DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal by the Appellant.

The interlocutory decision of the First-tier Tribunal (General Regulatory Chamber) dated 21 December 2017 under file reference EA/2017/0259 does not involve any error on a point of law.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

Before Upper Tribunal Judge Wikeley

Attendances:

The **Appellant** was represented by Mr Greg Callus of Counsel, acting *pro bono*.

The **Respondent** was represented by Ms Jen Coyne of Counsel, instructed by Mr Richard Bailey, Solicitor to the Information Commissioner.

REASONS FOR DECISION

Introduction

1. This is an appeal against the refusal of an anonymity ruling in an information rights appeal. The First-tier Tribunal (General Regulatory Chamber) decided to refuse the Appellant's application for anonymity in his substantive appeal to that Tribunal. The Appellant now appeals to the Upper Tribunal against that interlocutory ruling.

2. My decision is that the First-tier Tribunal was right not to make an anonymity order in the particular circumstances of this case. In short, the Applicant's Article 6 and Article 8 rights are outweighed by the Article 6 and Article 10 rights of others. An incidental reason for that decision is that there are other ways in which the Appellant's concerns about a potential breach of his privacy rights may be properly addressed. One such technique is by drafting this decision in such a way that unnecessary details are excluded, so further minimising what I decide is, in any event, a very remote possibility of "jigsaw" identification. It follows that in this decision factual details are included only where strictly necessary to enable the disinterested reader to understand the proceedings.

A preliminary point: the nomenclature ruling

3. At an early stage in this appeal I directed that the case be simply known by the nomenclature of *D v Information Commissioner* (case management directions dated 22 March 2018). This was because, as Warby J. explained in *Hemsworth (formerly SWS) v Department for Work and Pensions* [2018] EWHC 1998 (QB): "The justification … is obvious: the point of the application would be defeated if identification of the applicant was the price of making it. Anonymity was therefore necessary to do justice, pending my decision" (at paragraph 3).

4. Although in the event I dismiss the Appellant's appeal, I maintain what I describe as my "nomenclature ruling" for a limited period. This is to allow the Appellant the

appropriate time to consider whether he wishes to challenge this decision on appeal in the Court of Appeal (see paragraph 49 below).

A summary of the background to the present appeal

5. Some years ago, the Appellant brought judicial review proceedings unsuccessfully against a public sector body (PSB 1) that is charged with an investigatory function. He then brought a related judicial review claim against a second public sector body that also has an investigatory role (PSB 2). Although that latter claim was unsuccessful, and according to a document on the file apparently adjudged to be "totally without merit" (I should record that I have not seen a copy of the court order in question), both the High Court and the Court of Appeal granted the Appellant's request for anonymity in that second set of judicial review proceedings. Subsequently, the Appellant made a request to another public sector body (PSB 3), in effect to review decisions taken by PSB 2, but to no avail. The Appellant then made a request to PSB 3 under the Freedom of Information Act 2000 (FOIA) for certain information concerning its approach to PSB 2 and related matters.

6. In response, PSB 3 released some of the information requested. However, it also (i) refused to provide the remainder of the information on the basis that section 40(2) of FOIA applied (personal information); and (ii) denied holding other information that had been requested. The personal information in question comprised the names of certain PSB 3 staff members. PSB 3 maintained its position on internal review. The Appellant then lodged a complaint with the Information Commissioner. She concluded in her decision notice that PSB 3 should release one small element of the data sought, but in all other respects confirmed its approach.

7. The Appellant appealed against the Information Commissioner's decision notice to the First-tier Tribunal. His grounds of appeal (in summary) were that the Commissioner had (1) failed properly to investigate the complaint; (2) wrongly accepted PSB 3's understanding of a relevant statutory provision (not a provision in FOIA); (3) erred in her application of section 40(2) of FOIA; (4) ignored the Appellant's arguments; and (5) breached the Appellant's Article 6.1 rights to a fair hearing (as had PSB 3). As will be seen, that substantive appeal has yet to be heard by the First-tier Tribunal.

8. The standard notice of appeal form used by the First-tier Tribunal includes a section which allows a party to specify any special requirements they may have. The Appellant wrote in that box as follows:

> "I have a number of debilitating physical and mental health problems (evidence of which has already been provided to the GRC) and I'm disabled for the purposes of the Equality Act 2010. I will be unable to attend a hearing in person and request a telephone hearing. I have no means of paying for representation and legal aid is not available for proceedings before the Tribunal, so I will be severely disadvantaged in having to represent myself against the Commissioner (and possibly [PSB 3] as well), who has experienced solicitors and barristers acting for her, paid for by public funds. As such these proceedings may breach my Article 6(1) right to a fair hearing and whilst the Tribunal may be limited in what it can do to avoid this, it is asked to bear this in mind and consider what it might do to try and minimise any disadvantage."

