has jurisdiction to entertain NGN's application, notwithstanding that it has made decisions disposing of the appellate proceedings in SC's case. In Dring v Cape Intermediate Holdings Ltd [2019] UKSC 38, the Supreme Court held that, unless inconsistent with statute or rules of court, all courts and tribunals have an inherent jurisdiction to determine what the constitutional principle of open justice requires in terms of access to documents or other information placed before the court or tribunal in question. It is plain from paragraph 47 of the judgment in Dring that a court or tribunal retains jurisdiction to deal with "open justice" aspects arising from a case, after that case has concluded before that court or tribunal. In paragraph 47, the Supreme Court held that, whilst it was highly desirable that the application for documents was made during the trial, this was because a person who sought such access after the proceedings were over "may find that it is not practicable to provide the material because the court will probably not have retained it and the parties might not have done so". There is no suggestion that any jurisdictional problem was envisaged.

F. WHAT IS THE APPROPRIATE FORUM FOR DETERMINING THE APPLICATION?

30. The fact that the Upper Tribunal has jurisdiction to decide NGN's application does not mean that it should do so if there is a more appropriate forum.

31. In Spiliada Maritime Corp v Cansulex Ltd [1987] 1 AC 460, the House of Lords considered the principle of *forum non conveniens*. In a dispute about the appropriate jurisdiction for trial, it was held that the burden rested on the defendant "not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum" (477E: Lord Goff).

32. Mr Malik submits that the appropriate forum, in the present circumstances, is the Court of Appeal. The matter is now before that court, awaiting a decision on permission. Mr Malik seeks to invoke rule 5(3)(k) of the 2008 Rules. This empowers the Upper Tribunal to transfer proceedings to another court or tribunal with jurisdiction if "the Upper Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case".

33. Mr Malik says that, for the purposes of rule 14, the "proceedings" referred to in the anonymity order of the Upper Tribunal are the proceedings in SC's appeal under section 82 of the 2002 Act. He disagrees with Mr Bunting's submission that the "proceedings" in this context mean only the proceedings in the Upper Tribunal and not those in the First-tier Tribunal. If Mr Bunting's submission on this issue is correct, NGN's application would be strengthened, in that the Upper Tribunal's anonymity order[1] would not prevent the press from reporting the proceedings in SC's appeal to the First-tier Tribunal.

34. On the issue, we agree with Mr Malik. The consequences of regarding the First-tier Tribunal's proceedings as conceptually separate from those in the Upper Tribunal for this purpose would be problematic. If, as indeed happened in the present case, the First-tier Tribunal failed to make an anonymity order in a protection appeal, but the Upper Tribunal then did so in respect of the "proceedings", it would defeat the purpose of the Upper Tribunal's anonymity order if, as Mr Bunting submits is the position, the press or others were able to disclose the identity of the person in question, in the context of the proceedings before the First-tier Tribunal. The same point applies, as regards the Upper Tribunal and the Court of Appeal. We consider the correct position to be that the higher court or tribunal may, at each stage, impose an anonymity order that has an effect in respect of the entirety of the proceedings under section 82 and, conversely, may discharge such an order. Such a discharge may occur expressly or by necessary implication.

35. The process we have described is, in our view, entirely compatible with what Lord Neuberger had to say in Pink Floyd Music Ltd:-

> "66. I consider, therefore, that the present appeal provides a good opportunity for this court to make it clear that a private hearing or party anonymisation will be

[1] "Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings."

granted in the Court of Appeal only if, and only to the extent that, a member of the court is satisfied that it is necessary for the proper administration of justice.

67. The fact that the first instance judge granted or refused to permit a private hearing or anonymisation cannot be conclusive of such issues in the Court of Appeal (although the judge's refusal of such relief will, in most cases, render any subsequent application on appeal pointless). A first instance judge's decision on such an issue self-evidently does not bind the Court of Appeal, and cannot determine how an appeal in this court proceeds. However, this court would normally pay close regard to the judge's decision, especially if expressed in a reasoned judgment. None the less, in relation to appeals, the Court of Appeal should not depart from the general rule that litigation is to be conducted in public, unless a judge of that court is persuaded that there are cogent grounds for doing so.

