[2020] EWCA Civ 580

Case No: C3/2019/0585

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
[2018] UKUT 441 (AAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15th May 2020

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE HADDON-CAVE

- -

Between :

Derek Moss	**Appellant**
- and -	
Information Commissioner	**Respondent**

- -

Appellant in person (via audio link)
Jen Coyne (instructed by Information Commissioner) for the **Respondent**

Hearing date : 18th March 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Friday 1st May 2020.

Lord Justice Haddon-Cave:

INTRODUCTION

1. This case concerns the principle of open justice and the application of orthodox principles to an application by a litigant for an anonymity order, namely, the balancing exercise between an individual's Article 8 and 6 rights of the European Convention on Human Rights ("ECHR") and the Article 10 and 6 ECHR rights of the press and public.

2. The Appellant, Derek Moss, appeals against the decision of UTJ Wikeley, dated 21st December 2018, sitting in the Upper Tribunal (Administrative Appeals Chamber), which upheld a First-tier Tribunal ("FTT") interlocutory decision of 21st December 2017 to deny the Appellant an anonymity order. The substantive FTT appeal arose from the Appellant's challenge to a Decision Notice of the Information Commissioner ("the Respondent") which upheld a decision of the PSB3 in relation to sections 1 and 40(2) of the Freedom of Information Act 2000 ("FOIA 2000").

BACKGROUND

3. The Appellant has engaged in serial litigation about his privacy for several years. He asserts that he is a disabled man who suffers from physical and mental health conditions. He has hitherto obtained anonymity orders in proceedings in the High Court and Court of Appeal.

4. He has involved no less than three public sector bodies in the lead up to the present case. In or around 2015, the Appellant tried to bring judicial review proceedings against the first public sector body ("PSB1") but failed to obtain legal aid. He subsequently brought a related judicial review claim against a second public sector body ("PSB2"). Although both claims were unsuccessful, the High Court and this Court granted him anonymity in the latter.

5. The Appellant then applied to a third public sector body ("PSB3") to take action against PSB2, and raised questions whether PSB2 had complied with duties under the Equality Act 2010. PSB3 refused the application. The Appellant then made a Freedom of Information request to PSB3. PSB3 disclosed some information in response but, materially for present purposes, applied the exemption at sections 1 and 40(2) of FOIA 2000: that it did not hold the requested information to the request and/or it was personal information.

6. On 13th January 2017, the Appellant complained to the Respondent about PSB3's handling of the request. After an investigation, on 26th September 2017 the Respondent issued a Decision Notice which upheld PSB3's reliance on sections 1 and 40(2) FOIA 2000 the ("Decision Notice").

FTT appeal and interlocutory decision

7. On 23rd October 2017, the Appellant appealed the Decision Notice to the FTT. In summary, the grounds of appeal were that the Respondent:

(1) failed to properly investigate the complaint;

(2) wrongly accepted PSB3's understanding of a statutory provisions within the Equality Act 2010;

(3) should have ordered the disclosure of the names of PSB3's employees;

(4) ignored most of the Appellant's arguments in part 2 of his complaint; and

(5) breached the Appellant's Article 6(1) ECHR rights to a fair hearing, as had PSB3.

8. On 24th October 2017, the Appellant made an interlocutory application to the FTT requesting anonymity to protect his medical confidentiality, and that the file in the proceedings be sealed.

9. On 1st December 2017, Judge McKenna refused the application for anonymity because:

(1) the Tribunal was able to determine the relevant issue, namely whether the Commissioner correctly applied sections 1 and 40(2) of FOIA 2000, without considering the Appellant's personal data;

(2) the criteria for anonymisation were not met; and

(3) there was no reason for the documents sent by the Appellant to be included in a bundle at that stage.

10. On 17th December 2017, the Appellant renewed his application. In an "application for directions" he requested the Tribunal to: (1) grant anonymity; (2) hold any hearings in camera; (3) seal the file; (4) withdraw Judge McKenna's Order from the public record and re-issue it with redactions. The Appellant also objected to the exclusion of documents from the bundle, but did not formally request that the Tribunal reconsider that finding.

