APPROVED

THE HIGH COURT

[2024] IEHC 337

Record No. 2021/500JR

BETWEEN/

BARTH O'NEILL

APPLICANT

-AND-

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 31st day of May 2024

INTRODUCTION

Preliminary

1. This is an interlocutory application in which the Applicant seeks either (a) an order that his substantive judicial review proceedings be heard otherwise than in public (*i.e.*, *in camera*) or (b) an order directing the anonymisation of that challenge.

2. The substantive proceedings concern the Applicant's challenge to the Respondent's refusal to erase data in relation to his 2007 tax return, pursuant to the right to erasure ("*right to be forgotten*") contained in Article 17 of the General Data Protection Regulation ("GDPR"). [1]

[1] Article 17 GDPR provides as follows:

"*(1) The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies: (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed; (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing; (c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2); (d) the personal data have been unlawfully processed; (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject; (f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).*

(2) Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.

Leave to apply for judicial review: 31st May 2021

3. Prior to the issuing of this interlocutory motion, on 31st May 2021 this court (O'Moore J.) granted the Applicant leave to apply for judicial review to seek a number of reliefs, including: (a) an order of mandamus directing the Respondent to comply with the GDPR, in particular Articles 5, 6 and 17, the EU Charter, in particular Article 8, the Taxes Consolidation Act 1997, in particular section 851B, the constitutional right to privacy and the doctrine of proportionality with respect to the right to be forgotten, and data processing generally with respect to the tax year 2007; (b) an order of mandamus requiring the erasure (or reduction to zero) of all personal data concerning the Applicant held by or on behalf of the Respondent without undue delay and/or for four or six years, or such other period as the court may direct, in accordance with the GDPR, in particular Articles 5, 6 and 17, the EU Charter, in particular Article 8, the Taxes Consolidation Act 1997, in particular Section 851B, the constitutional right to privacy, and the doctrine of proportionality with respect to the right to be forgotten, and data processing generally; (c) in the alternative, an order pursuant to section 117 of the Data Protection Act 2018, Article 17 of the GDPR, and

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(3) Paragraphs 1 and 2 shall not apply to the extent that processing is necessary: (a) for exercising the right of freedom of expression and information; (b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3); (d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or (e) for the establishment, exercise or defence of legal claims."

Order 84B of the Rules of the Superior Courts 1986, directing the Respondent to erase (or reduce to zero) all records relating to the year 2007 and such additional years as the court deems lawful.

4. The Applicant also sought and was granted leave to apply for a number of ancillary reliefs at paragraphs (d) to (p) of the Statement of Grounds.

The in camera/anonymisation application

5. In summary, the application before me is essentially an interlocutory application, issued post-leave, and comprised in two notices of motion (dated 5th December 2022 and 12th December 2023) where, as mentioned, the Applicant seeks an order that the substantive proceedings be either heard *in camera* or anonymised. Initially, the Applicant relied *inter alia* upon the inherent jurisdiction of the High Court, Article 43 of the Charter of Fundamental Rights of the European Union ("the Charter") and Article 13 of the European Convention on Human Rights and Fundamental Freedoms ("the ECHR"), and in terms of the later amendment, which sought to have the hearing heard otherwise in public (*in camera*), the Applicant also seeks to invoke section 117 and section 156 of the Data Protection Act 2018 ("the 2018 Act").

6. As just mentioned, by Notice of Motion dated 5th December 2022, the Applicant sought *inter alia* an "*order that in accordance with the inherent jurisdiction of the court and the Applicant's right to an effective remedy, under Article 47 of the EU Charter of Fundamental Rights and Article 13 of the European Convention on Human Rights, that these proceedings are anonymised using initials that do not relate to the Applicant's name*."

7. By further Notice of Motion dated 12th December 2023, the Applicant sought an amendment to the earlier motion in the following terms: "[t]*hat the proceedings be held otherwise than in public as allowed for under … section 156 of the Data Protection Act 2018*."

8. The Applicant is a litigant in person. Eoin Clifford SC, together with David Quinn BL, appeared the Respondent.

Terms of settlement: 13th June 2016

9. The Applicant reached terms of settlement (comprising nine numbered paragraphs) with the Respondent on 13th June 2016.

10. The first paragraph of the terms of settlement provided for payments in relation to CGT and income tax both of which assessments were recorded as being under appeal by the Applicant. The second paragraph of the settlement provided for the manner and time period of the payment of the sums referred to in the first paragraph.

11. The fourth paragraph of the settlement *inter alia* provided that when the full amount of the sum referred to had been discharged in accordance with the terms of paragraph 2, "*the Respondent, in consideration of the Appellant's financial position, shall write out the balance of the assessments as being uncollectable*."