68. In a case where permission to appeal is required from this court, then, where the applicant wants a private hearing or anonymisation, the correct procedure is to apply for an appropriate order at the time permission to appeal is sought. If another party to such an appeal wants a private hearing or anonymisation, or in a case where permission to appeal has been granted below, if any party has such a wish, the party concerned should make an appropriate written application to this court. Where any application for a hearing in private or anonymisation is made, it will be referred to a single Lord Justice, who will, at any rate initially, consider it on paper. If such an application is granted ex parte and another party (or a representative of the media) objects, the order will, of course, be reconsidered.

69. Of course, particularly in a case in which anonymisation or privacy was granted below, where anonymisation or privacy is sought in an appeal to this court, it would (at least in the absence of unusual circumstances) be appropriate for the parties and the court to maintain anonymisation or privacy on an interim basis, without a direction from a judge of this court, until it was possible for this court to rule on the question of whether an order for anonymisation or privacy should be made."

36. Thus, in the present case, which is no longer a protection appeal, the Court of Appeal will expect the party who seeks to continue anonymity to make the appropriate application to that court.

37. There is also the following point. Whilst rule 14(1)(a) refers to the proceedings, rule 14(1)(b) confers a power to prohibit disclosure or publication of any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified. Even if, contrary to our finding, the reference to the proceedings in sub-paragraph (a) were confined to the proceedings before the Upper Tribunal, the power to make an anonymity order in any event extends beyond the ambit of the proceedings in the Upper Tribunal.

38. Having said all this, we nevertheless agree with Mr Bunting on the actual issue under this heading. In the particular circumstances of this case, it is appropriate for this Tribunal to consider NGN's application to lift the Tribunal's anonymity order. As Mr Gullick submits, if permission to appeal were refused by the Court of Appeal,

it is unlikely that the issue of SC's anonymity would be addressed by that court. In any case, there is before the Upper Tribunal the evidence upon which to make the necessary fact-sensitive determination of whether the anonymity order should be lifted. If the Court of Appeal in due course addresses the issue of anonymity, it is likely to be assisted by the process that Mr Bunting invites us to undertake. We shall, however, endeavour to do so in a way which pays due regard to the stage at which the proceedings have reached.

G. ARTICLE 10 CONSIDERATIONS

39. We take account of the importance ascribed to the ability of the press, in the public interest, to report freely to the public on matters of genuine concern. The case law reveals that, in the case of qualified rights, powerful reasons are required to overcome the interests enshrined in Article 10. This is particularly so in the area of criminal law, for the reasons we have seen.

40. The present case does not involve an individual who has received a criminal conviction in the United Kingdom. To that extent, SC's case differs from those such as In re S and In re Trinity Mirror plc. Nevertheless, there are powerful factors pointing to there being a legitimate and strong public interest in lifting the anonymity order. SC is a convicted murderer, who received a long sentence of imprisonment in Albania. He arrived in the United Kingdom in 1997, claiming asylum using a false identity and nationality (Kosovan). After protracted legal proceedings, SC was extradited according to English law. He re-entered the United Kingdom illegally. He also told his wife that she should use a false identity in order to enter the United Kingdom.

41. SC has employed persistent dishonesty. As well as his false identity and nationality, he has not told the truth about being the victim of a blood feud. Before the Upper Tribunal, he admitted lying to the court during his extradition proceedings. He also admitted lying to the Asylum and Immigration Tribunal. He also lied when, in his false identity, he denied knowing the victim of his crime. He gave evidence before the Upper Tribunal which we characterised as "incoherent", "wholly bogus", "totally unbelievable", and "false" (paragraphs 82, 85 and 98). As found in paragraph 87, SC was "fundamentally and persistently dishonest … over a significant period of time".

42. SC's case has, in fact, attracted significant press attention. We were unaware of this press coverage when making the anonymity direction, as no doubt were the other constitutions of the Tribunal mentioned at the beginning of this decision. Articles identifying SC by name and giving details of his business and home town, together with captioned photographs, featured in *The Scottish Sun*, *The Sun*, *The Mail Online* and *The Telegraph* in 2017. MPs expressed public disquiet at the fact that SC was still in the United Kingdom at that time. The fact that so much of this is in the public domain, is, we consider, highly relevant.

