Neutral Citation: [2024] UKUT 00364 (TCC)

Case Number: UT/2022/000070

UPPER TRIBUNAL
(Tax and Chancery Chamber)

By remote video hearing

Heard on: 24 October 2024
Judgment date: 19 November 2024
Republished: 9 December 2024

Before

MR JUSTICE MILES
JUDGE THOMAS SCOTT

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

LANFRANCO DETTORI

Respondent

and

TIMES MEDIA LIMITED AND NEWS GROUP NEWSPAPERS LIMITED

PA MEDIA

TAX POLICY ASSOCIATES LIMITED **Third Parties**

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 KC, instructed by Morr & Co LLP

For the Third Parties: Jude Bunting KC, instructed by Times Media Limited and News Group Newspapers Limited

NOTE: THIS DECISION WAS ORIGINALLY PUBLISHED IN ANONYMISED FORM. IN ACCORDANCE WITH PARAGRAPH [52] OF THE DECISION IT IS NOW REPUBLISHED WITHOUT ANONYMITY

DECISION

INTRODUCTION AND BACKGROUND

1. In a decision released on 11 January 2024 (the " Decision"), the Upper Tribunal allowed an appeal by the Appellants ("HMRC") against a case management 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.

2. The Decision set aside the relevant FTT direction. At [62]-[64] of the Decision, the position regarding anonymisation of the Decision was set out as follows:

> **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.

3. On 10 February 2024, the Taxpayer applied to the Upper Tribunal for permission to appeal the Decision and at the same time applied for directions as follows:

> 1.2. If the Respondent withdraws his appeal to the FTT within 3 months of the date of this direction (and notifies the Upper Tribunal that he has done so), these Upper Tribunal proceedings will remain anonymised.
>
> 1.3. Determination by the Upper Tribunal of the Respondent's application for permission to appeal is stayed pending the Upper Tribunal's determination of the application in §1.2.
>
> 1.4. If the application in §1.2 is granted, determination of the Respondent's application for permission to appeal is stayed until the end of the 3-month period referred to in §1.2.

4. The Upper Tribunal refused those directions, and also refused the application for permission to appeal. No application for permission was made to the Court of Appeal.

5. On 9 April 2024, The Taxpayer made an application to the Upper Tribunal "to continue anonymity" (the "Anonymity Application"). The direction sought by the Anonymity Application is "that these Upper Tribunal proceedings and the decision of 11 January 2024 will remain anonymised". The Anonymity Application stated that the Taxpayer had decided to withdraw his substantive appeal to the FTT and "in those circumstances he ought to be permitted to retain the existing anonymity".

6. On 8 October 2024, the Taxpayer notified the FTT that he was withdrawing his substantive appeal.

7. HMRC opposed the Anonymity Application and continue to oppose it following withdrawal of the substantive appeal.

8. The Anonymity Application is also opposed by Times Media Limited and News Group Newspapers Ltd (together "NGN"), and PA Media and Tax Policy Associates Limited (together the "Third Parties"). The Third Parties have supplied written submissions, which we have taken into account in our decision.

9. We directed in advance of the hearing to determine the Anonymity Application that the Tribunal would also consider the application made by NGN for disclosure of various documents (the "Disclosure Application").

10. We are grateful to all Counsel for their clear and helpful submissions.

JURISDICTION

11. The Upper Tribunal has power to determine the Anonymity Application under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules"), which permits the Tribunal to "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".

12. While the Rules contain no equivalent to CPR 5.4C, the Upper Tribunal has an inherent power to grant a third party access to any document relating to proceedings which is held in the Upper Tribunal's records. Section 25 of the Tribunals, Courts and Enforcement Act 2007 also confers on the Tribunal all the powers of the High Court in relation to the production and inspection of documents. We therefore have power to determine the Disclosure Application.

THE ANONYMITY APPLICATION

13. Mr Firth's skeleton argument sets out the justification for the Anonymity Application as follows:

> The Respondent submits that where an individual wishes to avoid a loss of privacy in relation to litigation and makes an application to a Court/Tribunal in order to find out whether he/she will be entitled to privacy in relation to those proceedings, the very process/procedure of applying for privacy should not be what causes the privacy to be lost.

