THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Upper Tribunal Case No. GIA/447/2017

PARTIES

The Information Commissioner (Appellant)

and

Mr Edward Malnick (First Respondent)

and

The Advisory Committee on Business Appointments (Second Respondent)

APPEAL AGAINST A DECISION OF A TRIBUNAL

DECISION OF THE UPPER TRIBUNAL

JUDGE WIKELEY, JUDGE WRIGHT AND JUDGE MARKUS QC

Date of Hearing: 7th and 8th December 2017

Date of Decision: 1st March 2018

Representation:

Appellant:	Mr P Lockley (counsel)
First Respondent:	Mr A Waterman QC and Mr J Bunting (counsel)
Second Respondent:	Ms H Stout (counsel)

First-tier Tribunal:	General Regulatory Chamber (Information Rights)
Decision Date:	3 November 2016
File Reference:	EA/2016/0055

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 3 November 2016 under file reference EA/2016/0055 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It follows that the First Respondent's appeal against the Information Commissioner's Decision Notice FS50591296, dated 3 February 2016, is remitted to be re-heard by a different First-tier Tribunal in accordance with the decision of the Upper Tribunal and subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the re-hearing:

(1) The new First-tier Tribunal should not involve either the tribunal judge or either of the two members who were previously involved in considering this appeal on 21 September 2016.

(2) These Directions may be supplemented by later directions issued by the Tribunal Caseworker, the Registrar or a Tribunal Judge in the General Regulatory Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. The *Ministerial Code* (The Cabinet Office, latest edition December 2016) provides that, on leaving office, Ministers (and senior civil servants) must seek advice from the Advisory Committee on Business Appointments (ACOBA) about any appointments or employment which they wish to take up within two years of leaving office, and that they must abide by that advice. ACOBA is a non-departmental public body, sponsored by the Cabinet Office. The Code is characterised as a code of honour. Thus ACOBA has no power to compel former Ministers either to seek advice before taking up appointments or to accept the advice given.
2. The Government's *Business Appointments Rules for Former Ministers* explain the process for making applications to ACOBA and the tests adopted by ACOBA in considering applications. The Rules also stipulate that approaches to the Committee are handled in confidence and remain confidential until an appointment or employment is publicly announced or taken up, at which time ACOBA publishes its advice (whether or not the advice was followed). ACOBA's policy is also to confirm whether or not its advice has been sought in relation to any specified appointment.
3. Mr Malnick is a journalist. On 19 February 2015 he wrote to ACOBA requesting:

   > "copies of all correspondence, or records of oral conversations, between ACOBA and Tony Blair/Mr Blair's representatives, in the period from July 2005 to July 2009."

4. There cannot be many reading this decision who need to be reminded that the Rt Hon Tony Blair was the United Kingdom's Prime Minister until June 2007. According to Mr Malnick's skeleton argument, Mr Blair's "case has come to exemplify public concern at former Ministers obtaining lucrative post-office appointments. If ever there was a case for transparency, it is this one".
5. On 30 March 2015 ACOBA refused to disclose the information requested by Mr Malnick, relying on the exemptions in section 36(2)(b)(i) and (ii), section 36(2)(c) and section 40(2) of the Freedom of Information Act 2000 (FOIA).
6. Mr Malnick then complained to the Information Commissioner. The Commissioner concluded that the information was exempt from disclosure under both section 36(2)(b) and (c) (prejudice to effective conduct of public affairs) and so did not go on to consider the application of section 40(2) (personal information).
7. Mr Malnick appealed to the First-tier Tribunal (FTT) which allowed the appeal on the ground that section 36 was not engaged but that, if it was, the public interest favoured disclosure. The FTT held that the decision notice was not in accordance with the law and that the Commissioner would "therefore need to issue a new decision notice, which does not rely on [section 36]". The purpose of this order was to allow the Commissioner

to consider whether the information was exempt under section 40(2), an issue which the Commissioner had not yet considered and which the FTT did not consider was in play in the appeal before it.

8. The Upper Tribunal gave the Information Commissioner permission to appeal on the following three grounds:
    a. Ground 1: The FTT erred in law in holding that section 36 was not engaged because the opinion of the Qualified Person (QP) was not a reasonable one.
    b. Ground 2: The FTT erred in its assessment of the balance of public interest under section 36.
    c. Ground 3: The FTT had no power to order the Commissioner to issue a new decision notice.
9. ACOBA was subsequently joined as a party to the appeal. An application by ACOBA to add its own further ground of appeal relating to what was claimed to be procedural unfairness on the part of the FTT was unsuccessful. ACOBA supports the Commissioner on Grounds 1 and 2 but not on Ground 3. In this decision we refer to the Commissioner and ACOBA together as the appellants, given their common position on the issues of substance that the FTT erred in law concerning section 36 (i.e. Grounds 1 and 2).
10. On 25 April 2017 Mr Justice Charles, the President of the Upper Tribunal (Administrative Appeals Chamber), directed that the appeal be heard by a panel of three judges of the Upper Tribunal. This was because, as regards Ground 3, it concerned "difficult points of law relating to the powers and remedies available to the First-tier Tribunal when deciding an appeal against a decision notice issued by the Information Commissioner, and in particular whether *Information Commissioner v Bell* [2014] UKUT 106 (AAC) was correct to rule that the First-tier Tribunal has no power to remit a case to the Information Commissioner for further consideration ('the *Bell* question')."
11. The hearing of the appeal took place before the three judge panel on 7 and 8 December 2017. All parties were represented by counsel: the Commissioner by Mr Peter Lockley, ACOBA by Ms Holly Stout, and Mr Malnick by Mr Adrian Waterman QC and Mr Jude Bunting. We are grateful to all counsel for their submissions.

Legislative framework

12. Section 1 of FOIA makes provision for the 'General right of access to information held by public authorities'. According to section 1(1) and (2):

> "(1) Any person making a request for information to a public authority is entitled—
>
> > (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> >
> > (b) if that is the case, to have that information communicated to him.
>
> (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

13. Section 2 provides as follows:

"2.— Effect of the exemptions in Part II

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
 (a) the provision confers absolute exemption, or
 (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,
 section 1(1)(a) does not apply.
(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
 (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
 (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—
 (a) section 21,
 (b) section 23,
 (c) section 32,
 (d) section 34,
 (e) section 36 so far as relating to information held by the House of Commons or the House of Lords,
 (ea) in section 37, paragraphs (a) to (ab) of subsection (1), and subsection (2) so far as relating to those paragraphs,]
 (f) in section 40—
  (i) subsection (1), and
  (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 (g) section 41, and
 (h) section 44."

14. Section 36 (which in the present case operates as a qualified exemption, given the terms of section 2(3)(e), and so is subject to the public interest balancing test) materially provides as follows:

"36.— Prejudice to effective conduct of public affairs.

(1) This section applies to—
 (a) information which is held by a government department ... and is not exempt information by virtue of section 35, and
 (b) information which is held by any other public authority.
(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
 (a) ...
 (b) would, or would be likely to, inhibit—
  (i) the free and frank provision of advice, or
  (ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

...

(5) In subsections (2) and (3) "qualified person" —

...