43. We place less weight, however, on the fact that the Divisional Court proceedings named SC. Given the passage of time, this aspect is of less significance than the 2017

articles in demonstrating that knowledge of SC and his background have significantly entered the public domain.

44. For the reasons we have given earlier, we do not accept Mr Bunting's submission that, even if this anonymity order were to remain, news organisations could report freely on the First-tier Tribunal proceedings.

45. Despite what we have just said about the Divisional Court and the First-tier Tribunal proceedings, the Article 10 case is still very strong. The public has a legitimate interest in knowing about a man with a conviction for murder, who, as a serious, persistent immigration offender, has done his best to take improper advantage of laws designed to protect those genuinely at real risk of harm. His case is already in the public domain to a significant degree as a result of relatively recent press coverage.

H. ARTICLE 2/3 CONSIDERATIONS

46. In his witness statement of 19 November 2020, filed in connection with the present application, SC raises a new issue. He says that his "family is very well-known [in Albania] and people recognise me and my family there. If the people recognised them, they will kidnap them either for ransom or to sell them to my enemy". Later, SC says that:-

> "If my case is refused by the Court of Appeal, my wife and I have decided to move to Albania with our young children. More people know my family and me there than here. As I mentioned above, that the News not only travels there but the Albanian media exaggerate it even more. They will make my young British children identifiable there as well and will put their lives at great risk there as well. Also, I will be left with no other option but to return to the UK and claim a fresh asylum on these basis [sic]".

47. The statement of SC's wife of 20 November 2020 talks about Albanian media attracting the attention of "big mafias and kidnappers over there". SC "is already in news as big shot here. If we were to return to Albania, then not only my husband's life would be in danger not only by these kidnappers but also from our enemy with whom he has blood feud". She also says that this would expose the British children's lives to great risk and danger.

48. There is not a shred of objective evidence to support these assertions regarding the threat of kidnapping. Given our findings in the April 2020 decision regarding the credibility of SC and his wife, we are not prepared to accept their latest utterances at face value. On the contrary, they are, we consider, further evidence of their persistent mendacity. By referring to SC's "enemy" they seek to perpetuate the false claim regarding the blood feud.

49. The claims are also undermined by the fact that the older children of SC travelled to Albania on their own in the summer of 2020, without incident. Although SC's wife said they were "recognised by the local police", in the light of the problems we have with her evidence, we are not prepared to accept this unsubstantiated assertion.

There is, furthermore, no justification whatsoever for her inference that this recognition, even if it occurred, would "put their lives in danger in future travel if any adverse news are published in the media". There already has been publicity, of the kind we have described, as recently as 2017.

50. So far as risk in the United Kingdom is concerned, the local press carried a report in June 2020 of a gun being fired at the door of a house in SC's home town. This is said to be the house of SC. The report says that armed officers were called "following reports that a firearm had been discharged in the street". There is some witness evidence, filed by SC, from neighbours who refer to the incident, as well as SC's children. However, nothing further appears to have emerged and there is no indication of the police taking any further interest.

51. SC has not explained how this incident impacts in any material way on the present application. It is, frankly, fanciful to believe that it relates to the publicity that occurred in 2017. There is no basis upon which to assume that lifting the anonymity order would give rise to any repetition of this incident.

52. Finally, we note that since SC has not sought to appeal to the Court of Appeal on the protection issue, that aspect can no longer justify the continuation of an anonymity order.

53. For the above reasons, having had regard to the totality of the evidence before us, we find there is no real risk of Article 2/3 harm if the anonymity order were to be lifted.

I. ARTICLE 8 CONSIDERATIONS

54. In his latest statement, SC described the background to *The Sun* newspaper articles in 2017. SC says that they published "a misleading and negative news" [sic]. The next day he woke up with "hundreds of notifications from friends and family asking if everything was okay and telling them to be careful because people were writing very unpleasant comments". SC said that his family's life after publication became miserable and hard as he had to witness the negative effect of being published on his family's mental and physical state. It put them under tremendous pressure to deal with this at a very young age. It put his children's welfare at risk. The children would constantly come back from school, saying that classmates and other students were saying negative comments about them or students would ask them questions such as how it feels to have a father as a criminal. The children could not confront these people making negative comments and remarks about their father. This was said to be affecting their education and careers and also their physical and mental development and wellbeing.