> Accordingly, if the application for anonymity/privacy is unsuccessful (or, as in this case, held to have been granted on an incorrect basis and thus, in effect, left to be determined following a further application), the applicant has a choice:
>
> 1. the proceedings continue in public with consequent loss of privacy; or
>
> 2. withdraw from the proceedings and maintain privacy.
>
> In other words, the applicant is permitted to make an informed choice about the loss of privacy by being able to find out whether he/she is entitled to privacy/anonymity without thereby losing privacy/anonymity if unsuccessful.
>
> The Respondent submits that this is the correct approach on the basis that it is necessary for the maintenance of the administration of justice and also to ensure the effectiveness of the HRA 1998, Article 8 right to privacy.

14. Mr Firth submitted that case law supports this position, and that the analysis which he puts forward is necessary in order to avoid deterring applicants from seeking a judicial determination on anonymity or privacy because they would know that an unsuccessful application would cause their anonymity/privacy to be lost.

15. The starting point for the derogation sought by Mr Firth is the principle of open justice.

16. The principles to be drawn from the leading authorities have recently been helpfully summarised by Nicklin J in *Farley v Paymaster Limited (1836) t/a Equiniti* [2024] EWHC 3883 ("*Farley*"), at [118]-[120] of that judgment:

> 118. The default position, under the CPR, is therefore that the name and address of a party to civil litigation is required to be publicly available. These requirements are an important dimension of open justice and transparency. The Court has the power to permit derogation from this default position under CPR PD 16 §2.3 and CPR 39.2(4). As these are derogations from the principles of open justice, the following principles apply (drawn from *Practice Guidance (Interim Non-Disclosure Orders)* [2012] 1 WLR 1003 ("the *Practice Guidance*") [9]-[13] and [16]):
>
> (1) Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public: see Article 6.1 of the Convention, CPR 39.2 and *Scott -v- Scott* [1913] AC 417.
>
> (2) Derogations from this general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional: *R -v- Chief Registrar of Friendly Societies, Ex p New Cross Building Society* [1984] QB 227, 235; *Donald -v- Ntuli* [2011] 1 WLR 294 [52]–[53]. Derogations should, where justified, be no more than strictly necessary to achieve their purpose.
>
> (3) The grant of derogations is not a question of discretion. It is a matter of obligation, and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: *M -v- W* [2010] EWHC 2457 (QB) [34].
>
> (4) There is no general exception to open justice where privacy or confidentiality is in issue.
>
> (5) The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: *Scott -v Scott* [1913] AC 417, 438–439, 463, 477; *Lord Browne of Madingley -v- Associated Newspapers Ltd* [2008] QB 103 [2]-[3]; *Secretary of State for*

the Home Department -v- AP (No.2) [2010] 1 WLR 1652 [7]; *Gray -v- W* [2010] EWHC 2367 (QB) at [6]-[8]; and *JIH -v- News Group Newspapers Ltd (Practice Note)* [2011] 1 WLR 1645 [21].

(6) When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of article 8 of the Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their article 8 Convention right is entitled. The proper approach is set out in *JIH* [21].

(7) Derogations from the principle of open justice cannot be granted by consent of the parties. Such orders affect the Article 10 Convention rights of the public at large. Parties cannot waive or give up the rights of the public.

119. Anonymity orders are usually justified on one of two bases: maintenance of the administration of justice and harm to other legitimate interests. The first category of case is where, without the relevant order being made, the administration of justice would be frustrated. Examples of this type of justification for derogations from open justice would include cases involving trade secrets or other confidential information. In such cases, if no derogations from open justice were granted, the proceedings themselves would destroy that which the claimant was seeking to protect, thereby frustrating the administration of justice: *Lupu -v- Rakoff* [2020] EMLR 6 [28]-[30]:

> "Restrictions on open justice to protect the legitimate interests of others raise more difficult issues. The starting point is the recognition that open justice (and probably of greater practical significance, the privilege that attaches to media reports of proceedings in open court) will frequently lead to some interference with the legitimate interests of parties and witnesses. Media reports of proceedings in open court can have an adverse impact on the rights and interests of others, but, ordinarily, 'the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public': *Khuja -v- Times Newspapers Ltd* [2019] AC 161 [34(2)] per Lord Sumption."