9. Subsequently the Appellant made a freestanding interlocutory application to the First-tier Tribunal in the following terms:

> "The documents filed for this appeal contain details that would enable someone to identify me as the claimant in the aforementioned [judicial review] proceedings and thus undermine the court orders protecting me. They also contain details of my medical conditions/disabilities and my home address and e-mail address. Therefore I request that the Tribunal order that the file in these proceedings be sealed.
>
> As for anonymity, most of the grounds do not raise arguments about my disabilities or health conditions but they will be relevant to Ground 5 in considering whether Article 6.1 requires that I need legal representation in order to secure my right to a fair hearing. It may be that these arguments can be heard in private and the Tribunal can ensure that no specifics of my medical conditions or disabilities are disclosed in its decision but if this is not possible I request that I be afforded anonymity in these proceedings to protect my medical confidentiality."

The interlocutory decision of the First-tier Tribunal

10. That application was considered by Principal Judge (now Chamber President) McKenna; on 1 December 2017 she ruled as follows:

> "4. I note that the issue which the Information Commissioner decided was whether (a) [PSB 3] correctly applied s.40(2) FOIA to part of the withheld information and (b) whether [PSB 3] holds the information requested. The appeal to the Tribunal will consider whether the Decision Notice was wrong in law. I can see no reason for the Appellant's personal medical information to be placed in evidence or referred to in any published Decision when the Tribunal determines that issue.
>
> 5. I have also had regard to the Decision of Mr Justice Charles (CP) in *Adams v SSWP and Green* [2017] UKUT 0009 (AAC), and I note that the common law principle of open justice requires not only that cases should be heard in public but that "*full, fair and accurate reports naming those involved can and should be published".* The anonymization of a published judgement is regarded as a derogation from the principle of open justice. I also note the view taken in that case was that the burden lies on the Applicant for anonymization to show that the paramount object of securing that justice is done would be rendered doubtful if anonymization were not granted.
>
> 6. I am not persuaded by the Appellant's submission that the criteria for anonymization are met in this case. It is perfectly possible for the Tribunal to determine the issue before it without considering the Appellant's personal data. The Respondent will prepare the bundle for the Tribunal and I can see no reason for the documents which the Appellant has sent to the Tribunal at this stage to be included."

11. The Appellant then renewed his application, providing further representations. On 21 December 2017 Judge McKenna reconsidered the matter but again refused the application:

> "8. The Appellant relies on the fact that he was granted anonymity in previous Court proceedings and that it was recognised in those proceedings that he is vulnerable, has a mental illness, and is concerned about his privacy so that details of his medical condition should not be placed into the public domain. I entirely agree that, if these proceedings required him to disclose personal information, that it would be fair and just for me to consider granting him

anonymity. However, for the reasons I have already given, I am not persuaded that it is necessary for the Tribunal to consider any personal information about the Appellant in order to determine the issues before it in this appeal. I have already ruled that the information he has sent to the Tribunal need not be placed in the hearing bundle.

9. I have had regard to the Decision of Mr Justice Charles (CP) in *Adams v SSWP and Green* [2017] UKUT 0009 (AAC), and I note that the common law principle of open justice requires not only that cases should be heard in public but that "*full, fair and accurate reports naming those involved can and should be published".* The anonymization of a published judgement is regarded as a derogation from the principle of open justice. I also note the view taken in that case was that the burden lies on the Applicant for anonymization to show that the paramount object of securing that justice is done would be rendered doubtful if anonymization were not granted. I am not persuaded that the Appellant has done so in this case because it seems to me that justice can be done without anonymization.

10. I have considered carefully the overriding objective at rule 2 and the Appellant's assertion that, if anonymization is not granted, he would be likely to withdraw his appeal. I have taken into account the requirement for me to consider how best to ensure his participation in the proceedings, but in the light of the decision in *Adams* referred to above, it does not seem to me that I can place a higher value on the Appellant's reluctance to proceed if not anonymised than on the constitutional principle of open justice without strong and fact-specific justification which do not in my judgement apply in this case. I therefore refuse to amend my earlier Ruling and I do not grant anonymization.

11. In his submission of 17 December, the Appellant has also applied for directions that his hearing be held in camera, that the file be sealed, and for my earlier Ruling be removed from the record. He asks me to order the Information Commissioner to destroy my earlier Ruling and for it to be re-issued in an anonymised form. The Appellant submits that these steps are necessary to secure his rights under ECHR articles 6 and 8. I now refuse all these applications as the Directions sought are in my view unnecessary and disproportionate. I am not persuaded that they are required in order to protect the Appellant's Convention rights."

12. Although she refused the Appellant's renewed application, Judge McKenna stayed the substantive appeal and gave the Appellant permission to appeal her interlocutory ruling refusing anonymity to the Upper Tribunal. In doing so, she noted that the General Regulatory Chamber receives "a growing number of requests for anonymization … in particular [in] the Information Rights jurisdiction. The guidance of the Upper Tribunal on the principles to be applied would be welcome."

13. In his notice of appeal to the Upper Tribunal, the Appellant set out four grounds of appeal against the First-tier Tribunal's ruling refusing him anonymity. Ground 1 was a complaint of unfairness arising from a mistake of material fact (namely the conclusion that his personal information did not need to be disclosed as part of the appeal). Ground 2 was that the refusal of anonymity breached the Appellant's Article 6.1 right to a fair trial. Ground 3 was that the decision breached the Appellant's Article 8 privacy rights. Ground 4 was a challenge based on a failure by the First-tier Tribunal to provide adequate reasons.