55. SC's wife describes the media putting "incorrect facts about my husband in the news". What the newspapers were saying was "not completely the truth". It had had an effect on her children's wellbeing and sometimes they had come home from school or college upset in that the media were saying "appalling things which were not true".

56. The 22 year old adult son of SC said that it was unpleasant to see his father being approached by the media "as if he is a cold-hearted criminal which broke my heart". Seeing him exposed in a very popular local newspaper and seeing him on TV "affected my life massively". The witness felt he was "being treated differently" at the schools he went to. In November 2017, newspapers wrote "very negative and incorrect information about my father and his previous history". The witness says that this led to having a firearm shooting at his house. The media attention is described as "negative propaganda against my father". Any further publication by *The Sun* newspaper "will bring a downfall on my life and possibly my future".

57. We have already noted that there can be no rational connection between the November 2017 publicity and the June 2020 firearm incident. So far as the rest of this witness's evidence is concerned, it suffers from the fundamental defect, identified by Mr Bunting, that SC has been unable to point to any aspect of the 2017 reporting that is untrue. As a result, it is not possible to place weight on this evidence.

58. There is a statement from the second elder son of SC. He describes *The Sun* newspaper as publishing "fake stories about my father" which is said to have "ruined my life because they have caused me stress, anxiety and depression".

59. Once again, there is nothing to indicate that *The Sun* newspaper has published a "fake" article. Insofar as this witness, and the other witnesses, described distress when being confronted with the publicity, this has to be assessed by reference to the fact that the information about their father was not untrue, however much they may believe (or wish to think) it were otherwise.

60. Another son of SC has submitted a witness statement of 19 November 2020. He describes not believing the newspaper articles because SC "is such a good role model in my life and the world's media say about him do not portray who he really is". A further article in *The Sun* would "make me very upset having to witness the things they will say about him".

61. A statement from another child of SC says: "our house was in news and therefore some people decided to open fire at our house". We reiterate what we have already said about this incident. The witness says that "making my father look like a criminal and a bad person, has really affected me and made me upset at my young age".

62. We have seen that the outcome of both In re Trinity Mirror plc and In re S was that anonymity was not granted, despite there being independent medical evidence regarding the adverse effect that publicity would be likely to have on a child. Although those cases involved domestic criminal proceedings, for the reasons we have given we do not consider that the Article 10 factors pointing towards open justice in the present case fall significantly below the level set by the courts in the case of domestic criminal law. There is in the present case a complete dearth of objective evidence that shows any member of SC's family was subjected to any significant psychological or other harm, as a result of the publicity in 2017.

63. The high point of the case for SC for continuing anonymity concerns what we said at paragraph 99 of our decision:-

> "99. Insofar as the evidence from the children articulates a concern that, if the appellant were removed to Albania, he would be at risk from the blood feud, this evidence has, we find, either been composed in the light of pressure from the appellant and his wife; or else is the genuine concern of children who have, regrettably, being fed untruths by their parents. For the purposes of assessing the strength of the appellant's case for resisting deportation, we are prepared to follow the latter approach to the children's evidence."

64. Mr Malik submitted that this was a finding that was critical of some of the children of SC. As a result, lifting the anonymity order would risk adverse consequences for them, in terms of reactions by their peers, and so forth. After careful consideration, however, we concluded that this is not the case. The ending of paragraph 99 indicates that the Tribunal, on balance, treated the evidence as a genuine concern on the part of the children; but that this concern was objectively misplaced because it was rooted in the false claim of SC to be at risk of a blood feud. As a result, there is no cause to think that the children who gave evidence to the Tribunal would be held in lower esteem by others. This conclusion also meets Mr Malik's point that, because the children were not named in the decision, paragraph 99 could apply to those who would not, in fact, have given evidence.

65. This is not to say, of course, that a renewed bout of publicity, of the kind faced by the family in 2017, would not be unpleasant for the family; in particular for the children. It plainly would. The family has, however, faced this before, without lasting or serious ill-effects. For the reasons we have given, we do not find that the consequences of that publicity were anything like as extreme as has been sought to be portrayed in the latest witness statements.