120. Consistent with the requirement to establish the necessity for any derogation from open justice with convincing evidence, the Court will scrutinise with care any application that the Court should withhold the name of a party or other details about the claim (including the party's address) from the public. Mere assertion that a party may suffer some harm is unlikely to discharge the burden to justify the order.

17. Although this summary was given in the context of the position under the CPR, we consider it to be applicable in this case. Indeed, Mr Firth confirmed that the position which he asked us to accept was equally applicable in all civil litigation.

18. We see no reason why the principles summarised by Nicklin J should not apply in a tax case, and we did not understand Mr Firth to suggest otherwise. As the Upper Tribunal observed in the Decision, at [24]-[25]:

> 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.

19. Mr Firth accepts that the Taxpayer's application for permanent anonymity must be justified as being a "necessary" derogation from the principle of open justice. However, he argues, with the possible exception of an application made in bad faith, such a derogation is always necessary, in order to secure the administration of justice and to protect an applicant's Article 8 rights, in a situation where the applicant withdraws their underlying appeal. He submits that any party to civil litigation always has a choice to withdraw their underlying appeal and preserve anonymity, and this right is not dependent on the facts or circumstances asserted to be a substantive justification for privacy or anonymity, or the strength or merits of those facts or circumstances. In the present case, it is striking that the taxpayer has at no stage produced any evidence of potential harm which is said to have justified either the application to the FTT for privacy or the Anonymity Application itself. Mr Firth's submission is that it is the very act of making any privacy or anonymity application which generates the permanent right to maintain privacy or anonymity.

20. Mr Firth advanced three main arguments for this proposition, namely:

(1) It is supported by case law.

(2) The making of a privacy or anonymity application should not be what causes privacy or anonymity to be lost if the application is unsuccessful.

(3) If the position were otherwise, it would have a deterrent effect on privacy or anonymity applications, however meritorious.

21. Mr Firth relied on the following authorities:

(1) *Scott v Scott*.

(2) *JK v HMRC* [2019] UKFTT 411 (TC) ("*JK*").

(3) *A v Burke and Hare* [2022] IRLR 139 ("*Burke*").

(4) *Zeromska-Smith v United Lincolnshire Hospitals* [2019] EWHC 552 (QB) ("*Zeromska-Smith*").

22. Mr Firth referred to various statements in *Scott v Scott*, including the following:

> While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that, justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well.be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. 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 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 turning, not on convenience, but on necessity (page 437, per Viscount Haldane).
>
> An aggrieved person, entitled to protection against one man who had stolen his secret, would not ask for it on the terms that the secret was to be communicated to all the world. There would be in effect a denial of justice
>
> …
>
> It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court. (pages 446-447 per Earl Loreburn).

23. Mr Firth drew an analogy between the position in this case and the position in litigation regarding a trade secret, and argued that the statements set out above from Viscount Haldane

and Lord Loreburn should be read as applying here. He said that, as with a trade secret case, the "whole purpose" of the privacy/anonymity application would be destroyed if the rejection of the application itself caused privacy/anonymity to be lost.

24. We reject that argument. First, it rests on a false premise as to "the subject-matter of the litigation". When Viscount Haldane states that "litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing" he is clearly referring to trade secrecy as the subject-matter[1]. In the context of a trade secrecy case, the statements in *Scott v Scott* are entirely understandable. In relation to the Anonymity Application, however, the subject-matter of the application is the underlying substantive tax appeal in relation to which proceedings were sought to be kept private and anonymous. Mr Firth's suggested analogy, which presupposes that it is the application for privacy/anonymisation itself which is the subject-matter, is misplaced. Its effect would be to create "a class which stands on a different footing" as regards the assumption of open justice in relation to all litigation, regardless of the underlying substantive subject-matter.

25. Second, if that were what their lordships had intended in *Scott v Scott* they would have said so, given the far-reaching exception to the open justice principle (for which *Scott v Scott* remains the leading authority) which such an approach would have entailed.

26. Third, it is not the application for privacy which leads to publicity (if a privacy application is refused) but the choice to bring a tax appeal (or any other civil proceedings). Seeking privacy or anonymity in relation to that appeal may create an additional risk of publicity as a practical matter, but, again, that is the applicant's informed decision to bring the appeal, in a system where open justice is the norm.

