Neutral Citation: **[2024] UKUT 00012 (TCC)**

Case Number: UT/2022/000070

UPPER TRIBUNAL
(Tax and Chancery Chamber)

The Royal Courts of Justice, Rolls Building, London

INCOME TAX – case management direction that "preliminary proceedings in this matter shall be heard in private" – whether direction justified in order to prevent prejudice to the interests of justice – appeal allowed

Heard on: 21 November 2023
Judgment date: 10 January 2024

Before

MRS JUSTICE BACON
JUDGE THOMAS SCOTT

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

THE TAXPAYER

Respondent

Representation:

For the Appellants: Hui Ling McCarthy KC and Barbara Belgrano, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: Michael Firth, instructed by Morr & Co LLP

DECISION

INTRODUCTION

1. Pursuant to directions issued by the Upper Tribunal (Judge Richards) on 19 December 2022, the proceedings in this appeal have been anonymised. While the hearing before us was in public, in accordance with the direction for anonymity the Respondent is referred to in this decision as the "Taxpayer", and we do not provide details in this decision which would enable the Respondent to be identified.

2. The Appellants ("HMRC") appeal against a direction issued by the First-tier Tribunal (Tax Chamber) (the "FTT") on 15 September 2021.That direction was that "preliminary proceedings in this matter shall be heard in private". The reference to "this matter" was to the Taxpayer's substantive appeal against the denial by HMRC of certain tax deductions which he had claimed.

PROCEDURAL BACKGROUND

3. It is helpful to set out the procedural background, both because none of the relevant directions and decisions has been published and because it is material to the issues which we have to determine.

4. The Taxpayer appealed to the FTT against certain decisions which HMRC had made denying him deductions for income tax purposes. The deductions which had been claimed were said to arise in relation to arrangements which had been challenged by HMRC and which were the subject of two other lead cases (the "Lead Appeals").

5. On 23 December 2019, the Taxpayer applied to the FTT for a direction that his appeal be stayed behind the Lead Appeals (the "Stay Application"). HMRC opposed the application.

6. On 13 July 2021, the Taxpayer made an application to the FTT for the following:

   (1) A direction of the Tribunal that the Appeal be heard in private and that the Tribunal's decision be anonymised.

   (2) A direction of the Tribunal that the Appellant is to be anonymised in continuing proceedings.

   (3) A direction of the Tribunal that the hearings will be held in private.

   (4) A direction of the Tribunal that the preliminary proceedings in this matter be heard in private and anonymised.

   (5) A direction that there be a non-reporting restriction in these proceedings.

   (6) An order restricting publication of information.

7. We refer below to this application as "the Privacy and Anonymity Application".

8. Both the Stay Application and the Privacy and Anonymity Application were considered by the FTT (Judge Sukul) at a hearing which took place in private on 19 July 2021. The FTT released its decision on the applications on 15 September 2021 (the "September 2021 Decision").

9. In the September 2021 Decision, the FTT described the reasons given for the directions sought by the Privacy and Anonymity Application as follows:

(1) That they are necessary to protect the taxpayer's private or family life.

(2) It is necessary to maintain the confidentiality of sensitive information.

(3) It will avoid prejudice to the interests of justice.

10. The FTT issued the following directions in the September 2021 Decision:

> 1. This appeal shall be stayed, under Rule 5(3) of the Tribunal Rules, until 60 days after the Tribunal disposes of either of the appeals (the 'Lead Appeals') of [two identified appeals before the FTT] whether the appeals are disposed of by the Tribunal releasing a decision, the appeals being withdrawn or otherwise.
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> 2. Either party may apply at any time for this stay to be lifted.
>
> 3. Preliminary proceedings in this matter shall be heard in private.
>
> 4. Both parties shall provide to the Tribunal and each other their final representations on the Appellant's application for anonymity not later than 21 days before the substantive hearing.

11. In this decision, we shall refer to the third and fourth directions above as Direction 3 and Direction 4 respectively.

12. The FTT gave its reasons for Directions 3 and 4 as follows:

> 16. HMRC strongly oppose the application, submitting that the application does not provide any good reason for displacing the strong presumption in favour of public hearings or departing from the fundamental principle of open justice.
>
> 17. HMRC do not however object to the Appellant's proposal that the Tribunal defer consideration of the application to closer to the substantive hearing date (although they do not concede that interim proceedings should remain anonymised if the application is ultimately refused). I agree with that approach and I have therefore directed, in the interest of fairness and justice, that preliminary proceedings in this matter shall be heard in private to prevent the Appellant's outstanding anonymity application being rendered futile.