11. On 21st December 2017, Judge McKenna reconsidered the matter but again refused the application. The Judge also:

(1) granted permission to appeal her interlocutory ruling refusing anonymity to the Upper Tribunal due to the "growing number of requests for anonymisation" in the FTT which would benefit from the "guidance of the Upper Tribunal on the principles to be applied"; and

(2) stayed the substantive FTT appeal pending the Upper Tribunal appeal.

Upper Tribunal decision on appeal in the present case

12. On 19th February 2018, the Appellant issued a Notice of Appeal in the Upper Tribunal which raised four grounds of appeal:

(1) unfairness resulting from a mistake of material fact, namely the conclusion that his personal information did not need to be disclosed as part of the FTT appeal;

(2) the refusal of anonymity breached the Appellant's Article 6(1) right to a fair trial;

(3) the decision breached the Appellant's Article 8 privacy rights; and

(4) the Judge failed to give adequate reasons.

13. The Appellant also requested anonymity and similar directions within the UT appeal itself. The Appellant did not make any further application for permission to appeal on grounds *beyond* that which he had been granted permission by the FTT.

14. On 5th December 2018, an oral hearing was held before UTJ Wikeley, and on 21st December 2018, the Upper Tribunal in *D v Information Commissioner* [2018] UKUT 441 (AAC) dismissed the Appellant's appeal, finding no error of law within the FTT decision. In relation to that decision, the following findings by the Upper Tribunal were important:

(1) Although the Appellant's Article 8 rights were engaged [38], the weight to be attached to those privacy rights is limited and "on the facts … the principle of open justice prevails" [40]. The UTJ cited Lord Sumption at [14] in *Khuja v Times Newspapers Ltd* [2019] AC 161 (SC), "necessity remains the touchstone of this jurisdiction" [40]

(2) The FTT correctly concluded that there was no need to introduce medical evidence, as it was difficult to see how the Appellant's medical conditions in themselves could show that the Decision Notice "was not in accordance with the law" [38].

(3) In regards to necessity:

a. The Appellant argued that without an anonymity ruling he is at risk of being identified as the litigant in previous proceedings in the High Court and Court of Appeal [41]. However, in the view of the UTJ, the "risk of jigsaw identification" was "less than negligible" [42].

b. The Appellant also argued that he would be forced to abandon the case without anonymisation, but this was unpersuasive for two reasons, aside from the Respondent's submission that there was no hard evidence of such a harmful potential outcome. First, there was no appreciable risk of a breach to his privacy. Second, that argument seeks a subjective, as opposed to objective, understanding of open justice which is rejected by the case law [44].

(4) The FTT that eventually determines the substantive appeal can write its decision in a way to minimise the remote risk of any interference with the Appellant's privacy rights [45].

(5) The Article 6(1) argument fared no better for two reasons. First, there are strong competing Article 6(1) rights, namely the wider interests of public confidence in the administration of justice. Second, the Appellant's Article 6(1) arguments "essentially stand or fall with those put under Article 8" [46].

(6) It is true that FTTJ McKenna's decision was not as reasoned out as fully as it could have been, but it did not need to be, and the decision was "more than sufficient to show that the Tribunal had not misdirected itself in law" [47].

15. On 1st February 2019, the Appellant applied to the Upper Tribunal for permission to appeal that decision. On 12th February 2019, the Upper Tribunal granted the Appellant permission to appeal to this Court on a point of law on the basis that it "would be helpful for all concerned to have the question of a proper basis for anonymity rulings authoritatively resolved". The Upper Tribunal further recorded that in its view there were "no grounds for setting aside the Upper Tribunal's decision for procedural reasons or for reviewing the decision".

Current proceedings

16. On 14th March 2019, the Appellant lodged the Appellant's Notice with this Court. On 24th May 2019, Singh LJ ordered that: the Appellant be granted anonymity *pro tem*; and the determination of whether the hearing should be held in private be adjourned to be considered by the full Court.

17. On 18th October 2019, Davis LJ granted an adjournment which was requested by the Appellant due to parting company with his solicitors.

18. Since then, the Appellant acquired fresh pro-bono representation but, shortly before the hearing, parted with his counsel again. He thus appeared before this Court as a litigant in person. His request to make his submissions remotely by audio-link was granted. He was refused permission to rely on two supplemental skeleton arguments served late, but the Court nevertheless read and considered both supplemental skeleton arguments before the hearing and told the Appellant it had done so.