12. By e-mail dated 22nd February 2021 from an official in the Data Protection Unit of the Respondent, the Applicant was *inter alia* advised that "[a]*rticle 17 of the GDPR is not*

an absolute right and there are circumstances in which the further retention of the personal data is lawful. In the case of Revenue, personal data can be retained "for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject…" as set down in Article 17(3)(b). The legal obligation referred to is the Taxes Acts, in particular Section 851B(3), Taxes Consolidation Act 1997 which allows taxpayer information to be processed by the Revenue Commissioners, inter alia, where required for the purposes of the 'administering, raising, collecting and accounting for tax under the care and management of the Revenue Commissioners.'"

13. The letter added that "[i]*n the circumstances, the information to which you refer is part of your tax record and will be treated as confidential taxpayer information and processed in accordance with the Tax Acts. Accordingly we are unable to accede to your request under Article 17 of the GDPR. If you disagree with this decision, you have the right to make a complaint to the Data Protection Commission*."

SUMMARY OF THE APPLICANT'S CASE

14. The Applicant avers by Affidavit sworn on 25th October 2022 *inter alia* that without the benefit of this interlocutory application there would be "*no point in the substantial relief sought (the subject of the 31st May 2021 leave to take judicial review) – that is the Right to be Forgotten*"; that the "*Right to be Forgotten would be set to nought*" if the proceedings or the fact that there was a dispute over the sum referred to "*was reported in the media (all forms), recorded on the Court's website or in the various law reporting journals*"; "*if the legal proceedings or the quantum were to be reported*

in the media (all forms) or otherwise "an impression might be created whereby I am seen to be a non-compliant tax-payer. This could do irreparable damage to my reputation as a compliant tax-payer, it would be defamatory and would lower my reputation in the eyes of reasonable members of society""; that the Applicant's main business interest was audited by the Revenue Commissioners in February 2019 and the conclusion of the Revenue Commissioner's finding was that there was no outstanding liability, and all paperwork and procedures were in accordance with all the Tax Acts and that the "*ignominy of being … labelled "tax dodger", even if incorrectly so, is something that stays with one for life and it is a topic that the media/public are fixated with and would have lasting consequences on my right to earn a living.*"

15. In summary, the Applicant claims that the central focus of his case is about his data and should be seen through the prism of the Charter and the ECHR, whereas he contends that the Respondent seeks to emphasise the taxation context and question the applicability of the Charter and the ECHR.

16. The Applicant refers to case-law which he submits illustrates the differences in the development of data protection law domestically and in the EU, including, *Nowak v Data Protection Commissioner* (Case C-434/16) (ECLI:EU:C:2017:994) and *GD v Commissioner of An Gárda Síochána* (C-140/20) (ECLI:EU:C:2022:258).

17. The Applicant relies, in particular, on paragraph 29 of the judgment of the CJEU in *Nowak* which stated that "[i]*t is not disputed that a candidate at a professional examination is a natural person who can be identified, either directly, through his*

name, or indirectly, through an identification number, these being placed either on the examination script itself or on its cover sheet". The Applicant submits that an equivalent situation arises in his case and he wishes to have his name replaced by initials.

18. There is, what the Applicant says, is a minor difference between him and the Respondent on the applicability of the case law of the CJEU and that of the European Court of Human Rights ("the Strasbourg Court"). He submits that the jurisprudence of the Strasbourg Court is persuasive but that every organ of the State is bound by it arising from the provisions of section 3 of the European Convention on Human Rights Act 2003.

19. The Applicant cites Article 6(3) of the Consolidated Version of the Treaty on the European Union which provides that "[f]*undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member states, shall constitute general principles of the Union's law*." He refers to what he says is the equivalence in the treatment of the provisions of the ECHR and the Constitution in the judgment of the Supreme Court in *Gilchrist v Sunday Newspapers Ltd* [2017] IESC 18; [2017] 2 I.R. 284 per O'Donnell J. (as he then was) at paragraphs 23 and 24, pages 202-303.

20. The Applicant also refers to the decision of the CJEU in *Google Spain SL v AEPD* ("*Google Spain*") (C-131/12, ECLI:EU:C:2014:317) in the context of Article 8 of the Charter and Article 8 of the ECHR and the predecessor to the GDPR, Directive

94/46/EC (24th October 1995). He cites, in particular: paragraph 3 of that judgment, where reference is made to certain recitals in Directive 94/46/EC, including at paragraph 10 of the Directive which refers *inter alia* to "*the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention of Human Rights and Fundamental Freedoms … and in the general principles of Community law*"; paragraph 74 of the judgment, where it is *inter alia* stated that the application of Article 7(f) of Directive 94/46/EC necessitates a balancing of the opposing rights and interests concerned, in the context of which account must be taken of the significance of the data subject's rights arising from Articles 7 and 8 of the Charter; and paragraph 81 of the judgment, which *inter alia* references that a fair balance should be sought in particular between the legitimate interest of internet users potentially interested in having access to information and the data subject's fundamental rights under Articles 7 and 8 of the Charter: "[w]*hilst it is true that the data subject's rights protected by those articles also override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life*". The Applicant contends that while a public figure may lose some of their privacy rights, he is not a public figure.

