Neutral Citation Number: [2009] EWHC 1229 (Ch)

Case No: CH/2007/APP/0198

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/06/2009

Before :

MR JUSTICE HENDERSON

- -

Between :

COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and -	
DR PIU BANERJEE	**Respondent**

- -
- -

Mr Sam Grodzinski (instructed by **the Solicitor for HMRC**) for **the Appellants**
Mr Mark Warby QC (acting on a direct access basis) for **the Respondent**

- -

Judgment

JUDGMENT
ON THE APPLICATION BY THE RESPONDENT TO HAVE THE MAIN JUDGMENT ANONYMISED

Mr Justice Henderson :

Should the main judgment be anonymised? Introduction

1. The Revenue's appeal to the High Court was heard in public, in the usual way, on 5 December 2008. No application was made by or on behalf of Dr Banerjee, either before or during the hearing, for the hearing to take place in private. Her previous appeal to the General Commissioners had likewise been heard in public, no direction to the contrary having been made by the Tribunal either upon the application of Dr Banerjee or of its own motion: see regulation 13 of the General Commissioners (Jurisdiction and Procedure) Regulations 1994, SI 1994 number 1812, as substituted with effect from 31 December 2002 by SI 2002 number 2976. On each occasion Dr Banerjee was professionally represented, before the General Commissioners by Stanbridge Associates Limited and before me by Mr Julian Hickey and Berwin Leighton Paisner LLP ("BLP"): see paragraphs 3 and 4 of the main judgment.

2. I circulated my judgment to the parties in draft on 14 January 2009, saying that I intended to hand it down on 20 January and asking for lists of typing corrections and other obvious errors to be submitted to my clerk by 16 January.

3. On 16 January BLP forwarded to my clerk a written submission from Dr Banerjee, in which she gave a number of reasons for requesting anonymity in the judgment for herself and the senior medical colleagues who had written the letters appended to the case stated. In his covering letter, the partner of BLP with conduct of the appeal, Mr Jonathan Levy, said that Mr Hickey and he had "explained the consequences, in terms of publicity, that pursuing litigation in the High Court might have when we were first instructed", but the issue was clearly troubling Dr Banerjee, and he was therefore taking the liberty of drawing it to my attention. I have no doubt that he was right to do so.

4. The reasons given by Dr Banerjee for requesting anonymity were, in essence, that any publicity would be detrimental to her professional reputation and career, and that she had no choice in bringing the matter to the High Court, because she was the respondent to the Revenue's appeal. She drew attention to her position as a single woman, working in the public sector in a public place, where "anyone can easily find me and walk in through the door". She said that she had recently been a victim of identity theft, and was feeling extremely anxious as a result. Her name was an unusual one, she had no receptionist, and there were no "barriers of protection" between herself and the public or the press. She had no resources to deal with public or press enquiries regarding her tax affairs.

5. Dr Banerjee went on to say that she oversees the care of several hundred patients each week in her department, who cover the whole spectrum of society including convicted criminals. She does not want them to know about her personal tax affairs, and publicity for them could give rise to unforeseen consequences. There have already

been attacks on staff at the inner city London hospital where she works, and she has faced aggression from patients on several occasions. She also expressed the fear that any publicity would harm her professional reputation. Senior doctors are expected to keep a low profile outside the academic and professional spheres, and publicity for her tax affairs would be "frowned upon by those in positions of power over my career". She cited the example of a doctor in her speciality who had recently been named in a press article, and who had been formally disciplined as a result.

6. Dr Banerjee went on to submit that her confidential personal details were not relevant to the issues of legal principle discussed in the judgment, and made various suggestions about how the judgment could be anonymised.