19. At the start of the hearing of the appeal on 18 March 2020, we informed the Appellant that the Court was sitting in public and would continue to do so unless persuaded otherwise. Thereafter, the Appellant addressed no further argument that the hearing should be conducted in private and the doors of the court room remained open. The Court's judgment on this appeal and its order will appear with the Appellant's name in the title.

THE LAW

20. Articles 8 and 10 ECHR provide as follows:

" Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

" Article 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. "

21. Where these qualified rights are in conflict, an "ultimate balancing test" must be undertaken, as was emphasised in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 (HL). There Lord Steyn at [17] observed that the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457 (HL) had illuminated the interplay between Articles 8 and 10 through four propositions:

> " 17. … First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test". (emphasis in original)

22. In *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645 (CA), Lord Neuberger MR, as he then was, at [21] summarised the principles to be observed in a case where a claimant seeks "an anonymity order or other restraint on publication of details of a case which are normally in the public domain" (I have omitted principles (8) and (10) as they are specific to injunction proceedings):

> " (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.
>
> …
>
> (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.
>
> … "

23. The principle of open justice is also enshrined in Article 6 ECHR, as was emphasised in *JIH* at [19]. The Court of Appeal expanded on this at [4]:

> " 4. … public coverage of court proceedings is a fundamental aspect of freedom of expression, with particular importance: the ability of the press freely to observe and report on proceedings in the courts is an essential ingredient of the rule of law. Indeed the right to a "fair and public hearing" and the obligation to pronounce judgment in public, save where it conflicts with "the protection of the private lives of the parties" or "would prejudice the interests of justice", are set out in Article 6 of the Convention". (my emphasis)

24. An anonymity order is therefore a derogation from the principle of open justice, and an interference with that general public interest, protected in Articles 10 and 6.

25. Any derogation from open justice must be "necessary". As Lord Sumption underscored at [14] in *Khuja*, "necessity remains the touchstone of this jurisdiction". Several other authorities emphasise a test of necessity: see *JIH* at [21(4)], cited above; Lord Dyson at [11] in *Al-Rawi v Security Service* [2012] 1 AC 531 (SC), citing *Scott v Scott* [1913] AC 417 (HL):

> " 11. The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In *Scott v Scott* [1913] AC 417, Lord Shaw of Dunfermline (p 476) criticised the decision of the lower court to hold a hearing in camera as "constituting a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security." Lord Haldane LC (p 438) said that any judge faced with a demand to depart from the general rule must treat the question "as one of principle, and as turning, not on convenience, but on necessity". "

26. The House of Lords in *Scott v Scott* also gave guidance on when a derogation from open justice is necessary, and on whom the burden should lie for proving it is the case. Viscount Haldane LC made clear (at p 437, 438 and 439) that:

> " 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. … 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 a particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. … I think that to justify an order for hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made ". (my emphasis)

27. The reason for a test of necessity is apparent when one examines the justification for the principle of open justice, summarised by Lord Sumption at [13] in *Khuja* as "the value of public scrutiny as a guarantor of the quality of justice". Lord Atkinson at p 463 in *Scott v Scott* described that justification in these terms:

> " The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect". (my emphasis)

28. In *R v Legal Aid Board ex parte Kaim Todner (A firm)* [1999] QB 966 (CA), Lord Woolf MR (at [4]-[5], p 977) warned against the erosion of open justice, and explained the justification for the principle:

> " The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. … Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However Parliament has recognised there are situations where interference is necessary ".

This passage was later endorsed by the House of Lords in *Re S* at [29], and the Supreme Court in *Khuja* at [14].

29. This Court in *ex p. Kaim Todner* (at [8], p 978) also highlighted the relevancy of the position of the parties:

> " 8. A distinction can also be made depending on whether what is being sought is anonymity for a plaintiff, a defendant or a third party. <u>It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings</u>. … If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public. A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation. In general, however parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule ". (my emphasis)

GROUNDS OF APPEAL

30. The Appellant raises three grounds of appeal:

> Ground (1): That the learned judge erred by making material errors of law when weighing the Appellant's Convention Rights as part of the balancing exercise because there are no Convention Rights of

others in circumstances where Article 10 does not give a positive right to information.