(o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means—

...

(iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

15. The exemption in section 40, which is an absolute exemption by virtue of section 2(3)(f), applies to personal data of which the applicant is not the subject.

16. The main procedural provisions are the following:

"17.— Refusal of request.

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
(a) states that fact,
(b) specifies the exemption in question, and
(c) states (if that would not otherwise be apparent) why the exemption applies.
...
(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—
(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
...
(7) A notice under subsection (1), (3) or (5) must—
(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
(b) contain particulars of the right conferred by section 50.
...

50.— Application for decision by Commissioner.

(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 1.

(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.
...

57.— Appeal against notice served under Part IV.

(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.
...

58.— Determination of appeals.

(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.”

17. We also mention section 11, which we do not need to set out. It makes provision for the means of communication by the public authority of the requested information.

Ground 1: section 36 and the Qualified Person's opinion

18. At the relevant time Baroness Browning, the Chair of ACOBA, was authorised under section 36(5)(o)(iii) as the QP.

19. Her opinion under section 36(2) was that the prejudice in section 36(2)(b)(i) and (ii) would be likely to occur because

> "Information and advice would be less open and honest if there was a risk that it would be released publicly; and applicants would not feel confident about approaching ACOBA and might feel inhibited from cooperating fully if they thought that the full details of their applications and correspondence about them would be disclosed"
>
> and
>
> "ACOBA and applicants (or applicants' representative) need a safe space to discuss prospective outside appointments in advance of any public announcement in the knowledge that this discussion (although not the detail of any appointment subsequently taken up, which will be published) is and will remain confidential."

20. Baroness Browning's opinion was that prejudice under section 36(2)(c) was also likely to occur because

> "If applicants did not feel confident about approaching ACOBA, this would make it less likely for applicants to cooperate with the Committee in future, thereby hindering the Committee's ability to function effectively. This would have a negative impact on effective public administration more widely. ACOBA supports the implementation of the relevant rules on accepting outside appointments in a range of public authorities. It also provides advice directly to former Ministers in the UK, Scottish and Welsh Governments. If the Committee were unable to fulfil its role effectively, the outside appointments of former Ministers and Crown servants would not be subject to the necessary degree of independent scrutiny and the appointments would be subject to more public concern, criticism or misinterpretation."

21. The issues which Baroness Browning identified under subparagraphs (b) and (c) are frequently described as concerning "safe space" and "chilling effect" respectively.

22. The FTT admitted evidence which had not been before the Commissioner, comprising transcripts of the oral evidence of two hearings of the House of Commons Public Administration Constitutional Affairs Committee (PACAC). The first took place on 8 February 2011, at which Lord Lang of Monkton, Baroness Browning's predecessor, gave evidence in respect of ACOBA. The second hearing was on 19 April 2016, when Baroness Browning gave evidence.

23. In its decision, the FTT cited from Lord Lang's evidence in which he explained that the individual is free to ignore ACOBA's advice but that "If they chose to ignore it, they are flouting our recommendation and they face the court of public opinion". However, he could not think of a case in which someone had disregarded ACOBA's advice and so could not give an example of a case in which public opinion had come into play (FTT's decision at paragraph 39).

24. The FTT then said:

"40. It is plain from this exchange that an important element in the workings of ACOBA is the belief of ex-Ministers and others that, if they do not engage appropriately with ACOBA, then they face "the court of public opinion". It is, ultimately, public opinion which provides the incentive to comply with the Ministerial Code. This important aspect is, we find, entirely missing from Baroness Browning's opinion in the present case. This is particularly surprising given that, in her own evidence in April 2016, she made plain the importance of journalism in facilitating public opinion to provide the requisite enforcement machinery:

> "**Q7** **Chair:** How much is the credibility of ACOBA and the process you oversee one of the main challenges you face?
>
> ***Baroness Browning***: It is a very big challenge.
>
> **Chair:** But you did not mention it in your first answer.
>
> ***Baroness Browning***: No, I did not because, frankly, I see it as an almost indigenous challenge that is with us all of the time. We have been subject in the last year to quite considerable press coverage, not just the committee but also many of the individuals who have applied to us in the last year or so, and that has created some quite negative publicity. What I think is interesting about it is that despite that coverage there have been very few examples found of people who have failed to apply to ACOBA in the appropriate way to seek our advice, nor have they found any significant areas where applicants have then flouted the rules or the advice that they were given.
>
> **Q8** **Chair:** Why is the credibility of ACOBA such a big challenge?
>
> ***Baroness Browning***: I suspect because there is a public view across the piece not just of ACOBA, but of people who have held public office going on and doing other things. There has been an awful lot of focus on the amount of money that people earn when they leave office, and all of that is part of the lack of confidence that I think the public has in probity in public life overall.
>
> ...
>
> **Q13** **Paul Flynn:** Right, but doesn't this go to the heart of the futility of the body, that you are not a watchdog; you are a pussycat without teeth or claws? If Mr Davey says, "Fine, I will be a good boy. I shan't use my insider knowledge," what can you do about it?
>
> ***Baroness Browning***: We have to work within the rules we are given, as you will know.
>
> **Paul Flynn:** So what can you do about it?
>
> ***Baroness Browning***: I think one of the main influences once we have given our advice, is that if somebody breaks that advice or flouts it, the press pick it up and publish it. I think the reputation—
>
> **Q14** **Paul Flynn:** How would you know that he has flouted your advice? He is not going to advertise his relationship with these four customers.

> ***Baroness Browning***: We would not. We have neither the resources, nor the remit to—
>
> **Paul Flynn:** How would the press know?
>
> ***Baroness Browning***: Well, that I do not know. They would presumably engage in some—
>
> **Paul Flynn:** But you are—
>
> ***Baroness Browning***: Can I just answer the previous question?
>
> **Paul Flynn:** Yes.
>
> ***Baroness Browning***: They would engage in some form of investigative journalism, which is something that we follow with great interest because we are very keen to see, but we have no remit or no resources to police the advice that we give. That is our remit. If you are saying that we should be given that resource and that remit, it is obviously a matter that we would take very seriously."

41. This evidence puts beyond doubt the inadequacy of the opinion purported to be given under section 36(2) in the present case. The same person who gave that opinion was, here, recognising the importance of investigative journalism as an enforcement mechanism, which serves to underpin the purpose of ACOBA. But, having acknowledged both the important contributions that can be made by investigative journalism to supporting ACOBA's work and the difficulties that such journalism currently faces in undertaking that role, Baroness Browning failed to have regard to these matters in giving her qualified person's opinion.

42. What the PACA transcripts therefore make clear is that there is at the very least a case for permitting journalists (and by extension the public) to know - by asking ACOBA - whether ACOBA's advice has been disregarded. Viewed in this light, arguments based on "safe space" need to be carefully examined, since the obvious response to any "safe space" argument against disclosure in this scenario is that a person may very well be less likely to disregard ACOBA's advice if he or she knows that this fact could be disclosed in response to a freedom of information request. By the same token, a "safe space" argument is difficult to deplov as a generic reason for refusing to disclose whether an ex-Minister, who accepts a potentially controversial outside appointment, has approached ACOBA at all for its advice on that appointment.