7. On 19 January I sent a letter in reply to BLP and copied it to the Revenue. I said that, although I had considerable sympathy with many of the reasons which Dr Banerjee had given for wishing to preserve her anonymity, my firm provisional view was that it was now too late for me to anonymise the judgment, even if the circumstances might have justified a prior request that the High Court hearing should be held in private. My letter continued:

> "The hearing on 5 December 2008 took place in open court and in public, and the findings of fact in the case stated were the subject of submissions on both sides and questioning by myself. Any interested member of the public would be able to obtain a transcript of that hearing, and it seems to me that any rights to privacy and confidentiality that Dr Banerjee might have wished to assert were irretrievably lost at that stage.
>
> I would add that, as I am sure you are aware, it has always been the invariable practice (to the best of my knowledge) for tax appeals by way of case stated to be heard in public, and for the full text of the case to be reported together with the judgment. There is a strong public interest in the precise facts upon which the judgment is based being known, and perhaps particularly so in an area as fact-sensitive as the deductibility of expenses for income tax. Any form of anonymising places the facts at one remove, and may reduce the value of the case as an authority as well as making it harder for an interested reader to follow the judgment. Moreover, I am not clear what jurisdiction, if any, I would have to direct redaction of the case stated now that it has been transmitted to the High Court and been the subject of a public hearing."

8. I went on to note that the consequences, in terms of publicity, of pursuing litigation in the High Court had been explained to Dr Banerjee by Mr Hickey and Mr Levy when they were first instructed, but no application had been made for the hearing to be held in private. Dr Banerjee was of course the respondent to the appeal to the High Court, but she had initially appealed against the amendments to her self-assessments, and she had professional representation at the time. I added:

> "I would have thought it was generally understood by all taxpayers that, if they appeal to Commissioners, there is a

> possibility that the case may proceed to the High Court or beyond, and at that stage their right to confidentiality in relation to that part of their tax affairs will be lost."

I therefore said that I still proposed to hand down the judgment on the following day in its existing form unless I heard that Dr Banerjee still wished to pursue her application, in which case it would be necessary to arrange a further hearing at which I could hear full argument on the point from both sides.

9. My letter prompted a further urgent communication from Dr Banerjee, in which she asked me to delay handing down judgment until she had had an opportunity to seek independent advice on the question and to consult her union. She made it clear that BLP were unable to continue to represent her. In the event, a short hearing took place on 20 January, at which I was addressed by Mr Hickey, who confirmed that BLP felt unable to represent Dr Banerjee in her quest for anonymity, and by Mr Grodzinski, who said that if Dr Banerjee, having taken advice, did pursue her application, the Revenue would oppose it. This represented a hardening of the Revenue's stance, because they had previously indicated that their attitude might be one of neutrality. In the circumstances, and in view of the strength, and evident sincerity, of Dr Banerjee's concerns, I decided to postpone handing down my judgment until she had taken independent advice, and (if she was advised to pursue the application) until it had been determined. My initial reluctance at taking this course, with the inevitable delay that it would occasion, was outweighed by the potential importance of the question and the risk of unfairness to Dr Banerjee in rejecting her application out of hand, despite the very late stage at which it had been raised.

10. In due course Dr Banerjee was able to secure the services, on a direct access basis, of Mr Mark Warby QC, and a timetable was agreed between counsel, with my approval, for the service of sequential written submissions by Mr Warby for Dr Banerjee and Mr Grodzinski for the Revenue. I have had the benefit of an initial submission from Mr Warby dated 17 February 2009, a submission in response from Mr Grodzinski dated 25 March, and a submission in reply from Mr Warby dated 30 March, supplemented briefly on 7 April. In addition, on 25 February 2009 Dr Banerjee issued a formal application notice asking the court to make two orders. The first order that she seeks is that the judgment should be anonymised, in order to protect her private life. The second order sought is described as a "supplemental direction", forbidding the Revenue from disclosing to the public, or any section of the public, any information about Dr Banerjee (such as her name, address, professional status, or details of her medical career or qualifications) which would be likely to lead to her identification as the respondent to the appeal. Dr Banerjee supported her application with a written statement, which repeats and in some respects amplifies the points already made in her earlier submissions to me of 16 and 19 January, and with a proposed anonymised version of the judgment.