Ground (2): That the refusal to anonymise the Appellant unlawfully interfered with his Article 6(1) right.

Ground (3): That the refusal to anonymise the Appellant unlawfully interfered with his Article 8 right.

ANALYSIS

Ground 1: Errors of law in weighing the Appellant's Convention Rights

Appellant's submissions

31. The Appellant submits in his application for permission to appeal to this Court, which he reinforced in oral submissions, that UTJ Wikeley erred in weighing his Convention rights against the Article 6 and 10 rights of others because the latter rights were not engaged.

32. He asserts that Article 10 is not engaged when a court or tribunal decides whether or not to publish certain information. Rather, it is only when someone makes a request for specific information that satisfies the *Magyar* criteria (cited below) that a right to access information under Article 10 arises. In support of these propositions, the Appellant submits that:

    (1) *Kennedy v Charity Commission* [2014] UKSC 20 (SC) at [101] and [147-148] held that there was no general right of access to information held by public bodies under Article 10.

    (2) *Magyar Helsinki Bizottság v Hungary* (2016) App. No. 18030/11 at [156] held that Article 10 "does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual", but such a right or obligation may arise in certain circumstances, which must be assessed under four criteria set out at [158-170].

    (3) There are different forms of derogation from open justice, some being more intrusive of Article 10 than others. *Khuja* articulated an important distinction between: (1) the inherent common law powers to derogate from open justice; and (2) the statutory powers to restrict the reporting of open court proceedings by third parties. The possibility of an interference with Article 10 only arises with statutory powers: as the court held at [16], the use of inherent powers is "more likely to engage article 6 than article 10".

    (4) UTJ Wikeley erroneously relied on *Re S* and *JIH*. Those cases concerned *statutory* powers, whereas the present case concerns *inherent* powers, so Article 10 is not engaged at all.

33. In relation to Article 6 not being engaged, the Appellant argues that the right to a fair and public hearing is afforded to him as opposed to: non-parties to the litigation, such as the press or the public; and public authorities such as the Respondent who do not have any Convention rights.

34. The Appellant also makes a separate argument in relation to open justice. He argues that the Upper Tribunal erred in finding that derogation from the open justice principle must be reserved for cases of "strict necessity" and "exceptional circumstances". He asserts that, in contrast to the courts, there is no right to a public hearing in tribunals, which routinely depart from the principle by deciding appeals on the papers.

Respondent's submissions

35. Counsel for the Respondent, Ms Jen Coyne, argues that the UTJ correctly: (1) conducted "the ultimate balancing test" by weighing the Appellant's Article 8 and 6 rights against the Article 10 and 6 rights of the press and/or public; (2) considered the principle of open justice and the necessity requirement for departing from it.

36. In support of this, the Respondent highlights that the Appellant has previously accepted that both Article 10 and 6 are engaged, and now he unfairly seeks to criticise the Upper Tribunal for adopting his own original position.

37. More substantively, the Respondent submits that Article 10 is clearly engaged: *JIH* at [21(3)] recognised that the public have a right to receive information, and the press have a right to impart it. Further, a departure from open justice due to anonymisation falls squarely within the scope of Article 10 as it reduces the accuracy and quality of information, and restricts what the press may say.

38. In reply to the Appellant's submissions on Article 10, the Respondent submits that:

    (1) *Kennedy* is an obiter authority for the proposition that Article 10 does not confer a free-standing right of access to information held by public authorities ([90-101]). However, the current case does not concern a party seeking access to private information held by a public authority. It is the opposite: the Appellant seeks to obstruct the release of normally public information held by the Tribunal.

    (2) Whether an interference with Article 10 originates from a statutory or common law power is of no significance. The Appellant seeks to introduce this artificial demarcation which finds no support in the authorities, including in *Khuja*. Naturally, a reporting restriction on the entirety of proceedings is more intrusive than anonymising the name of parties, but a lesser interference remains an interference, and thus capable of engaging Article 10.

39. In relation to Article 6, the Respondent argues that UTJ Wikeley correctly found at [46] that, in a decision to anonymise parties, there were "wider interests of public confidence in the administration of justice, and so there are strong competing Article 6 rights", for three reasons:

(1) In *Re S*, Lord Steyn at [15] recognised that the purpose of a public hearing in a criminal context is "to guard against an administration of justice in secret and with no public scrutiny and to maintain public confidence: *Axen v Germany* (1983) 6 EHRR 195, para 25", and that the rule in favour of "publicity of any proceedings" had "long" existed in the common law also.