43. Where the request concerns a person who has, in fact, consulted ACOBA about a proposed appointment and who has heeded ACOBA's advice not to accept it, there is a somewhat different but nevertheless important public interest case for disclosure that needs to be addressed; namely, that the public has a legitimate interest in knowing whether those who have been Ministers have exhibited poor judgment in contemplating taking a job that is plainly inappropriate.

44. The fact that none of these important considerations found any expression in the opinion of March 2015 or in any materials underpinning it means that the qualified person gave the opinion without having regard to relevant considerations. Her opinion was, accordingly, not "reasonable" in public law terms. The respondent was, as a result, wrong in law to treat it as

> reasonable. Although the respondent probed the matter a little further with ACOBA, the upshot was that the respondent effectively chose to accept the opinion at face value. The decision notice is, thus, not in accordance with the law because section 36(2) was not engaged."

25. Mr Lockley and Ms Stout submit that these passages show that the FTT erred in three respects. First, it adopted an incorrect approach in law to the QP's opinion. It should have asked whether the QP's opinion, that prejudice within section 36(2) was likely, was a reasonable one. Instead, the FTT erroneously asked whether Baroness Browning had properly carried out a full public interest evaluation of the case for and against disclosure of the information. Second, the decision was perverse. There was no rational connection between the effect of the "court of public opinion" and the likelihood of prejudice within section 36(2). The evidence of the Chairs to the PACAC did not support such a conclusion, being directed to the effect of the public knowing when an applicant had flouted ACOBA's advice. Alternatively, even if (as Mr Waterman submitted) the FTT's conclusion was that media scrutiny might encourage applicants to engage openly with ACOBA, that conclusion was perverse. Applicants are less likely to be frank if they fear that the details they supply will end up being examined in the "court of public opinion". Third, the FTT adopted the wrong test in deciding whether the QP's opinion was reasonable. The question is not whether the opinion was reasonable in both substantive and procedural terms, as in judicial review. The word "reasonable" in section 36(2) should be given its ordinary meaning, being "in accordance with reason, not irrational or absurd". In any event, section 36 does not list the matters which a QP must consider when giving an opinion, and so an opinion could only be found to be unreasonable for failing to take into account a relevant consideration if that consideration was so obviously material that omitting to consider it would not be in accordance with the intention of the Act. The FTT applied the inverse of the correct test because, rather than considering whether no reasonable QP could have regarded the contribution of the media as irrelevant, it held that the QP's opinion could only be saved if no reasonable QP could have regarded the matter as irrelevant.

26. Mr Waterman says that, as the last sentence of paragraph 44 of the FTT's decision makes clear, in that part of its decision the FTT addressed the threshold questions whether section 36(2) was engaged. The effect of potential disclosure was relevant to the question of likely prejudice. In particular, the fact that it would become publicly known if a minister failed to disclose relevant information to ACOBA would give an incentive to individuals to make full and frank disclosure when seeking advice. This is what the FTT meant at paragraph 40, which was the heart of its reasoning regarding the QP's opinion. Paragraphs 41 to 43 were merely further elaboration of its reasoning.

27. In any event, Mr Waterman says that the word "reasonable" is to be considered in public law terms including whether the QP took into account relevant considerations. In support of this he relies on *Hansard*; he referred us to the Parliamentary Debates in the House of Lords on what was then clause 34 of the Bill (Prejudice to the effective conduct of public

affairs), which later became section 36 of FOIA (Hansard, HL Debs, Vol. 618, col. 305-307, 24 October 2000). Even if this submission surmounts the admissibility test in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, which we seriously doubt, we do not consider that the Parliamentary material "clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words" (per Lord Browne-Wilkinson at p.634E).

The Upper Tribunal's analysis

28. The starting point must be that the proper approach to deciding whether the QP's opinion is reasonable is informed by the nature of the exercise to be performed by the QP and the structure of section 36.

29. In particular, it is clear that Parliament has chosen to confer responsibility on the QP for making the primary (albeit initial) judgment as to prejudice. Only those persons listed in section 36(5) may be QPs. They are all people who hold senior roles in their public authorities and so are well placed to make that judgment, which requires knowledge of the workings of the authority, the possible consequences of disclosure and the ways in which prejudice may occur. It follows that, although the opinion of the QP is not conclusive as to prejudice (save, by virtue of section 36(7), in relation to the Houses of Parliament), it is to be afforded a measure of respect. As Lloyd Jones LJ held in *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758 (at paragraph 55):

> "It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal's own assessment of the matters to which the opinion relates."

30. With that observation in mind, we turn to consider the appellants' challenges to the FTT's approach to the QP's opinion.

(1) Taking into account the public interest when considering section 36(2)

31. Under section 2 of FOIA, information is exempt from disclosure if an absolute or qualified exemption is conferred and, in the latter case, if the public interest in maintaining the exemption outweighs the public interest in disclosure. Section 36 (for present purposes – see section 2(3)(e)) confers a qualified exemption and so a decision whether information is exempt under that section involves two stages: first, there is the threshold in section 36 of whether there is a reasonable opinion of the QP that any of the listed prejudice or inhibition ("prejudice") would or would be likely to occur; second, which only arises if the threshold is passed, whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing it.

32. The QP is not called on to consider the public interest for and against disclosure. Regardless of the strength of the public interest in disclosure, the QP is concerned only with the occurrence or likely occurrence of prejudice. The threshold question under section 36(2) does not require the Information Commissioner or the FTT to determine whether prejudice will or is likely to occur, that being a matter for the QP. The threshold question

is concerned only with whether the opinion of the QP as to prejudice is reasonable. The public interest is only relevant at the second stage, once the threshold has been crossed. That matter is decided by the public authority (and, following a complaint, by the Commissioner and on appeal thereafter by the tribunal).

33. Given the clear structural separation of the two stages, it would be an error for a tribunal to consider matters of public interest at the threshold stage. In the present case, we are satisfied that is what the FTT did.

34. The FTT decided that Baroness Browning should have taken into account the role of public opinion in providing effective enforcement of ACOBA's advice, which it considered to be particularly important given ACOBA's lack of enforcement powers. This is the only proper way of reading paragraph 40, in the light of the reference to "the importance of journalism in facilitating public opinion to provide the requisite enforcement machinery". At paragraph 42 the FTT identified two reasons why it considered that the 'safe space' arguments were outweighed. The first of these related to the likelihood of a person complying with ACOBA's advice, the second to the public interest in knowing whether an ex-Minister had approached ACOBA for advice. Neither of these reasons has any relevance to the risk of prejudice to 'safe space'. They said nothing about the effect on safe space or inhibition of discussions prior to advice being given, which was what Baroness Browning was concerned with. Consideration of compliance with ACOBA's advice relates to what might occur after those discussions are over. And the observation that the "safe space" argument is "difficult to deploy" is concerned with the justification for non-disclosure. Both of these are public interest considerations. The final consideration, at paragraph 43, is explicitly said to be one of public interest.