11. The application notice requested that I should deal with the matter without a hearing, and in his written submissions Mr Grodzinski made it clear that the Revenue did not positively seek an oral hearing, while indicating their willingness to attend one if the court so wished. In the light of the very full written submissions and citation of authority which I have now received, and for which I express my gratitude to both counsel, I do not consider that an oral hearing is necessary. I therefore accede to Dr Banerjee's request for her application to be dealt with on paper.

The submissions for Dr Banerjee

12. Mr Warby begins by making it clear that Dr Banerjee does not seek a general prohibition on her identification. No order is sought against any third party, and it is accepted that a general reporting restriction prohibiting the use of her name or identity in connection with the case would be a step too far, the case having already been heard in public. Her objective is, rather, to protect her privacy to the extent that is now practicable. If the judgment is anonymised, this will minimise the risk of her being named or identified in reporting of and comment on the court's decision. If she is named or identified, the inevitable consequence is that her private and confidential financial and tax affairs will become public knowledge, and her name will be associated on the internet and elsewhere with a well-known tax case. The hearing of the appeal on 5 December 2008 did not in fact attract the interest of the media, and it has not yet been publicised. Accordingly, so it is argued, anonymising the judgment has good prospects in practice of achieving Dr Banerjee's objective, which is a legitimate one, and which can be achieved without compromising the principle of open justice.

13. Turning to the relevant law, the starting point is that a person's financial and tax affairs are private and confidential in nature. Public authorities, such as the Revenue, which come into possession of such information, by compulsion or otherwise, owe the individual a duty of confidence: see, for example, R v Inland Revenue Commissioners, ex parte National Federation of Self Employed & Small Businesses Limited [1982] 1 AC 617 at 651A per Lord Scarman, referring to the "very significant duty of confidence" owed by the Revenue "in investigating, and dealing with, the affairs of the individual taxpayer". This obligation of confidentiality is now underpinned by the duty laid on public authorities by section 6(1) of the Human Rights Act 1998 not to act in a way which is incompatible with Article 8 of the European Convention on Human Rights. Article 8 provides as follows:

> "*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, or the protection of health or morals, or for the protection of the rights and freedoms of others."

14. These rights and obligations of privacy and confidence are not automatically overridden merely because a person's financial and tax affairs become the subject of litigation. Both the common law and the Convention generally require a hearing to be in public, and judgment to be given in public. However, they do not require that everything the court comes to know about a party or other participant in litigation should be made public. The jurisprudence of the European Court of Human Rights makes clear that the court is obliged to strike a fair balance between the interest of publicity for court proceedings and the interest of a party or third person in

maintaining confidentiality of personal data: see, for example, Z v Finland (1997) 25 EHRR 371 at paragraphs 94 and following. The Strasbourg Court held in that case that disclosure in a judgment of the Swedish Court of Appeal of the name and sensitive medical data of the accused's wife infringed her Article 8 rights.

15. In the domestic context, CPR 39.2(4) empowers the court to order that the identity of any party must not be disclosed "if it considers non-disclosure necessary in order to protect the interests of that party". This is a broad power, and the "interests" involved may include, although they are not limited to, privacy and confidentiality. It is now common, says Mr Warby, for privacy claims to be anonymised, and for judgments in such cases to be reported in a form such as AB v CD. He cites a recent unreported decision of Eady J, Ivereigh v Associated Newspapers Limited, [2008] EWHC 339 (QBD), where anonymity was granted to a witness in a sensitive libel trial, and the judge said with reference to the exercise of the court's discretion under CPR 39.2(4), at paragraph 7 of his judgment:

> "Plainly, that discretion is to be exercised judicially and the modern approach, where competing Convention rights are engaged (as they plainly are here), is to apply an intense focus to the particular circumstances and then, being so informed, to carry out the ultimate balancing exercise …"

Eady J went on to say, in paragraph 10, that the matter could not be determined merely by voicing the mantra of "open justice", and "[t]he importance to be attached to that public policy consideration will depend upon the particular circumstances". One of the reasons why the public and the media need to have access to court proceedings, Eady J added, is that people are entitled to understand the issues which have come before the court and the reasoning processes which have led to the ultimate decision. In the context of the application before him, Eady J commented that only very rarely would the need for such understanding require the identification of a child involved in proceedings. More generally, Mr Warby submits that the identities of parties and witnesses are normally immaterial for this purpose, and that the issues can usually be understood without knowing the identities of the parties.