(2) In *JIH*, Lord Neuberger MR, as he then was, at [4] also considered that rule being encapsulated in Article 6, and his reasoning was rightly cited by UTJ Wikeley at [23].

(3) The publication of names of parties is important for press scrutiny as, inter alia, it generates public interest: as Lord Roger held at [63] in *Re Guardian News and Media Ltd and others* [2010] 2 AC 697, "a lot" is in a name.

40. In relation to open justice, the Respondent submits that:

(1) The Appellant seeks to carve out an exception to the open justice principle but fails to articulate a threshold for the departure, instead relying on the assertion that it is "not adhered to as strictly" in the tribunals.

(2) UTJ Wikeley at [40]-[41] and [44]-[45] correctly applied a test of necessity, and any derogation from open justice must be "necessary": see Lord Dyson at [11] in *Al-Rawi*. When applying this test to anonymisation, it is also relevant to consider the status of the party for whom it is sought: *ex p. Kaim Todner* at [8].

(3) *Kennedy* at [115] affirmed that open justice applies with equal force in tribunals (emphasis added): "The court held in *Guardian News* that the open justice principle applies, broadly speaking, <u>to all tribunals</u> exercising the judicial power of the State … The fundamental reasons for the open justice principle are of general application to any such body, although its practical operation may vary according to the nature of the work of a particular judicial body". Tribunals have explicitly followed that stringent approach when it comes to derogating from open justice, see: *AH v West London MHT and SSJ* [2010] UKUT 264 (AAC) at [17] and [42]; and *BBC v Roden* [2015] 5 WLUK 259 at [13] and [22].

(4) The Appellant's claim that there is no 'right' to a public hearing in the tribunals is wrong, and the emphasis on tribunals deciding appeals on the papers is misplaced, because they are a minor derogation from open justice for the sake of administrative efficiency, and the decision itself and names of parties remain public.

<u>Discussion</u>

41. In my view, Ground 1 must fail essentially for the reasons given by the Respondent and Ms Coyne in her able and succinct submissions. The Appellant's submissions are essentially misconceived.

42. Articles 10 and 6 are plainly engaged where an order of anonymity is requested, as is done by the Appellant in the present case. Those Convention rights protect the common law principle of open justice, which both the public and the press enjoy, and must be balanced against the Convention rights of the Appellant. That general public interest subsists irrespective of whether the press or public are 'party' to this litigation, which the Appellant erroneously places emphasis on, and therefore must be considered in the ultimate balancing exercise.

43. This case involves the orthodox application of the well-established authorities cited above. In regards to Article 10, *JIH* at [21(3)] recognised that an anonymity order "is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large". As held by Lord Rodger at [33] in the unanimous judgment of *Re Guardian News*, "it is settled that the press and journalists enjoy the rights" enshrined in Article 10. The Article 6 rights of the public and press are also engaged, as is highlighted in *Re S* at [15], *JIH* at [4] and [19], and *Re Guardian News* at [63].

44. The Respondent correctly refutes the Appellant's assertions on three grounds. First, the *obiter* proposition expounded in *Kennedy* at [90-101] - that Article 10 does not confer a free-standing right of access to information held by public authorities - is inapplicable to the present case. Here, no party is requesting the release of private information, rather, the Appellant is seeking to obstruct the release of normally public information held by a tribunal.

45. Second, the distinction between interferences with Article 10 originating from common law or statutory powers is not supported in *Khuja*, and in any event is beside the point, as a lesser interference remains an interference that is capable of engaging Article 10.

46. Third, and in regards to the open justice principle, the UTJ correctly held that any derogation from that principle must be necessary: at [40] he cited Lord Sumption at [14] in *Khuja*. As highlighted above, the requirement of necessity is supported in the case law: per Lord Dyson at [11] in *Al-Rawi*. The Respondent also correctly refutes the Appellant's other arguments by highlighting: *Kennedy* at [115] affirmed that open justice applies with equal force in tribunals; and the Appellant's claim that there is no 'right' to a public hearing in the tribunals is wrong; and the emphasis on tribunals deciding appeals on the papers is misplaced.

