IN THE UPPER TRIBUNAL **Appeal No. GIA/1075/2020**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

Kolade Kayode

Appellant

- v –

The Information Commissioner

First Respondent

-and-

The General Medical Council

Second Respondent

Before: Upper Tribunal Judge Wright

Decision date: 31 March 2021
Decided on consideration of the papers

Representation:
Appellant: Mr Kayode represented himself.
First Respondent: Alexandra Littlewood of counsel.
Second Respondent: Christopher Knight of counsel.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

1. This appeal arises from permission given by the Chamber President of the First-tier Tribunal (General Regulatory Chamber), Judge Alison McKenna, in respect of a decision she had made on 10 July 2020 dismissing Mr Kayode's appeal. Judge McKenna gave Mr Kayode permission to appeal on all seven of his grounds of appeal.

2. All parties agree that the appeal to the Upper Tribunal can be decided on the papers, and I agree.

3. Mr Kayode's appeal before the First-tier Tribunal concerned a request for information he had made under the Freedom of Information Act 2000 ("FOIA) on 4 June 2019 to the General Medical Council ("GMC"). The information sought by Mr Kayode from the GMC was "a copy of the Fitness to Practice Panel (FTPP) determination in the Fitness to Practice proceedings involving [a named doctor]". The eventual basis of the GMC's refusal to provide Mr Kayode with the information he sought was section 40(2) of FOIA. Mr Kayode then complained to the Information Commissioner under section 50 of FOIA.

4. It is important to emphasise at this stage a number of features of the evidence. The GMC is the statutory regulator of doctors under the Medical Act 1983 and one of its functions under that Act is to investigate complaints about a doctor's fitness to practise. The information sought by Mr Kayode fell under the investigative and regulatory functions of the GMC. In 2007 the GMC had erased the doctor whose determination was the subject of Mr Kayode's request from its register. Full details of the erasure, including the subsequent fitness to practice determination sought under Mr Kayode's request, were held on the register, and accessible as such, until February 2018. However, on 26 February 2018 the GMC put in place a "Publication and Disclosure Policy – Fitness to Practise", made pursuant to section 35B(4) of the Medical Act 1983. Under that policy the determination sought by Mr Kayode was no longer made available to members of the public by the GMC from the date this policy took effect. This was because the policy from 26 February 2018 provided that a determination in respect of a decision by the GMC to erase a doctor from the medical register was only available for a period of 10 years. That period of 10 years had passed in respect of the doctor the subject of Mr Kayode's request by the time when the policy took effect and so the link to the determination sought by Mr Kayode had been removed on 26 February 2018. This was over a year before Mr Kayode's FOIA request.

5. The essence of the GMC's case was that it would be contrary to the doctor's data protection rights to disclose the information sought by Mr Kayode beyond the 10-year publication period laid down in the policy.

6. The Information Commissioner issued her Decision Notice on Mr Kayode's complaint on 25 November 2019. Her decision was that the GMC had correctly applied section 40(2) of FOIA to withhold the information sought by Mr Kayode.

7. In dismissing Mr Kayode's appeal from that Decision Notice Judge McKenna noted that the appeal by Mr Kayode had originally been based on a misunderstanding about the GMC's policy about for how long details of fitness to practice determinations were published by it. The GMC's policy was not to delete such determinations after only year but after ten years. Judge McKenna agreed with the respondents that the lawfulness of the GMC's policy was beyond the statutory remit of the First-tier Tribunal. However, a correct understanding of that policy was an important pre-requisite to deciding Mr Kayode's appeal, in the judge's view, as it was

relevant to the expectations of the data subject concerned (i.e. the doctor). The misunderstanding about the policy was unfortunate but not in Judge McKenna's view determinative because the First-tier Tribunal had to conduct a full-merits review based on the correct information. In making that 'full-merits' reconsideration the First-tier Tribunal directed itself to adopt a three-part test under Article 6(1)(f) of the General Data Protection Regulation 2018 ("GDPR"): namely, (i) whether there is a legitimate interest, (ii) whether disclosure is necessary to meet that interest, and if so (iii) consideration being given to a balancing test to weigh those interests against the rights and freedoms of the data subject [here the doctor]: per *Goldsmith International Business School v ICO and the Home Office* [2014] UKUT 563 (AAC) at paragraph [35].