16. The court will often anonymise its judgment following a hearing in private. Cases of that nature are common, where there is a continuing need to protect the interests which justified the hearing being held in private in the first place. However, submits Mr Warby, the court can in appropriate circumstances anonymise its judgment even after a public hearing, and he refers to two recent cases where this has apparently been done. The first case is an interim ruling in a libel action handed down by Tugendhat J on 5 March 2008, W v J H & A County Council [2008] EWHC 399 (QB). According to information supplied to Mr Warby by junior counsel for the defendants in the case, the claimant sued the defendants over allegations that he had been guilty of sexual harassment, and the judge heard applications by the defendants for summary judgment and other rulings. The hearing took place in public, but did not attract publicity. No application was made by either side for a hearing in private or for any form of anonymity. Nevertheless, the judge decided to, and did, anonymise his judgment, although without making any order to that effect. There was apparently no argument on the point, and the judgment therefore does not set out the judge's reasoning. However, his decision to anonymise must have been based on the sensitive nature of the content of the alleged libel. As Mr Warby puts it, the

anonymisation of the judgment spares the claimant's blushes, but in no way detracts from the value of the judgment to the public as a statement of the issues before the court and how and why they were resolved by the judge.

17. The second case concerns a judgment handed down on 29 January 2009 by Eady J in another libel action, Wakefield v Ford and another [2009] EWHC 122 (QB). The claimant, who traded as "Wills Probate and Trusts of Weybridge" and wrote and advised on the preparation of wills, sued in respect of an allegedly defamatory allegation made against him. Shortly before the matter was due to go to trial, he decided to drop the case. Having rejected a submission that the parties had come to a contractual settlement, the judge then had to deal with the basis upon which costs should be paid on a discontinuance of the action. He held that costs should be paid on an indemnity basis throughout. For present purposes, the significant point is that in the judgment which he handed down, following a hearing in public on 12 January 2009, the judge referred in two places by name to a specialist chancery barrister and to certain advice given by that barrister. The judge subsequently received a request from the barrister, who was in no way implicated in the case, that her name should be redacted from the judgment, to prevent any possible inference of implication being drawn in the future. He acceded to the request, and on 10 February 2009, 12 days after the original judgment was handed down, he issued a revised version.

18. There is no hard and fast rule, submits Mr Warby, that information deployed in court during a public hearing automatically loses its qualities of privacy and confidentiality. Everything depends on the precise circumstances, and the "public domain" doctrine does not operate in this sphere in the same way as it does in relation to issues of commercial confidence or state secrecy. In the case of confidential information of a private and personal nature, the case law establishes that:

    (a) confidentiality is not lost merely because information could be accessed in some way;

    (b) nor is it lost merely because some people do in fact know the information; and

    (c) the key criterion is whether publicity (or further publicity) would cause harm.

    See generally Tugendhat & Christie, The Law of Privacy and the Media, at paragraphs 6.90, 6.93 and 6.98 to 6.99.

19. In the light of these principles, Mr Warby invites the court to apply the "intense focus" referred to by Eady J in Ivereigh to the peculiar circumstances of the present case. He relies in particular on the following points:

    (1) The information at stake is personal, financial and confidential. It forms part of Dr Banerjee's private life. The information was disclosed to the Revenue privately in connection with her taxation affairs.

    (2) Although the information has been deployed, and referred to, in proceedings in open court, it has not in fact received any publicity. It is not yet in the public domain, nor has it lost its attributes of privacy and confidentiality.

(3) Identification of Dr Banerjee in the judgment, and through reporting of it, would result in public disclosure of these personal and private matters, and embarrassment to her.