13. Following the September 2021 decision, there were various further applications by the parties, in the course of which the FTT set aside these directions, and then reinstated them.

14. HMRC sought permission to appeal against Direction 3. Permission was refused by the FTT but ultimately granted by the Upper Tribunal (Judge Richards). Permission to appeal was granted on the grounds that the FTT erred in law:

(1) By directing that "preliminary proceedings" were to be in private without having received any evidence from the taxpayer dealing with the need for such a direction.

(2) By failing to take into account, or by failing properly to apply, common law on the principle of "open justice" which indicated that such proceedings should be in public.

(3) By failing to consider alternatives to Direction 3 that were more proportionate having regard to the principle of open justice.

15. By directions released on 19 December 2022, accompanied by detailed and comprehensive reasons, Judge Richards directed that the appeal before this Tribunal should be anonymised, and that all parties and the Tribunal should refer to the Respondent as the Taxpayer.

AN APPEAL AGAINST A CASE MANAGEMENT DECISION

16. An appeal to this Tribunal lies only on a point of law[1]. In addition, the direction under appeal resulted from an exercise by the FTT of its case management powers. In the decision of the Supreme Court in *BPP Holdings v HMRC* [2017] UKSC 55 ("*BPP*") Lord Neuberger, delivering the judgment of the Court, said this, at [33]:

> In the words of Lawrence Collins LJ in *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427, para 33:
>
> > "[A]n appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."
>
> In other words, before they can interfere, appellate judges must not merely disagree with the decision: they must consider that it is unjustifiable.

17. Earlier in his judgment, at [21], Lord Neuberger said:

> However, it would nonetheless be appropriate for an appellate court to interfere with [the FTT's decision], if it could be shown that irrelevant material was taken into account, relevant material was ignored (unless the appellate court was quite satisfied that the error made no difference to the decision), there had been a failure to apply the right principles, or if the decision was one which no reasonable tribunal could have reached.

18. We have applied this guidance in reaching our decision.

FTT RULES

19. Direction 3 was made by the FTT pursuant to Rule 32 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) (the "FTT Rules"). The relevant parts of Rule 32 state as follows:

> **Public and private hearings**
>
> 32. (1) Subject to the following paragraphs, all hearings must be held in public.
>
> (2) The Tribunal may give a direction that a hearing, or part of it, is to be held in private if the Tribunal considers that restricting access to the hearing is justified—
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> (a) in the interests of public order or national security;

[1] Section 11(1) Tribunals, Courts and Enforcement Act 2007.

> (b) in order to protect a person's right to respect for their private and family life;
>
> (c) in order to maintain the confidentiality of sensitive information;
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> (d) in order to avoid serious harm to the public interest; or
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> (e) because not to do so would prejudice the interests of justice.
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> …
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> (6) If the Tribunal publishes a report of a decision resulting from a hearing which was held wholly or partly in private, the Tribunal must, so far as practicable, ensure that the report does not disclose information which was referred to only in a part of the hearing that was held in private (including such information which enables the identification of any person whose affairs were dealt with in the part of the hearing that was held in private) if to do so would undermine the purpose of holding the hearing in private.

20. As regards matters relating to anonymity covered by Direction 4, Rule 32(6) concerns the anonymity of published decisions. Wider powers in relation to anonymity exist under Rule 14 of the FTT Rules, which provides as follows:

> **Use of documents and information**
>
> 14. The Tribunal may make an order prohibiting the disclosure or publication of—
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> (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 Tribunal considers should not be identified.

HEARINGS IN PUBLIC AND THE PRINCIPLE OF OPEN JUSTICE

21. The powers contained in Rules 32 and 14 do not fall to be exercised in a vacuum. The starting point in tax cases is that all hearings must be in public. Article 6 of the Human Rights Convention states that "everyone is entitled to a fair and public hearing" in the determination of their civil rights and obligations. That principle is also reflected in Rule 32(1) of the FTT Rules.