8. The First-tier Tribunal noted that Mr Kayode was not himself relying on any context-specific factors but it accepted that a relevant factor could be the doctor with whom Mr Kayode was concerned practising in other countries after having been removed from the register in the UK. In Judge McKenna's view there could be specific reasons why a person in another country would wish to know why a doctor practising in that country has been erased from the register in the UK, and access to the fitness to practice determination would be a necessary means of meeting that legitimate interest. Such a factor could, in the First-tier Tribunal's view, tip the balance in favour of disclosure, but no such case was being made in respect of the particular doctor in Mr Kayode's request.

9. The legitimate interest first part of the three-part test was met, and accepted as such by all parties before the First-tier Tribunal, on the basis that there is a legitimate interest in transparency about the system for ensuring doctors are fit to practice. The First-tier Tribunal also accepted that second part of the three-part test set out in *Goldsmith* was also met. In so holding the First-tier Tribunal agreed with Mr Kayode and the Information Commissioner that it was necessary to access the fitness to practice determinations to meet the identified legitimate interest. This then brought the First-tier Tribunal to the third and final part of the test and whether, applying a balancing test, the satisfaction of parts one and two of the three-part test outweighed the rights of the data subject (the doctor) so as to require disclosure.

10. In carrying out this weighing analysis the First-tier Tribunal concluded that no statutory provision required disclosure by the GMC of the Fitness to Practice determination in respect of the doctor. Nor was the 'open justice principle' relevant to the balancing exercise. Further, the relevant time for deciding whether the requested information was already in the public domain was the date of the GMC's response to the FOIA request as that was the moment when the requester's appeal rights crystallised, and the requested information was not in the public domain at that time. Moreover, the relevant time for considering the data subject's reasonable expectations was also the date of the GMC's final response to the information request. By that time the doctor concerned would have seen the details of his fitness to practice determination had been removed from the GMC's website in accordance with its new policy. The First-tier Tribunal considered that it was not concerned with the correctness of that policy but only with the reasonable expectations of the doctor

as a result of his reliance on this GMC policy. On that basis the doctor had a reasonable expectation that the information would not be disclosed. The First-tier Tribunal concluded this third part of its analysis by saying the following.

> "47. I have balanced carefully the weight of the legitimate interest and the necessity which I have identified against the particular data subject's rights. I am satisfied that it would be distressing to this data subject for the information of the type here requested to be disclosed. Nevertheless, for the reasons I have alluded to above, it seems to me there could well be circumstances in which the balance would tip in favour of disclosure of such information, for example if there were fresh fitness to practice concerns in another country which heightened the arguments in favour of disclosure. However, there has been no suggestion that this context-specific applies here and so I conclude that disclosure would be unfair to the data subject in the circumstances of this case. I conclude that the legitimate interests and necessity I have identified above should not override this data subject's rights."

11. I have to say that at first blush I struggled to see on what basis this reasoning gave rise to any material error of law on the part of the First-tier Tribunal. The reasoning may be somewhat compressed but read in context and as a whole it seemed to me to address the fundamental issues arising under section 40(2) of FOIA and was a judgment the First-tier Tribunal was entitled to make on the evidence before it. That initial impression remains even after considering the detail of Mr Kayode's seven grounds of appeal.

12. The seven grounds on which Mr Kayode was given permission to appeal are as follows.

(i) The First-tier Tribunal erred in law by considering only Article 6(1)(f) of the GDPR.
(ii) The First-tier Tribunal erred in law in stating its only concern was with the reasonable expectation of the data subject.
(iii) It fell into error when, having determined that the Information Commissioner's Decision Notice was wrong in at least one respect, it nevertheless arrived at the same decision as the Information Commissioner.
(iv) The First-tier Tribunal was wrong in law in holding that the lawfulness of the GMC's policy was beyond the statutory remit of Mr Kayode's appeal.
(v) The First-tier Tribunal further erred in law in concluding that section 35B(4) of the Medical Act 1983 was permissive of disclosure rather than mandatory.
(vi) The First-tier Tribunal erred in law in failing to see the application of the principle of open justice to the substantive issue on the appeal.
(vii) The First-tier Tribunal failed to give adequate reasons for its decision, particularly in relation to grounds five and six.

13. Before turning to address those grounds and explaining why they do not give rise to any error of law on the part of the First-tier Tribunal, I should first set out the relevant law.