The proceedings before the Upper Tribunal

14. Both parties have made detailed written submissions on the issues raised by the appeal. I also held an oral hearing of the appeal on 5 December 2018. The Appellant did not attend, which was understandable given his earlier representations. However, he had the good fortune to be represented by Mr Greg Callus of Counsel, acting *pro bono*. The Information Commissioner was represented by Ms Jen Coyne of Counsel, instructed by Mr Richard Bailey, Solicitor to the Commissioner. I am indebted to both advocates for their helpful submissions.

The parties' submissions in outline

15. It is difficult to do adequate justice to the magisterial sweep of Mr Callus's written and oral submissions within the narrow confines of a decision such as this. Mr Callus began by acknowledging that there was a large measure of agreement as to the relevant legal framework as between the parties, although there was also an important difference of emphasis. He suggested it was conceptually helpful to analyse the issues in terms of three trios.

16. The first trio comprised the three Convention rights in issue, namely Articles 6 (the right to a fair trial), 8 (the right to privacy and family life) and Article 10 (the right to freedom of expression). The first part of Article 6.1 (the right to a fair hearing and publicly pronounced judgment) is absolute, whereas the remainder of the rights in Article 6.1 are qualified in nature, as of course are Articles 8 and 10.

17. The second trio centred on the three types of interference with one or more of those rights that might be consequential upon the order of a court or tribunal. The first type of interference is e.g. a ruling requiring anonymity or a sitting in private, which on the face of it involves an interference with the principle of open justice (and Article 10), being premised on either a common law or a statutory power. The second form of interference is more onerous, such as the effect of an injunction, which may only be exercised if there is a statutory power. The third form of interference is where the court or tribunal restricts access to its own documents, where the *vires* is sometimes to be found in statute, sometimes in an inherent power and sometimes neither.

18. The third and final trio comprised the three stages in any open justice assessment. The first stage was to identify the *vires* – what could the court or tribunal do? The second stage was to identify whether there was a countervailing Convention right that might outweigh the principle of open justice and Article 10. The third and last stage was to conduct the balancing exercise between the competing rights that had been so identified.

19. At that stage, Mr Callus submitted, there could be no question of the open justice principle being accorded any presumptive weight or special status. The competing rights – e.g. Articles 8 and 10 – enjoyed presumptive equality. It was only by the application of Lord Steyn's "ultimate balancing test", with its "intense focus on the comparative importance of the specific rights being claimed" (see *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 A.C. 593 at paragraph 17), that a court or tribunal could determine which right should properly prevail. This is, necessarily, a fact-specific exercise. Generalised statements about the importance of the open justice principle, detached from a factual context, were not sufficient. So, for example, a criminal defendant may not be tried anonymously, save in the most exceptional circumstances (*Guardian News & Media v Incedal* [2014] EWCA Crim 1861). However, Mr Callus contended that the present case was placed right at the other end of that spectrum, not least given that FOIA is both (as it is conventionally said to be) applicant-blind and motive-blind. Here, he submitted, there was a real risk of harm to the Appellant if his privacy was breached, whereas

there was no real benefit to be gained from naming him as the individual litigant in these proceedings.

20. Ms Coyne's oral submissions at the hearing began with a focus on the terms of Judge McKenna's ruling. This was, Ms Coyne contended, an appropriately fact sensitive assessment. In the Commissioner's view there were two central issues. The first was to assess whether the medical evidence adduced was relevant to the appeal as brought, as that was pertinent to the question of whether the Appellant's Article 8 rights were in fact engaged. The second was to identify the correct balance between those Article 8 rights (assuming they were so engaged) and the principle of open justice embodied in Article 10. On the facts the Judge had reasonably concluded that the medical evidence was simply not relevant to the grounds of appeal. The original FOIA request was directed to seeking information about PSB 3's strategic priorities and was several layers removed from the Appellant's own personal circumstances.

21. Ms Coyne further submitted that the Appellant's five grounds in his substantive appeal before the First-tier Tribunal (see paragraph 7 above) did not in themselves require consideration of any confidential medical evidence relating to the Appellant himself. Ms Coyne also noted that there was no actual evidence before the Upper Tribunal as to the potential impact of disclosure on e.g. the Appellant's mental health – rather, it was a matter of his assertion. In conclusion, the Commissioner accepted that in principle the Appellant had an Article 8 right to privacy in relation to the details of his medical condition but in the circumstances of these proceedings the weight accorded to this right fell well short of what was required to 'tilt the scales' of the ultimate balancing test in favour of anonymity. The correct balance was towards upholding the Article 6 and Article 10 rights of others, as outweighing the Appellant's own Article 6 and Article 8 rights.

The case law

22. There was no real disagreement between counsel as to the high-level principles to be derived from the case law. In this section I only refer to those authorities which I found particularly helpful, starting with *Re S (A Child) (Identification: Restrictions on Publication)*. There Lord Steyn observed that the House of Lords in *Campbell v MGN Ltd* [2004] 2 A.C. 457 had illuminated the interplay between Articles 8 and 10 by way of highlighting four propositions (at paragraph 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."

