Appeal number: EA/2019/0461P

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

KOLADE KAYODE **Appellant**

- and -

(1)THE INFORMATION COMMISSIONER **Respondents**
(2) THE GENERAL MEDICAL COUNCIL

Before:
JUDGE ALISON MCKENNA (CP)

Determined on the papers, the Tribunal sitting in Chambers on 8 July 2020

MODE OF HEARING

1. This determination was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to compose the panel in this way, having regard to paragraph 6 (a) of the Senior President's Pilot Practice Direction dated 19 March 2020[1] and the desirability of determining all cases which are capable of determination by the most expeditious means possible during the pandemic.

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules[2].

3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 354, plus additional papers consisting of the Information Commissioner's final submission. There is no closed bundle.

DECISION

4. The appeal is dismissed.

REASONS

Background to Appeal

5. The Appellant made an information request under the Freedom of Information Act 2000 ("FOIA") to the General Medical Council ("GMC") on 4 June 2019. He requested a copy of the Fitness to Practice Panel determination for a named doctor, in relation to a hearing which has taken place in 2008, before the establishment of the Medical Practitioners Tribunal Service ("MPTS").

6. GMC originally refused to confirm or deny whether it held the requested information but on internal review on 6 September 2019, GMC confirmed that it held the requested information but refused to disclose it in reliance on s. 40 (2) FOIA. The Appellant complained to the Information Commissioner.

7. The Information Commissioner issued a Decision Notice on 25 November 2019 (number FS50872018). The Decision Notice concluded that there was a legitimate interest in the requested information in view of the requirement for the public to understand that doctors are appropriately regulated. It also concluded that disclosure was necessary because the entry on the register alone is insufficient to meet that legitimate interest. In applying a balancing test, the Decision Notice

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[1] https://www.judiciary.uk/publications/pilot-practice-direction-panel-composition-in-the-first-tier-tribunal-and-the-upper-tribunal/

[2] https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules

concluded that the named doctor had a reasonable expectation that the information would be withheld, taking into account the changed data protections landscape and the "right to be forgotten" under GDPR. It was noted that GMC had amended its policy in the light of GDPR so that disclosure was time-limited, so disclosure of the requested information in this case would have effectively re-introduced its earlier blanket policy of indefinite disclosure. The Decision Notice concluded that disclosure of the requested information in this case would be unfair and cause distress to the doctor concerned so that GMC had been correct to refuse disclosure in reliance upon s. 40 (2) FOIA.

8. The Appellant appealed to the Tribunal.

The Law

9. Section 40 (2) FOIA provides that information is exempt from disclosure if it is the personal data of any person other than the requester and where one of the conditions in s. 40 (3A), (3B) or (4A) is satisfied.

10. Section 40 (3A)(a) FOIA applies where disclosure of the information would contravene any of the principles in Article 5 of the General Data Protection Regulation ("GDPR"). This is an absolute exemption, so no public interest test is to be applied.

11. 'Personal Data' is defined by s. 3(2) of the Data Protection Act 2018 as *any information relating to an identified or identifiable living individual.*

12. Article 5 (1) (a) GDPR provides that *personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.*

13. *Lawful processing* under Article 6 (1) (f) GDPR requires processing to be *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.*

14. The Upper Tribunal has endorsed the adoption of a three-part test in considering whether (i) *there is a legitimate interest, (ii) whether disclosure is necessary to meet that interest* if so, (iii) the consideration of a *balancing test* to weigh those interests against the rights and freedoms of the data subject. See *Goldsmith International Business School v Information Commissioner and Home Office* [2014] UKUT 563 (AAC)[3] at [35] to [42]. This was a reiteration of the Supreme Court's judgment in *South Lanarkshire Council v The Scottish Information Commissioner* [2013] UKSC 55[4] at [18].

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[3] https://www.bailii.org/uk/cases/UKUT/AAC/2014/563.html

[4] https://www.supremecourt.uk/cases/docs/uksc-2012-0126-judgment.pdf

15. In *Cox v IC and Home Office* [2018] UKUT 119 (AAC)[5] Upper Tribunal Judge Wikeley commented that:

> *45. Also relevant in the present context is Judge Jacobs's warning in GR-N v Information Commissioner and Nursing and Midwifery Council (at paragraph 30) against over-generalised propositions: "is impossible to apply paragraph 6(1) without having regard to the identity of the applicant, the interest pursued by the request, and the extent to which information is already potentially available to the public."*

16. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> *"If on an appeal under section 57 the Tribunal considers -*
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> *(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.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

17. The burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The relevant standard of proof is the balance of probabilities.