22. In *A v British Broadcasting Corporation (Scotland)* [2014] UKSC 25, Lord Reed, delivering the judgment of the Supreme Court, described the rationale for the common law principle of open justice in this way:

> It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy. As Toulson LJ explained in *R (Guardian News & Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420; [2013] QB 618, para 1, society depends on the courts to act as guardians of the rule of law. *Sed quis custodiet ipsos custodes*? Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.

23. In *Global Torch Ltd v Apex Global Management Ltd* [2013] EWCA Civ 819 ("*Global Torch*"), the Court of Appeal referred to the decision of the House of Lords in *Scott v Scott* [1913] AC 417 as continuing to embody the common law approach, at [13]:

> This year marks the centenary of the decision of the House of Lords in *Scott v Scott* [1913] AC 417. It was and remains a beacon of the common law. Outside three exceptional areas of wardship, lunacy and trade secrets (the third being a precursor of CPR r 39.2(3)(a)), the House of Lords emphasised the paramountcy of open justice. Almost every page of the speeches underwrites that principle…Viscount Haldane LC stated, at p 438:
>
> > "But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with the by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as of turning, not on convenience, but on necessity."

24. Where a taxpayer brings a tax appeal, the principle of open justice will inevitably result in some intrusion into the taxpayer's privacy. However, that is a necessary price in most cases, as explained by Henderson J in *HMRC v Banerjee* [2009] EWHC 1229 (Ch) in the context of an application for anonymisation of a judgment which (as in this appeal) related to the deductibility of payments for income tax, as follows, at [35]:

> …taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane-seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat.

25. In relation to hearings before the FTT, in *Moyles v HMRC* [2012] UKFTT 541 (TC) ("*Moyles*"), another case concerning the deductibility of payments, the then president of the FTT, Judge Bishopp, cited with approval the above passage from *Banerjee*. Having described the presumption that hearings would be in public as "nowadays stronger than it might have been perceived even a few years ago", Judge Bishopp emphasised (at [14]):

> …There is an obvious public interest in its being clear that the tax system is being operated even-handedly, an interest which would be compromised if hearings before this tribunal were in private save in the most compelling of circumstances.

DIRECTIONS 3 AND 4

26. It is necessary to determine the precise meaning and scope of Direction 3 and (since the only reason given by the FTT for Direction 3 was Direction 4) Direction 4.

27. As regards Direction 3, we note that it does not provide for anonymity of any preliminary proceedings (although if the FTT published a decision regarding any such proceedings it would

be necessary to comply with Rule 32(6)). Any such proceedings would therefore be listed on the FTT list of forthcoming hearings as taking place in private but showing the taxpayer's identity, absent any successful application for anonymity.

28. Direction 3 applies to "preliminary proceedings". As we discuss below, one of the difficulties with Direction 3 is that it does not allow for any distinction to be drawn between different types of preliminary proceedings. So, an application by HMRC in this case to strike out the taxpayer's appeal, or the determination of a preliminary issue, would be in private pursuant to the direction, even though they would be much more significant, and of greater interest to the public, than (say) a stay application. Mr Firth sought in response to questions from us to suggest that a strike-out or preliminary issue determination would not be regarded as "preliminary proceedings", but that is plainly wrong.

29. As regards the breadth of Direction 4, what is meant by the Appellant's "application for anonymity"? As we have seen, the Privacy and Anonymity Application covered several matters, and, in particular, sought directions relating to both preliminary proceedings and the continuing proceedings more generally (which would include the substantive hearing). Ms McCarthy said that the "application for anonymity" referred to in Direction 4 was only the application regarding the hearing of the substantive appeal. Mr Firth initially suggested that by making Direction 4, the FTT was deciding to defer *any* consideration by it of possible "harm" to the Taxpayer in terms of the justifications listed in Rule 32(2), both in relation to preliminary proceedings and the substantive hearing.

30. Fortunately, a transcript was taken of the hearing before Judge Sukul on 19 July 2021. It is clear from that transcript that Ms McCarthy's interpretation of Direction 4 is to be preferred. Mr Firth (who also represented the Taxpayer before the FTT) presented his application to the FTT as follows (emphasis added):

> Within that application, it is actually a composite of three -- at least three different applications in terms of there are three aspects of the proceedings that will need to be considered in terms of their application. **The first is the final hearing, if and when that happens, so a full hearing, with the substantive issues, with live evidence before the FtT at some point in the future. That is number one**. Number two is the application to lift the stay and number three is the application for anonymity itself. My submission **on the first issue** is that you should defer or the tribunal should defer consideration of whether to grant anonymity and a private hearing in respect of the final substantive hearing until the outset of the final substantive hearing. So the application is there but the appropriate time to consider it, in my submission, will be at the beginning of that hearing.