35. Moreover, the material relied on by the FTT (the exchanges before the House of Commons PACAC) did not touch on factors relevant to the reasonableness of Baroness Browning's opinion as to likely prejudice was wrong. Nothing was said in these exchanges about any matter relevant to the prejudice in section 36(2). They were wholly concerned with compliance with ACOBA's advice and the role of the media and public opinion in that respect. In its analysis of the evidence the FTT had, as Ms Stout submitted, effectively conflated what happens *before* and *after* the giving of advice by ACOBA.

36. Mr Waterman submits that the FTT's decision as to the threshold is found only in paragraph 40, which was focussed on the threshold question, and that paragraphs 41-43 are merely incidental to its decision in paragraph 40. We reject this. In paragraph 40 the FTT relied on its view that exposure to "the court of public opinion", through the role of the media, provided an incentive to ex-Ministers to comply with the Code. The FTT did not say that the QP's opinion on prejudice was undermined by that consideration, but that the opinion was outweighed by it. That is the language of the public interest balancing test which only comes into play once the threshold condition is met. Indeed, the FTT did not address the basis of the opinion as to likely prejudice.

37. The criticisms of the QP's opinion made at paragraph 41 are directed to the same point as those in paragraph 40, the FTT finding that the exchange between Baroness Browning and Mr Flynn put that conclusion "beyond doubt". In paragraph 41 and the subsequent paragraphs, the tribunal elaborated on that view. Paragraph 42 is not concerned with section 36(2) prejudice at all, but solely with the benefits of disclosure. The first sentence of paragraph 44 makes it crystal clear that the FTT found that the QP's opinion was not reasonable because the considerations in the preceding paragraphs had not been taken into account. On any reading these paragraphs are the core of the tribunal's reasoning.

38. We conclude, therefore, that the First-tier Tribunal erred in law in its approach to the threshold question.

(ii) Irrational conclusion

39. The impact of the "court of public opinion" could only be relevant to the threshold question if it would or could somehow lessen the impact on a safe space or the chilling effect, that being the prejudice that Baroness Browning was concerned about.

40. Mr Waterman submits that that was indeed what the First-tier Tribunal decided. He says that the FTT's conclusion was that the fact that communications between an applicant and ACOBA would be made public would provide a positive incentive for the applicant to be full and frank, knowing that any failure in that regard would be exposed in the court of public opinion.

41. This adds a gloss on the FTT's decision which is not consistent with its reasons. What the tribunal said at paragraph 40 was based on the exchange between Lord Lang and the PACAC, which it set out in the preceding paragraph. In that exchange there was no discussion of the effect of public opinion in ensuring full and frank disclosure when an applicant seeks advice. Lord Lang was referring to a later stage of the process and in particular the effect of public opinion in securing an individual's compliance with advice which ACOBA had given. That is what the FTT was referring to when it talked of being engaged with ACOBA and the incentive to comply with the Ministerial Code. This is reinforced by paragraphs 41 to 42, where the FTT was concerned with the role of public opinion "as an enforcement mechanism" and the likelihood of a person disregarding ACOBA's advice. Therefore we reject Mr Waterman's argument. The tribunal's analysis of the impact of "the court of public opinion" was not rationally connected to the threshold question.

42. The alternative submission by the Commissioner and ACOBA is that, even if the FTT did decide that the impact of the "court of public opinion" lessened the impact of disclosure on a safe space or the chilling effect, that conclusion was perverse. In the light of our conclusion above, we do not need to decide this. However, for what it's worth, we are inclined to agree with the Commissioner and ACOBA. It is difficult to see how an applicant would be encouraged to be open and frank about, say, matters of commercial sensitivity if there was a risk that those discussions would subsequently be made public.

(iii) Wrongly applying judicial review principles

43. The appellants submit that the FTT wrongly approached its assessment of the reasonableness of the QP's opinion as if it were carrying out a judicial review of that opinion.

44. In their written and oral submissions, all parties referred to decisions of the First-tier Tribunal (General Regulatory Chamber) and its immediate predecessor, the Information Tribunal. In particular, the Information Tribunal made detailed observations regarding the nature of its appellate jurisdiction in *Guardian Newspapers Ltd and Heather Brooke v Information Commissioner and British Broadcasting Corporation* (EA/2006/0011 and EA/2006/0013; hereafter *Guardian Newspapers and Brooke*). All parties adopted some of what the Information Tribunal said in that case, but parted company on other aspects of its decision. As the Upper Tribunal explained in *Dransfield v Information Commissioner* [2012] UKUT 440 at paragraph 15, it is important to remember that first instance decisions do not carry the status of being legal precedents. One FTT decision cannot bind another FTT, let alone the Upper Tribunal. But if what is said by a first instance tribunal is adopted by the Upper Tribunal, it will acquire the status afforded to decisions of this Tribunal.

45. With that in mind, we cite with approval the following passages from *Guardian Newspapers and Brooke*:

> "14. Inlight of this material we consider the following observations are justified concerning the nature of the Tribunal's appellate jurisdiction:
> (1) The Tribunal's task is not a judicial review of the Commissioner's decision on the principles that would be followed by the Administrative Court in carrying out a judicial review of a decision by a public authority (contrast the jurisdiction relating to national security certificates under s 60(3), which is expressly on a judicial review basis). The statutory jurisdiction under s 58 is substantially wider.
> (2) The Tribunal does not start with a blank sheet. The starting point is the Commissioner's notice. But analogy with the Court of Appeal is not apt. The Court of Appeal only hears fresh evidence in special circumstances. By contrast, subject to limited exceptions, the Tribunal is required to receive relevant evidence, documents and information from the parties to the appeal, and the material is not limited to that which was available to the Commissioner.
> (3) In considering whether the Commissioner's notice is in accordance with the law, the Tribunal must consider whether (in the present context) the provisions of FOIA have been correctly applied. The Tribunal is not bound by the Commissioner's views or findings but will arrive at its own view. In doing so it will give such weight to the Commissioner's views and findings as it thinks fit in the particular circumstances.
> (4) In some cases the correct application of the provisions of the Act will depend upon the findings of fact. Where facts are in dispute, the Tribunal may review any finding of fact by the Commissioner. The Tribunal will reach its conclusions on the factual issues upon the whole of the material which is properly before it on the appeal. Having decided the factual issues, the Tribunal must consider the correct application of the provisions of the Act to the facts as found. It is therefore possible that in some cases the Tribunal will consider that the Commissioner's notice is not in accordance with the law, not because of any error of legal reasoning in the notice, but because the

Tribunal, having received evidence at the appeal hearing, makes findings of fact which are different from those made by the Commissioner.
(5) In some cases the dispute on appeal will be on the public interest test in s 2(2)(b), namely, whether the public interest in maintaining a qualified exemption outweighs the public interest in disclosing the information. Adjudging the balance of public interest involves a question of mixed law and fact, not the exercise of discretion by the Commissioner. If, based either on the Commissioner's original findings of fact or on findings made by the Tribunal on fresh evidence, the Tribunal comes to a different conclusion from the Commissioner concerning the balance of public interest, that will involve a finding that the Commissioner's notice was not in accordance with the law and should be corrected.
(6) The combination of the power to review findings of fact and the duty under the rules to receive evidence on the appeal does not predetermine the extent of the Tribunal's review of the facts. This will depend upon the circumstances of the case. If in a particular case no fresh evidence is adduced, or the Tribunal considers that the fresh evidence is not of material significance, the Tribunal will proceed on the basis of the facts found by the Commissioner.
(7) While it is not necessary for the purposes of the present case to consider the situation where the notice involved an exercise of discretion by the Commissioner, we incline to the view that in such a case the Tribunal must form its own view on how the discretion ought to have been exercised. Review of the merits of the Commissioner's exercise of discretion is assisted by the presence of lay members on the Tribunal. Again, the Tribunal's decision may be affected by findings of fact which differ from those made by the Commissioner."