21. In *NT1 v Google LLC* [2018] EWHC 799 (QB), Warby J. at page 367 (paragraph 32) summarised the facts of the *Google Spain* case as follows: the claimant was a Spanish national who wanted to remove two links on Google Search to an auction notice

posted on a Spanish newspaper's website, following his bankruptcy. He complained that the auction notice was many years out of date and was no longer relevant. When the newspaper and Google declined to remove the links to the notice, he brought a complaint to the Spanish data protection authority against the newspaper, Google, and Google Spain SL, its Spanish subsidiary. The CJEU held that Google was bound by the Data Protection Directive because it had set up a subsidiary in an EU Member State which was intended to promote and sell advertising space offered by Google Search and which orientated its activity towards the inhabitants of that state.

22. In the application before me, the Applicant placed emphasis on the finding by the CJEU in *Google Spain* (at paragraphs 94 and 96 of the judgment) that there is a "*right to be forgotten*" and that a data subject's fundamental rights under Articles 7 and 8 of the Charter entitled them to request that information no longer be made available to the general public by means of a list of results displayed following a search made by reference to their name, and their rights may override the rights and interests of the ISE[2] and those of the general public and, particularly, that it was unnecessary for the data subject to show that the inclusion of the information in the search results caused prejudice.

SUMMARY OF THE RESPONDENT'S CASE

23. On behalf of the Revenue Commissioners, Mr. Clifford SC submits that the Applicant has not brought himself within the established statutory or common law exceptions to the rule that justice be administered in public. In addition, the point is made that much

[2] The operators of internet search engines.

of the detail of the Applicant's 2007 income tax returns, which he seeks in this application to be the subject of a ruling that the matter he heard *in camera*, or in the alternative, be anonymised, and in the substantive judicial review proceedings to be effectively erased from the Respondent's computer systems, was the subject matter of a determination by the Supreme Court in *O'Neill v The Revenue Commissioners* [2016] IESCDET 9 which is both published and retrievable in the ordinary way.

24. Mr. Clifford SC submits, by reference to a number of authorities,[3] that the Superior Courts have carefully scrutinised claims advanced by litigants to determine whether they fall within the common law or statutory exception to the fundamental constitutional principle in Article 34.1 of the Constitution that "[j]*ustice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution and, save in such special and limited cases as may be prescribed by law, shall be administered in public*" and, by analogy, referenced the seven principles referred to by the Supreme Court[4] in *Gilchrist v Sunday Newspapers Limited* [2017] IESC 18; [2017] 2 I.R. 284 (which are set out later in this judgment).

25. Counsel refers to the decision of Clarke J. (as he then was) in *Doe & Doe v The Revenue Commissioners* [2008] IEHC 5; [2008] 3 I.R. 338 and submits that Clarke J. rejected the contention that there was a constitutionally-based derived right to taxpayer confidentiality and, instead, found that any entitlement that a non-compliant

[3] The Respondent also referred to *Kennedy v Ireland* [1987] I.R. 587; *Simpson v Governor of Mountjoy Prison* [2019] IESC 81; *FOIE v The Government of Ireland* [2020] IESC 49; *Medical Council v Anonymous* [2019] IEHC 245; *Medical Council v A Medical Practitioner* [2020] IEHC 245; *SM v LM* [2022] IEHC 449; *RM v SHC* [2023] IEHC 252; *Baby AB, Children's University Hospital Temple Street v CD* [2011] IEHC 1.

[4] O'Donnell J. (as he then was).

taxpayer has to confidentiality in their tax affairs is confined to a statutory entitlement. It was submitted that the Applicant's taxpayer information, including for the year 2007, was protected by the provisions of section 851A(2) of the Taxes Consolidation Act 1997 which provides that "[a]*ll taxpayer information held by the Revenue Commissioners or a Revenue officer is confidential and may only be disclosed in accordance with this section or as is otherwise provided for by any other statutory provision.*"

26. In their written submissions, Mr. Clifford SC and Mr. Quinn BL make the point that from this 'general prohibition', a number of exceptions are statutorily prescribed and that the Oireachtas, from time to time, has amended this provision to add or clarify the circumstances when such information may be lawfully disclosed. Counsel also state that it is a common misconception that tax appeals are *required* to be heard *in camera* and refer to section 949Y(1) the Taxes Consolidation Act 1997 which provides that, *subject to* section 949Y(2) and section 949Y(3), tax appeals before the Tax Appeals Commission shall be held in public and that in practice, the Commission facilitates requests for *in camera* hearings pursuant to these provisions.

27. It is pointed out that section 949AO(4) of the Taxes Consolidation Act 1997, requires that the Commission's published determinations, insofar as possible, do not identify any person whose affairs were dealt with on a confidential basis. Further, it is submitted that even where a tax appeal before the Commission is dealt with *in camera*, any case stated to the High Court is dealt with in public and that there is no express provision to displace the constitutional obligation that justice be administered in public.

28. The Respondent also makes submissions which address the substantive judicial review application, stating, for example, that arising from the decision of the CJEU in *Google Spain*, the courts must perform a case specific balancing exercise.