14. Section 40 of FOIA, insofar as is relevant, provided at the material time as follows.

> "40.(2) Any information to which a request for information relates is also exempt information if—
>
> (a) it constitutes personal data which does not fall within subsection (1), and
>
> (b)the first, second or third condition below is satisfied.
>
> (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—
>
> (a) would contravene any of the data protection principles…
>
> (7) In this section:
>
> "the data protection principles" means the principles set out in-
>
> (a) Article 5(1) of the [GDPR], and
>
> (b) section 34(1) of the Data Protection Act 2018…
>
> "data subject" has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);
>
> "the GDPR", "personal data", "processing" and references to a provision of Chapter 2 of Part 2 of the Data Protection Act 2018 have the same meaning as in Parts 5 to 7 of that Act (see section 3(2), (4), (10), (11) and (14) of that Act).
>
> (8) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted."

15. By section 3(2) of the Data Protection Act 2018 'personal data' is defined as "any information relating to an identified or identifiable individual".

16. The relevant data protection principle under section 40(3A) of FOIA is the first data protection principle which is set out Article 5(1)(a) GDPR and provides that:

> "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."

17. In the context of the GDPR, lawfulness means whether one of the conditions set out in Article 6(1) is satisfied: per section 40(8) FOIA. Article 6(1)(f) of the GDPR provides that:

> "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".

It is Article 6(1)(f) which the First-tier Tribunal in essence was addressing in the passage quoted above form paragraph 47 of its decision.

18. Mr Kayode's first ground of appeal relies on Article 6(1)(c) and 6(1)(e) of the GDPR. These provide, respectively, as follows.

> "processing is necessary for compliance with a legal obligation to which the controller is subject"
>
> and
>
> "processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller"

19. The relevant provisions of FOIA dealing with complaints to the ICO and appeals to the First-tier Tribunal are found in sections 50 and 57-58 of FOIA. These provide as follows:

> "**Application for decision by Commissioner.**
>
> 50.-:(1)Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.
> (2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—
> (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
> (b) that there has been undue delay in making the application,
> (c) that the application is frivolous or vexatious, or
> (d) that the application has been withdrawn or abandoned.
> (3) Where the Commissioner has received an application under this section, he shall either—
> (a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or
> (b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.
> (4) Where the Commissioner decides that a public authority—
> (a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
> (b) has failed to comply with any of the requirements of sections 11 and 17,

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.
(5) A decision notice must contain particulars of the right of appeal conferred by section 57.
(6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.
(7) This section has effect subject to section 53.

Appeal against notices served under Part IV.

57.-:(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.
(2) A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice.
(3) In relation to a decision notice or enforcement notice which relates—
(a) to information to which section 66 applies, and
(b) to a matter which by virtue of subsection (3) or (4) of that section falls to be determined by the responsible authority instead of the appropriate records authority,
subsections (1) and (2) shall have effect as if the reference to the public authority were a reference to the public authority or the responsible authority.

Determination of appeals.

58.-:(1) If on an appeal under section 57 the Tribunal considers—
(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

20. The last piece of relevant legislation is section 35B(4) (and (5)) of the Medical Act 1983.

"S35B(4):- Subject to subsection (5), the General Council shall publish in such manner as they see fit—
(a) decisions of a Medical Practitioners Tribunal that relate to a finding that a person's fitness to practise is impaired (including decisions in respect of a direction relating to such a finding that follow a review of an earlier direction relating to such a finding);
(b) decisions of a Medical Practitioners Tribunal to make an order under section 38(1) or (2) below;

> (c) decisions of a Medical Practitioners Tribunal to refuse an application for restoration to the register or to give a direction under section 41(9) below;
> (d) decisions of an Interim Orders Tribunal or a Medical Practitioners Tribunal to make an order under section 41A below (including decisions in respect of orders varying earlier orders under that section);
> (da) decisions of a Medical Practitioners Tribunal to make a direction under paragraph 5A(3D) or 5C(4) of Schedule 4 and decisions of a Medical Practitioners Tribunal under section 35D that relate to such a direction;
> (e) warnings of a Medical Practitioners Tribunal regarding a person's future conduct or performance;
> (f) warnings of the Investigation Committee regarding a person's future conduct or performance; and
> (g) undertakings that have been agreed in accordance with rules made under paragraph 1(2A) or (2C) of Schedule 4.
> (5) The General Council may withhold from publication under subsection (4) above information concerning the physical or mental health of a person which the General Council consider to be confidential."