23. The context of *Re S (A Child) (Identification: Restrictions on Publication)* was a criminal trial. The Article 10 considerations may be no less weighty in the context of civil proceedings. As the Court of Appeal observed in *JIH v News Group Newspapers Ltd (Practice Note)* [2011] EWCA Civ 42; [2011] 1 W.L.R. 1648 ("*JIH*"):

> "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."

24. *JIH*, as is notorious, concerned a well-known professional sportsman who had applied for an injunction to restrain publication of confidential information about his private life and for anonymity in those proceedings. Lord Neuberger of Abbotsbury set out the guiding principles in the following terms (I have omitted principles (8) and (10) in the passage below as they are context-specific to injunction proceedings in the courts):

> "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."
> …
> (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.
> …"

25. There is also an extensive analysis by Charles J., then Chamber President of the Upper Tribunal (Administrative Appeals Chamber), in *Adams v Secretary of State*

for Work and Pensions and Green (CSM) [2017] UKUT 9; [2017] AACR 28, a decision on which Judge McKenna expressly relied in her rulings. The most important passage for present purposes from that judgment by Charles J. is as follows (emphasis added in paragraph 55):

> "52. The position is therefore that the UT(AAC) applies the principle of open justice and the relevant Convention rights in accordance with the authorities that have given guidance on this over the years.
>
> 53. I agree with Mr Adams that these cases show that:
>
> i) the principle of open justice is a fundamental and very important one,
>
> ii) no judge should depart from it without proper regard to its importance and the public interest on which it is founded, and
>
> iii) no judge has "a general and arbitrary discretion to give privacy rights to parties or children whenever it feels it would be nice to do so, or to avoid supposed discomfort or embarrassment".
>
> Rather departure from the principle of open justice must be based on a proper assessment of the relevant competing factors.
>
> 54. An example of the strength and importance of the principle is found in the judgment of Lord Dyson in *Al-Rawi v Security Service* [2012] 1 AC 531 at [10] and [11] where he said:
>
> > "10. There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. The importance of the open justice principle has been emphasised many times: see, for example, *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, at p 259, per Lord Hewart CJ, *Attorney General v Leveller Magazine Ltd* [1979] AC 440, at pp 449H-450B, per Lord Diplock, and recently *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening)* [2011] QB 218, paras 38-39, per Lord Judge CJ.
>
> 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'."
>
> 55. *An aspect of that approach is that anonymization of a report of a hearing in open court, or of a judgment relating to a hearing in open court, is a departure from the default position founded on the public interest and so the burden of justifying that departure falls on the person seeking that anonymization*."

26. I also found the decisions of Warby J. in the *SWS* litigation especially illuminating, as they too involve the practical application of the principles derived from

the decisions of the superior courts. SWS (who we now know to be a Mr Hemsworth) was a claimant in receipt of disability living allowance. The Department for Work and Pensions (DWP) conducted an investigation into his claim but took no further action and closed the inquiry. However, in the course of the investigation a DWP caseworker had disclosed to the claimant's employer a substantial amount of confidential information about the claimant's health conditions. Mr Hemsworth's solicitors sent the DWP a letter asserting claims for breach of confidence, misuse of information and for breaches of the Data Protection Act 1998 and the Human Rights Act 1998. The DWP duly sought a settlement and made a Part 36 offer which was accepted. The relatively narrow issue before Warby J. was Mr Hemsworth's application for permission for there to be a statement in open court (SIOC) about the settled privacy claim but on an anonymous basis (the DWP was content to make a SIOC, but not in anonymous terms). As Warby J. both framed the question and summarised his answer (*Hemsworth (formerly SWS) v DWP* [2018] EWHC 1998 (QB) at paragraph 37):

> "The applicant's task is to persuade me that justice demands that I allow him to make a SIOC containing all the intimate detail that features in the agreed draft, whilst derogating from open justice by allowing this to be done anonymously. The applicant has failed to persuade me of that."

27. It was common ground before Warby J. that there were two relevant strands of authority that required consideration: a line of cases on the open justice principle and a separate stream of case law on statements in open court. As to the former, Warby J. summarised the principles to be applied as follows (Mr Helme appeared in those proceedings for Mr Hemsworth and Mr Eardley for the DWP):

> "(A) *The open justice principle*
>
> 21. This must be the starting point, as Mr Helme agreed in his reply submissions. The principle, and its implications, are not in doubt. The well-known authorities cited on this application include *Scott v Scott* [1913] AC 417, *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966, 978 (Lord Woolf MR), *Re Guardian News and Media Ltd* [2010] 2 AC 697 [52], *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645 [21], The Master of the Rolls' *Practice Guidance: Interim Non-disclosure Orders* [2012] 1 WLR 1003 [9]-[15] (White Book 2018 p.2536), *Khuja v Times Newspapers Ltd* [2017] 3 WLR 351 [15] and *Khan v Khan* [2018] EWHC 241, [81]-[93] (Nicklin J). Also relevant are Parts 5 and 32 of the CPR.
>
> 22. Key points to be derived from the CPR and these authorities include the following:
>
> (1) Open justice is a fundamental principle. Any derogation from it requires justification. Derogations "can only be justified in exceptional circumstances, when … strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional [and] should, where justified, be no more than strictly necessary to achieve their purpose" (Practice Guidance [10]).
>
> (2) A derogation from open justice is only strictly necessary to secure the proper administration of justice where "the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made" (*Scott v Scott,* 439 (Viscount Haldane LC)) or, putting the same point another way, "the administration of justice would be rendered

impracticable … 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" (Ibid, 446, Earl Loreburn).