29. Insofar as the Applicant relies on section 156 of the 2018 Act, it is submitted that this contemplates a tortious data protection action and not an application by way of judicial review. Additionally, it is noted that the Applicant chose not to initiate the complaint process to the Data Protection Commissioner.

AUTHORITIES REFERED TO

30. As referred to above, the Applicant submits that if this application is unsuccessful, his substantive proceedings are essentially rendered otiose. On behalf of the Respondent, it is submitted that this application was, in any event, misconceived *ab initio.*

31. This court, Clarke J., (as he then was) in *In the matter of an intended action*, *Doe & Doe v The Revenue Commissioners* [2008] IEHC 5; [2008] 3 I.R. 338, addressed issues in that case which contained both similarities *and* differences to that concerning the Applicant in this case.

32. Unlike the position which applies here, for example, the names of the plaintiffs in that case were fictional from the outset and the court was not informed of the actual plaintiffs' names. Clarke J. followed the practice adopted by McCracken J. in *Re Ansbacher (Cayman) Limited* [2002] IEHC 27; [2002] 2 I.R. 517, who described this

scenario as akin to "*something of the chicken and the egg*" where a preliminary issue arose as to whether the court had any power to order a hearing *in camera* or in some other way limit the publication of the plaintiffs' names. In that case, the relevant preliminary application was maintained in the name of the plaintiffs' solicitors.

33. In the case before me, no application was made to anonymise either the initial application for leave to apply for judicial review or the various occasions in which the substantive proceedings and this motion have appeared in the Non-Jury/Judicial Review List-to-Fix dates. The Applicant refers to the decision of the High Court of England and Wales (Warby J.) in *NT1 & NT2 v Google* [2018] EWHC 799 (QB) (the title of the proceedings reflected the anonymisation of the claimants), in a decision which involved business persons whose convictions of criminal convictions were spent under the Rehabilitation of Offenders Act 1974 and where at page 357 (paragraph 3) under the sub-heading 'Introduction', Warby J. *inter alia* observed that "[i]*n short, anonymity is required to ensure that these claims do not give the information at issue the very publicity which the claimants wish to limit. Other individuals and organisations have been given false names in this judgment for the same reason: to protect the identities of the claimants*". At pages 359-361 of the reported judgment, Warby J. sets out ten key features of the legal framework and common law developments in chronological order, including reference to the Human Rights Act 1998 which gave effect to provisions of the ECHR in England and Wales (paragraph 6) and to the Charter of Fundamental Rights of the European Union, particularly Article 7 (respect for private life), Article 8 (protection of personal data), Article 11 (freedom of expression and information), Article 16 (freedom to conduct a business) and Article 47 (right to an effective remedy).

34. The Applicant claims that the comments of Warby J. in *NT1 & NT2* apply *mutatis mutandis* to his substantive application for judicial review where he seeks the 'right to be forgotten' and the deletion of his tax data in 2007 but contends that the seeking of this remedy would be worthless (and rendered moot) if his name is on the proceedings and that he has a right to an effective remedy and to a fair trial pursuant to Article 47 of the Charter (which provides that "[e]*veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice*") and the right to an effective judicial remedy against a controller or processor, as per Article 79 of the GDPR (which provides "*(1)* [w]*ithout prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation; (2) Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual*

residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers."

35. The Applicant states that the right to his reputation as a compliant taxpayer is important and the 'right to be forgotten' is part of the protection of this reputation and he references Warby J.'s observation at page 379 (paragraph 63) of the judgment in *NT1 & NT2 v Google* that "[t]*he authorities show that injury to reputation can engage the protection of Article 8 of the Convention*".

36. The Applicant contends that whereas he has rights under Article 8 ECHR, the Revenue Commissioners have no corresponding Article 10 ECHR (freedom of expression) rights and he refers to page 403 (paragraph 132) of the judgment of Warby J. in *NT1 v Google*, as follows: "[i]*n my judgment, the balancing process in any individual delisting case is ordinarily, as a matter of principle, to be entered into with the scales in equal balance as between delisting on the one hand and continued processing on the other. I say that on the basis that such cases will ordinarily engage the rights protected by Articles 8 and 10 of the Convention and, for so long as European law is part of our domestic law, their counterparts under the Charter, as well as the right to freedom of information contained in Article 11 of the Charter.*"

37. The Applicant refers to the analysis of the *Google Spain* case by the Strasbourg Court in *Hurbain v Belgium* (Application No.57292/16, 4th July 2023) where that court, at paragraph 73, *inter alia* described the decision of the CJEU in *Google Spain* as concluding "*that if, under Articles 7 and 8 of the European Union's Charter of Fundamental Rights guaranteeing, respectively, the right to respect for private life*

and the right to the protection of personal data, the data subjects had a right to ensure that the information in question relating to them personally should no longer be linked to their name by a list of results – although this did not presuppose that the inclusion of the information in question caused prejudice to the data subject – and if they were thus entitled to request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights overrode, as a rule, not only the economic interest of the search engine operator but also the interest of the general public in having access to that information through a search relating to the data subject's name. However, according to the CJEU, the balance to be struck between the interests of the person making the request and the public's interest in having access to the information might depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which might vary, in particular, according to the role played by the data subject in public life."