31. The application so presented was what HMRC responded to in the hearing before Judge Sukul. Judge Sukul referred to "the question of anonymity at the substantive hearing, which we have decided will not be addressed now". The following exchange between Judge Sukul and Ms Belgrano, who appeared for HMRC, makes the position clear:

> JUDGE SUKUL: To clarify, if we were to keep the matters in the three headings that Mr Firth has suggested, then I think that that may be helpful because I think we are clear that both parties agree that the application for anonymity in respect of the substantive hearing should be heard closer to the substantive hearing. As I understand it, Miss Belgrano, that is where you began with your submission
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> MISS BELGRANO: Yes.

32. We consider it clear that Direction 4, while loosely worded, relates only to the hearing of the Taxpayer's application for anonymity (and possibly privacy) in respect of the hearing of the substantive appeal. The reason given by the FTT for making Direction 3 must therefore be considered by reference to Direction 4 so construed. That is logical, because if Mr Firth's suggested interpretation were correct, that would result in deferral of any consideration of the issues relating to the privacy/anonymity of proceedings which, by the date of the consideration, had already taken place.

33. Indeed, as Ms McCarthy pointed out, Direction 4 not only says nothing about what is to be done in relation to preliminary proceedings, it goes no further than setting a deadline for final representations by the parties on the application in relation to the substantive hearing.

THE TAXPAYER'S SUBMISSIONS

34. Mr Firth raised a number of arguments to support the proposition that the FTT's decision to make Direction 3 was reasonable and involved no error of law. In summary, those arguments were as follows:

(1) The reason for the FTT's decision was that if Direction 3 was not made, Direction 4 would become futile. That reason fell squarely within Rule 32(2)(e), namely that not to order privacy in respect of preliminary proceedings would "prejudice the interests of justice", because it would render Direction 4 futile. Unlike a decision to order privacy on the basis of any of the factors identified by paragraphs (a) to (d) of Rule 32(2), this required no evidence of potential harm to the Taxpayer to be before the FTT or considered by it, because the prejudice to the interests of justice was plain, and followed necessarily from the futility which would otherwise arise.

(2) Direction 3 could not permissibly be argued to be wrong on the basis that Direction 4 was wrong. HMRC had not appealed against Direction 4, so Direction 4 must be assumed to stand and to have been properly made by the FTT.

(3) In applying the principle of open justice, there is a spectrum of hearings in the tax field, with a hearing of the substantive appeal at one end of the spectrum. Open justice carries less weight in relation to hearings further down the spectrum.

(4) In particular, as illustrated by the decision in *Kandore Ltd v HMRC* [2021] EWCA Civ 1082 ("*Kandore*"), open justice does not apply with full force to the preliminary stages of a tax appeal, which involve merely procedural matters. At those stages, the legitimate interest in keeping the confidential tax affairs of a taxpayer private carry significant weight, prior to any judicial adjudication on those tax affairs.

(5) Open justice applies with less force to proceedings in the FTT than in the courts: see *Cider of Sweden v HMRC* [2022] UKFTT 76 (TC) ("*Cider of Sweden*").

(6) The FTT's decision was consistent with a number of decisions regarding anonymity of appeals against privacy or anonymity decisions, and in particular with comments made in *A v Burke and Hare* [2022] IRLR 139 ("*Burke and Hare*").

(7) Direction 3 had a limited effect on the principle of open justice given that the preliminary stages of a tax dispute are normally not public in any event.

DISCUSSION

35. Where an application for privacy is based on the justifications set out at Rule 32(2)(a) to (d), there will in practice be an onus on the applicant to produce cogent evidence. The FTT must consider that evidence and must carry out a balancing exercise between the various Articles of the European Convention on Human Rights which must be respected by the FTT by virtue of section 6 of the Human Rights Act 1988. In particular, there will often be a tension to be resolved in that balancing exercise between Article 6, which in this context provides a right to a public hearing (from which the applicant will in effect be seeking a derogation), and Article 8, which provides a right to respect for private and family life.