(3) "The burden of establishing any derogation from the principle lies on the person seeking it. It must be established by clear and cogent evidence" (Practice Guidance [13])

(4) Open justice, as a general rule, requires that litigants be identified to the public. Parties' names must be given when proceedings are issued. "The general rule is that the names of the parties to an action are made public when matters come before the court, and included in orders and judgments of the court" (*JIH* [21(1)]). Party anonymity is therefore a derogation from open justice, which requires justification as strictly necessary, and no more than strictly necessary, according to the principles stated above.

(5) "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". (*JIH*, [21(4)])

(6) "Where the court is asked to restrain the publication of the names of the parties … 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": (*JIH*, [21(5)]).

23. As Mr Eardley points out, it would be wrong to read this last proposition as imposing a burden on the respondent to an anonymity application, to identify a public interest in naming a party. That would be at odds with principles (1) to (5). The proposition originates in the Supreme Court's decision in *Re Guardian News and Media.* It is clear from that decision as a whole that the burden is on the party seeking a derogation from open justice. The question of whether there is a specific public interest in naming a party arises only once that party has shown that the application of the usual principle would result in some interference with their Convention rights going beyond what is generally to be expected by a claimant in litigation.

24. In practice, the application of these principles normally leads to the grant of anonymity to claimants seeking injunctions to prohibit the disclosure of personal information. The court will commonly set out in its judgment the nature of the information at issue, but withhold the identity of the individual to whom it relates. The public interest tends to favour the resolution of the competing considerations in that way: see *JIH* at [33]."

28. *Hemsworth (formerly SWS) v DWP* was decided in July 2018. The matter came back before Warby J. in September 2018, when the issue was "whether anonymity should be preserved come what may" (*Hemsworth (formerly SWS) v DWP (No.2)* [2018] EWHC 2282 (QB) at paragraph 7); thus "SWS now seeks anonymity in his present capacity as an unsuccessful applicant for an anonymous SIOC" (at paragraph 11). Accordingly, the question was "whether SWS has now adduced 'clear and cogent evidence' which establishes that there are 'exceptional' circumstances

which show that it is 'strictly necessary' for his name to continue to be withheld from the public in perpetuity" (at paragraph 10).

29. The way that *Hemsworth (formerly SWS) v DWP (No.2)* was argued is instructive, not least because of the close parallels with the current appeal. The applicant's case in *Hemsworth*, as here, was that continued anonymization was necessary because of a real risk to his health and private life if he were named, whereas there was no significant public interest in naming him. In particular, the applicant's identity was said to be of no real relevance to the facts or issues. Counsel for the applicant, posing the question "What's in a name?" (see *Re Guardian News and Media Ltd* [2010] 2 A.C. 697 per Lord Rodger of Earlsferry at paragraph 63), suggested the answer is "nothing, really", a point echoed by Mr Callus in the present appeal – indeed, an argument he submitted carried extra force given the present context of FOIA, where the legislative regime is applicant- and motive-blind.

30. Warby J. set out the conceptual framework for his approach in *Hemsworth (formerly SWS) v DWP (No.2)* in the following terms (emphasis added in paragraph 22):

> "21. One of the best-known statements of principle in this area is that 'where the Court is asked to restrain the publication of the names of the parties… 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': *JIH v News Group Newspapers* [2011] EWCA Civ 42 [2011] 1 WLR 1645 [21(5)]. It can sometimes be tempting to treat this test as exhaustive of the relevant principles. If that were the position, then the applicant might prevail on this application. His identity may well add nothing of any great significance to the 'stories' which are told in the First Judgment.
>
> 22. But, as noted in the First Judgment at [23], that would be a wrong approach. Read in its proper context, the passage cited encapsulates a subsidiary principle which only comes into play if and when the party seeking anonymity has shown that the application of the usual rules about open justice would result in some interference with their Convention rights going beyond what is generally to be expected by a party to litigation. *Open justice is always the starting point; derogations can only be justified to the extent that they are necessary; and, as is rightly accepted by Mr Helme, the burden of adducing evidence and/or reasons to justify a derogation from open justice always falls on the applicant for such an order. These are all established principles, founded on important public interest considerations."*

31. Mr Callus sought to persuade me that the *SWS* decisions could properly be distinguished. This was on the basis that the *SWS* litigation arose out of a privacy claim and was concerned with the terms for making a SIOC. There was, he noted, an inherent paradox in Mr Hemsworth's case in that he was seeking a remedy grounded in vindication (a SIOC) while at the same time seeking the protection of a cloak of anonymity in the very same proceedings. The present case, by contrast, was very different. The Appellant was not seeking vindication but rather the limited protection of an anonymity ruling to avoid interference with his privacy rights.