27. Mr Firth also relied on the following passages from *JK* at [40]-[42], *Burke* at [68]-[71] and *Zeromska-Smith* at [21]:

> 40. I refuse the application for anonymity. I do not consider it justified on any grounds put forward by the appellant. It seems to me that the appellant now has the choice referred to by Lord Atkinson in *Scott v Scott*. He may pursue his appeal in public with the consequent risk of reputational damage if in his appeal he relies on his diagnosis, or he may choose not to pursue the appeal. (If he goes ahead with the proceedings, I would make the order to keep his contact details private as set out in §38.)
>
> 41. Nevertheless, I am anonymising this decision on the anonymisation application. That is for two reasons.
>
> 42. Firstly, I have said that the appellant should be given the choice: pursue his appeal in public, or withdraw it. It is for him to make that decision. I am not going to make that an empty choice by publishing this decision under his name. (*JK*).
>
> 68. The Claimant indicated that if the price of obtaining payment of her alleged right to arrears of holiday pay was the publication of her name in the merits judgment, she would prefer to drop her claim. In this situation I was

[1] That is made clear beyond doubt in the judgment of Lord Atkinson, where he refers at page 450 to a secret process and says that anonymity is necessary because "otherwise the whole object of **a suit brought to protect property** might be defeated by the form of procedure adopted by the tribunal from which the relief desired was sought to be obtained"(emphasis added to original). Lord Atkinson goes on to firmly reject the extension of that proposition to other categories of hearing.

> asked not to publish her name on this judgment. Ms Lord pointed out that if her name was published on the judgment the Claimant would suffer a loss of privacy merely because she had sought to obtain anonymity as opposed to seeking a remedy for her alleged right to holiday pay. I was advised that the hearing before the EJ took place in private. Ms Lord submitted that it would be unfortunate if the Claimant was forced into the open merely because she wished to challenge the EJ's decision.
>
> 69…In effect the Claimant has asked whether she would be entitled to anonymity if she pressed on with her case. It does not seem proper to publish a judgment in the Claimant's name merely because she has asked for anonymity. As I have indicated I am satisfied that art 8 is engaged. In that situation I consider I should grant an order in relation to the present application.
>
> …
>
> 71. For the reasons given, and on the understanding that the Claimant intends to drop her claim against the Respondents, I will continue the anonymity order pronounced by Griffiths J in respect of this judgment and that of the EJ. (*Burke*).

> 21. Finally, I wish to say something about the timing of any application for anonymity in cases which are not approval hearings for protected parties or children. Here, the application was made at the start of the trial, without any notice having been given to The Press Association in advance. This put the court reporter in an awkward position, and did not allow for full consideration of the issues or properly prepared submissions on behalf of the Press. Mr Feeny, for the Defendant, understandably took a neutral stance, although, when I adjourned the application, he helpfully provided to the court some additional authorities, for which I was very grateful. But, in general, it seems to me that such an application should be made and heard in advance of the trial, and should be served on the Press Association. There are two reasons for this. First, and most obviously, it gives the Press Association a proper opportunity to make representations, whether orally at the application or in writing in advance. Secondly, the outcome of the application may inform any decision taken by a Claimant in relation to settlement. Thus, if a Claimant in a sensitive case such as the present knows that, if the matter goes to trial, her name will be published in the press, she may consider that to be an important factor in deciding whether or not to accept an offer of settlement – in some cases it could tip the balance. For these reasons, an application for anonymity should be made well in advance of the trial and Claimants (and their advisers) should not assume that the application will be entertained at the start of the trial (because of the disruption to the trial which may ensue, if the application needs to be adjourned to enable the Press Association time to prepare submissions), nor that it will be "nodded through" by the judge, where the Defendant takes a neutral stance and there is only a court reporter to represent the interests of the press. (*Zeromska-Smith*).

28. Mr Firth invites us to draw from these passages support for his proposition that a party such as the Taxpayer who has made a privacy or anonymity application generally has a choice, regardless of the facts or merits supporting the application, to withdraw the appeal in relation to which the application was made and for all proceedings to remain private and anonymous thereafter.