36. However, Rule 32(2)(e) also provides the FTT with power to direct that a hearing should be held in private "if the Tribunal considers that…is justified… because not to do so would prejudice the interests of justice". As Ms McCarthy pointed out, the wording referring to prejudice to the interests of justice is also found in Article 6, though we do not accept her submission that this means one should read across to Rule 32(2)(e) the specific qualifications and restrictions in that respect spelt out in Article 6.

37. Where privacy is directed by the FTT in reliance on Rule 32(2)(e), the need for "cogent evidence" in the sense relevant where privacy is sought under paragraphs (a) to (d) is not directly applicable. However, that does not mean that the FTT can properly direct a hearing in private under Rule 32(2)(e) without rational and persuasive reasons for departing from the principle of open justice. It is critical in considering an application under paragraph (e) to keep in mind the presumption, set out in Rule 32(1), that all hearings before the FTT will be in public unless the FTT directs otherwise. Additionally, the FTT may only make a direction under paragraph (e) where it considers that a public hearing *would* (not might, or be likely to) prejudice the interests of justice.

38. In this case, the only reason given by the FTT for making Direction 3 was that "in the interest of fairness and justice…preliminary proceedings in this matter shall be heard in private to prevent the Appellant's outstanding anonymity application being rendered futile". As we have explained, the "outstanding anonymity application" meant the application for the substantive appeal to be anonymised (and possibly heard in private).

39. We consider that in making Direction 3 for this reason the FTT erred in law.

40. The critical error made by the FTT was its conclusion that omitting to make Direction 3 would have rendered the application in relation to the substantive hearing futile. The FTT also erred in failing to consider whether Direction 3 was proportionate, taking into account its practical effect.

41. We deal first with futility. In principle, prejudice to the interests of justice could rationally be found to arise in two categories of futility relevant to this appeal. The first is where the subject-matter of the hearing is itself an application for privacy or anonymity, where a hearing in public would effectively prejudge the application and thereby render that hearing futile. The second is where a public and/or unanonymised hearing of (or decision on) a particular matter would render futile or nugatory an outstanding appeal against an existing decision regarding privacy and/or anonymity.

42. Examples of the first category include *EGC v PGF NHS Trust* [2022] EWHC 1908 (QB) ("*EGC")* and *Burke and Hare*. Examples of the second category include the decisions in *EGC, JK v HMRC* [2019] UKFTT 411 (TC) and (as regards anonymity) the hearing of this appeal.

43. *EGC* merits some discussion. It illustrates both categories, and it was particularly relied on by Mr Firth in justifying the FTT's making of Direction 3. The claimant had applied for anonymisation of the parties in litigation he had brought against his former employer (the "Anonymity Application"). He had sought an injunction against his former employer to prevent the proposed disclosure of certain confidential information, and argued as follows (see [12] of the decision):

> i) Without these orders being granted, the bringing of the proceedings would defeat their purpose; in other words, the litigation process would destroy that which the Claimant seeks to protect. In particular, without appropriate restrictions to access to the Court file, the Confidential Information (or parts of it) would be open to public inspection and the confidentiality that the Claimant is seeking to protect thereby lost.
>
> ii) It would be inevitable that, at any interim and/or final hearing, there would be need to discuss the confidential information in open court which would also threaten to destroy the confidence in the information…
>
> iii) Anonymisation of the Claimant (and the making of associated orders to enforce that anonymity) are necessary to protect the Claimant's Article 2 and Article 8 rights.

44. Nicklin J noted at [29] that orders anonymising parties and directions that a hearing should be in private were "derogations from the principle of open justice that require justification". Relevantly to this appeal, he stated as follows, at [34]:

> Derogations from open justice can be justified as necessary on two principal grounds: maintenance of the administration of justice and harm to other legitimate interests: *Various Claimants -v- Independent Parliamentary Standards Authority* [36]-[40].
>
> > i) In the first category (recognised expressly in CPR 39.2(3)(a)) fall the cases – such as claims for breach of confidence – in which, unless some restrictions are imposed, the Court would by its process effectively destroy that which the claimant was seeking to protect. There is no general exception to the principles of open justice in cases involving alleged breach of confidence/misuse of private information. However, it is well recognised that this type of case may well justify some derogation. The challenge is usually to ensure that the measures imposed are properly justified; that they are tailored to the facts of the individual case; and that they are proportionate, i.e. the least restrictive measure(s) necessary to protect the engaged interest…
> >
> > ii) The second category consists of cases in which the anonymity order is sought on the grounds that identification of the party (or witness) would interfere with his/her Convention rights. In that case, the Court must assess the engaged rights and, if appropriate, perform the conventional balancing exercise…