32. I start with the obvious point that the *SWS* decisions are not strictly binding on me. The Upper Tribunal is not bound by decisions of the High Court where the Upper Tribunal is in effect exercising a jurisdiction formerly exercised by the High Court

(*Chief Supplementary Benefit Officer v Leary* [1985] 1 W.L.R. 84). Likewise, as a court of record, the Upper Tribunal is not bound by decisions of the High Court where a co-ordinate jurisdiction is being exercised (*Gilchrist v Revenue and Customs Commissioners* [2014] UKUT 162 (TCC); [2015] Ch. 183). All that said, the *SWS* litigation was decided by a judge with a considerable wealth of experience and expertise in the arena of privacy rights. Moreover, Warby J. made it clear that there were two distinct streams of authority – the open justice case law and the separate SIOC authorities. The first is a freestanding body of jurisprudence which is wholly independent of the SIOC context. Furthermore, while *Hemsworth (formerly SWS) v DWP* was undoubtedly decided in the SIOC context, *Hemsworth (formerly SWS) v DWP (No.2)* was a consequential anonymity ruling. Ms Coyne understandably relied in her submissions on paragraph 22 of Warby J.'s judgment in *Hemsworth (formerly SWS) v DWP (No.2)*, and drew my attention especially to the italicised passage cited at paragraph 30 above. She was right to do so, as it is plainly an accurate summary of the relevant case law from the superior courts.

33. Does it make any difference that the Appellant here is the party who instituted the proceedings in the first place? In terms of legal analysis, this is where there was some parting of the ways as between Mr Callus and Ms Coyne. In *R v Legal Aid Board ex p. Kaim Todner* [1999] Q.B. 966, the Court of Appeal acknowledged that in general "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" (at 978F). At the same time, the Court referred to a more nuanced approach (at 978E, emphasis added):

> "A distinction can also be made depending on whether what is being sought is anonymity for a plaintiff, a defendant or a third party. *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.* 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."

34. Mr Callus's argument was that *ex p. Kaim Todner* was a decision that now needed to be treated with some circumspection. It was, of course, a pre-Human Rights Act 1998 (HRA) authority (or at least certainly a pre-HRA implementation decision) and in Mr Callus's submission it failed to reflect the modern Strasbourg jurisprudence. Ms Coyne for her part contended that *ex p. Kaim Todner* remained good law, as shown by the reliance placed upon it by Warby J. in both *SWS* decisions (see *Hemsworth (formerly SWS) v DWP* at paragraph 23 and *Hemsworth (formerly SWS) v DWP (No.2)* at paragraph 22), with the references to interference with a party's Convention rights "going beyond what is generally to be expected by a claimant [or party] to litigation". Likewise, I note that in *Khuja v Times Newspapers Ltd* [2017] UKSC 49; [2017] 3 W.L.R. 351 (at paragraph 14) Lord Sumption cited with approval Lord Woolf MR's warning in *ex p. Kaim Todner* (at 977E) against "the natural tendency for the general principle [of open justice] to be eroded and for exceptions to grow by accretion as exceptions are applied by analogy to existing cases".

35. In my judgement it remains the case that there is a potential distinction to be drawn between the various different categories of participant in any given set of proceedings – but the real question is how that distinction plays out in the context of

the ultimate balancing test. I am not at all sure the Court of Appeal in *ex p. Kaim Todner* was seeking to establish some hard-edged proposition of law that turned on the precise status of participants in legal proceedings. Rather, it may just be that simply on the facts in any given case it is likely in practice to be more difficult for the appellant who brought the case to court to argue convincingly for anonymity than it may be for e.g. a witness in legal proceedings. Contrary to Mr Callus's submissions, I am satisfied that the fundamental approach in *ex p. Kaim Todner* has survived the advent of the HRA, given its approval in several more recent decisions of the highest authority, even if the Court of Appeal's approach in that case might now be expressed using rather different terminology.

Analysis: application of those principles to the facts

36. Furthermore, notwithstanding Mr Callus's carefully constructed submissions, I can identify no error of law in the First-tier Tribunal's ruling to refuse the Appellant anonymity. It was telling that at no point in his extensive oral submissions did Mr Callus actually take me to the precise terms of either of Judge McKenna's rulings, whereas that was (quite rightly) the starting point for Ms Coyne's submissions. True enough, the First-tier Tribunal did not in terms refer to the ultimate balancing test, but within the scope of a concise interlocutory ruling it is clear that Judge McKenna engaged in a suitably "intense focus on the comparative importance of the specific rights being claimed in the individual case", as required by *Re S (A Child) (Identification: Restrictions on Publication)*.

37. A comparison between that authority and the present case is informative. *Re S*, of course, was a case in which it was abundantly clear that Articles 8 and 10 were both engaged and that both carried some considerable weight. On the one hand the child in question was facing "dreadfully painful times" as his mother was standing trial for the murder of his older brother (see paragraph 24). On the other hand, the case concerned "the freedom of the press, subject to limited statutory restrictions, to report the proceedings at a criminal trial without restriction" (paragraph 28).