38. Thus the Applicant, in the application before me, is seeking a similar remedy to that referred to by the Strasbourg Court at paragraph 249 of its judgment in *Hurbain v Belgium* where "*the Liège Court of Appeal found that the most effective means of protecting G.'s privacy without interfering to a disproportionate extent with the applicant's freedom of expression was to anonymise the article on the website of Le Soir by replacing G.'s first name and surname with the letter X. In that connection, the Court has previously held that anonymisation is less detrimental to freedom of expression than the removal of an entire article (see M.L. and W.W. v. Germany, cited above, § 105). It notes that anonymisation constitutes a particular means of altering*

archived material in that it concerns only the first name and surname of the person concerned and does not otherwise affect the content of the information conveyed."

39. The applicant also refers to *G v DPP* [2023] IEHC 134, where it was sought to have criminal proceedings which were listed before the District Court anonymised and the District Court refused the application. In granting leave, this court (Simons J.) observed at paragraph 28 of the judgment that he had previously directed that reporting restrictions apply to the judicial review proceedings *pro tempore* as it "*would render the proceedings nugatory*" if such an order were not imposed because the identity of the parties, which was the very thing that the applicant sought to protect, would have been disclosed.

40. As mentioned earlier, reference is also made to the decision of Clarke J. (as he then was) in *Doe & Doe v The Revenue Commissioners*.

41. In summary, the plaintiffs had reached a settlement with the Revenue Commissioners in relation to a scheme for disclosure of undeclared tax liabilities and had sought, via a preliminary application, the court's approval to issue proceedings under assumed names. Clarke J. described what the issues were in the case at paragraphs 4.11 to 4.13 of his judgment, as follows:

> "*4.11 Under this heading it was argued on behalf of the plaintiffs that an inability to maintain these proceedings with anonymity would amount, in substance, to a barrier to proper access to the courts. The plaintiffs' argument was to the effect that a requirement that they be named as plaintiffs would, in practical terms, deprive them of the*

opportunity to bring proceedings designed to protect their anonymity. There is, of course, a sense in which that assertion is factually correct. A finding by the court that the construction which the plaintiffs seek to place on the relevant provisions of the Taxes Acts was correct, would mean that the plaintiffs could not properly be included in the periodic list of tax defaulters published by the Revenue. However, the fact that the plaintiffs were tax defaulters who had entered into a settlement of the type which I have described earlier in this judgment would, of course, become public knowledge through the route of the court proceedings which, if not permitted to be brought anonymously would, of course, identify the plaintiffs as the tax defaulters concerned.

4.12 Thus, it was said, that where the purpose of the proceedings is to prevent the publication of a particular piece of information, then those proceedings are rendered largely useless if the party concerned has to be named in order to bring the proceedings in the first place.

4.13 However, similar considerations apply to a greater or lesser extent in many cases. It is, as McCracken J. pointed out in Re Ansbacher (Cayman) Ltd, the case that persons who wish to restrain an alleged defamation are required to be named and are, in practice, required to at least generally identify the defamatory material which it is believed is likely to be published. Plaintiffs who wish to restrain the use or publication of undoubtedly confidential material arising in,

for example, a commercial context, are also required to be named though it has to be said that it may be possible to frame such proceedings and the evidence presented in a way which does not disclose in detail the confidential information concerned. Nonetheless such parties will be required to bring into the public domain at least such a sufficient description of the material concerned as may be necessary for the determination of the proceedings and the making of any appropriate order."

42. The Applicant refers to paragraph 4.2 of the judgment of Clarke J. in *Doe & Doe v The Revenue Commissioners* where it was *inter alia* observed that "[w]*hatever may be the position of compliant taxpayers, it is difficult to see how any constitutional entitlement could be asserted which would prevent the public generally from being made aware of the manner in which others have failed to meet their tax obligations.*" The Applicant states that as he is a compliant taxpayer, the judgment in *Doe* has no relevance to him.

43. Throughout his submissions, the Applicant emphasises (in also seeking to distinguish the decision in *Doe*) that his application for judicial review is *not* about tax but *is*, rather, about his data which is stored in the Revenue system. He contends, for example, that the Respondent used his data to make a refund, which he states was owed to him, to be set at nought.