21. Turning now to the grounds of appeal, I will take them in the order advanced by Mr Kayode. None of them demonstrate in my judgment any material error of law on the part of the First-tier Tribunal in its decision of 10 July 2020. I would agree, however, with the GMC that taking the grounds in the order presented by Mr Kayode perhaps obscures the core of his argument for disclosure. His argument has its focus on section 35B(4) of the Medical Act 1983 and arguments as to the scope of the First-tier Tribunal's jurisdiction under section 58 of FOIA (ground 4 of the grounds of appeal), and on the scope of section 35B(4) of the Medical Act 1983 and whether it required the GMC to continue to publish the determination sought by Mr Kayode (ground 5). Both grounds four and five of Mr Kayode's grounds of appeal are misconceived and wrong, in my judgment (as are his other grounds of appeal). The First-tier Tribunal had no general jurisdiction to consider the lawfulness of any publication policy made by the GMC under section 35B(4) of the Medical Act 1983. Properly understood, the First-tier Tribunal's jurisdiction under section 58 of FOIA as to whether the Information Commissioner's Decision Notice was "not in accordance with the law" has to be understood in the context of the statutory task the Information Commissioner is required to undertake under section 50(1) of FOIA of determining whether the information request was dealt with in accordance with Part I of FOIA. I say more about this below. In addition, and for the reasons developed immediately below, section 35B(4) of the Medical Act 1983 did not oblige the GMC to continue to publish the determination sought by Mr Kayode after 26 February 2018.

22. **First ground of appeal – wrongly focusing only on Article 6(1)(f) of the GDPR**. Mr Kayode's argument here is that the First-tier Tribunal should also have considered Article 6(1)(c) and 6(1)(e) of the GDPR. The First-tier Tribunal's reasons for not finding these provisions of any material relevance is not explicit in its reasoning. However, in my judgment it made no material error of law in not clearly addressing these provisions in its decision. It plainly proceeded on the basis that they were not relevant and I consider it was right to do so. The reasons challenge adds nothing. The application of Article 6(1)(c) depends on the GMC, as the relevant State actor, being under a legal obligation to process the information. Mr Kayode relies on section 35B(4) of the Medical Act 1983 as imposing that obligation. In my judgment,

that section does not impose any such obligation because the opening wording of section 35B(4) only provide that the GMC "shall publish in such manner as it sees fit…decisions….that relate to a finding that a person's fitness to practice is impaired". Reading that statutory wording as a whole I do not consider that it imposes a legal obligation on the GMC to publish all its fitness to practice determinations for an indefinite period or for more than 10 years. The word "shall" need not mean "must" (see, for example, but in a different context, *SSWP v Hooper* 2007 [EWCA] Civ 495 at paragraphs [56]-[57]) and will takes its meaning from its surrounding context.

23. But even if the 'shall' in section 35B(4) does impose a duty or obligation, the content of that duty has to be determined by the rest of the wording in section 35B(4). I agree with the GMC that properly read any 'duty' in section 35B(4) only requires the GMC to engage in some manner of publication, but it does prescribe how that publication is to be made or for how long it is to be maintained. Those latter considerations are covered by the wording "in such manner as [the GMC] sees fit". That wording must be given effect but on Mr Kayode's argument it would seem to have no effect. His argument must be that the duty under section 35B(4) compelled the GMC to keep in publication for more than 10 years (and presumably for all time) the determination he sought in June 2019. I cannot see how that result is consistent with the wording of section 35B(4) as a whole. For that result to hold the relevant wording of section 35B(4) would need to read something like "the GMC must publish, and keep published, all decisions….that relate to a finding that a person's fitness to practice is impaired". I have deliberately used the wording 'keep in publication' because it is a necessary stage in Mr Kayode's argument. The GMC **had** published the relevant details in relation to the doctor the subject of Mr Kayode's request but had ceased doing so on 26 February 2018. Even if the GMC was pursuant to section 35B(4) under a duty to publish the relevant determination, it had done so, and so had met its duty.