38. In the present case Articles 8 and 10 were likewise engaged, even if the weight to be attached to the competing interests might not be put in quite such stark terms. The Appellant obviously enjoyed a right to privacy in relation to the details of his medical conditions. The question then was the weight to be attached to that interest. Judge McKenna's conclusion that there was no need to introduce such evidence is unassailable, given the terms of the original request to PSB 3 under FOIA and the grounds of appeal to the First-tier Tribunal. In this context Mr Callus's submission that the Appellant's name was of no wider interest or relevance, given that FOIA is applicant-blind and motive-blind, cuts both ways. If FOIA is applicant-blind, then the starting point is that the Appellant's own personal circumstances are immaterial. It is certainly difficult to see how his medical conditions in themselves could show that the Information Commissioner's decision notice "was not in accordance with the law" (FOIA, section 58(1)(a)).

39. The high point of the Appellant's case as it relates to Article 8 was said to be Ground 5 of the substantive appeal, namely the allegation that both PSB 3 and the Information Commissioner had breached the Appellant's Article 6.1 rights to a fair hearing. The Appellant's case was that PSB 3 was not an "independent and impartial tribunal" and that the Commissioner herself had failed e.g. to be impartial, to consider the Appellant's arguments and to give adequate reasons. However, the focus of Article 6 is inevitably on issues of due process. It is difficult to see how confidential and detailed evidence of the Appellant's medical conditions may have any real bearing on such matters.

40. It follows, accepting for the present that Article 8 is actually engaged, that the weight to be attached to the Appellant's privacy rights is limited. The voluntary but unnecessary placing of private information into the public domain counts for little in the ultimate balancing test. While as a matter of principle neither Article 8 nor Article 10 takes priority, on the facts the only possible conclusion is that the principle of open justice prevails. In the circumstances of this case the Appellant has failed to justify any derogation from that principle. The fact that the Information Commissioner anonymises her own decision notices, including the decision notice that prompted the appeal in these proceedings, is neither here nor there, as the Commissioner is not a court of tribunal, where different considerations apply – see also paragraph 22 of Warby J.'s judgment in *Hemsworth (formerly SWS) v DWP (No.2)*, cited at paragraph 30 above. As Lord Sumption put it neatly in *Khuja v Times Newspapers Ltd*, "necessity remains the touchstone of this jurisdiction" (at paragraph 14).

41. As to necessity, a key plank in the Appellant's arguments is that without the protection afforded by an anonymity ruling he is at risk of being identified as the litigant in the previous High Court and Court of Appeal proceedings, where he undoubtedly did (and still does) enjoy the benefit of such an order. But, as Ms Coyne put it in her written submission, "there is no rule of law that anonymity in later proceedings will be granted as a matter of course merely because an Appellant has secured it in earlier proceedings in a different Court and those proceedings are alluded to in later proceedings" (Response at §33). Ms Coyne identified several features of the present case which indicated that the risk of cross-identification is "negligible". These were that:

- The previous proceedings in the High Court and Court of Appeal remain anonymised;
- As such, it follows by definition that any internet search engine inquiry using the Appellant's surname (if disclosed in these Tribunal proceedings) will not generate any link to those judicial review proceedings;
- Those judicial review proceedings are not extant and have not been live for several years;
- There is no evidence whatsoever of any wider public interest in those proceedings either at the time or since;
- The Appellant himself is an ordinary citizen with no public profile.

42. There is considerable force in those submissions, so much so that for myself I would regard the risk of jigsaw identification in this case as not so much negligible as rather less than negligible. The Appellant has produced copies of three interlocutory court rulings and one order refusing permission to appeal arising from the judicial review proceedings brought against PSB 2. There is no copy on this appeal file of a reasoned judgment on either an application for permission to apply for judicial review or an application for judicial review proper. However, it may well be that the Appellant is labouring under a misunderstanding as to the way in which court cases are reported (or not). Whereas superior court judgments may end up on a publicly accessible database, interlocutory rulings and orders are frankly legal ephemera that only rarely surface on the internet. In any event, I bear in mind that the standard legal databases used by lawyers (with the benefit of the relevant subscriptions) to access case law are in no way comprehensive and, historically at least, certainly do not include all High Court and Court of Appeal judgments, let alone other rulings.

43. My assessment as to this low level of risk of identification, based on the parties' written and oral submissions, was reinforced (although I did not need to rely on this)

by a simple exercise I carried out after the hearing. I searched Westlaw, Lexis Nexis and Lawtel for any decision in which PSB 2 was a party – a search I was able to undertake, of course, using PSB 2's actual name. This generated three overlapping, but not identical, case lists. However, I could find no reference on any list to any case which could in any conceivable way be linked to the Appellant, even using the data gleaned from the copies of the High Court and Court of Appeal rulings he has provided in the present proceedings. A similar targeted search using the public access search engine BAILII, which again does not include all High Court and Court of Appeal judgments and rulings, was no more informative (and in fact rather less so).