(4) She has in no way sought such publicity. The Revenue initiated the present proceedings, by appealing from the decision of the Commissioners. Furthermore, the Revenue started the whole process by denying Dr Banerjee relief from taxation in respect of the expenses in issue. It was that act which led to her original appeal.

(5) Far from seeking publicity, Dr Banerjee has at various stages made open offers to settle the case which were not accepted. In the event, she has been successful, but why should publicity for her private financial affairs be the price of that success?

(6) The Revenue's concern, in pursuing the case, is obviously not with the modest amount of tax at stake, but with the general principles affecting the deduction of expenses for taxpayers in employment. The identification of the particular taxpayer in the court's judgment should be a matter of indifference to the Revenue, and her public identification would confer no legitimate benefit or advantage on the Revenue.

(7) Nor would her identification confer any benefit on the public at large, because the court's judgment is readily comprehensible if anonymised in the way that she suggests.

The submissions for the Revenue

20. The Revenue submit, in summary, that:

(a) it would not have been appropriate for the court to direct the appeal to be heard in private, nor to have granted Dr Banerjee anonymity, even if such an application had been made before the hearing of the appeal; and

(b) her present application is even less tenable, given that no such application was made and the hearing took place in public.

21. The starting point is the long-established general principle of English law that justice must be done in public. The general rule may yield to the requirements of justice, but the burden lies on anybody who seeks to displace the general rule: see Scott v Scott [1913] AC 417, especially per Viscount Haldane L.C. at 437-8. Similarly, in Attorney-General v Leveller Magazine Limited [1979] AC 440, Lord Diplock, having referred to Scott v Scott and the requirements of open justice, continued as follows:

> "However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceedings are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the

> exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice."

In R v Legal Aid Board, ex parte Kaim Todner [1999] QB 966, the Court of Appeal said that the speeches in Scott v Scott and Attorney-General v Leveller "make it clear that an exception can only be justified if it is necessary in the interests of the proper administration of justice": see per Lord Woolf MR at 976H, delivering the judgment of the court.

22. The Court of Appeal recognised in ex parte Kaim Todner at 977A that "there are an immense variety of situations in which it is appropriate to restrict the general rule", and that these situations depend very much on their individual circumstances. However, as the court went on to note at 977E:

> "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 makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve."

23. For similar reasons, the court will generally refuse to conceal the name of a party to an appeal: see R v Registrar of Building Societies, ex parte A Building Society [1960] 1 WLR 669 at 687-9 (CA) and Lord Browne of Madingley v Associated Newspapers Limited [2007] EWCA Civ 295, [2007] 3 WLR 289, at paragraph 3 per Sir Anthony Clarke MR giving the judgment of the court.

24. These principles of English law are now also reflected in Article 6(1) of the European Convention on Human Rights, which provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the

> parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

25. In Diennet v France (1995) 21 EHRR 554, the Strasbourg Court at paragraph 33 reiterated

> "that the holding of court hearings in public constitutes a fundamental principle enshrined in Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society …"

See too In re S (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47, [2005] 1 AC 593, at paragraph 15, where Lord Steyn said that the above statement "reiterates the consistent earlier jurisprudence of the European Court of Human Rights" and has subsequently been reaffirmed by the ECHR on numerous occasions.

26. In determining whether it is necessary to hold a hearing in private, or to grant anonymity to a party, the court will consider whether, and if so to what extent, such an order is necessary to protect the privacy of confidential information relating to the party, or (in terms of Article 8 of the Convention) the extent to which the party's right to respect for his or her private life would be interfered with. The relevant test to be applied in deciding whether a person's Article 8(1) rights would be interfered with in the first place, or in other words whether the Article is engaged so as to require justification under Article 8(2), is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy: see Campbell v MGN Ltd [2004] UKHL 22, [2004] 2 AC 457, at paragraph 21 per Lord Nicholls of Birkenhead, and Murray v Express Newspapers Plc [2008] EWCA Civ 446, [2008] 3 WLR 1360, at paragraph 24 of the judgment of the court. If Article 8(1) is engaged, the court will then need to conduct a balancing exercise on the facts, weighing the extent of the interference with the individual's privacy on the one hand against the general interest at issue on the other hand. In cases involving the media, the competing general interest will normally be the right of freedom of expression under Article 10 of the Convention. In cases of the present type, the competing interest is the general imperative for justice to be done in public, as confirmed by Article 6(1) of the Convention.