29. We do not consider that these authorities support this proposition. Each of them concerned a situation in which the applicant had a strong, arguable case, supported by evidence, for privacy or anonymity on the particular facts of their case. They are far removed from the facts of this case, in which the applicant has declined many opportunities, over several years, to justify or evidence his claim to privacy or anonymity.

30. The context of each case is that the relevant sensitive personal information (mental illness in *JK*, profession as a stripper in *Burke*, and psychiatric injury arising from stillbirth in *Zeromska-Smith*) may have been insufficient for privacy in relation to the substantive hearing but sufficient in relation to the privacy/anonymity application. The passages selected by Mr Firth must not be taken in isolation but read in their context. In this case, there has been no justification or evidence offered.

31. Furthermore, *JK* is a decision of the FTT, in which HMRC remained neutral on the application for privacy, where it appears that the FTT heard no argument on the issue, and it is not apparent what part of Lord Atkinson's judgment in *Scott v Scott* was being relied on. The passage from the decision of the Employment Appeal Tribunal in *Burke* is expressed in broad terms, but must be seen in the factual context we have described. The passage relied on in *Zeromska-Smith* is plainly concerned with the issue of the timing of applications for anonymity. Moreover, it does not support Mr Firth's proposition, in that it is expressed to be dealing with "a claimant in a sensitive case such as the present".

32. The authorities on which Mr Firth relies cannot be read as supporting a substantial exception to the principle of open justice which applies regardless of the facts or evidence but simply by the act of making an application for privacy or anonymity. That would indeed undermine the well-established principles summarised by Nicklin J in *Farley* in the passages set out above. Nicklin J specifically endorsed the following description provided by Lord Neuberger in *JIH*, at [21]:

> In a case such as this, where the protection sought by the claimant is an anonymity order or other restraint on publication of details of a case which are normally in the public domain, certain principles were identified by the judge, and which, together with principles contained in valuable written observations to which I have referred, I would summarise as follows: (1) The general rule is that the names of the parties to an action are included in orders and judgments of the court. (2) There is no general exception for cases where private matters are in issue. (3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the article 10 rights of the public at large. (4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought. (5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life. (6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less. (7) An order for anonymity or for reporting restrictions

> should not be made simply because the parties consent: parties cannot waive the rights of the public. (8) An anonymity order or any other order restraining publication made by a judge at an interlocutory stage of an injunction application does not last for the duration of the proceedings but must be reviewed at the return date. (9) Whether or not an anonymity order or an order restraining publication of normally reportable details is made, then, at least where a judgment is or would normally be given, a publicly available judgment should normally be given, and a copy of the consequential court order should also be publicly available, although some editing of the judgment or order may be necessary. (10) Notice of any hearing should be given to the defendant unless there is a good reason not to do so, in which case the court should be told of the absence of notice and the reason for it, and should be satisfied that the reason is a good one.

33. In our view it would undermine these principles for the Anonymity Application to be granted without any consideration of the degree of necessity, the facts and circumstances said to justify anonymity, or the proportionality of the derogation from the principle of open justice. An application such as the Anonymity Application is not to be refused or granted in every case, but stands or falls by a granular, fact-specific, assessment of those factors.

34. As we have explained, we also reject Mr Firth's submission that unless the Anonymity Application is granted, privacy will be "destroyed" solely because a privacy application was made. There is no analogy with the position in a trade secret case, and the Taxpayer accepted the risk of publicity when he appealed against his tax assessment to the FTT (in a system where open justice is the default). The logic of Mr Firth's submission is that the very act of making a privacy application (regardless of its merits and without any supporting evidence) (1) generates anonymity for the proceedings in question, (2) can be carried out with no risk of anonymity being lost, even if refused or overturned on appeal, and (3) must itself attract permanent anonymity, in circumstances where the substantive appeal is eventually withdrawn. That is an outcome which we firmly reject.

35. Nor do we accept Mr Firth's argument that rejection of the Anonymity Application will have an undue deterrent effect on all privacy and anonymity applications. A person who is party to civil litigation and who makes a privacy or anonymity application does so in the knowledge of the risk that the application might itself attract publicity, either incrementally to the litigation itself or in its own right. The risk that the application is refused will be measured by an applicant by reference to the nature and strength of their reasons, and the evidence to support those reasons, in making the application. Mr Firth's formulation seeks to reduce the risk to zero in all cases, regardless of the merits of the case for anonymity. In rejecting that formulation, the only deterrent effect should be in respect of tactical, unmeritorious or unevidenced applications. That outcome would be both desirable and entirely consistent with the principles we have endorse above.