J. DECISION

66. Having had regard to the totality of the evidence and despite Mr Malik's able submissions, for the reasons we have given, the Article 10/Article 8 balance falls to be struck in favour of Article 10. We reiterate that the resulting publicity will not be pleasant for the family. It is, however, a degree of unpleasantness that is occasioned by the need to give effect to the freedom of the press under Article 10.

67. We accordingly decide that the anonymity orders made in the Upper Tribunal should be lifted. Subject to submissions in writing by the parties, we intend to impose a stay on this decision, whereby the lifting will take effect ten working days after the Court of Appeal has informed SC of its decision on permission to appeal. SC is hereby directed to communicate that decision to NGN, as soon as it becomes known to him.

68. A period of ten working days will afford SC the opportunity of seeking an anonymity order from the Court of Appeal; alternatively, of seeking to challenge this decision. Since our decision to lift the anonymity order is, in our view, an ancillary decision

made in relation to an appeal under section 82 of the 2002 Act, it is an excluded decision by reason of article 2(n) of the Appeals (Excluded Decisions) Order 2009 and, thus, challengeable only by means of judicial review.

Signed *Mr Justice Lane* Date: 21 December 2020

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber

ADDENDUM

1. By an Order dated 11 January 2021, having considered written submissions filed and served by the applicant and respondent, the Tribunal stayed its decision to lift the anonymity order consequent to the respondent having filed an appeal with the Court of Appeal in respect of the Tribunal's substantive consideration of his article 8 appeal: [2020] UKUT 00187 (IAC). The Tribunal ordered that the decision to lift the anonymity order would take effect at the end of the period of ten working days after the date on which the Court of Appeal informed the respondent of its decision on the application for permission.

2. By an Order dated 19 February 2021 Elisabeth Laing LJ refused the respondent permission to appeal from the decision in [2020] UKUT 00187 (IAC). She found no reason to interfere with the Tribunal's subsequent order that the respondent continue to be anonymised until ten working days of her decision on the application for permission to appeal. The tenth working day was 5 March 2021.

3. The respondent filed an application for judicial review challenging the Tribunal's decision to lift the anonymity order and applied for interim relief (CO/809/2021). By an Order dated 5 March 2021 Linden J stayed the Tribunal's decision to lift the anonymity order pending determination, on the papers, of the application for permission to apply for judicial review.

4. The interested party detained the respondent and took steps to remove him to Albania on 13 May 2021. The respondent filed further representations which were considered by the Interested Party in a decision dated 12 May 2021 not to satisfy the fresh claim requirements of para. 353 of the Immigration Rules.

5. The respondent filed an application for judicial review challenging his removal and seeking a stay of removal (JR/670/2021). The application for a stay of removal was initially refused by Upper Tribunal Judge Allen by an Order dated 12 May 2021.

6. On the same day, the respondent renewed the application for a stay of removal out of hours to the High Court. Following a hearing conducted by telephone, Mrs. Justice Moulder refused the application.

7. The respondent was removed to Albania on 13 May 2021.

8. The respondent instructed his legal representatives to withdraw his challenge against removal (JR/670/2021) and by means of a decision of Upper Tribunal Lawyer Bakhshi dated 21 June 2021 the Tribunal consented to the withdrawal of the applicant's case, pursuant to rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

9. By an Order of Ms. Margaret Obi, sitting as a Deputy High Court Judge, dated 22 June 2021, the respondent was refused permission to challenge the Tribunal's decision to lift the anonymity order and the application was certified as totally without merit: (CO/809/2021). The Order of Linden J was discharged. The decision of the Tribunal to lift the anonymity order made in respect of the respondent was stayed until seven days after the date of service of the Order. The Order was served on 25 June 2021 and the stay imposed by the Deputy Judge expired on 2 July 2021.

10. The decision of this Tribunal previously reported as *SC (paras A398-339D: 'foreign criminal': procedure) Albania* [2020] UKUT 00187 (IAC) will now be reported as *Cokaj (paras A398-339D: 'foreign criminal': procedure) Albania* [2020] UKUT 00187 (IAC).

Signed: **Date: 19 July 2021**

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber