[2019] UKFTT 0411 (TC)

TC07226

PROCEDURE – application for anonymity – mental health issues – risk of reputational damage – application REFUSED – this decision anonymised to give appellant choice whether to proceed with appeal and/or seek permission to appeal this decision

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: xxxxx

BETWEEN

JK **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Decided on the papers after an application made by the appellant in person

DECISION

INTRODUCTION

1. The appellant applied to the Tribunal on 25 May 2018 for permission to lodge a late appeal with HMRC against 7 assessments spanning the tax years 2003/4-2009/10 which were all dated 22 May 2012 but which he did not seek to appeal until 8 July 2014, and which appeal by letter dated 31 July 2014 HMRC refused to accept on the grounds that he did not have a reasonable excuse for the late lodging of it.

2. The hearing originally called to hear the application was adjourned; the Tribunal is in the process of re-listing the hearing. On 5 March 2019, the appellant made an application for the case to be heard 'anonymously on the advice of the appellant's police safeguarding team'. No further explanation was given, although the Tribunal was provided with a copy of a psychiatric report on the appellant dated 11 February 2019.

3. By letter dated 4 April 2019, the Tribunal gave the appellant the opportunity to say more about his application for anonymity and drew to his attention the need to establish solid grounds for anonymisation. The Tribunal also drew his attention to the recent case of *Zeromsky-Smith v United Lincolnshire Hospitals NHS Trust* [2019] EWHC 552 on the basis that, while factually very different, it contained an informative discussion the principles courts and tribunals would take into account when deciding an application for anonymisation.

4. By letter dated 23 April 2019, the appellant provided further but still brief grounds in support of his application for anonymity. By letter dated 17 April, HMRC had already said that they remained neutral in the application.

GROUNDS OF THE APPLICATION

5. The grounds the appellant put forward to support his application for anonymisation were as follows:

(1) HMRC did not object to the application;

(2) Case-law such as *Zeromsky-Smith* was irrelevant as, unlike the appellant in that case, he was not suing for damages;

(3) He relied on his mental health as grounds in his application to be allowed to appeal out of time, but publication of details of his mental health might cause reputational damage to his business;

(4) Discussion of his mental health would inevitably result in references to his previous criminal behaviour and thus have 'safeguarding' issues for him;

(5) Case-law such as my decision in *The Appellant* [2016] UKFTT 839 (TC) supported anonymisation of cases where mental health issues were concerned.

MY APPROACH TO THE FACTS IN THIS APPLICATION

6. The grounds of the appellant's application for anonymity are closely allied to his grounds for seeking permission to appeal out of time and that is his case that he has a life- long mental disorder and in particular hyperkinetic disorder, more commonly referred to as attention deficit hyperactivity disorder or ADHD for short.

7. The first procedural question I have to address is when to make a decision on the application for anonymity in an appeal in circumstances when the evidence relied on is also the evidence to be relied on in the substantive issue in the hearing. On the one hand, it is inappropriate and unfair for me to make findings of fact relevant to the question of whether he

should be allowed to lodge his appeal late before the hearing of that issue takes place, while, on the other hand, the question of whether that hearing should be in private really needs to be decided in advance. It needs to be decided in advance as the Tribunal will need to know whether members of the public must be excluded and it is fairest if the appellant himself knows whether the hearing will be in public before it takes place.

8. I have therefore decided to proceed on the basis that, for the purpose of this application for anonymisation only, I will proceed on the assumption that the appellant can prove all that he claims about his mental condition. If, having made those assumptions, I do not consider anonymisation justified then I will refuse the application and the parties will know in advance that the hearing of the late appeal application will not be in private and the decision after the hearing will be published referring to the appellant by name. If, however, having made those assumptions, I would be minded to grant anonymisation, it seems to me that the only fair way of proceeding would be to hold the hearing in private at which both the application for anonymisation and late appeal would be decided on the basis of the facts as actually found and not assumed. Then, if the anonymisation application failed at the hearing, the decision recording the outcome of the appeal would be published naming the appellant.

9. Having decided to precede in making this determination about anonymisation on the basis of assumed facts, what are those assumed facts? The assumed facts are as follows:

(1) The appellant suffers from ADHD. It is a condition which has affected him since birth, making him restless, impulsive, disorganised and have difficulties with concentration. He has poor memory and is easily distracted when working.

(2) His professional career was in giving tax and accountancy advice, first in HMRC and then in professional firms. His ADHD made it difficult for him to hold down employment and he became self-employed in around 2004.

(3) Due to his ADHD, he has a personality that is prone to addiction and in the period 2009-12 he engaged in substance abuse; he took cocaine and drank up to a bottle of gin per day. He considered that in the past he also had an addiction to sex, and at some point he was convicted of an offence relating to pornography for which he was given two years' probation and a Sexual Offences Prevention Order.

(4) He was diagnosed with ADHD in 2017. Since then, he has been on medication which makes the symptoms less severe and he is now less distracted and less disorganised and more able to run his tax/accountancy business effectively.

10. As I have said, I have only assumed these facts for the purpose of this determination. They remain unproved and would have to be proved at the hearing of the late appeal application if the appellant wishes to rely on them. Whether the facts as alleged would be sufficient for him to be successful at the hearing of his late appeal application is something that must also be left to that hearing.

11. I move on to consider the law relating to anonymisation of judicial hearings and decisions.

THE LAW

12. The rules of the High Court (CPR) do not bind this Tribunal but they are a guide to how it should exercise its discretion. It seems to me that the rules in the CPR on anonymisation of decisions are a good guide. High Court case law makes clear the importance of open justice:

> 'The hearing of a case in public may be, and often is, no doubt, painful, humiliating or deterrent both to parties and to witnesses, ….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.'
>
> Per Lord Atkinson in *Scott v Scott* [1913] AC 417

13. Having said that, the courts have always recognised that that in some circumstances, in order to truly administer justice, anonymity has to be granted. So cases involving the insane or children, or cases where publication of the subject matter would defeat the purpose of the litigation, have been held in private and/or anonymised. The CPR expressly recognise the case law on this by authorising anonymisation where:

> (d) a private hearing is necessary to protect the interests of any child or protected party; or … (g) the court considers this to be necessary in the interests of justice. (CPR 39.2(3))

14. The appellant is not the first to suggest that open justice is still served if the decision is published but the claimant's name anonymised. This was considered in *In re Guardian News and Media Ltd* [2010] 2 AC 697 where Lord Rodger stated (§§63-65) that freedom of the press and open justice required the names of all parties to be public because the public find stories about real individuals more interesting than bland decisions from which identifying information is removed.

15. And, as I have said, this Tribunal has applied a similar test to that in the Courts. In *In Re Mr A* [2012] UKFTT 541 (TC) – later republished as *Moyles),* the Tribunal said:

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

16. Applications have been refused by this Tribunal where a celebrity risked reputational damage (*Moyles,* above, and *Martin Clunes* [2017] UKFTT 204 (TC)), and where a professional risked being barred by his professional body (*Chan* [2014] UKFTT 256 (TC)*)* and where a doctor wanted to keep her private tax affairs confidential from her patients (*In Re Banerjee* [2009] EWHC 1229 (Ch)). In that last case, Henderson J said:

> "[34] … In my opinion any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that this basic principle should not be whittled away. However, the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform.
>
> [35] …taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane seeming tax dispute. …. in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat."

17. The appellant referred me to my own decision in *The Appellant* [2016] UKFTT 839 (TC) where I ordered anonymity as the taxpayer was a paranoid schizophrenic, saying at [16]:

> …..While it is in the interests of justice being seen to be done that decisions are not ordinarily anonymised, in this case I considered that the appellant's illness was an exceptional circumstance. This was because mental illness should not be a bar to challenging HMRC decisions, so it is right to grant anonymization of this decision, so other litigants with mental illness are not discouraged from appealing.

18. On reflection, however, it seems to me that in light of the above binding authorities such as *Scott v Scott* (above), while my decision to grant anonymity in that case was correct, the reasoning ought to have been better expressed. In particular, it is clear from the citation above from *Scott v Scott* that the mere fact that holding the hearing in public and/or publishing the decision might deter would-be litigants from litigation is not enough to justify anonymisation. The test is whether anonymisation is necessary for justice to be done. So if the harm from publication is likely to be sufficiently serious such that a litigant would not realistically be able to assert his or her rights then it can be said that anonymisation is necessary for justice. For instance, asylum seekers might be granted anonymity in immigration tribunal hearings where the Tribunal considers there is a real risk of serious reprisals against the asylum seeker or his family back in the country from which the litigant seeks asylum.

19. The special position which justifies anonymisation for underage or insane litigants may in part be to ensure that they are not discouraged from litigation but also appears to be on the basis that actions taken as children or while insane should not be known about them or held against them when adult or restored to mental health. It seems to me that children and the insane are in a special position because their decision making is impaired by reason of their disability; they cannot be regarded as responsible adult human beings. The same protection is not routinely justified for adults who are not insane.

Summary of the law

20. To justify anonymity the appellant would have to satisfy me that it was necessary for the proper administration of justice. That means I would have to be satisfied that, despite the very real need for justice to be seen to be done, justice could not be done if it was done in public in this particular case. While the category of cases where this is true is not closed, most cases where anonymity has been granted could be summarised as cases where the risk of harm to the litigant from publication was very significant such that justice could not be done if done in public.

CONSIDERATION OF THE APPELLANT'S CASE FOR ANONYMITY

21. As I set out above, the appellant put forward five reasons for anonymity and I will deal with each but not in the same order as given by the appellant.

HMRC did not object to the application?

22. It must be the case that HMRC's failure to object to the application does not in law support the application. HMRC's neutrality is to be expected: they have nothing to gain or lose if the application is allowed. But it certainly does not mean that the application will be nodded through (see [21] of *Zeromska-Smith).*

23. While HMRC might be neutral, the public at large might have objections: the Tribunal is established to administer justice and justice must not only be done, but be seen to be done. The public at large cannot voice objections but, as stated in *Zeromska-Smith,* the Press Association, as a proxy for the public, can voice objections if made aware of the application. I

would need to consider making the Press Association aware of this application if I was minded to grant it.

The applicability of *Zeromska-Smith*?

24. I dismiss the appellant's second objection, which was that *Zeromska-Smith* was irrelevant as it concerned a claim for damages; the appellant was told when the case was drawn to his attention that it was being pointed out to him for the legal principles it contained and not because of any similarly in the nature of the legal proceedings. On the contrary, I find the decision a useful summary of the case law and in that sense relevant to this application.

Mental illness?

25. There is a category of person knowledge of whose condition is normally kept from the public. It clearly encompasses the insane or those suffering with certain mental illness. But whether this protection should extend to more minor mental illness or to what are referred to as personality disorders or other non-neuro-typical behaviours should be determined by reference to the reason why the protection is given.

26. My conclusion at §19 above is that the special protection is given to those who cannot, by reasons of age or mental disability or disturbance, be regarded as responsible adult human beings.

27. And it seems to me that the appellant cannot claim protection on these grounds. While I am making the assumption that he can prove that he suffers from ADHD and is prone to addiction, and that this impacts on his behaviour, it is also his case that he can function as an adult and can run a business.

28. It may be difficult if not impossible to draw the line between certain non-neuro typical personalities, behaviours disorders and illnesses which do not of themselves justify the protection of anonymity and others which do, but I am clear that on the appellant's own description of his situation he has not crossed that line.

29. He relies on my decision in *The Appellant* concerning a paranoid schizophrenic. But paranoid schizophrenia is a serious mental illness that on the evidence in that case meant the appellant could not function as a responsible adult. While it was true that by some means or another she was able to let property which she had acquired before her illness incapacitated her from earning her living, it was also true that she did not act as a responsible adult (see [26]), apparently regularly and unjustifiably complaining to the police about her tenants, behaviour which was against her own interests as a landlord and quite likely in breach of the tenancy agreement (see [24]). She also lacked insight into her own mental condition (see [19]) and even in the hearing demonstrated irrational behaviour driven by her paranoia (see [17]-[19]).