45. Nicklin J had ordered that the hearing of the application should take place in private, as "a public hearing would have immediately defeated the Anonymity Application": [3]. Although he refused the Anonymity Application and refused permission to appeal, Nicklin J noted that the Claimant could apply for permission to the Court of Appeal. In that regard, his view was that "to preserve the position, pending any renewed application, the ring must be held. That means that my judgment refusing the Anonymity Application must remain private until such time as any appeal has been finally resolved": [2]. The former decision was an

illustration of futility in the first category, and the latter an illustration of futility in the second category.

46. Mr Firth argued that in this case the FTT was adopting the same approach as in *EGC*. We consider that, to the contrary, the material differences between the situation in this case and that in *EGC* highlight how the FTT fell into error. In *EGC*, the holding of a public and/or unanonymised hearing would have rendered futile the very question at issue in the hearing, and the failure to anonymise the decision for a specified period would have rendered nugatory any appeal against that decision. In this case, there had been no decision regarding anonymity or privacy as a result of Direction 4 or otherwise; all that existed was an application for privacy, unsupported by evidence, and which would not be considered or determined by the FTT until some unspecified date close to the substantive hearing, assuming that the substantive hearing took place. A situation within the first category would be scrutinised and decided at the hearing itself, and in the second a decision had already been taken. This case fell within neither category; neither the application unsupported by evidence nor Direction 4 gave rise to a "ring" to hold.

47. The fact that the situation in this case did not fall within either of the categories we have described did not mean that it was necessarily unjustified or irrational for the FTT to have directed open-ended privacy for all preliminary proceedings in reliance on Rule 32(2)(e). However, it did mean that the FTT should have recognised the material difference, and it should as a result have considered carefully whether a failure to make Direction 3 *would* have prejudiced the interests of justice. We do not consider that the FTT could rationally have concluded that it would.

48. The wording of Rule 32(2)(e) means that in order to answer that question the FTT needed to have considered what the position would have been if they did not make Direction 3. Mr Firth's submissions assumed (in large part) that the counterfactual position would have been that the preliminary proceedings would have been in public. But that is not correct. Absent Direction 3, the Taxpayer the Taxpayer would have needed to make an application for privacy/anonymity for the relevant preliminary proceedings, supported by evidence. It is hard to see that such an outcome would have rendered Direction 4 futile, or otherwise prejudice the interests of justice, particularly given that Direction 4 related only to privacy in the substantive appeal.

49. Further, an assessment of privacy for the purposes of preliminary proceedings would not in any event have prejudged the assessment to be made of privacy for the substantive hearing. The two decisions would not inevitably have been the same, as they would call for consideration of different facts at different times, and, therefore, different balancing exercises. Unlike cases such as *EGC*, it would not have been the case that by failing to make Direction 3 the very purpose of Direction 4 would have been defeated.

50. We consider that the FTT also erred in not considering the practical consequences of Direction 3, and whether those consequences were proportionate to any risk to the interests of justice. We endorse the comments of Nicklin J in *EGC*, set out above, that where (as was said to be the case in this case) a derogation from the principle of open justice is justified on the basis of the interests of justice "the challenge is usually to ensure that the measures imposed are properly justified; that they are tailored to the facts of the individual case; and that they are proportionate…".

51. As we have observed, Direction 3 extended to all preliminary proceedings. A direction that a strike-out hearing, for example, be held in private would in our view be a significant derogation from the principle of open justice, and the assumption in Rule 32(1). The FTT should have explained why it thought such a blanket derogation was justified, by Direction 4 or otherwise.

52. We summarised Mr Firth's submissions at paragraph 34 above. We have explained why we reject his central argument that Direction 3 was reasonable and justified for the reason stated by the FTT. As regards Mr Firth's other arguments, our conclusions are as follows:

(1) In reaching our decision, we have proceeded on the basis that there is no challenge to Direction 4. However, the issue in this appeal was not whether Direction 4 was correct, but whether the reason given for Direction 3 was an error of law.