44. The necessity argument was also put by the Appellant in another way. In his grounds of appeal to the Upper Tribunal, the Appellant asserted that "he would be forced to abandon the case if steps are not taken to ensure that his privacy will not be breached, as to proceed otherwise would cause him to suffer severe distress and mental harm" (p.101). Mr Callus reiterated that point in his oral submissions. This is not an attractive argument for at least two reasons (I leave to one side, and do not need to resolve, Ms Coyne's submission that there is in fact no hard evidence of such a harmful potential outcome). The first is that, for the reasons outlined above, I do not accept that there is, in the circumstances of this case, any appreciable risk of a breach to his privacy. And as Warby J. put it in *Hemsworth (formerly SWS) v DWP*, "if the detail is not necessary, any justification for anonymity falls away" (at paragraph 52). The second is that such an argument means that a party is in effect seeking to engage in legal proceedings subject to the open justice principle on their own terms, rather than on the court or tribunal's terms, which can appropriately weigh the competing considerations and interests. The Court of Appeal forcefully put the counter-argument in *ex p. Kaim Todner* at 978G-979B as follows (emphasis added in the concluding paragraph):

> "9. There can however be situations where a party or witness can reasonably require protection. In prosecutions for rape and blackmail, it is well established that the victim can be entitled to protection. Outside the well-established cases where anonymity is provided, the reasonableness of the claim for protection is important. Although the foundation of the exceptions is the need to avoid frustrating the ability of the courts to do justice, 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.
>
> *Conclusions as to this appeal*
>
> This last point is particularly relevant to the claims for anonymity in this court which the appellants are putting forward. 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.* The appellant had secured anonymity until the end of the appeal and they could not reasonably ask for more."

45. Finally, at least as regard the weighing of Articles 8 and 10, and again bearing in mind the touchstone of necessity, I am entirely satisfied that the First-tier Tribunal that eventually hears and determines the substantive appeal can write its decision in such a way as to minimise still further the remote risk that there could be any interference with the Appellant's privacy rights. I have drafted the present decision with that aim in mind. On a practical level, the fact that the Appellant has opted for a telephone hearing will further reduce that very low risk.

46. The Appellant's claim fares no better in the ultimate balancing test when Article 6.1 is invoked, for two main reasons. First, there are obviously the wider interests of public confidence in the administration of justice, and so there are strong competing Article 6.1 rights. Second, the Appellant's Article 8 arguments involve Article 6 considerations (e.g. the question of whether there is any risk that the previous anonymity orders in judicial review proceedings will be jeopardised, and the access to justice argument based on the Appellant's stated unwillingness to proceed in the absence of an anonymity ruling in these proceedings). The Appellant's Article 6.1 arguments essentially stand or fall with those put under Article 8.

The First-tier Tribunal's ruling

47. I am therefore satisfied that the First-tier Tribunal's decision was the correct one on the facts and involves no error of law. The Appellant's grounds of appeal are not made out. Judge McKenna was entitled to conclude that the Appellant's confidential medical information did not need to be referred to. For the reasons given above, her refusal to make an anonymity ruling did not breach the Appellant's Article 6 and/or Article 8 rights. As the Judge compendiously put it, "it does not seem to me that I can place a higher value on the Appellant's reluctance to proceed if not anonymised than on the constitutional principle of open justice without strong and fact-specific justification which do not in my judgement apply in this case". It 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. Busy judges sitting at first instance and dealing with a pile of interlocutory applications cannot be expected to write a small treatise justifying each and every ruling. Moreover, the statutory duty to give reasons only applies to a tribunal decision "which finally disposes of all issues in the proceedings" (Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976), rule 38(2)). It is also well-established that reasons for interlocutory decisions can be summary in nature: see *Carpenter v Secretary of State for Work and Pensions* [2003] EWCA Civ 33 (reported as R(IB) 6/03) at paragraph 25 and *KP v Hertfordshire County Council* [2010] UKUT 233 (AAC) at paragraphs 22-30. The reasons in the present case were more than merely summary and were more than sufficient to show that the Tribunal had not misdirected itself in law in any way.

Conclusion

48. I conclude that the decision of the First-tier Tribunal involves no error of law for the reasons summarised above. I therefore dismiss the Appellant's appeal against the ruling of 21 December 2017. (Tribunals, Courts and Enforcement Act 2007, section 11).

Postscript on *D v Information Commissioner* nomenclature ruling

49. The time limit in the information rights jurisdiction for making an application to the Upper Tribunal for permission to appeal to the Court of Appeal is one month from the date that the Upper Tribunal's written reasons are issued: see Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), rule 44(4)(a). The one-month time limit may also run from one of the special circumstances set out in rule 44(4)(b) and (c), e.g. notification that an application under rule 43 for the decision to be set aside for procedural reasons is unsuccessful. I therefore direct that D's anonymity will remain in place until at least one month after the date this decision is issued to him (or such later date as is required by rule 44(4)(b) or (c)). The effect of this decision is that (barring one of those special cases) anonymity will be removed one month after this decision is issued, unless within that time the Appellant makes an application to the Upper Tribunal for permission to appeal to the Court of Appeal. In that event, and subject to any contrary order of the Court of Appeal, the nomenclature ruling will

continue until disposal of that permission application and any ensuing appeal and will then be discharged.

50. It follows that this Upper Tribunal decision, when first allocated a neutral citation number (NCN), will be known as *D v Information Commissioner*. Once the time for appealing has expired, and assuming no such application for permission has been made, then after that date the decision will be known as *[Appellant's surname to be inserted] v Information Commissioner*.

Signed on the original
on 21 December 2018

Nicholas Wikeley
Judge of the Upper Tribunal