47. I would reject Ground 1.

Ground 2: Breach of Article 6(1)

Appellant's submissions

48. The Appellant argued before the Upper Tribunal that if he were not provided with anonymity "he would feel unable to include the documentary material he says is necessary for him to make out his Fifth Ground of Appeal".

49. The Appellant sought to raise a series of further arguments before this Court, in particular:

(1) First, as regards the decision under appeal and the application in the FTT, he submitted that the Upper Tribunal erred at [47] in finding that "Judge McKenna was entitled to conclude that the Appellant's confidential medical information did not need to be referred to", because FTTJ McKenna in fact excluded *all* the documents filed by the Appellant, not just confidential medical information. He further submitted that the UTJ ignored the evidence that the Appellant needed to file the documents to secure his Article 8 rights.

(2) Second, as regards the jurisdiction of the FTT in relation to Ground 5 of the FTT appeal, he submitted that, in order to enable him to demonstrate that he required representation to secure a right to a fair hearing, he needed to adduce evidence of his medical conditions.

(3) Third, as regards the opportunity to provide evidence, he submitted that it was not unreasonable for him to have explained that he would not be able to pursue his case in the FTT without measures being granted to protect his privacy, and the UTJ unfairly characterised this as seeking to engage in legal proceedings on his own terms. He submitted that 'equality of arms' required that he be afforded reasonable opportunity to present his case.

(4) Fourth, as regards the duty to provide reasons, the UTJ decision at [47] that the FTT ruling did not need to be fully reasoned and that the statutory duty to give reasons does not apply to interlocutory decisions was contrary to Strasbourg jurisprudence.

Respondent's submissions

50. The Respondent points out that that the *only* Article 6(1) ground that the Appellant raised in his skeleton argument before the Upper Tribunal was the argument that if he were not provided with anonymity he would feel unable to run his Fifth Ground of Appeal. Accordingly, the Respondent submits the further arguments raised by the Appellant before this Court are new arguments and the Upper Tribunal should not be criticised for not dealing with them.

51. The Respondent's submissions in answer to the Appellant's new arguments are as follows:

(1) First, FTTJ McKenna's decision to exclude certain documents, on the basis that they were irrelevant, was not under appeal: the FTTJ granted permission to appeal the ruling on anonymity only. The UTJ's remark at [47] was merely a summary of the analysis, which was fed into the 'ultimate balancing test' in relation to anonymity. Accordingly, all further complaints in relation to documents that the Appellant sought to file are simply outside the scope of this appeal.

(2) Second, the Appellant misunderstands the nature of the jurisdiction of the FTT.

(3) Third, the Appellant has not been denied an opportunity to advance evidence before the FTT; rather he does not wish to file certain evidence under the normal rules of open justice *due to his own preferences*. UTJ Wikeley correctly concluded that this argument was "unattractive" due to (1) there being no appreciable risk to his privacy, (2) the irrelevancy of the medical evidence, and (3) seeking to engage in legal proceedings subject to his own terms (see Upper Tribunal judgment at [38] and [44]).

(4) Fourth, the Appellant mischaracterises [47] where the UTJ actually said: "[i]t is true, of course, that Judge McKenna's own decision was not reasoned out as fully as the discussion above but nor did it need to be". The UTJ also correctly found that interlocutory decisions can be summary in nature. Further, the FTT did indeed give sufficient reasons, and the Appellant did not allege otherwise in the appeal before the Upper Tribunal: it was on the narrow point of anonymity.

Discussion

52. In my view, Ground 2 must also fail essentially for the reasons given by the Respondent.

53. The Respondent correctly points out that the Appellant has raised new arguments which were not before the Upper Tribunal. More importantly, the Appellant seeks to argue matters which stray beyond that for which he was given leave in this appeal. FTTJ McKenna granted permission to appeal her interlocutory ruling refusing *anonymity* only, and the Upper Tribunal granted permission to appeal to this Court on a point of law related to that issue. The Appellant did not appeal FTTJ McKenna's finding that certain documents were irrelevant and could therefore be excluded from the trial bundle. In light of that, the Appellant's arguments about his documents being wrongly excluded, as they contained evidence necessary to secure his Article 6 rights, are outside the scope of this appeal.