(2) We do not agree that in applying the principle of open justice there is a "spectrum" of tax hearings, with the principle carrying more weight the closer one gets to a substantive appeal hearing and less weight the further one is from that hearing. Rule 32(1) applies to "all hearings", not to certain types of hearing or hearings at certain stages. The exercise which must be carried out by the FTT in considering any application for privacy or anonymity is fact-sensitive, and different considerations will arise in different types of case, but there is no general principle of the sort suggested by Mr Firth. To take only one example, a hearing of an application to strike out an appeal (or debar HMRC) may take place well before the substantive appeal is to be heard, but there is no reason why the principle of open justice should as a result carry less weight at that stage than in relation to the substantive appeal hearing.

(3) The decision of the Court of Appeal in *Kandore* does not support the proposition that open justice applies with less force to preliminary proceedings. That case related to the very particular circumstances of a hearing before the FTT of an application by HMRC seeking approval by the FTT of an information notice under Schedule 36 to the Finance Act 2008. In relation to such applications, a private *ex parte* hearing will usually be appropriate because the application is made in the course of an HMRC investigation, before any appealable decision by HMRC has even been made. At that very preliminary stage, and in the context of the particular statutory scheme, it is easy to see why materially different considerations would apply to the privacy of such a hearing. The decision of the Court of Appeal makes quite clear that the rationale for a different approach to open justice stems not from such a hearing arising at a preliminary stage of an appeal, but from it arising at an investigatory stage before there has been any decision to be appealed. See, for example, the following at [102] and [105]-[106]:

> 102 No one doubts the importance of the principle of open justice but the above authorities…were concerned with the typical judicial hearing, in which a court or tribunal adjudicates on a dispute between parties. As I have set out earlier, the nature of the process under Schedule 36 to the 2008 Act is entirely different; it consists of the judicial monitoring of a step in an investigation into the affairs of a taxpayer by HMRC.
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> …
>
> 105 In this context it must be recalled that the private affairs of taxpayers will be discussed at this preliminary stage of an investigation. Very often it would not be in the public interest for those to be discussed in public.

> 106 Furthermore, it must be recalled that sometimes the investigation will end in no further action being taken, for example because the position of the taxpayer is vindicated. There would be a real risk of injustice if in the meantime questions had been raised in public over whether they had, for example, been illegally avoiding or evading tax when they had not in fact been doing so.

(4) We firmly reject the submission that the principle of open justice applies with less force in the tribunals than in the courts. In the FTT, Rule 32(1) replicates the common law position that the default position is that proceedings will take place in public. Mr Firth relied on statements made by the FTT in *Cider of Sweden.* That case related to an application by a third party for access to documents filed in an appeal where there had been no hearing of any type in relation to the appeal and no appeal was listed or likely to take place in the near future: see [1] of the decision. While the FTT did balance open justice against the interests of the parties in confidentiality at such an early stage, that was a balancing exercise in the fact-specific context of an application by a third party for disclosure of certain documents, at a stage "before there has been any judicial involvement in the substance of [the] dispute or effective hearing of it": [54]. In the present case, the issue is the extent of confidentiality that is justified at a stage where there *is* a hearing before the FTT. Moreover, the statements to which we were referred go to the uncontroversial proposition that the specific rules of the CPR cannot simply be read across to the FTT, such that in that respect the FTT differs from the courts. Nevertheless, as the FTT correctly stated at [39] of *Cider of Sweden*, " "Open justice" is a constitutional principle which applies to all courts and tribunals exercising the judicial power of the state…This clearly includes the FTT."

(5) Mr Firth relied on paragraph [69] of the decision of the Employment Appeals Tribunal in *Burke and Hare* as demonstrating that the principle of open justice carries less force in the preliminary stages of a dispute than at the final substantive hearing. We do not agree. That case was a "first category" case, in which a preliminary application was made for anonymity by the claimant and the EAT had to decide whether to anonymise its decision on that anonymity application. The comments made by the EAT relate to that situation and were made in that context.

(6) Mr Firth argued that Direction 3 did not really offend against open justice because the preliminary stages of a tax dispute are not usually visible to the public in any event. In fact, while decisions taken on the papers are obviously not in public, the weekly FTT website lists all hearings by taxpayer name (without identifying their subject-matter), which are by default open to the public.

