



[2018] UKUT 0338 (TCC)
Appeal number: FS/2018 /001

PENSIONS REGULATOR – publication-whether Upper Tribunal should prohibit publication of information relating to prohibition of person acting as a trustee of occupational pension schemes and direct that the Tribunal’s register of references should not contain particulars of the Applicant’s reference-no-whether Tribunal has jurisdiction to give direction to suspend prohibition order pending hearing of the reference-no-applications dismissed-Rules 5 (5) and (6) and Rule 14 and para 3 (3) Schedule 3 The Tribunal Procedure (Upper Tribunal) Rules 2008

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

ANTHONY MUSTAFA SALIH

Applicant

- and -

THE PENSIONS REGULATOR

**The
Regulator**

TRIBUNAL: Judge Timothy Herrington

Sitting in private at The Royal Courts of Justice, Strand, London WC2 on 8 June 2018

The Applicant in person

Bobby Friedman, Counsel, instructed by The Pensions Regulator, for the Regulator

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DECISION

Introduction

5 1. On 8 January 2018 the Determinations Panel of The Pensions Regulator the ("the
Regulator") gave a Determination Notice to the Applicant ("Mr Salih") which
determined that a prohibition order should be made in respect of Mr Salih under s 3 of
the Pensions Act 1995, prohibiting him from being a trustee of trust schemes
generally on grounds of a lack of competence and capability of acting as such a
10 trustee.

2. By a reference notice dated 3 February 2018 Mr Salih referred the matter to the
Tribunal. In that reference notice Mr Salih also applied for a direction that the effect
of the Determination Notice be suspended pending the determination of the reference.
I refer to this application in this decision as the Suspension Application. Mr Salih has
15 also applied for directions that the Regulator be constrained from publishing his
prohibition pending the outcome of the hearing of his reference and that the Register
maintained by the Tribunal pursuant to paragraph 3 of Schedule 3 to the Rules shall
not include particulars of the reference. I refer to these applications in this decision as
the Privacy Applications.

20 3. I heard the applications on 8 June 2018 following which I gave an oral decision
dismissing the Applications. I have subsequently made directions for the future
conduct of the reference. As requested by the Regulator, this decision sets out my
reasons for that decision.

Applicable statutory provisions

25 *Provisions relevant to the Suspension Application*

4. Pursuant to Rule 5(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the
"Rules") the Upper Tribunal has the power to direct that the effect of the decision in
respect of which the reference is made is to be suspended pending the determination
of the reference:

30 "...if it is satisfied that to do so would not prejudice –

(a) the interests of any persons (whether consumers, investors or
otherwise) intended to be protected by that notice;

(b) the smooth operation or integrity of any market intended to be
protected by that notice; or

35 (c) the stability of the financial system of the United Kingdom."

5. However, Rule 5 (6) of the Rules specifically provides that Rule 5 (5) does not
apply in the case of a reference in respect of a decision of the Pensions Regulator. The
operation of Rule 5 (5) is therefore confined to cases involving references of decisions

made by the financial services regulators, namely The Financial Conduct Authority and the Prudential Regulatory Authority.

6. Section 3 of the Pensions Act 1995 gives the Regulator power by order to prohibit a person from being a trustee, among other things, of trust schemes in general
5 if it is satisfied that the person concerned is not a fit and proper person to be a trustee of the schemes to which the order relates.

7. Section 96 of the Pensions Act 2004 (“PA 2004”) sets out the procedure, known as the standard procedure, to be followed by the Regulator proposing to exercise certain of its regulatory functions. That procedure applies in cases where it proposes
10 to make an order under s 3 of the Pensions Act 1995 prohibiting a person from being a trustee and requires the giving of a warning notice to the person concerned, followed by the right to make representations to the Regulator’s Determinations Panel following which the Determinations Panel can, as it did in this case, issue a Determination Notice.

8. Section 96 (3) PA 2004 provides that the determination which is the subject matter of the determination notice (in this case the prohibition order) may be referred to this Tribunal by the person to whom the determination notice is given.

9. Section 96 (5) PA 2004 provides that where the determination which is the subject matter of the determination notice is a determination to exercise a regulatory
20 function the Regulator must not exercise the function during the period within which the determination may be referred to this Tribunal and, if the determination is so referred, until the reference, and any appeal against the Tribunal’s determination, has been finally disposed of.

10. However, Section 96 (6) PA 2004 provides that s 96 (5) does not apply where
25 the determination is a determination to exercise, among other functions, the power to make an order under s 3 of the Pensions Act 1995 prohibiting a person from being a trustee: see s 96 (6) (h).