46. The notion that the FTT has a full merits appellate jurisdiction is also evidenced by section 58(2), which provides that "the Tribunal may review any finding of fact on which the notice in question was based". This principle has, of course, been confirmed in subsequent case law (see e.g. the Court of Appeal's judgment in *Birkett v Department for the Environment, Food and Rural Affairs* [2011] EWCA Civ 1606; [2012] AACR 32 at paragraph 23).

47. The information tribunal in *Guardian Newspapers and Brooke* then went on to set out how the question of "reasonable opinion" should be approached under section 36(2). It said:

"54. The first condition for the application of the exemption is not the Commissioner's or the Tribunal's opinion on the likelihood of inhibition, but the qualified person's "*reasonable opinion*". If the opinion is reasonable, the Commissioner should not under s 36 substitute his own view for that of the qualified person. Nor should the Tribunal.

…

60. On the wording of s 36(2) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable. We do not favour substituting for the phrase "*reasonable opinion*" some different explanatory phrase, such as "an opinion within the range of reasonable opinions". The present context is not like the valuation of a building or other asset, where a range of reasonable values may be given by competent valuers acting carefully. The qualified person must take a view on whether there either is or is not the requisite degree of likelihood of inhibition. We do, however, acknowledge the thought that lies behind the reference to a

> range of reasonable opinions, which is that on such matters there may (depending on the particular facts) be room for conflicting opinions, both of which are reasonable."

48. All parties before us agreed that, when the tribunal is considering the substance of the QP's opinion, this passage sets out the correct approach.

49. However, the information tribunal in *Guardian Newspapers and Brooke* went on to find that an opinion must be judged not only with regard to its *substantive* reasonableness but also as to its *procedural* reasonableness. It said:

> "64. On this point we consider that the Commissioner is right, and that in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at. We derive this conclusion from the scheme of the Act and the tenor of s 36, which is that the general right of access to information granted by s 1 of the Act is only excluded in defined circumstances and on substantial grounds. The provision that the exemption is only engaged where a qualified person is of the reasonable opinion required by s 36 is a protection which relies on the good faith and proper exercise of judgment of that person. That protection would be reduced if the qualified person were not required by law to give proper rational consideration to the formation of the opinion, taking into account only relevant matters and ignoring irrelevant matters. In consideration of the special status which the Act affords to the opinion of qualified persons, they should be expected at least to direct their minds appropriately to the right matters and disregard irrelevant matters. Moreover, precisely because the opinion is essentially a judgment call on what might happen in the future, on which people may disagree, if the process were not taken into account, in many cases the reasonableness of the opinion would be effectively unchallengeable; we cannot think that that was the Parliamentary intention."

50. We acknowledge that the views expressed in that passage have found general if not universal support in decisions of other First-tier Tribunals (but for dissenting FTT voices on this point, see e.g. *Roberts v Information Commissioner* (EA/2013/0059 at paragraph 6) and also *Montague v Information Commissioner* (EA/2014/0040 at paragraph 48)). As we have explained, those expressions of view either way are not binding on us or on anyone other than the parties to those appeals, and in any event we have had the advantage of full argument from counsel. There is no Upper Tribunal authority on the point in issue.

51. Mr Waterman pointed out that the Information Commissioner's position in this appeal is inconsistent with that in *Guardian Newspapers and Brooke* and other FTT cases. However, the Commissioner's approach cannot be relevant to the issue of construction which we have to decide. In any event Mr Lockley readily admitted to us that the Information Commissioner had changed her position since *Guardian Newspapers and Brooke,* with the benefit of the experience of seeing how the section 36 test had played out in practice. She now took a more flexible approach and was concerned that the *Guardian Newspapers and Brooke* test could result in the correct outcome under section 36 being vitiated by a purely technical error. She therefore encouraged us to adopt an approach which focussed on substantive reasonableness as the test. Mr Lockley acknowledged that an

opinion which had been arrived at by way of an unreasonable process might be, but was not automatically or necessarily, also substantively unreasonable.

52. We agree that one only has to pause to think through the consequences of the approach adumbrated in paragraph 64 of *Guardian Newspapers and Brooke* (set out above) to realise that it cannot be right. If a defect in the process by which the opinion was reached would mean that the opinion was not reasonable, the result would be that information would have to be disclosed even though the opinion appears to be correct in substance and where the consequences of disclosure would be very serious prejudice within section 36(2) and where there was no sufficient countervailing public interest in disclosure. Such an outcome militates against the purpose of FOIA which is concerned with matters of substance not process. We agree with Ms Stout that Parliament cannot have intended that a procedural failing could of itself prevent the public authority from successfully protecting the public interests encompassed by section 36.

53. We also agree with Ms Stout that importing procedural requirements in relation to the QP's opinion at the gateway stage, with the result that an opinion which is in substance reasonable may yet be found to be unreasonable because of a procedural failing, may lead to other bizarre and unintended consequences.

54. First, it would mean that the decision-making process requirements are more demanding at the initial gateway stage than they are at the substantive stage of considering the public interest balancing test. Yet given that all relevant interests are protected by the full merits determination required in applying the public interest balancing test, it makes little sense to have a more rigorous procedural test at the initial stage.

55. Second, Parliament has plainly decided that the threshold question is a matter for the QP. If, however, a procedural error prevents a public authority from relying on section 36, then (absent any other exemption applying) the disputed information must be disclosed, whatever the potential prejudice. By contrast, in a conventional judicial review scenario, the quashing of a public authority's decision for procedural error would have typically resulted in it being allowed to take the decision again.

56. For these reasons, we conclude that "reasonable" in section 36(2) means substantively reasonable and not procedurally reasonable.

57. Alternatively, in the circumstances of the present case, a reliance on standard judicial review principles should also have led the FTT to approach the threshold test in the same way, as Mr Lockley submitted. The public law authorities show that <u>mandatory</u> relevant considerations (as opposed to merely <u>permissible</u> considerations) are those that are stated or implied as such in the governing legislation (see e.g. *Re Findlay* [1985] 1 AC 318 *per* Lord Scarman at 333G-H, approving *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 at 183, and *R v Secretary of State for Transport ex p. Richmond upon Thames LBC & Ors (No.1)* [1994] 1 WLR 74 *per* Laws J at 95C). Section 36 itself, however, does not stipulate

any specific considerations which the QP must take into account when formulating her opinion under section 36(2). The FTT concluded that the QP's opinion could only be saved if no reasonable QP could have regarded the contribution of the Fourth Estate as relevant. In fact, the QP's opinion was flawed only if no reasonable QP could have regarded that contribution as irrelevant. As such, the FTT in effect inverted the test and so erred in law.