30. While it is true that the appellant's case in this appeal, which I assume to be true for the purpose of this decision, is that his ADHD and addictions means that he does not always act in his own long-term best interests, it is also his position that he is capable of and does run a successful business. He is also clearly capable of recognising the shortcomings in his behaviour. The degree of his impairment, even on his own case, is much less than that of a paranoid schizophrenic and in my mind has clearly not crossed the line to justifying anonymity as being a person who should be protected by reason of incapacity.

Risk of harm to reputation

31. The second related ground put forward by the appellant was that public knowledge of his ADHD and other behaviour issues risks reputational damage for his business, such that it might mean his right of appeal would in practice be difficult to exercise: defending the appeal risks jeopardising his livelihood.

32. I reject that as a ground justifying anonymity. While I accept that in the case of asylum seekers referred to at §18 above anonymity can be justified because the right of appeal is impossible to exercise without real risk of serious physical harm, the case law also makes clear that risk of reputational damage does not fall into that same category. See the citation from *Scott v Scott* and the cases referred to at §16 above.

33. Indeed, it might be said that justice positively requires the hearing to be in public. And that is because justice requires that the courts do not, and are not seen to be, assisting the appellant in putting forward inconsistent images of himself. On the one hand, it is his case that his ADHD is both the cause and excuse for his failure to file his own tax returns; while on the other hand, he does not desire his clients and potential clients to know of his ADHD as it may make them doubt his ability as a tax adviser.

34. Having said that, the appellant's position here is probably more nuanced. His position is that his ADHD *in the past* was the cause and the excuse for his failure to file his own tax returns in the years and lodge a timely appeal: it is his position that now, on the prescribed medication, he is capable of running a tax advisory service.

35. But, on reflection, I do not think that it makes a difference to the application: reputational damage would not usually justify anonymity and that is particularly so when, even on the appellant's case, he is putting forward a seeming paradox (which he may be able to explain) of claiming an impairment in dealing with his own tax affairs while (at least to some extent) it appears at the same time he was holding himself out as able to deal with other persons' tax affairs.

Risk of harm - safeguarding issues

36. The appellant does not make clear what he means by 'safeguarding' issues. I can only assume he means that he does not want it known that he has had addiction issues and a criminal conviction in his past because of the concern that criminals might use the information against him, such as trying to sell him drugs again or blackmail him over his conviction.

37. However, that risk will always be there to a greater or lesser extent in any case where a litigant has a history that is an embarrassment to him- or herself. It is clear from *Scott v Scott* that is insufficient reason for the decision to be anonymised.

38. Nevertheless, it seems to me that that risk does justify the tribunal withholding the appellant's contact details: in practice it would be rare indeed for the contact details for an appellant to be included in a decision notice and I am quite prepared to order that they should not be published in this appeal. The appellant's contact details are, so far as I can see, quite irrelevant to the case and there would be no reason to publish them in any event. Private addresses are sometimes referred to in a hearing so I am also prepared to order in this case that the appellant's contact details should not be referred to in open court and should be redacted from any documents to which the public would have access.

39. Withholding the appellant's contact details minimises the risk of contact from strangers while at the same time does not compromise the principle that justice should be seen to be done.

DECISION

40. I refuse the application for anonymity. I do not consider it justified on any grounds put forward by the appellant. It seems to me that the appellant now has the choice referred to by Lord Atkinson in *Scott v Scott.* He may pursue his appeal in public with the consequent risk of reputational damage if in his appeal he relies on his diagnosis, or he may choose not to pursue the appeal. (If he goes ahead with the proceedings, I would make the order to keep his contact details private as set out in §38.)

41. Nevertheless, I am anonymising this decision on the anonymisation application. That is for two reasons.

42. Firstly, I have said that the appellant should be given the choice: pursue his appeal in public, or withdraw it. It is for him to make that decision. I am not going to make that an empty choice by publishing this decision under his name.

43. Secondly, in any event, he may (as explained below) seek permission to appeal this decision: I will not prejudge any application for permission to appeal nor render it nugatory by publishing his name at this point.

44. The best way of implementing this limited anonymity seems to me to be as follows: this decision will be anonymised. If the appellant pursues his application for permission to make a late appeal and does not successfully apply to appeal my refusal of anonymisation, the Tribunal's hearing of his late appeal application will take place in public and the resulting decision, if published, will be published without anonymity.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 27 JUNE 2019