44. In *Gilchrist v Sunday Newspapers Ltd* [2017] IESC 18; [2017] 2 I.R. 284, the Supreme Court considered the court's common law power to direct an *in camera*

hearing, having regard to the provisions of Article 34.1 of the Constitution which provides that justice shall be administered in courts established by law by judges appointed in the manner provided by the Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public and further considered the provisions of Article 6 of the ECHR. After analysing a number of statutory provisions and case law, including *In re R Ltd* [1989] I.R. 126; *Irish Times Ltd v Ireland* [1998] 1 I.R. 359; O'Donnell J. in *Gilchrist v Sunday Newspapers Ltd* [2017] IESC 18; [2017] 2 I.R. 284 at paragraph 45, summarised the applicable principles, as follows:

> "*(i) The Article 34.1 requirement of administration of justice in public is a fundamental constitutional value of great importance;*
>
> *(ii) Article 34.1 itself recognises, however, that there may be exceptions to that fundamental rule;*
>
> *(iii) Any such exception to the general rule must be strictly construed, both as to the subject matter, and the manner in which the procedures depart from the standard of a full hearing in public;*
>
> *(iv) Any such exception may be provided for by statute but also under the common law power of the court to regulate its own proceedings;*
>
> *(v) Where an exception from the principle of hearing in public is sought to be justified by reference only to the common law power and in the absence of legislation, then the interests involved must be very clear, and the circumstances pressing.*

Here that demanding test is capable of being met by the combination of the threat to the programme and the risk to lives of people in it or administering it. This is not a matter of speculation, but seems an unavoidable consequence of the existence of a witness protection programme;

(vi) While if it can be shown the justice cannot be done unless a hearing is conducted other than in public, that will plainly justify the exception from the rule established by Article 34.1, but that is not the only criterion. Where constitutional interests and values of considerable weight may be damaged or destroyed by a hearing in public, it may be appropriate for the legislature to provide for the possibility of the hearing other than in public, (as it has done) and for the court to exercise that power in a particular case if satisfied that it is a case which presents those features which justify a hearing other than in public;

(vii) The requirement of strict construction of any exception to the principle of trial in public means that a court must be satisfied that each departure from that general rule is no more than is required to protect the countervailing interest. It also means that court must be resolutely sceptical of any claim to depart from any aspect of a full hearing in public. Litigation is a robust business. The presence of the public is not just unavoidable, but is necessary and welcome. In particular this will mean that even after concluding that case warrants a

> *departure from that constitutional standard, the court must consider if any lesser steps are possible such as providing for witnesses not to be identified by name, or otherwise identified or for the provision of a redacted transcript for any portion of the hearing conducted in camera.*"

ASSESSMENT & DECISION

45. The decision of the Supreme Court in *Gilchrist* eschewed, as incorrect, an approach which contemplated only two binary options, *i.e.*, a hearing *in camera* or a hearing in public. Rather, a sceptical and incremental approach which examined lesser steps which might meet the legitimate interests involved was preferred including, by way of example, considerations of anonymising witnesses, orders that witnesses may not be photographed or identified in any way, whether any part of the hearing may be conducted in public, whether it was possible in respect of any hearing that was held in private that a redacted transcript of proceedings can be released to the media.

46. For the following reasons, I am of the view, notwithstanding the comprehensive submissions of the Applicant, that his application is misconceived and incorrect, (including having regard to section 156 of the 2018 Act). Further, I do not consider that the arguments of the Applicant are exceptional in the *Gilchrist* sense or that there are any intermediate steps, along the spectrum book-ended by an *in camera* hearing, at one end, and a public hearing, at the other, such as the use of initials, a process of redaction or any process of anonymisation, is warranted in this case. For the following

reasons, therefore, I am of the view that this application for judicial review should be conducted fully in public.

47. In *Doe & Doe v The Revenue Commissioners*, Clarke J. was *not* satisfied that the fact that publicity attaching to proceedings might be counterproductive to the benefit of bringing proceedings from an intended plaintiffs' perspective constituted a basis for anonymisation and observed as follows at paragraphs 4.18 of his judgment:

> "*There is, in my view, a distinction of some importance to be drawn between, on the one hand, a case where the benefit of bringing proceedings (even if they be successful) would be impaired (even to a significant extent) by the necessity to have the proceedings conducted in full publicity, and on the other hand, a situation where the very outcome of the proceedings themselves could be affected by such publicity. Each of the judgments of the Supreme Court in Irish Times emphasised the heavy constitutional weight to be placed on ensuring that the administration of justice is conducted in a fair manner. Publicity which might affect the fair and just result of proceedings has the potential, therefore, to be a significant interference with the administration of justice. In those circumstances significant weight has to be attached to a consideration of measures which may be designed to promote the likelihood of a fair and just result to litigation. I was not satisfied that an equivalent weight ought be attached to circumstances where there was no risk that the ultimate determination of the court, in the exercise of the administration of justice, would be other than fair, but where it might be said that*

publicity attaching to proceedings might, even to a significant extent, devalue the benefit of bringing the proceedings on anything other than an anonymous basis."