27. Turning to the facts of the present case, the Revenue submit that none of the matters referred to in the draft judgment are matters in respect of which Dr Banerjee can have had a reasonable expectation of privacy; and even if that is wrong, none of the matters on which she relies would have been sufficient to outweigh the general need for justice to be done in public. While not doubting that her concerns are entirely sincere and genuine, on an objective basis they are unfounded. The personal information about Dr Banerjee in the case stated and the draft judgment relates only to the following matters:

(1) It identifies her by name, and thus makes it clear that she had been involved in litigation with the Revenue. However, that cannot by itself be a sufficient reason to grant anonymity. If it were, then everyone involved in such litigation would be entitled to anonymity. Furthermore, there is no evidence to support her surprising assertion that her involvement in the present proceedings would be "frowned upon" by those in positions of power over her career.

(2) Details are given of the total amount of expenses that she incurred in attending educational courses, conferences and meetings between 1997 and 2000. Such information is not inherently private, and in any event it reveals nothing about her wider or general financial position, either at the time in question or today. In particular, no information is given about her annual income.

(3) Some details are also given of her employment history up to 2001, and reference is also made to some of the standard terms and conditions of her employment. Again, none of these matters are inherently confidential, or (if they are) they are not so confidential as to justify departure from the general rule. Nor can the fact that Dr Banerjee currently works at a particular hospital be confidential. Indeed, her own evidence emphasises that she works at a public place and that members of the public have direct access to her.

More generally, submit the Revenue, it is very difficult to see how, on any reasonable and objective basis, any detriment could be caused to Dr Banerjee as a result of patients knowing that she has successfully contested the Revenue's treatment of her expenses. As Lord Hope of Craighead said in Campbell at paragraph 94, albeit in a somewhat different context, "The law of privacy is not intended for the protection of the unduly sensitive".

28. The present case is quite unlike any other case in which the courts have ordered a hearing to be held in private or granted anonymity for a party or witnesses. Such orders are typically made in cases which involve a person's family or children, or in libel cases of a sensitive nature. Thus in the case of Ivereigh, relied upon by Dr Banerjee, the witness who had sought anonymity did so because her evidence would have required "disclosure by her to the court of intimate and detailed information as to her personal life, her sexual life, her health and her family which strongly engage her Article 8 rights" (paragraph 3 of the judgment, quoting from the skeleton argument for the applicant). In addition, as the judgment notes at paragraph 4, there were several witness statements and supporting documents evidencing the potential harm to the applicant's family and her children which would result from publicity, including statements from a consultant paediatrician and a teacher. Similarly, in the case of W v J H and A County Council, the claimant had brought an action for slander concerning an allegation of sexual harassment, and it is clear (as Mr Warby's written submissions accept) that the judge's decision to anonymise must have been based on the sensitive nature of the alleged libel. Nothing remotely comparable can be said to arise in the present case. Accordingly, even if an application for a private hearing and/or anonymity had been made prior to the High Court hearing in the present case, it should not have been granted.

29. The present application is even less sustainable in view of the fact that a hearing in public has now taken place. The submissions for Dr Banerjee refer to the principles and case law concerning the question whether a duty of confidence can continue to

apply once the information has entered the public domain. Those cases, however, do not directly address the question whether it is appropriate to anonymise a court's judgment following a hearing in public, but rather the question of when a civil action based on the private law duty of confidence can survive pre-existing publicity of the information in question. The position is quite different in relation to information revealed in open court, as Tugendhat & Christie make clear at paragraph 6.63:

> "Information of an otherwise confidential character will lose that quality when it enters the public domain in the course of criminal proceedings in public. The position is similar in civil proceedings: where a document has been read to or by the court or referred to at a hearing in public, the restrictions which the CPR impose on collateral use of the document cease and any private law claim to confidentiality in information contained in the document evaporates to the same extent, unless the court specifically makes an order restricting or prohibiting the use of the document. In both the criminal and civil contexts the public domain exception applies to documents which are read by the court to itself as well as to documents read aloud in court."