18. This appeal is against the Information Commissioner's Decision, and not the process of reasoning set out in the Decision Notice – see the Decision of a three-Judge panel in *Information Commissioner v Malnick and the Advisory Committee on Business Appointments* [2018] UKUT 72 (AAC) at [94][6].

Submissions and Evidence

19. By the time of the hearing of this appeal, the Appellant relied on four grounds of appeal, which I summarise as follows:

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[5] https://www.gov.uk/administrative-appeals-tribunal-decisions/cox-v-information-commissioner-and-home-office-2018-ukut-119-aac

[6] https://assets.publishing.service.gov.uk/media/5e208b08e5274a6c38aae2a2/_2018__AACR_29ws.pdf

(i) That the Decision Notice was wrong in law;

(ii) That the Information Commissioner erred in law when she expressed a view on the GMC's policy consultation in 2015 that indefinite publication was problematic from a data protection view-point;

(iii) That the Information Commissioner erred in law by relying on her own previously expressed view in the Decision Notice;

(iv) That GMC's policy is unlawful.

20. The Appellant made submissions in respect of a range of additional factors. To summarise, his contention is that GMC's policy is unlawful and that the Information Commissioner ought not to have endorsed it. He contrasts the position of the GMC in relation to the information on its own website with that of doctors who bring an onward appeal so that their information is not subject to the same right to be forgotten as those who take the matter no further. He also submits that the particular information requested has in the past been publicly available so that any viewer of the website could have downloaded it and continue to disseminate it. Thus, that the Decision Notice failed to consider the extent to which the requested information is already in the public domain.

21. The Appellant also objects to the reference in the Decision Notice to him not having put forward a particular justification for disclosure. He submits that there is no legal requirement for him to do so.

22. The Information Commissioner's Response dated 28 January 2020 generally maintained the analysis as set out in the Decision Notice. I refer to her pleaded case in more detail in respect of her final submissions below, as it has been amended over time.

23. The Appellant's Reply to the Information Commissioner's Response took issue with the Information Commissioner's submission that the Appellant was asking the Tribunal to determine matters outside its jurisdiction. He submitted that his four grounds of appeal were intrinsically connected. He referred the Tribunal to the case law on open justice and submitted that GMC's policy was unlawful in contravening this principle.

24. The GMC was added as a party to the appeal. Its Response dated 18 February 2020 helpfully clarified its policy for the Tribunal and corrected some misunderstandings on the part of the Appellant and the Information Commissioner. It asked the Tribunal to dismiss the appeal and uphold the Decision Notice.

25. In respect of the particular doctor who is the subject of the Appellant's information request, GMC submitted that he was erased from the register in 2007, and full details of his erasure were held on the register until February 2018 when the new policy took effect. There had throughout that period been a link to the MPTS determination. Under the new policy, details of the reason for his erasure (fitness to practice) are no longer published so the MPTS link has been deleted. However,

any member of the public can search the medical register and find that he is not entitled to practice in the UK.

26. GMC accepted that, in response to a FOIA request in 2010, it disclosed details of all doctors erased from the medical register for fitness to practice reasons since 2005 and that that information was published on the whatdotheyknow.com website. Information about the particular doctor with whom the Appellant is concerned was included in that disclosure.

27. GMC's submission was that there is a limited legitimate interest in disclosure as the public should understand how doctor's fitness to practice hearings are conducted. However, it submitted that the Decision Notice had erred in concluding that there was an interest related to the use of taxpayers' money, as GMC is not funded from the public purse. It was submitted that disclosure is not necessary to meet the legitimate interest identified as the public is entitled to know whether a doctor is entitled to practice, and that information is always available. Fitness to practice hearings are conducted in public and determinations are made available for ten years, but there is not in GMC's submission a necessity in relation to the availability of details of an erasure which took place over ten years ago. It is noted that an individual may no longer be affected by the issues which caused him or her to become unfit to practice.

28. It is submitted by GMC that if the Tribunal finds it necessary to conduct the balancing exercise, then the balance favours non-disclosure in circumstances where the doctor's expectation at the time of the request would have been influenced by the policy, and a breach of his reasonable expectations would cause distress and be unfair. It is submitted that grounds two, and four fall outside of the Tribunal's statutory remit in determining this appeal. It is further submitted that the Decision Notice did not err in law in referring to the Information Commissioner's previously expressed opinion about GMC's policy.