11. Section 103 (4) PA 2004 provides that on a reference, the Tribunal must determine what (if any) is the appropriate action for the Regulator to take in relation
30 to the matter referred to it.

12. It is therefore clear that as far as the relevant statutory provisions are concerned, a prohibition order made by the Regulator pursuant to s 3 of the Pensions Act 1995 takes effect upon the issue of the relevant determination notice notwithstanding any
35 reference of the determination notice that is made to the Tribunal and that there is no power contained in the Tribunal’s Procedure Rules to grant a suspension order in relation to the decision to impose a prohibition order.

13. I consider later whether there is any other basis on which the prohibition order may be suspended pending determination of the reference.

Provisions relevant to the Privacy Applications

14. Rule 14 of the Rules so far as relevant provides:

“(1) The Upper Tribunal may make an Order prohibiting the disclosure or publication of:

5 (a) specified documents or information relating to the proceedings; or

(b)...

(1) The Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if:

10 (a) the Upper Tribunal is satisfied that such disclosure will be likely to cause that person or some other person serious harm; and

(b) the Upper Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.”

15 15. Mr Salih seeks a direction that the Regulator be constrained from publicising the prohibition order in such terms as the Upper Tribunal shall decide pending the outcome of the hearing of his reference. Although he did not specifically refer to Rule 14, I treated his application as an application to prohibit the Regulator from disclosing information concerning the prohibition order pursuant to the powers given under that Rule.

20 16. Rule 3(3) of the Rules provides:

“The Upper Tribunal may direct that the register is not to include particulars of a reference if it is satisfied that it is necessary to do so having regard in particular to any unfairness to the Applicant or prejudice to the interests of consumers that might otherwise result.”

25 17. Mr Salih seeks a direction under this rule that the register shall not contain particulars of his reference.

18. Section 66 (1) PA 2004 requires, inter-alia, the Regulator to keep in such manner as it thinks fit a register of all persons who are prohibited under s 3 Pensions Act 1995.

30 19. The contents of the register required to be maintained pursuant to s 66 (1) may not be disclosed or otherwise made available to members of the public except in accordance with s 67 PA 2004.

20. Section 67 (1) PA 2004 requires the Regulator to make arrangements to secure that the prohibition register is open for inspection during normal working hours.
35 Section 67 (2) permits the Regulator to comply with a request made as to whether a particular person identified in the request is a person appearing in the prohibition register as prohibited in respect of an occupational trust scheme specified in the request, in respect of a particular description occupational trust schemes so specified, or in respect of all occupational trust schemes.

21. Section 67 (3) PA 2004 permits the Regulator, in such manner as it considers appropriate, to publish a summary of the prohibition register containing limited information about the register's content, including the names of persons appearing in the register as persons who are prohibited and the extent of the prohibition applying to such persons.

22. Section 67 (6) PA 2004 provides that a person is not to be identified in the summary referred to above as a prohibited person where the determination by virtue of which that person's particulars would appear on that list is, inter-alia, the subject of any pending reference, review, appeal or legal proceedings which could result in such a revocation or other overturning of a prohibition of that person.

23. Consequently, the effect of these provisions concerning the register of prohibited persons is that particulars of a person, such as Mr Salih in this case, who has been made the subject of a prohibition order will be contained in the register maintained by the Regulator. That register is open to inspection and information contained in it may be provided on request to a limited extent, but no particulars regarding Mr Salih's prohibition will be contained in the summary register, which is generally published by the Regulator, pending the determination of his reference.

Discussion

The Suspension Application

24. As I have previously stated, the relevant statutory provisions are clear. There is no statutory power for this Tribunal to suspend the effect of a prohibition order pending the determination of a reference which has been made in respect of it. Mr Salih put forward two arguments to the contrary:

(1) Section 103 (4) PA 2004 gives the Tribunal power to determine that an "appropriate action" in this case is a direction to the Regulator that it be constrained from publishing information concerning the prohibition order pending the outcome of the substantive hearing of the reference; and

(2) Notwithstanding the wording of Rule 5 (6) of the Rules the Tribunal can regulate its own procedure and give directions as to the conduct of proceedings, general powers which are not displaced by Rules 5 (5) and Rule 5 (6). Furthermore, the Tribunal can use its inherent jurisdiction to find that it may suspend the order as distinct from suspending the effect of the Regulator's decision.