30. The footnotes to the above passage cite the judgment of Sir Nicolas Browne-Wilkinson V.-C. in Derby & Co Ltd v Weldon & others, The Times, 20 October 1988, where he said "Once a document has been read or referred to in open court, it becomes a public document". See too Tugendhat & Christie at paragraphs 6.101 and 102, where the authors suggest that there may be a rule of policy to the effect that information referred to in a public court automatically lacks the necessary quality of confidence, whatever the extent of actual public knowledge about it may be. So, for example, in Bunn v BBC [1998] 3 All ER 552, Lightman J held at 557e that confidence could no longer attach to a witness statement which the judge at an earlier hearing had read to himself in open court.

31. The Revenue submit the correct position to be that once information has been referred to in open court, it automatically loses its quality of confidence, regardless of the extent to which the wider public has in fact been made aware of it. Such an approach is consistent with the general principle of open justice: it should not be open to a party retrospectively to seek to conceal matters which were openly disclosed as part of his or her case. If the position were otherwise, it might be necessary to make detailed enquiries about who was in court during the hearing, and whether they had already disclosed the matters more widely or intended to do so. The requirements of open justice should not depend on who happened to be present in court on the day in question, and for what purpose.

32. In the present case, some people were observed to be present in the public gallery taking notes during the hearing on 5 December. Whether they were law reporters, members of the press or simply interested members of the public, the information disclosed or referred to in open court has now irretrievably entered the public domain. Consistently with this, no order is sought by Dr Banerjee imposing reporting restrictions on third parties. Accordingly, without breaching the orders which she now seeks, a law reporter could quite properly obtain a transcript of the hearing and then publicise the very details, including Dr Banerjee's name, which she seeks to have redacted from the draft judgment.

Discussion and conclusions

33. As will already be apparent from the fact that this judgment is not anonymised, I have come to the clear conclusion that Dr Banerjee's application must be refused.

34. In agreement with the Revenue's general approach to the question, I think it is helpful to begin by considering whether an application for anonymity and/or a hearing in private would have succeeded, had such an application been made before the hearing on 5 December. The court would clearly have had jurisdiction to entertain such an application: see CPR 39.2(3), which provides that a hearing, or any part of it, may be in private if … "(c) it involves confidential information (including information relating to personal financial matters) and publicity will damage that confidentiality". Nevertheless, in my judgment any such application would have been firmly rejected, on the basis that the fundamental principle of public justice enshrined in Article 6(1) of the Convention, and long established in the English common law, would have decisively outweighed the very limited interference with Dr Banerjee's right to respect for her private life, and the very limited disclosure of information relating to her personal financial affairs, that a public hearing would entail. I will assume in Dr Banerjee's favour at this point that her relevant rights of privacy and confidentiality had not already been irretrievably lost by reason of the public hearing of her previous appeal to the Commissioners. Making that assumption, I would accept that her Article 8(1) rights were engaged. 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. It is relevant to bear in mind, I think, that taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane-seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat.

36. Can it then be said that there is anything truly exceptional about the circumstances of the present case, such that Dr Banerjee's rights to privacy and confidentiality might arguably have outweighed the principle of open justice? In my judgment, clearly not. She is not involved merely as a witness, or as a third party caught up in a dispute that has nothing to do with her. On the contrary, the very issue in the case is the correct

tax treatment of her own expenses. The relevant information that is needed to resolve the dispute is set out in the case stated and the appended correspondence. It relates to only one aspect of her financial affairs, and to a period of only three tax years ending in April 2000, the best part of a decade ago. Viewed objectively, as it must be, the infringement of her privacy is very limited both in time and in extent. Nor is there anything inherently sensitive or embarrassing about the information disclosed. The case is about routine expenditure of relatively small amounts of money in fulfilling the training obligations of her past employment as a specialist registrar. It is hard to see how anybody could reasonably criticise her for her involvement in the present litigation, or how it could possibly lessen the professional esteem in which she is held by her patients, colleagues and superiors, if they know that she successfully challenged the Revenue's refusal to allow the deductions. On the contrary, I feel sure that the reaction of any reasonable person would be one of respectful admiration for her tenacity.