29. In his Reply to GMC's Response, the Appellant confirmed his acceptance that the information requested is personal data. However, he relied on GMC's statutory power to publish determinations under s. 35B(4) of the Medical Act 1983[7] and submitted that it tipped the balancing test in favour of disclosure. He relied on this statutory provision as providing a basis for lawful processing "otherwise than under this Act" under s. 40 FOIA and submitted again that GMC's policy is unlawful in seeking to apply GDPR to its pre-existing statutory requirement to publish. He submitted that there is a mandatory duty to publish fitness to practice information and not a discretion, as the GMC had submitted. He submitted that the 'right to be forgotten' is a right exercisable by a data subject and does not provide a basis for the refusal of information under FOIA.

30. GMC filed a further submission dated 16 March 2020, with the permission of the Tribunal. It submitted that the Appellant was in fact attempting to mount a

[7] http://www.legislation.gov.uk/ukpga/1983/54/section/35B

challenge to GMC's policy which it was beyond the Tribunal's remit to determine. It submitted that the Appellant should have applied for judicial review if this was his aim. It resisted the Appellant's suggestion that these proceedings should be transferred to a court with jurisdiction to determine that issue.

31. The Appellant filed a "Rejoinder" dated 18 March 2020, in which he made a submission (possibly amounting to a fresh ground of appeal) that the Decision Notice was wrong in law for its failure to conclude that the statutory basis for publication provided by the Medical Act 1983 is a lawful basis for processing under Article 6 GDPR.

32. The Information Commissioner's final submissions dated 30 June 2020 note that, since the filing of her Response, the GMC had clarified the length of time for which information concerning erased doctors is available on its website and that the Appellant had (with the permission of the Tribunal) amended his grounds of appeal in the light of that clarification. In responding to the Appellant's fourth ground, the Information Commissioner submitted that the Tribunal has no jurisdiction to determine whether GMC's policy is lawful.

33. The Information Commissioner submitted that the Decision Notice had reached the correct conclusion because disclosure of the requested information would have been contrary to the data subject's expectations, contrary to their reasonable expectations given the changes in the data protection landscape and would have the effect of re-introducing a blanket policy of indefinite disclosure, causing distress and unfairness to the doctor concerned. It was submitted that none of these key conclusions were affected by the clarification that the policy was of keeping MPTS determinations on GMC's website for 10 years.

34. The Information Commissioner clarified that she no longer relied on the legitimate interest identified at paragraph 33 of the Decision Notice (now accepting that GMC is not in fact funded by the tax payer) but that she did still rely on the legitimate interest identified at paragraph 34, which is the interest in knowing that doctors are appropriately licenced and regulated.

35. None of the parties relied on witness evidence. The documentary evidence in the Tribunal's bundle included the correspondence between the parties and GMC's consultation and finalised policy documents. GMC also included some helpful screen shots of its website.

Conclusion

36. Firstly, I note that the Appellant's appeal, as originally pleaded, was based on a misunderstanding of GMC's policy. He has fairly acknowledged this (page 187 of the bundle) and amended his submissions to refer to the ten-year publication period. His original contention was that GMC's policy was to delete details of fitness to practice determinations after only one year, whereas the policy is in fact to delete it after ten years. The Information Commissioner also seems to have misunderstood this point. I am grateful to GMC for its clarification.

37. I agree with both Respondents that the lawfulness of GMC's policy is beyond the statutory remit of this appeal and accordingly I make no decision on the Appellant's grounds two and four. The Appellant has, at some length, tried to persuade me that I cannot determine the lawfulness of the Decision Notice without deciding that issue, as he submits that the issues are integral. However, it seems to me that even if I were persuaded to comment on that issue, anything I said would necessarily be *obiter*. It is regrettable that the Appellant and GMC have exchanged so many submissions on matters which have no bearing on the statutorily defined decision I must take. I have not referred to all their submissions.

38. It does seem to me that a correct understanding of the GMC's policy is an important pre-requisite to deciding this appeal, as it is relevant to the expectations of the data subject concerned. It is unfortunate that the Decision Notice does not reflect a correct understanding of the policy. However, it does not seem to me that this misunderstanding, by itself, requires the appeal to be allowed. In determining this appeal I am required to undertake a full-merits review, which means that I am able to approach the legal issues afresh in the light of the correct information and thus cure the factual defects of the Decision Notice.

39. In considering the Appellant's ground three, I find I share the Appellant's discomfort that the Information Commissioner would rely, in undertaking her quasi-judicial role, on an opinion that she had herself expressed in her regulatory and advisory role. This approach would appear to risk the introduction of extraneous considerations into the Decision Notice. However, as noted at paragraph 18 above, this appeal is against the decision reached in the Decision Notice and not the reasoning adopted in support of that decision. I am not therefore persuaded by the Appellant's submission that a material error of law was introduced into the Decision Notice by its reliance on the Information Commissioner's previously expressed view about the GMC's policy. It seems to me that I can safely make my fresh decision on this appeal without any reference at all to that consideration.