Ground 2: section 36 and the public interest balancing test

58. The Commissioner's second ground of appeal is that consideration of the public interest is only called for if section 36 is engaged, and so presupposes that there is a reasonable QP opinion. The fact of that opinion and therefore the basis for it is a relevant consideration in considering the public interest, but that was not how the FTT approached it. This was demonstrated, according to Mr Lockley, by the FTT's failure to attach any weight to the QP's opinion that inhibition would occur. Mr Lockley further submitted that although there was a significant public interest in the disclosure of the disputed information, overall the public interest was finely balanced and fell in favour of maintaining the exemption, for the reasons given both in the original decision notice and in the Commissioner's response to the original FTT appeal.

59. ACOBA supported the Commissioner's second ground of appeal. Ms Stout submitted that the FTT had failed to give any weight to the opinion of the QP and had irrationally regarded disclosure to the media of the disputed information as a factor that reduced the inhibition a former Minister would feel in approaching ACOBA. Ms Stout then departed somewhat from Mr Lockley's position by arguing that the public interest balance test was in fact not finely balanced at all, but plainly and firmly tipped on the side of maintaining the exemption rather than disclosing the requested information. To that end she sought to rely on two witness statements prepared for the Upper Tribunal proceedings by Ms Catriona Marshall, Team Leader and Principal Advisor to ACOBA (and which had therefore not been before the FTT).

60. Mr Waterman submitted that Ground 2 was a barely concealed attempt to re-argue the case on its factual merits and on which the Commissioner had failed before the FTT. It was open to the FTT to decide the case as it did, namely that the public interest balance in this case "falls decisively in favour of disclosure" (FTT's decision at paragraph 52), on the evidence that was before it. Mr Waterman characterised Ms Marshall's new witness statements as part of ACOBA's wider but inappropriate attempt to re-argue the case on its merits. He submitted that the Upper Tribunal should not admit those witness statements – and in any event, if they were received in evidence, he contended they merely reinforced the FTT's finding that the public interest balance favoured disclosure in this case.

The Upper Tribunal's analysis

61. We can deal with this ground of appeal relatively shortly. There is no doubt that the primary focus of the FTT's decision and its reasons was the issue

of whether section 36 was engaged in the first place. The FTT's narrative of the history of the appeal before it certainly rehearsed the arguments advanced by both the Commissioner and ACOBA in favour of withholding the requested information as part of the process resulting in the decision notice (paragraphs 11-14). The FTT also summarised the Commissioner's further arguments with regard to the public interest test as they were put on the appeal (paragraphs 24-30). However, the bulk of the FTT's reasons then addressed Mr Malnick's arguments on the reasonableness of the QP's opinion (paragraphs 34-44).

62. The FTT's rather compressed reasoning on the application of the public interest balancing test is to be found at paragraphs 45-52. Paragraph 45 is purely introductory, while paragraphs 46-47 review the arguments in favour of maintaining the exemption and so withholding the requested information and paragraphs 48-51 address the contrary arguments, with paragraph 52 stating the FTT's conclusion.

63. The FTT dealt with the arguments in favour of maintaining the exemption as follows:

> "46. On the basis of the evidence and submissions provided, we are not satisfied that there is any material weight in generic contentions of the kind described in paragraph 42 and 43 above, that 'safe space' requires information concerning the dealings between ACOBA and ex-Ministers and others to be indefinitely withheld, on the basis that such persons would not otherwise engage with ACOBA or would merely do so on a 'lip service' basis. On the contrary, the views publicly expressed by both the present and previous Chair of ACOBA point clearly towards the opposite conclusion.
>
> 47. We do, however, accept that there is a role for 'safe space' whilst any discussions are ongoing between the ex-Minister etc. and of ACOBA. How much weight would fall to be given to such a consideration is likely to be case-specific. In the present case, of course, no such consideration arises since the discussions covered by the appellant's request [are] long past."

64. We recognise, of course, that the FTT's decision must be read as a whole. However, that said, neither in paragraphs 46 and 47, nor in any other passage in the reasons, is there any hint by the tribunal that it was proceeding on the premise that the QP's opinion was reasonable. Yet that was an essential step in its analysis if it was to proceed properly on the alternative basis that section 36 was indeed engaged. Alternatively, the view expressed at paragraph 46 by reference to paragraphs 42 and 43 show that, if any weight was afforded to the QP opinion, it was very slight on account of the view that the FTT had taken of the merits of that opinion: a view which, as we have found, was itself flawed.

65. Thus the consideration of the public interest balancing test was flawed by the FTT either ascribing no weight at all to the QP's opinion or, if it did, failing to give it appropriate weight given the errors identified under Ground 1 above.

66. We therefore conclude that the FTT erred in law in this regard as well, essentially consequentially upon the decision under Ground 1. For reasons which we explain at the end of this decision, we do not consider it appropriate for the Upper Tribunal to re-decide the public interest question

and so we do not need to address the issue of whether we should formally admit Ms Marshall's evidence in the new witness statements.

Ground 3: the *Bell* question

67. Having decided that the information was not exempt under section 36, the FTT decided that the Commissioner would need to issue a new decision which did not rely on that provision. In effect, the Commissioner was required to start again and decide whether the information was exempt under section 40.

68. The Commissioner submits that this course of action was not open to the FTT, relying on the decision of the Upper Tribunal in *Information Commissioner v Bell* [2014] UKUT 106 (AAC), which the Commissioner submits was correctly decided. On the other hand ACOBA and Mr Malnick both submit that, while it is open to the FTT to consider an exemption not considered by the Commissioner, it is also open to the FTT to remit the case for consideration by the Commissioner. In that regard, they submit that *Bell* was wrongly decided.

69. The Commissioner's case, in summary, is that the FTT and the IC are creatures of statute and so can only do what statute authorises them to do. There is no express power in the FTT to remit a case to the Commissioner and so, if it has a power to do so, it must be by necessary implication. But, as is agreed by all the parties, the FTT can consider an exemption not addressed by the IC and so, it is submitted, it cannot be necessary for the FTT to be empowered to remit such an exemption to the IC.

70. Moreover, the Commissioner submits that analysis of the legislative scheme shows that she does not have power to consider a second exemption and only the FTT does. The sequencing of the decision-making process under FOIA shows that Parliament intended that a case should move from one stage of the decision-making scheme to the next and, as it does so, each prior stage is finally concluded. When the nature of the Commissioner's role under section 50 is properly understood, it is clear that she is *functus officio* (i.e. she has no further role to play as she has discharged her functions) when she issues a decision notice.

71. Ms Stout for ACOBA submits that the Information Commissioner is empowered to issue more than one decision notice in two circumstances. First, the Commissioner will not have completed her task where the first decision notice has failed to address all relevant issues and so she is able to issue a subsequent notice in order to complete the task. Second, where the FTT decides that a decision notice is not in accordance with the law, the effect is that that notice is of no legal effect and so the Commissioner must make a further decision in order to comply with her duty under section 50.