37. Dr Banerjee's concerns about her personal vulnerability, and her wish to avoid publicity of any kind, naturally attract sympathy, but it seems to me that little weight can be attached to these factors. Her perceived vulnerability to physical attack stems from the nature of her job and the environment in which she works. She is known by name to her patients, and she works in a public place. I can see no rational grounds for supposing that publication of the judgment would place her at any increased risk of physical harm. Similarly, I cannot believe that the brief details disclosed of her employment history and expenses ten years ago will in some way place her at increased risk of identity theft or financial harm. There is, however, one small alteration to the draft judgment which I feel I can properly make, and that is to remove the specific reference to the hospital where she now works and where she took up employment as a consultant in August 2001. I have replaced it with a reference to "another London hospital": see paragraph 14 of the judgment. This particular detail has no relevance to the tax dispute, and I am happy to accede to Dr Banerjee's wishes in this respect.

38. If, as I think, an application for the appeal to be heard in private would have been rejected, I agree with the Revenue that the application which Dr Banerjee now makes, following a public hearing, has even less chance of success. The preponderance of English authority supports the view that once material has been read or referred to in open court, it enters the public domain. It seems to me that there is a need for a clear and simple rule on this point, which reflects the principle of open justice, and which can be overridden, if at all, only in exceptional circumstances where the interests of justice so require. The general rule is also reflected in the right of any interested member of the public to obtain a transcript of any judgment given or order made at a public hearing, subject to payment of the appropriate fee: see paragraph 1.11 of the Practice Direction to CPR Part 39. It is true that the paragraph refers only to judgments or orders, but I see no reason why an interested person should not also be able to obtain a transcript of the entire proceedings which took place in open court. After all, such a person would have had the right to sit in court and take notes, and if he was a shorthand writer, he could have taken a verbatim note. The right to obtain a full transcript would therefore add nothing to what he could, in principle, have done for himself by attending the hearing. The touchstone, in my view, is whether the hearing in question is held in public, not whether it is in fact attended by any member of the public.

39. The court should never make orders which it cannot police, or which are liable to cause confusion, or which may bring the administration of justice into disrepute. In my judgment there is a very real danger of one or more of these undesirable consequences ensuing if I were to make the orders now sought by Dr Banerjee. The judgment would be handed down in anonymised form, and the Revenue (but nobody else) would be forbidden by court order from revealing any information likely to lead to identification of Dr Banerjee as the respondent to the appeal. What is then to happen when the case comes to be reported? I have not been asked to make any reporting restrictions, or indeed any orders binding on third parties. The normal practice, in the taxation field, is for the case stated to be reported together with the judgment of the appeal court. I have not been asked to make an order redacting the case stated, and as I said in my original letter to Dr Banerjee's solicitors, I am not clear what jurisdiction, if any, I would have to do so. Is the case then to be reported with an unredacted case stated standing next to a redacted judgment? That would clearly be absurd. Furthermore, would the reporters of Tax Cases, which are reported under the direction of HMRC, be at risk of proceedings for contempt of court if they were to follow the usual practice and include the case stated in the report? Even the reporters from an independent series of reports, such as Simon's Tax Cases, might be worried and feel it necessary to apply to the court for guidance. That apart, any interested member of the public would still be at liberty to apply for a transcript of the hearing on 5 December, and to ask for a copy of the case stated as a document which was referred to and discussed in open court on that occasion. It is unnecessary to pursue these speculations any further. They are sufficient to show, in my judgment, that there are sound practical reasons, as well as good legal reasons, for dismissing Dr Banerjee's application.