25. I can deal with these arguments very briefly. As regards s 103 (4) PA 2004, it is clear that this section only applies in relation to the Tribunal's ultimate determination of the merits of the reference following its substantive hearing. The provision has no application to interlocutory matters, hence the need for specific Rules to be contained within the Tribunal's Procedure Rules in that regard. In that respect, the provisions of Rules 5 (5) and (6) are exhaustive and take priority over the general case management powers contained in Rule 5, including the Tribunal's power to regulate its own procedure. It cannot exercise those general powers in a manner which is inconsistent

with specific provisions of the Rules dealing with the relevant subject matter, in this case Rule 5 (5) and (6). As regards the point on inherent jurisdiction, the Tribunal has no inherent jurisdiction. It is a creature of statute and only has such powers as have been conferred on it by Parliament.

5 26. I did, however, ask the parties in advance of the hearing to consider the question
as to whether the determination to issue a prohibition order, which has the effect of
removing the right of the subject of the order to act as the trustee of a trust-based
scheme, prior to their having been a judicial determination to that effect by an
independent tribunal might infringe the rights of the applicant under Article 6 of the
10 European Convention on Human Rights. Article 6 provides that in the determination
of his civil rights and obligations or of any criminal charge against him, everyone is
entitled to a fair and public hearing within a reasonable time by an independent and
impartial tribunal established by law.

15 27. I drew the attention of the parties to the case of *ABC Limited and others v
HMRC* [2017] EWCA Civ 956 where the Court of Appeal considered to what extent
either HMRC or the High Court had power to allow a wholesaler of duty-paid alcohol
to continue to trade lawfully pending appeal against a determination by HMRC that
the wholesaler was not a fit and proper person to deal in such goods. Although the
wholesaler had the right of appeal against that decision to the First-tier Tribunal
20 (“FTT”), there was no power in the FTT to grant any interim relief to enable the
wholesaler to continue to trade lawfully pending the appeal and if the wholesaler
continued to trade it would commit a criminal offence.

28. Burnett LJ (as he then was) set out the Article 6 argument as it was presented in
that case in the following terms at [75] of his judgment:

25 “The essence of the argument under article 6 is that without interim relief the claimants
can demonstrate that they will not survive to pursue an appeal given the immediate and
destructive consequences for their businesses. For the purposes of A1P1, Mr Coppel
QC recognised that the Strasbourg jurisprudence suggests that if a business is shut
down, or ceases to be viable, in the public interest for reasons of regulation and control
30 an argument that the regulatory action is disproportionate is unlikely to prosper. In any
event, the substance of that point can be taken in the appeal: *R (Ahmad) v HMRC*
[2015] EWHC 3954 (Admin) per Mitting J at paragraph 15. The argument he advances
is different. It is not the decision to refuse approval that is in issue but the lack interim
relief which is said to be a disproportionate interference with the A1P1 rights of the
35 claimants. Whether under article 6 or A1P1 the basis of the argument is the same. By
the time the appeal comes on the claimants will have ceased to be viable.”

29. Burnett LJ dealt with the argument at [81] and [83] to [85] of his judgment as
follows:

40 “81. In my opinion, a statutory appeal against a refusal of approval which is unable to
provide a remedy before an appellant has been forced out of business, rendering the
appeal entirely academic (or theoretical or illusory in the language of the Strasbourg
Court) is capable of giving rise to a violation of article 6 which the High Court would
be entitled to prevent by the grant of appropriate injunctive relief under section 37 of

the 1981 Act. To that extent, the exceptions enumerated by Underhill LJ in *CC&C* can be expanded to include cases in which a claimant can demonstrate, to a high degree of probability, that the absence of interim relief would violate its ECHR rights. Moreover, such an injunction need not be ancillary to a claim for judicial review of any decision of HMRC, although it might be.

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83. It was no part of Mr Coppel's case that interim relief should issue automatically even if a claimant could demonstrate that it would not be able to survive the wait for the appeal to be heard. He recognised that factors such as the strength of the appeal and the nature of the concern that led to the refusal to approve would be factors to weigh when considering whether to grant an injunction, itself a reflection of the fact that the Scheme exists to protect the public purse and legitimate traders.

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84. In cases of this sort, the hierarchy of a claimant's attempts to safeguard its position pending appeal should be:

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i) Seek temporary approval from HMRC under section 88C of the 1979 Act;

ii) Seek expedition from the F-tT;

iii) Consider an application for an injunction in the High Court.