72. Mr Waterman's position is that section 50 requires the Commissioner to consider each exemption relied on. An appeal to the FTT is against a decision notice not a decision. In the present case the decision notice only addressed section 36 and so that was the limit of the appeal to the FTT. There was, therefore, no lawful decision notice in existence dealing with

section 40, there was equally no appeal in relation to section 40 before the FTT and so the Commissioner was not *functus*. Once the appeal to the FTT (which was confined to section 36 and the public interest test) had been allowed, the FTT was entitled to direct the Commissioner to consider the section 40 issue. If she declined to do so, and as here the requester had not previously complained about the authority's reliance on section 40, then the requester can simply lodge a fresh complaint with the Commissioner.

The Upper Tribunal's analysis

73. All counsel founded their submissions on their analysis of the nature and scope of the statutory powers at the various stages of the decision-making process under FOIA. We agree that that is the correct starting point and we conclude that, for reasons which we now explain, the nature and scope of those powers support the Information Commissioner's arguments.

74. The first decision-maker in the statutory process is the public authority. Its duties are found in Part 1 of FOIA. An authority must confirm or deny whether requested information is held, and communicate the information which it holds, unless a relevant exemption applies: section 1(1). If an authority communicates information it must do so in accordance with section 11. Where it refuses to either confirm or deny, or to communicate information, it must issue a refusal notice in accordance with section 17 setting out all the exemptions claimed and why they apply. A public authority which correctly applies one of the exemptions on which it relies but incorrectly relies on others, and provides reasons and information in accordance with section 17, has complied with its duties under Part 1. It has complied with its duties under section 1 because section 1 permits it to withhold information to which any exemption applies. It has complied with its duties under section 17 because it has set out the basis on which it is claiming all exemptions relied on. It does not matter that it also incorrectly relies on other exemptions because the scheme of Part 1 means that, although a public authority must state all the exemptions which it relies upon, it need only be right about one of them.

75. This analysis is consistent with the powers of the IC to issue a decision notice under section 50(4). Under paragraph (a) the IC must require a public authority to take steps to correct a failure to communicate information or issue confirmation or denial where it is required to do so by section 1(1). But where one exemption is correctly relied on by the authority, there has been no failure to comply with section 1(1) even if the other claimed exemptions do not apply. Under paragraph (b), the Commissioner must specify the steps to be taken to correct a failure to comply with sections 11 or 17. But, even if an authority wrongly relied on some exemptions included in its refusal notice, this would not amount to a failure to comply with either section as long as it had correctly relied on one exemption. This explains why section 50(4) does not make any provision for a decision notice to address those other exemptions.

76. Once the authority has complied with its obligations under sections 1 and 17, it has fulfilled its duties in relation to that request, save for compliance with a decision notice of the IC or a decision of the FTT. Section 17(7)

requires the authority to signpost a requester who is unhappy with the authority's response to the next stage of the process: complaint to the IC under section 50(1).

77. There was some debate before us as to what "in any specified respect" means in that subsection. If it refers to the content of the complaint, it suggests that the Commissioner must consider any exemption relied upon by the authority which is disputed by the requester, even if the authority has correctly relied on a different exemption. However, we are satisfied that that is not the meaning or function of the phrase. Upper Tribunal Judge Jacobs's decision in *Birkett v Department for the Environment, Food and Rural Affairs* [2012] AACR 32 makes clear that it is for the IC to decide the scope of her consideration:

> "46. There is a question whether the words "in any specified respect" refer to the application that is made or to the decision that the Commissioner is asked to give. Ms Proops argued that it was the former and that it limited the scope of the Commissioner's consideration. Mr Swift argued that it was the latter. Even if Ms Proops is correct that the words govern the application, I do not accept that they limit the scope of the consideration that the Commissioner has to give to the application. This would not be a realistic interpretation given the possible nature of complainants and the circumstances in which they may be placed. As to the complainants, they vary on a spectrum from the uninformed and unrepresented at one extreme to the expert, informed and competently represented at the other. As to the circumstances in which complainants may be placed, they are by definition people who have not seen the information. A person in that position cannot, and cannot be expected to, identify all the respects in which a public authority may have failed to deal with the request in accordance with Part 1. This must be done by someone else. And that someone can only be the public authority or the Information Commissioner. And they are only protected if this is a duty, not a discretion.
> ...
> 50. It may be helpful to explain how I see the role of the Commissioner in the section 50 process. The Commissioner is under a duty to consider whether the request has been dealt with in accordance with Part I. That duty must be performed in respect of the information available, and the arguments presented, to the Commissioner. The consideration is limited by the terms of the request for information. Within those limits, it must cover the position of the complainant, the public authority and any third parties who may be affected. As to the complainant, the starting point will be the terms of the application under section 50(1). As the complainant will not have seen the information, the Commissioner must always consider any issues that the complainant would not have been able to identify without seeing that information. Beyond that, the extent to which the Commissioner considers issues not raised in the application will depend on the competence that the complainant appears to have. As to the public authorities, the starting point will be the section 17 notice. They may also suggest that different or other exemptions may apply. Public authorities will generally be able to look after their own interests. However, the Commissioner may need to consider points in favour of an inexperienced public authority. As to third parties, the Commissioner must always be alert to their interests if they are not being protected by the complainant or the public authority.
> ...

> 52. To emphasise, the Commissioner does not have to consider every exemption, only those that merit consideration on the information presented. Nor does the Commissioner have to launch an investigation into every aspect of every exemption."

78. So it is clear from *Birkett* that it is for the Commissioner to specify the respects which are relevant to her decision. Although this passage in *Birkett* discussed the powers of the IC to consider matters which are not included in the complaint, once it is accepted that it is the Commissioner, and not the complainant, who is responsible for deciding what "specified respects" are to be considered, this must apply to both limiting and extending the scope of the complaint. The Commissioner may consider more or less than is included in the complaint. The inclusion of "specified" indicates that the Commissioner must state in what respect or respects the authority has failed to comply with its duties. This understanding of the duty under section 50(1) is supported by the Upper Tribunal's comments in *Birkett* at paragraph 58 regarding the requirements of fairness:

> "58 That is what section 58 does. The tribunal is required to consider whether the Commissioner's decision notice was in accordance with law. That directs attention to the contents of the notice and the scope of the Commissioner's duty under section 50. And that directs attention to whether the public authority is required to disclose the information. There is nothing in the language of the section or inherent in the nature of the tribunal's task to limit the scope of that consideration. In other words, the section imposes the "in accordance with the law" test on the tribunal to decide independently and afresh. It is inherent in that task that the tribunal must consider any relevant issue put it by any of the parties. That includes a new exemption relied on by the public authority."

79. The facts of the present case illustrate how this works. Although Mr Malnick only complained about the application of the public interest test in relation to section 36, the Commissioner of course had first to consider whether section 36 was engaged. Moreover, although Mr Malnick did not mention section 40 in his complaint, had the Commissioner found that the information was not exempt under section 36, she would have had to consider whether it was exempt under section 40 because the public authority had also relied on that provision. On the other hand, had Mr Malnick also complained about the authority's reliance on section 40, the IC need not have considered it if (as in fact she did) she upheld the section 36 exemption.