48. Clarke J. set out his conclusions on the plaintiffs' application made at paragraph 5.1 of the judgment as follows:

    "*For the reasons which I have sought to analyse I was not, therefore, satisfied that the court had any jurisdiction to permit proceedings such as those intended by the plaintiffs to be conducted on an anonymous basis. I was not satisfied that any entitlement to confidentiality concerning their tax affairs which the plaintiffs might assert could be of sufficient weight to countervail, even to a limited extent, the constitutional imperative to the effect that justice be administered in public. Nor was I satisfied that a requirement that the proceedings be brought in the names of the plaintiffs amounted to an infringement of the plaintiffs undoubted right of access to the courts. The fact that the plaintiffs might be discouraged from bringing proceedings if not permitted to bring them anonymously was not, of itself, in my view, a sufficient reason to give rise to a jurisdiction to permit the proceedings to be brought anonymously. Nor, in my view, was the fact that some of the purpose of the proceedings might be lost, in practice, a sufficient factor to give rise to a constitutional jurisdiction to permit these proceedings to be brought anonymously.*"

49. As it happens, arising from the decision of the court in *Doe & Doe v The Revenue Commissioners*, which required the plaintiffs to bring the proceedings in their own names, they decided not to proceed with the substantive proceedings.

50. In the case before me, the Applicant had already brought the application for judicial review in his own name and had not sought to have the leave application anonymised for that purpose or that reporting restrictions apply to the leave application. His application in that sense has a retrospective quality to it. Further, whatever about the question of the mootness of the substantive proceedings, which the Applicant submits will result from the refusal of this application, there is no suggestion that those proceedings would be conducted unfairly.

51. In relation to the Applicant's arguments concerning the position of the ECHR in our constitutional architecture, it is clear that, whether or not legal arguments by reference to the ECHR and the Constitution come first or second in time or in sequence, the important issue is that the provisions of the Constitution are properly considered and addressed (see the judgment of the Supreme Court in joint cases *Gorry & Anor v The Minister for Justice & Equality* and *ABM & BA v The Minister for Justice* [2020] IESC 55 at paragraph 209 per McKechnie J.) as the Oireachtas could not, in the absence of a constitutional amendment, have elected to treat the ECHR as if it were some form of shadow or substitute Constitution (see the judgment of the Supreme Court in *Clare County Council v McDonagh & Anor and Irish Human Rights and Equality Commission (Amicus Curiae)* [2022] IESC 2 per Hogan J. at paragraph 52).

52. As these authorities make clear, the Long Title to the European Convention on Human Rights Act 2003 states that the giving effect to the ECHR in our domestic law is subject to the provisions of the Constitution and, therefore, the ECHR does not have direct effect. Without a constitutional amendment, the Oireachtas could not have elected to treat the ECHR as if it were some form of proxy or substitute constitutional measure.

53. As just mentioned, (and paraphrasing Hogan J. in *Clare County Council v McDonagh*) the precise sequence in which the ECHR or the Constitution is considered, in any relevant litigation, is not predetermined or prescribed so long as the Constitution is also properly considered and addressed at the same time as the ECHR because to do otherwise would be yielding a form of quasi-constitutional primacy to the ECHR, which it has never been afforded.

54. Further, as explained by the Supreme Court (Hogan J.) in *Clare County Council v McDonagh* [2022] IESC 2, at paragraphs 51 and 52 of the judgment, the Charter has, as an EU measure, in principle, direct effect in Irish domestic law, subject only to the conditions of its application specified in Article 51 (the Member State must be implementing EU law) and Article 52 (*inter alia* the rights prescribed in the Charter are interpreted in harmony with the Member State's traditions), because Article 6(1) Treaty on European Union (TEU) prescribes that it "*shall have the same legal value as the Treaties*" and because the State is empowered to ratify the TEU in accordance with Article 29.4.6 of the Constitution. In contrast, by virtue of the European Convention on Human Rights Act 2003, the ECHR has – pursuant to Article 29.6 of

the Constitution – been given effect in Irish law without direct effect and at sub-constitutional level.

55. In relation to the Applicant's general arguments concerning anonymity, it is noted that the Oireachtas has provided for anonymity in certain circumstances, for example, section 27 of the Civil (Miscellaneous Provisions) Act 2008 provides for anonymity in civil proceedings in relation to a medical condition of a relevant person and section 26 of the International Protection Act 2015 provides for the protection of an applicant's identity.

56. In terms of tax matters, section 949Y(1) of the Taxes Consolidation Act 1997 ("the 1997 Act") provides that *subject to* sections 949Y(2) and 949Y(3) of the 1997 Act, all hearings are to be held in public. Section 949Y(2) of the 1997 Act provides that the Appeal Commissioners may direct to hold a hearing, or part of a hearing, in private in certain specified situations including where they consider the giving of such a direction is necessary in the following circumstances: (a) in the interests of public order or national security; (b) to avoid serious harm to the public interest; (c) to maintain the confidentiality of sensitive information; (d) to protect an individual's right to respect for his private and family life; or (e) in the interest of justice. Section 949Y(3) of the 1997 Act provides that the Appeal Commissioners must hold a hearing or part of a hearing in private where an appellant request they do so. Requests can be made by way of application for a direction or can be included in the statement of case and section 949Y(4) of the 1997 Act provides that an appellant can submit a request for a private hearing up to 14 days after being notified of a hearing. (The Applicant

submits that, in his experience, many of these appeals are in fact redacted having regard to the provisions of section 949Y(2)(d) of the 2018 Act).