85. A claimant seeking an injunction would need compelling evidence that the appeal would be ineffective. It would call for more than a narrative statement from a director of the business speaking of the dire consequences of delay. The statements should be supported by documentary financial evidence and a statement from an independent professional doing more than reformulating his client's stated opinion. Otherwise, a judge may be cautious about taking prognostications of disaster at face value. It should not be forgotten that a trader who sees ultimate failure in the appeal would have every incentive to talk up the prospects of imminent demise of the business, in an attempt to keep going pending appeal. Equally, material would have to be deployed which provided a proper insight into the prospects of success in an appeal. There is no permission filter for an appeal to the F-tT. The High Court would not intervene in the absence of a detailed explanation of why the decision of HMRC was unreasonable. It must not be overlooked that the F-tT is not exercising its usual appellate jurisdiction in these types of case where it makes its own decision. Finally, there would have to be detailed evidence of the attempts made to secure expedition in the F-tT and the reasons why those attempts failed. Whilst the jurisdiction exists to grant interim relief in this way, its use is likely to be sparing because steps (i) and (ii) identified above should provide practical relief in cases which justify it and the circumstances in which it would be appropriate for injunctive relief to issue will be rare."

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30. Applying these principles in this case, the question of a "temporary approval" from the Regulator does not arise as there is no statutory provision for such in the PA 2004.

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31. The question therefore is whether Mr Salih's Article 6 rights will be infringed by virtue of the fact that he may be prevented from earning a living pending the determination of his reference and so make his reference academic. If he is able to demonstrate that will be the case, and the passages above indicate that it is necessary for compelling evidence to be produced to show that the reference would be

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ineffective, then his remedy would either be to seek expedition of the hearing of his reference before this Tribunal or consider an application for an injunction in the High Court.

5 32. I leave aside the question of the injunction other than to observe that Mr Salih has not produced any compelling evidence that the effect of the prohibition order, and any publicity concerning it, has meant that he has been unable to earn a living at all.

10 33. This leads to the question of expedition in this Tribunal. Following the hearing, I have made directions which are designed to bring the substantive hearing of the reference before the Tribunal as soon as practicable and will use the Tribunal's case management powers to ensure that both parties cooperate to achieve that end. The effect of the prohibition order is not to prevent Mr Salih from earning a living generally (and as I have mentioned he has provided no cogent evidence to that effect), but merely from acting as the trustee of trust-based occupational pension schemes. He has indicated that he has no desire to carry on that activity for the time being in any event. In those circumstances, I am satisfied that the steps the Tribunal is taking are sufficient to ensure that Mr Salih's reference is not academic and has not been rendered ineffective. As Mr Friedman observed, the rights given by Article 6 are qualified; Mr Salih is entitled to have his fair and public hearing "within a reasonable time" and I am satisfied that that will be the case in relation to this reference.

20 34. For these reasons, I decided to dismiss the Suspension Application.

The Privacy Applications

25 35. The approach to be taken by this Tribunal in relation to privacy applications in financial services cases is now well established. I see no reason to apply different principles where the Respondent to the references is the Pensions Regulator rather than one of the financial services regulators. The relevant principles were summarised by this Tribunal in *PDHL Limited v The Financial Conduct Authority* [2016] UKUT 0129 (TCC) at [36] and [37] of its decision as follows:

30 "36. It was common ground that the principles established in *Arch v Financial Conduct Authority* (2012) FS/2012/20 and *Angela Burns v Financial Conduct Authority* [2015] UKUT 0601 TCC were applicable to the Privacy Applications. As correctly summarised by Mr Herberg in his skeleton argument these provide:

(1) The open justice principle is to be applied such that the starting point is a presumption in favour of publication in accordance with the strong presumption in favour of open justice generally;

35 (2) The onus is on the applicant to demonstrate a real need for privacy by showing unfairness;

40 (3) In order to tip the scales heavily weighted in favour of publication the applicant must produce cogent evidence of how unfairness may arise and how it could suffer a disproportionate level of damage if publication were not prohibited; and

(4) a ritualistic assertion of unfairness is unlikely to be sufficient. The embarrassment to an applicant that could result from publicity, and that it might draw the applicant's clients and others to ask questions which the applicant would rather not answer does not amount to unfairness.

5 37. It is clear that if publication would result in the destruction of a firm's business then it would be unfair to publish a decision notice. The Tribunal said this at [89] to [90] of *Angela Burns*:

10 "89. I accept that cogent evidence of destruction of or severe damage to a person's livelihood is capable of amounting to disproportionate damage such that it would be unfair not to prohibit publication of a Decision Notice. Although I should be careful not to approve specifically the criteria that the Authority sets out in its recent consultation paper on publishing information about Warning Notices at a time when that paper is still open for comment, it appears to me that by including paragraph 2.17
15 of that paper the Authority accepts that a disproportionate loss of income or livelihood would mean that it would be unfair to publish. In my view damage of that kind is of a different and more serious kind than damage of reputation alone.