40. I turn to the Appellant's ground one. None of the parties have suggested that the three-stage test is the wrong approach. In considering the elements of that test, it is necessary to undertake a fact-sensitive analysis, as referred to by UTJ Wikeley in *Cox* (see paragraph 15 above). This may have been what the Decision Notice was intending to refer to in stating that the Appellant did not identify a particular interest in the disclosure of the requested information. Whilst accepting the Appellant's submission that he is not required to evidence the nature of his interest, I also note here that he has not expressed himself as relying on any context-specific factors.

41. Nevertheless, it seems to me that there is a context-specific factor which ought to be considered in this case, which is the reference at paragraph 49 of the Decision Notice (and the Appellant's submissions thereon at page 229 of the hearing bundle) to the doctor with whom he is concerned practising in other countries after being removed from the register in the UK. It seems to me that this is a factor which should properly be considered under the three-stage test. There may be specific reasons why a person in another country may legitimately wish to know why a doctor practicing there has been erased from the register here, so that access to the

fitness to practice determination would be a necessary means of meeting that legitimate interest. Such a factor could, in my view, tip the balance in favour of disclosure. However, I note that no such case has been made in respect of this particular doctor.

42. Addressing the first step of the three-stage test, I note the error in the Decision Notice as to the nature of the legitimate interests identified. I accept the Information Commissioner's latest submission that the reference to GMC being publicly funded was erroneous but that there is nevertheless a legitimate interest in transparency about the system for ensuring doctors are fit to practice. I agree with all parties that the legitimate interests test is met in this case and discern no material error in the Decision Notice in this regard.

43. Turning to the second question of necessity, I agree with the Appellant and the Information Commissioner that there is a necessity factor here, as accessing the detailed information about fitness to practice determinations is required to meet that legitimate interest. I reject GMC's submission that knowing whether a doctor is registered or erased is the only information necessary to meet that interest. I discern no error in the Decision Notice in this regard.

44. It follows that I am now required to move to stage three and apply the balancing test to consider whether, in all the circumstances, the factors I have found at stages one and two outweigh the rights of the data subject so as to require disclosure.

45. I turn briefly to deal with the Appellant's submissions. I conclude that the statutory provision relied on by the Appellant in relation to the publication of fitness to practice determinations is permissive as described by GMC and not mandatory of disclosure, as he suggests. I am not persuaded that the open justice principles he refers to are influential to the balancing exercise I must undertake. I consider that the relevant time for considering whether the requested information was already in the public domain is the date of the public authority's response to the FOIA request, as that is the moment when the requester's appeal rights can be said to crystallise. I draw an analogy here with the time at which a public interest is to be identified where a qualified exemption is considered[8]. I conclude that the requested information was not obviously in the public domain at the relevant time. I reject the Appellant's contention that it is appropriate for me to consider whether any person may have downloaded and saved it.

46. I conclude that the time for considering the nature of the data subject's reasonable expectations is also the date of the public authority's final response to the information request. At that time, the doctor with whom we are here concerned would have seen the details of his fitness to practice determination removed from the GMC's website in accordance with its new policy. I am not here concerned with the correctness of that policy or the effect that any disclosure in this case would have on that policy, but only with the reasonable expectations of that data subject

[8] See paragraphs [61] to [73] *Maurizi v IC and CPS* [2019] UKUT 252 (AAC) https://assets.publishing.service.gov.uk/media/5d8dec7ce5274a2fb7408487/GIA_0973_2018-00.pdf.

as a result of his reliance on GMC's public policy. I consider that he had a reasonable expectation that the requested information would not be disclosed.

47. I have balanced carefully the weight of the legitimate interest and 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 that 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 factor 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 should not override this data subject's rights.

48. For all these reasons, I conclude that the Decision Notice was correct to find that GMC was right to refuse disclosure of the requested information under s. 40 (2) FOIA. This is because the information requested was correctly identified as the personal data of a third party. Further, that s. 40 (3A)(a) FOIA was appropriately considered to be engaged because disclosure of the information would contravene Article 5 (1) (a) GDPR. Finally, I find no error of law in the conclusion that the processing of the personal data requested would not be lawful under Article 6 (1) (f) GDPR in the circumstances of this case.

49. Although my reasoning has differed from that of the Information Commissioner, I conclude that there is no error of law or inappropriate exercise of discretion in the Decision Notice and, accordingly, I now dismiss this appeal.

ALISON MCKENNA **DATE: 10 July 2020**

CHAMBER PRESIDENT **DATE PROMULGATED: 14 July 2020**

Corrected Decision **DATE : 27 July 2020**