24. The reading I consider applies to section 35B(4) of the General Medical Act is reinforced, in my judgment, by two further considerations. First, the wording "[the GMC] shall publish in such manner as it sees fit" applies to all the categories of decision recited in in that section and so is more likely to be a general duty to engage in some manner of publication. Second, I accept the GMC's point that it is required to exercise its function under section 35B(4) in accordance with its duty under section 6 of the Human Rights Act 1998 to act compatibly with Convention rights. This can impose significant restrictions on publication of determinations: *General Medical Council v X* [2019] EWHC 493 (Admin). The passage of time allowing once public matters to recede back into the private life is a well- recognised aspect of Article 8 ECHR, including by reference to criminal proceedings: see, e.g., *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; [2015] AC 49 at paragraphs [16]-[18].

25. Article 6(1)(e) of the GDPR may fall into different territory in that it may not be concerned with processing as a result of a legal obligation but instead processing resulting from the exercise of a legal power. Even if this is so, however, and section 35B(4) of the Medical Act 1983 provides a relevant power to publish the sought after determination, it was not 'necessary' to so given that the GMC's clear policy is not to publish such a determination after a relevant passage of time. Again, any failure by

the First-tier Tribunal to explain why Article 6(1)(e) did not apply does not of itself amount to a material error of law in its decision given the lack of merit in the substantive argument on Article 6(1)(e).

26. **Second ground of appeal – First-tier Tribunal wrong only to have concern with reasonable expectation of the data subject**. This seems to me in the final analysis to be more than a merits argument reworked. I can find nothing in the First-tier Tribunal's reasoning which supports the argument that it focused solely on the reasonable expectations of the doctor whose fitness to practice determination was the subject of the request. The merits basis for this ground is revealed in my judgment by Mr Kayode arguing that "the weight accorded to the reasonable expectation of the [doctor] ought to have been limited". It was for the First-tier Tribunal to evaluate the weight to be given to doctor's reasonable expectation and make a judgment on it, and that it has done. Nor does any reasons challenge add anything to the argument here.

27. However, Mr Kayode extends his argument here, as I understand it, by arguing that the First-tier Tribunal was wrong in approaching the issue of 'reasonable expectation' as one of fact rather than a question of law and that it failed to recognise the (alleged) legal principle that it is not possible to create a reasonable expectation of privacy in respect of a matter that was previously in the public domain (because the 'doctor's information' had been published by the GMC until 26 February 2018). There are two problems with this argument which make it unsustainable in error of law terms. First, the First-tier Tribunal found as a fact that the information was not obviously in the public domain at the relevant time and because of this the doctor concerned would "at that time" have had a reasonable expectation that the requested information would not be disclosed. I agree with the respondents that as a result of that uncontested finding it was simply not relevant whether the requested information had been in the public domain at some point in the past. Second and in any event, the alleged principle on which Mr Kayode founds is incorrect. The question of 'reasonable expectation' is one to be decided on the facts of the individual case: see paragraphs [24] and [30] of *GR-N v ICO and Nursing and Midwifery Council* [2015] UKUT 449 (AAC). The cases relied on by Mr Kolade are not on point as they were not concerned with section 40(2) of FOIA and the lawful processing of personal data under the GDPR or either Data Protection Act (1998 or 2018).

28. **Third ground of appeal – wrong for First-tier Tribunal to uphold the Information Commissioner's Decision Notice having found it wrong in at least one respect.** The errors identified and relied on by Mr Kayode are that the Information Commissioner proceeded (i) on the basis of a wrong understanding about the GMC's publication policy (thinking it to be for 1 year rather than 10 years), and (ii) by wrongly relying on a previously expressed view of hers, in her regulatory and advisory role, about the GMC's policy. The short answer to this is that neither error (if it be such) was considered by the First-tier Tribunal to vitiate the Decision Notice and having conducted its own full-merits reconsideration the First-tier Tribunal was entitled to uphold the Decision Notice notwithstanding these errors. Following the Upper Tribunal's decision in *ICO v Malnick and ACOBA* [2018] UKUT 72 (AAC);

[2018] AACR 29, the First-tier Tribunal was entitled under its full-merits reconsideration under section 58 of FOIA to disagree with aspects of the ICO's reasoning but still uphold her Decision Notice and dismiss the appeal. Mr Kayode advances no compelling reason not to follow *Malnick* (see paragraph [37(iii)] of *Dorset Healthcare NHS Trust v MH* [2009] UKUT 4 (AAC)) and moreover I consider it was plainly correct. Nor does he really explain why the said errors were material to the Decision Notice and could not be 'cured' by the First-tier Tribunal exercising its full-merits jurisdiction. Further, a reasons challenge has no purchase here as the First-tier Tribunal clearly explained its concerns about aspects of the Decision Notice, but directing itself correctly on the basis of *Malnick* it found afresh that the decision in that Decision Notioce was nonetheless in accordance with the law.