20 90. The requirement of cogent evidence in applications of this kind leads me to conclude that the possibility of severe damage or destruction of livelihood is insufficient; in my view the evidence should establish that there is a significant likelihood of such damage or destruction occurring. Mr Herberg in his submission summarised at paragraph 85 above appears to accept that to be the correct test. It would be too high a hurdle to
25 surmount which would make the jurisdiction almost illusory if the requirement were to show that severe damage or destruction was an inevitable consequence of publication."

36. In this case, Mr Salih contends that further publicity regarding the prohibition order made against him is both unnecessary and disproportionate. He contends that
30 even if he were successful at the substantive hearing, irreparable damage will already have been done to him. He contends that the effect on his reputation of publication of the prohibition order (or the Determination Notice to that effect) in advance of the substantive hearing of the Reference will have the effect of preventing him from conducting key aspects of his current business, and will (or is very likely to) have the
35 effect of preventing him from undertaking other business activities when the existence of the prohibition order is revealed. He says that having the benefit of a publicly available judgment in his favour will in no way be sufficient to restore his reputation or otherwise undo the damage already done.

40 37. Those assertions by Mr Salih are insufficient to enable me to grant privacy in this case. In addition to those assertions, Mr Salih sought at the hearing to give examples of where opportunities for him to carry out business assignments have been or may be restricted because of the fact that details of the prohibition order may become more widely known. However, none of those assertions were backed up by any evidence, let alone any cogent or compelling evidence, so they can only be

characterised as a “ritualistic assertion of unfairness” as referred to at [36] of *PDHL*. That reason alone is sufficient for me to dismiss the Privacy Applications.

38. I should, however, say something about how in practice, aside from the fact of this reference having been made and appearing on the Tribunal’s register, knowledge of the prohibition order may come to the attention of the wider public, including those who may have business dealings with Mr Salih.

39. Although it has the power to do so, the Regulator indicated to me through Mr Friedman at the hearing that it was not at present generally its practice to publish a Determination Notice in relation to a matter which has been referred to the Tribunal, pending the determination of the reference and currently had no plans to do so in this case. I would clearly have the power, pursuant to Rule 14 of the Rules, to direct that such a Determination Notice should not be published pending the determination of the reference were the case for privacy to be established. However, in view of what the Regulator has said, that issue does not presently arise in this case.

40. As regards the particulars which appear on the register of prohibited persons maintained by the Regulator pursuant to s 67 (1) PA 2004, although I do not have to determine this matter in this case because of my views of the overall merits of the Privacy Applications, I very much doubt whether the power in Rule 14 extends so as to override the statutory duty on the Regulator to maintain that register and allow access to the particulars on it in the manner prescribed by s 67, bearing in mind the public interest in those who have responsibility for appointing trustees of occupational pension schemes being able to ensure that they do not appoint somebody who is prohibited from acting as such.

41. As regards the particulars contained on the summary of that register pursuant to s 67 (3) PA 2004, as I have explained above, the effect of s 67 (6) PA 2004 is that those particulars will not be published pending the determination of Mr Salih’s reference.

42. It is therefore unlikely in practice, absent the publication of this decision, that the fact of Mr Salih’s prohibition order will generate much publicity.

30 **Conclusion**

43. Both the Suspension Application and the Privacy Applications are dismissed.

44. However, I do not consider it necessary that there should at this stage be further publicity regarding the prohibition order beyond what is already in the public domain and what might legitimately become known through the rights that currently exist for persons to obtain knowledge of the prohibition order and the fact of this reference, particularly as it was the Regulator who requested me to provide detailed reasons for my decision to dismiss Mr Salih’s applications.

45. I am therefore directing that this decision should not be published on the Tribunal’s website until this reference has been finally determined. I therefore direct that it remains confidential to the parties and their advisers in the meantime, although

either party has liberty to apply to vary that direction. For example, if the Regulator can demonstrate a good reason for doing so in advance of the determination of Mr Salih's reference I would be prepared to give consideration to the publication of this decision in an anonymized form.

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JUDGE TIMOTHY HERRINGTON

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**UPPER TRIBUNAL JUDGE
RELEASE DATE: 02 August 2018**