36. Mr Firth's argument based on the Taxpayer's Article 8 right to privacy is that, for essentially the same reasons as those relating to the administration of justice, a refusal of the Anonymity Application would render the Article 8 rights "theoretical or illusory" and thereby ineffective.

37. Mr Firth confirmed that his submission is that in any case where an underlying appeal is withdrawn, the merits of an applicant's case as to harm and potential harm absent privacy/anonymity are irrelevant, and, moreover, that the taxpayer's Article 8 rights must prevail over any other rights, in particular those under Article 10.

38. The position where an applicant for anonymity seeks to rely on their Article 8 rights is helpfully summarised in *R (Marandi) v Westminster Magistrates' Court* [2023] EWHC 587 (Admin) at [44][2]. At [44 (4)-(6)], Warby LJ stated as follows:

> (4) The threshold question is whether the measure in question – here, allowing the disclosure of the claimant's name and consequent publicity - would amount to an interference with the claimant's right to respect for his private and family life. This requires proof that the effects would attain a "certain level of seriousness": *ZXC* (SC) [55], *Javadov* [39]. It was the very essence of the claimant's case - as to which the judge was in no doubt - that the reputational impact of disclosure would amount to a very serious interference with his Convention rights. In my view it is clear that the judge accepted throughout that the threshold test was satisfied. His reasoning cannot be understood in any other way.
>
> (5) The next stage is the balancing exercise. Both the judge's decisions expressly turned on whether it was "necessary and proportionate" to grant anonymity. That language clearly reflects a Convention analysis and the balancing process which the judge was required to undertake. The question implicit in the judge's reasoning process is whether the consequences of disclosure would be so serious an interference with the claimant's rights that it was necessary and proportionate to interfere with the ordinary rule of open justice. It is clear enough, in my view, that he was engaging in a process of evaluating the claimant's case against the weighty imperatives of open justice.
>
> (6) It is in that context that the judge rightly addressed the question of whether the claimant had adduced "clear and cogent evidence". He was considering whether it had been shown that the balance fell in favour of anonymity. The cases all show that this question is not to be answered on the basis of "rival generalities" but instead by a close examination of the weight to be given to the specific rights that are at stake on the facts of the case. That is why "clear and cogent evidence" is needed. This requirement reflects both the older common law authorities and the more modern cases. In *Scott v Scott* [1913] A.C. 417 at p438 Viscount Haldane held that the court had no power to depart from open justice "unless it be strictly necessary"; the applicant "must make out his case strictly, and bring it up to the standard which the underlying principle requires". *Rai* (CA) is authority that the same is true of a case that relies on Article 8. The *Practice Guidance* is to the same effect and cites many modern authorities in support of that proposition. These include *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42; [2011] 1 W.L.R. 1645 where, in an often-cited passage, Lord Neuberger of Abbotsbury MR said at [22]:
>
> > "Where, as here, the basis for any claimed restriction on publication ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule …"

39. It is clear that the requirements summarised in *Marandi* have not been satisfied in relation to the Anonymity Application. Indeed, there has been no attempt at any stage by the Taxpayer to make clear why the consequences of disclosure would be so serious an interference with the claimant's rights that it was necessary and proportionate to interfere with the ordinary rule of open justice, or to provide clear and cogent evidence, or to explain why the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule.

[2] The summary was referred to with approval in *Farley* at [122].

It is through the provision by an applicant of that information and its evaluation by the court that the Article 8 rights are rendered effective and not illusory.

40. Nor has the Taxpayer offered any argument as to how the Article 8 rights should be balanced against the rights arising under Article 10.

41. These necessary requirements to justify the Anonymity Application do not disappear simply because the Taxpayer has withdrawn his substantive appeal to the FTT.

42. For all the reasons given, we refuse the Anonymity Application. In reaching this decision, we are concerned solely with the facts and circumstances in this case. Any other privacy or anonymity application which is followed by a withdrawal from the underlying subject-matter of the litigation in question will fall to be determined on its merits, by reference to the principles which we have set out above.