29. **Fourth ground of appeal – First-tier Tribunal wrong to consider its statutory remit precluded it from ruling on the lawfulness of the GMC's policy.** I have addressed this already in paragraph 21 above. There is little to add to that analysis. Like the first ground of appeal, a reasons challenge here on its own takes Mr Kayode nowhere as a failure to give reasons can only be a material error of law if the substantive argument has merit. Here it does not. The function of the Information Commissioner under section 50 of FOIA was no wider than deciding if Mr Kayode's request for information had been dealt with in accordance with Part I of FOIA. That statutory remit did not involve the Information Commissioner in deciding whether the GMC's February 2018 '10 year' publication policy was lawful. That is reinforced by the limited nature of the decisions the Information Commissioner may reach under section 50(4) of FOIA. As Judge McKenna put it, the primary relevance of that policy sounded in any reasonable expectation the doctor may have at the relevant time in 2019 based on that policy.

30. The First-tier Tribunal is a statutory tribunal and only has the jurisdiction conferred on it be the statute. That statute here is FOIA. The phrase "the decision [notice] against which the appeal is brought is not in accordance with the law" in section 58(1)(a) of FOIA has to be read and understood in that context given its focus on, here, the Decision Notice under section 50 of FOIA. The 'law' spoken of in section 58(1)(a) is thus Part I of FOIA and, see *Malnick* at paragraph [100], procedural fairness issues in the making of the decision in the Decision Notice. But it does not extend to any and all law generally or public law challenges to the lawfulness of policies of a public authority.

31. **Fifth ground of appeal – section 35B(4) of the Medical Act 1983 is mandatory of disclosure rather than permissive**. The precise legal scope of section 35B(4) was relevant to whether Article 6(1)(c) or 6(1)(e) of the GDPR was relevant to Mr Kayode's appeal to the First-tier Tribunal. I have largely addressed the arguments here under the first ground of appeal above and for the reasons given there the First-tier Tribunal's holding that section 35B()4) of the Medical Act 1983 did not impose an obligation on the GMC to (continue) publishing the relevant doctor's information was not in error of law. And a separate reasons challenge here should not lead to any conclusion that the First-tier Tribal erred in law given the lack of merit in the fifth ground as a substantive ground of appeal.

32. **Sixth ground of appeal – failure to apply the principles of open justice**. I confess to struggling to understand what this ground added to Mr Kayode's appeal below or from where these principles of open justice are said to arise in a FOIA context. Neither Article 6 nor Article 10 of the European Convention on Human Rights would seem to apply in the context of FOIA (see *Moss v ICO and the Cabinet Office* [2020] UKUT 242 (AAC)). And there is no ground of appeal concerning any failure to hold the hearing below in an accessible and transparent manner. I am also unclear how such principles have a separate and independent application under section 40(2) of FOIA and Article 6 of the GDPR (that is, how this ground assists Mr Kayode even assuming (as I have found) all his other grounds fail). Be that as it may, transparency was taken into account, indeed relied on, by the First-tier Tribunal when it addressed the first two parts of the Article 6(1)(f) analysis. Further, I can find no error of law in the First-tier Tribunal deciding that the principle of open justice was not relevant *once* it reached weighing under Article 6(1)(f) the interests of transparency against the reasonable expectations of the doctor. And the principles of open justice did not otherwise require, given my conclusions under the first ground of appeal, the information to be published under Article 6(1)(f). Nor do I consider that a separate reasons challenge adds anything useful to this ground. In the context of this somewhat legally vague ground of appeal, the First-tier tribunal provided adequate reasons in relation to the 'principles of open justice' and their application to the appeal before it.

33. **Seventh ground of appeal – inadequate reasons**. I have addressed and rejected this ground in the relevant paragraphs above and need say no more about why this ground is not made out.

34. I should add that in coming to my decision above I have considered with care Mr Kayode's 82 page, 268 paragraph 'Response to the Respondents' Response[s] to the appeal'. Stripped to its essentials I found nothing in that response that differed or added materially to the arguments I have addressed above.

35. For all the reasons set out above this appeal is dismissed.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 31 March 2021