53. In conclusion, if one steps back it is clear that something has gone awry as a result of the FTT's directions. The Taxpayer has obtained the benefit of privacy for all preliminary proceedings, without having produced any evidence of harm or prejudice, for an open-ended period, in a situation where, should he decide to withdraw or settle his appeal and not pursue the Privacy and Anonymity Application, that benefit would not be reversible. That position cannot rationally be justified solely by reference to Direction 4. Nor is it an outcome which should be open to taxpayers, since it results in a blanket derogation from open justice by the backdoor.

DISPOSITION

54. We have found that there were material errors of law in the FTT's decision in relation to Direction 3, and we therefore set that decision aside. We remake the decision so as to set aside Direction 3.

55. We should mention that Mr Firth said that he was "not wedded to any particular form of Direction 3". That has no relevance to the meaning of Direction 3 for the purposes of this appeal, which we discuss above. Insofar as it impliedly invites us to replace Direction 3 with some slightly different formulation which nevertheless achieves the same result, it follows from our decision that that we decline to do so.

56. The Taxpayer may choose to make a further application relating to privacy and/or anonymity in relation to preliminary proceedings. Such an application would fall to be determined by the FTT on its merits, and by reference to the evidence submitted, and could not simply be justified by reference to the fact that an application for privacy and/or anonymity in relation to the substantive appeal hearing remained to be determined by the FTT.

GUIDANCE IN RELATION TO PRIVACY AND ANONYMITY APPLICATIONS

57. This case illustrates the difficulties which can arise where an application by a taxpayer for privacy and/or anonymity is delayed. The practical effect of deferring the substantive application has been that the taxpayer has been able to avoid the open justice principle for all preliminary proceedings for over two years, without any consideration having been given to his reasons for seeking privacy or anonymity.

58. In general, such applications should be dealt with promptly by the FTT when they are made, and should not be deferred.

59. In addition, as Martin Spencer J said in *Zeromska-Smith v United Lincolnshire Hospitals* [2019] EWHC 552 (QB) (at [21]), "an application for anonymity should be made well in advance of the trial". As explained in that case, an applicant may wish to take into account a refusal of anonymity in considering whether to pursue an appeal, and the timetable for hearing the substantive appeal should not be at risk because of an appeal by either party against a decision on an application for privacy or anonymity.

60. The determination of a privacy or anonymity application need not be a protracted affair. In *Global Torch*, the Court of Appeal referred to Lord Steyn's comment[2] that "where the values under [Articles 6 and 8] are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary", and, in the context of the rules of the CPR, observed as follows, at [27]:

> …Lord Steyn's reference to "an intense focus" does not mean that every time a litigant waves an Article 8 flag in support of an application for a private hearing there will have to be a protracted and expensive hearing to determine the issue. Often, indeed usually, experience suggests that the application can be determined very quickly. It also shows that, in most cases falling outside the area of recognized exceptional circumstances…the open justice principle will prevail.

[2] *In re S (a child)* [2005] 1 AC 593, at [17].

61. We respectfully endorse those comments in relation to privacy or anonymity applications made to the FTT.

ANONYMISATION OF THIS DECISION

62. In their skeleton arguments, the parties set out their respective positions as to when and whether we should anonymise this decision, and if so on what terms. In advance of the hearing, we sought comments from counsel for each party on the terms of a draft of our proposed decision in this respect. We have repeated that exercise in sending each party an embargoed draft of this decision. We are grateful to counsel for confirming their agreement to the approach which follows, which we consider is consistent with the case-law discussed above relating to anonymisation of decisions on appeals against privacy or anonymity orders.

63. The appeal by HMRC having been allowed, this decision will initially be published in anonymised form. Thereafter:

(1) The decision will remain in anonymised form if permission to appeal the decision is granted by either this Tribunal or the Court of Appeal, subject to paragraph (2).

(2) If (i) time for applying to the Court of Appeal for permission to appeal expires without any such application having been made, or (ii) both the Tribunal and the Court of Appeal refuse permission to appeal, or (iii) the onward appeal(s) (if any) are finally determined against the Taxpayer, then the decision will be republished in unanonymised form on the expiry of two weeks after the occurrence of (i), (ii) or (iii), as relevant, subject to any further application that may be made to the Tribunal by the parties during that two-week period.

64. The parties have liberty to apply for further directions.

MRS JUSTICE BACON
JUDGE THOMAS SCOTT

Release date:

11 January 2024