43. The Decision will therefore be republished in unanonymised form, subject to paragraph 52 below.

THE DISCLOSURE APPLICATION

44. NGN applies for access to the following documents, which we will refer to as Categories (1), (2) and (3):

(1) The transcript of the hearing before the FTT on 19 July 2021 "and any other transcripts of the preliminary proceedings".

(2) The appeal papers, including the Taxpayer's substantive notice of appeal to the FTT in relation to the substantive decision against which he appealed.

(3) The decision of the FTT dated 15 September 2021 referred to in the Decision.

45. The principles to be applied in determining such an application are uncontroversial. They are set out in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 and *R (Guardian News and Media Ltd) v City of Westminster Magistrates Court* [2012] EWCA Civ 420, and can be summarised as follows:

(1) The default position should be that access should be permitted on the open justice principle.

(2) This extends not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing.

(3) An applicant has no right to be granted access; it is for the applicant to explain why they seek access and how granting access will advance the open justice principle.

(4) The open justice principle must be balanced against other factors, including the practicality and proportionality of granting access and possible harm to the maintenance of an effective judicial process and the legitimate interests of others.

46. HMRC supported the Disclosure Application. Mr Firth objected to it, on the ground that the documents in question were not necessary to understand the Decision, as contrasted with the substantive appeal to the FTT. Mr Firth also submitted that NGN had not put forward

"credible evidence" as to why access was needed. Mr Bunting objected that these points should properly have been made before the hearing.

47. Having applied the principles summarised above, our decision in relation to the Disclosure Application is as follows:

(1) Category (1): most of this transcript concerns issues other than those which were the subject matter of the appeal to the Upper Tribunal, and, in our opinion, access to the full transcript is not necessary to understand the Decision, as contrasted to the circumstances of the underlying substantive appeal. We have considered whether to provide access to the sections of the transcript which are relevant to an understanding of the Decision, but we have decided not to do so for the reason that all relevant sections are quoted in the Decision. There are no other transcripts of preliminary proceedings which are relevant to an understanding of the Decision.

(2) Category (2): these documents were not considered by or before the Upper Tribunal in reaching the Decision, and so we decline to direct access to them.

(3) Category (3): this document deals largely with the issue of a stay of the underlying appeal, which was not an issue dealt with in the Decision. Insofar as it relates to the application for anonymity, which was the subject of the Decision, access is necessary under the open justice principle and it is proportionate to grant access. Therefore, we grant access to the document, redacted to remove the reference to the identity of the Taxpayer and the sections dealing with the stay application.

48. We therefore decline to grant access to the documents in Categories (1) and (2), and grant access to the document in Category (3) on the basis of the redactions we have described.

49. As we pointed out to Mr Bunting in the hearing, NGN are able to apply to the FTT for access to documents relating to proceedings before the FTT.

50. In the Disclosure Application, NGN also apply for permission to report the contents of the documents in the documents bundle for this hearing. Such permission is granted, but the decision we set out below relating to anonymity during appeal rights should be borne in mind in reporting on any documents.

ANONYMISATION DURING APPEAL RIGHTS

51. We have considered whether, as Mr Firth requested in his skeleton argument, we should anonymise this decision and/or preserve anonymity in relation to the Decision pending appeal processes, and if so on what terms.

52. Solely in order to "hold the ring" in relation to anonymity for the period of the appeal rights, this decision will initially be published in anonymised form and the Decision will remain anonymised. Thereafter:

(1) This decision and the Decision will remain in anonymised form if permission to appeal the decision to refuse the Anonymity Application 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, then this decision and the Decision will be republished without anonymising the identity of the Taxpayer.

RIGHT OF APPEAL

53. **In relation to any application to this Tribunal for permission to appeal this decision, it is directed that the time limit applicable under Rule 44(4) of the Rules is reduced from one month to 21 days.** This direction is made pursuant to the power which is included in Rule 5(3)(a) of the Rules to shorten the time for complying with any rule. We consider that in order to reduce any further delay, and taking into account the risk of further uninformed speculation as to the identity of the Taxpayer, it is expedient to reduce the usual time limit in this way.

MR JUSTICE MILES
JUDGE THOMAS SCOTT

Release date: 09 December 2024