54. The other complaints that the Appellant raises under this ground are misconceived for two reasons. First, as highlighted by the Respondent, the Appellant mischaracterises the UTJ's remark on the FTT decision not being "reasoned out as fully as the discussion" in the Upper Tribunal, as stating that the decision did not need to be fully reasoned.

55. Second, the Appellant's argument that he would have to abandon the proceedings in the FTT, absent measures being granted to protect his privacy, is circular and without merit for the reasons given by the Upper Tribunal. As outlined below, there was no appreciable risk of a breach of his privacy. UTJ Wikeley therefore correctly held at [46] that the Appellant's Article 6(1) arguments "essentially stand or fall with those put under Article 8". Further, and in light of the lack of risk of a breach to his privacy, such an argument seeks to arrogate the fate of the open justice principle from the hands of the court to his own. The impermissibility of this was highlighted by the Court in *ex p. Kaim Todner* at [9] (p 978G-979B):

> " 9. … a party cannot be allowed to achieve anonymity by insisting upon it as a condition for being involved in the proceedings irrespective of whether the

> demand is reasonable. There must be some objective foundation for the claim which is being made. … It is not a reasonable basis for seeking anonymity that you do not want to be associated with a decision of a court. Nor is it right for an appellant to seek to pre-empt the decision of this court by saying in effect we will not cooperate with the court unless the court binds itself to grant us anonymity ".

56. I would reject Ground 2.

Ground 3: Breach of Article 8

Appellant's submissions

57. The Appellant asserts that, in breach of Article 8, UTJ Wikeley discloses private information about the Appellant's medical condition at [8] and [11], despite at [45] claiming he is satisfied that the FTT can write its decision in such a way as to minimise any risk of an interference with the Appellant's privacy rights and that he had drafted his decision with that aim in mind. Further, even if the anonymity were maintained, the decision discloses the FTT case number, which would uncover the Appellant's identity.

Respondent's submissions

58. The Respondent submits that Ground 3 is misleadingly framed as one relating to the decision on anonymity, because the Appellant in fact argues that there has been a breach of Article 8 due to the UTJ referencing his medical condition. The references by the UTJ at [8] and [11] were broad: "I have a number of debilitating physical and mental health problems"; and "he is vulnerable, has a mental illness". This amounts to a parasitic complaint against the substance of the Upper Tribunal decision, as opposed to identifying an error of law within the decision.

59. The Respondent also submits that if anonymity is not maintained, then the Appellant's medical condition will have been referred to in broad terms in a public decision. However, the denial of anonymity in that scenario would be the result of the Appellant's Article 8 rights not prevailing in the ultimate balancing test. The Appellant submitted his information to the tribunal and was never guaranteed anonymity in respect of it. The starting point is open justice and the reasonable expectation is that such information will become public. Accordingly, the broad references do not breach Article 8.

Discussion

60. In my view, Ground 3 must fail for two main reasons. First, UTJ Wikeley's claim at [45] of drafting decisions in a way that *minimises* risk of Article 8 interference is not tantamount to promising the *complete removal* of that risk.

61. Second, even if anonymisation is not granted, the broad references to the Appellant's medical information by the UTJ would amount to a justified and proportionate interference with the Appellant's Article 8 rights, as opposed to a breach of them. This is evident from the ultimate balancing exercise conducted by the UTJ, which

rightly concluded that the principle of open justice prevails on the facts of this case. The Appellant failed to justify any derogation from that principle, and little weight attaches to his privacy rights for two reasons. First, the Appellant had voluntarily initiated the present legal proceedings himself. Second, the risk of 'jigsaw' identification in relation to previous proceedings subject to an anonymity order was less than negligible: there was no evidence of any wider public interest in the Appellant's previous proceedings, which are no longer extant.

62. I would reject Ground 3.

CONCLUSION

63. For the reasons set out in this judgment, in my view, the Appellant's appeal must be dismissed.

64. The application for an order of anonymity stands dismissed, and the temporary anonymity order of Singh LJ, dated 24th May 2019, must also be discharged. The Appellant's further applications relating to sealing the court file, disclosure and reporting restrictions should also be dismissed.

Lord Justice Peter Jackson

65. I agree.

Lord Justice McCombe

66. I also agree.