57. As set out earlier, in the letter dated 22nd February 2021 from the Respondent, the Applicant was advised that the Respondent was unable to accede to his request under Article 17 of the GDPR and that if he disagreed with that decision, he had the right to make a complaint to the Data Protection Commissioner. He chose not to do so and, rather, proceeded by way of judicial review under Order 84 RSC. The Applicant submits that his preference was to pursue the route of judicial review rather than make a complaint to the Data Protection Commissioner (though he submits that the DPC was contacted by him during Covid-19 but that he decided to proceed by way an application for judicial review). The Applicant refers to section 117 of the 2018 Act ('*Judicial Remedy for infringement of relevant enactment*') and, in particular, section 117(1) of the 2018 Act which refers to "[s]*ubject to subsection (9), <u>and without prejudice to any other remedy available to him or her</u>, including his or her right to lodge a complaint, a data subject may, where he or she considers that his or her rights under a relevant enactment have been infringed as a result of the processing of his or her personal data in a manner that fails to comply with a relevant enactment, bring an action (in this section referred to as a "data protection action") against the controller or processor concerned.*" (The Applicant relies on the portion of the quotation underlined).

58. Part 6 of the 2018 Act comprises Chapters 1 to 8 which includes sections 105 to 156 of the 2018 Act. Section 117 of the 2018 Act provides for "*Judicial remedy for*

infringement of relevant enactment" and (subject to section 117(5) and (6), the Circuit Court has concurrent jurisdiction with the High Court).

59. Section 117(4) of the 2018 Act provides that a court hearing a data protection action shall have the power to grant to the plaintiff one or more of the following reliefs: (a) relief by way of injunction or declaration; or (b) compensation for damage suffered by the plaintiff as a result of the infringement of a relevant enactment. Section 156 of the 2018 Act provides that the whole or any part of any proceedings under *this Part* may, at the discretion of the court, be heard otherwise than in public. The reference to "*this Part*" is a reference to "Part 6" of the 2018 Act and the legal proceedings which are prescribed therein, including, for example, those provided for in section 117(4) of the 2018 Act. Section 156 of the 2018 Act does not include or refer to the type of challenge brought by the Applicant in this case, *i.e.*, by way of judicial review.

60. Notwithstanding the Applicant's comprehensive written and oral submissions, his attempt, in this interlocutory application, to invoke section 156 of the 2018 Act, is misconceived.

61. In addition, it is noted that the Applicant has sought an order directing either an *in camera* hearing or anonymisation, mid-stream as it were, after leave to apply for judicial review had been granted, and the matter, has been before the court in the Non-Jury/Judicial Review List of the High Court without anonymisation or redaction on multiple occasions. To that extent, it is the Applicant who has brought his own tax affairs back into focus.

62. Further, the Supreme Court gave a detailed determination refusing the Applicant's application for leave to appeal in relation to the decision of the Court of Appeal delivered on 31st July 2015 which in turn referred to the two judicial review appeals brought by the Applicant to the Court of Appeal.

63. The Supreme Court (Denham CJ., Laffoy J. and Charleton J.) in *O'Neill v Revenue Commissioners & The Attorney General* [2016] IESCDET 9, for example, refused the Applicant leave to appeal from the judgment of the Court of Appeal (Ryan P., with whom Kelly J. and Hogan J. agreed) delivered on 31st July 2015, which decided the Applicant's appeals from both cases of judicial review, which he had brought to the Court of Appeal. The Applicant had sought an order quashing the financial assessment made against him and an order of mandamus requiring a letter from the respondent stating: "[w]*e have examined your expression of doubt and in accordance with Section 995(4) (a) hold that it is genuine; we will be treating you as though you have made a full and true return.*" The Applicant had stated that he was seeking a declaration that section 955(4) of the Taxes Consolidation Act 1997 along with the Taxes (Electronic Transmission of Income Tax and Capital Gains Tax Returns under Self-Assessment) (Specified Provision and Appointed Day) Order 2001 (S.I. 441 of 2001 (ROS: Revenue Online Service)) was unconstitutional. The Applicant had also sought a declaration that the method used by the respondent to define "*Trade*", "*the Badges of Trade*", which was a 1954 UK Royal Commission, was unconstitutional. The fact of these matters remains in the public domain.

64. In the circumstances, I shall refuse the Applicant's interlocutory application for an order that his substantive judicial review proceedings be heard otherwise than in

public or *in camera* and I shall also refuse the application that those proceedings be anonymised.

PROPOSED ORDER

65. Accordingly, I will make an order refusing the Applicant's application for an order that his substantive judicial review proceedings be heard otherwise than in public or *in camera* and I shall also refuse the application that those proceedings be anonymised.

66. It was agreed at the hearing of this application on 11th and 12th April 2024 that any intended application for a preliminary reference to the CJEU would be left over until judgment was delivered on the Applicant's *in camera*/anonymisation application. I will, therefore, put the matter in before me on Wednesday 5th June 2024 at 10:15 to deal with this and any other ancillary and consequential matters which arise.