80. Section 50(2) requires the Commissioner to make a decision unless one of the specified exceptions applies, and section 50(3)(b) then requires the Commissioner to serve a notice of her decision. Thus, unless an exception under section 50(2) applies, the Commissioner's task is to make and serve notice of her decision as to whether the public authority has dealt with the request in accordance with Part 1. Unless any issue arises as to compliance with sections 11, 16 or 17, the only issue will be whether the authority has complied with section 1, and so the Commissioner must decide whether any of the disputed information is exempt in any respect and, if so, specify that respect.

81. It follows from this that, once the Commissioner has issued a decision notice stating that the authority has complied with section 1 (and any additional duties under sections 11, 16 or 17, if they arise for consideration), the Commissioner has entirely discharged her functions under section 50. The Act makes no provision for the Commissioner to amend or supplement her decision, or to exercise any other function. Mr Lockley submits that at that point the Commissioner is *functus*. Ms Stout and Mr Waterman submit that she is not. They submit first that the IC can at any time issue a further decision notice if the IC has failed fully to discharge her functions in making the original notice, for instance because she has not addressed all possible exemptions. Second, Ms Stout contends that the IC's functions may revive following a successful appeal as that has the effect that the decision notice in question is a nullity.

82. The first submission turns on a different analysis of the IC's functions. It supposes that, contrary to our analysis above, the IC has not fully discharged her functions unless and until she has made a decision on every exemption relied upon. Ms Stout submits that the duty in section 50(2) to make "a decision" is to be read in accordance with section 6(c) of the Interpretation Act 1978, that the singular in a statute includes the plural unless the contrary intention appears. Accordingly, the IC can make *a decision* or *decisions*. The Interpretation Act also applies to other provisions of FOIA so that section 2(2)(b), for instance, means that the authority must be right on all exemptions which it relies upon. Further, she submits that FOIA leaves it open to the IC to deal with different parts of a complaint through different decision notices, or to dealt with multiple complaints through a single decision notice. She accepts that the IC might decide not to deal with all exemptions relied on by the authority because it is unnecessary to do so once it has been decided that one exemption applies, and she accepts that this would fulfil the IC's duty under section 50(2). However, Ms Stout submits that it does not completely discharge the IC's functions under section 50 since one or more of the grounds for withholding information has not been considered, and it remains open to the IC to deal with any remaining issues at any time. Although this may never be necessary, it will be where, after the decision notice has been issued upholding one exemption, the authority ceases to rely on that exemption or the FTT decides that it is not applicable or the public authority relies on a new exemption before the FTT.

83. We reject this submission. It misconstrues the nature of the duty under section 50. As we have explained, it is not to consider whether all exemptions relied on apply. It is a narrower requirement to consider whether the authority has acted in accordance with its Part 1 obligations. As set out above, once the authority has lawfully relied on one exemption and notified its decision in accordance with the Act, it has complied with its obligations. The applicability of other exemptions is simply irrelevant to the IC's functions.

84. Ms Stout's submission regarding section 2(2)(b) is wrong. The use of the word "any" in section 2(2) ("In respect of any information which is exempt information by virtue of any provision of Part II …") indicates that only one exemption need apply. More importantly section 2 FOIA does not impose

a duty on the public authority. The duty itself is in section 1. Section 2 merely defines the conditions as to when the duty arises. It simply makes no sense to require the Commissioner to consider whether the authority has lawfully relied on *all* exemptions where it is entitled to refuse on the basis of one.

85. Finally, there is no sensible way of applying section 50 if it is construed as allowing more than one decision notice on the same complaint. It is inconsistent with the clear statutory structure which is three sequential stages of decision-making, with a clear progression from one to the next. If Ms Stout was correct, there would be little finality in decision-making. It would mean that, if the IC saw the writing on the wall in relation to a decision which was in the course of being appealed, she could simply issue a further DN which she considers to be more robust. This is a recipe for procedural mayhem.

86. None of this means that the IC has no power to consider alternative exemptions should she decide that it is appropriate. Assuming it is not a case of 'no decision' (see section 50(2)), she does not discharge her duty until she issues a decision notice under section 50(3)(b). Prior to that, even if she considers that one exemption applies, it is open to her to address others as well.

87. Ms Stout also prayed in aid of her argument the Court of Appeal's ruling in *Union Marine Classification Services* v *Government of the Union of Comoros* [2016] EWCA Civ 239; [2016] 2 Lloyd's Rep 193. That case is undoubtedly authority for the proposition that an arbitrator is not *functus officio* where he had not dealt with a particular matter in dispute in his first decision. However, the respective statutory regimes are entirely different; the Arbitration Act 1996 expressly vests an arbitrator with the power to "make an additional award in respect of any claim … which was presented to the tribunal but was not dealt with in the award" (section 57(3)(b) of the 1996 Act). There is no equivalent power under FOIA. We also note that *Comoros* is, with the greatest respect, only a ruling on an application for permission to appeal. We do not read that ruling as seeking to lay down some much wider proposition of law as regards decision-making in other very different fields, especially where there is a carefully defined statutory process as under FOIA.

88. Mr Waterman's argument, which is very similar to that advanced by Ms Stout, also fails on this analysis. We reject his attempt to distinguish between a decision notice and a decision: the latter is the substantive content of the former. In any event, the distinction leads nowhere. A Commissioner's decision, which is set out in a decision notice, is whether the authority has dealt with a request in accordance with the requirements of Part 1. We have explained why that does not require consideration of all exemptions relied on.

89. Ms Stout's second (and in our view very ambitious) submission was that, even if the IC may not revisit a decision that has not been successfully challenged on appeal, an FTT decision on appeal that a decision notice was not in accordance with the law means that the decision was unlawful and, following *Anisminic Ltd v Foreign Compensation Commission* [1969]

2 AC 147*,* the decision notice is accordingly a nullity and so can be made again.

90. However, this submission is premised on a flawed analysis of the FTT's role under section 58. The question to be addressed under section 58(1)(a) is whether the decision notice is "in accordance with the law". Although the statutory language is less than helpful, this formulation embraces all errors, and is not limited to the traditional taxonomy of errors of law. As is clear from section 58(2) and *Birkett* (see paragraph 45 above), the FTT exercises a full merits appellate jurisdiction and so stands in the shoes of the IC and decides which (if any) exemptions apply. If it disagrees with the IC's decision, the IC's decision was "not in accordance with the law" even though it was not vitiated by public law error.

91. *Anisminic* abolished the distinction between error of law on the face of the record and other errors of law but simply has no application in the FOIA context. As is clear from the speech of Lord Reid (especially at p. 171), the House of Lords there was concerned with public law errors. Thus, Lord Reid gave examples of errors of law which would render a decision a nullity. They are all public law errors. Lord Reid distinguished between decisions which are based on public law error and those which are simply wrong, the latter being as legally valid as a decision which is right (at p.171E-F). Lord Pearce similarly drew a distinction between a decision which is tainted by error of law, meaning public law error which renders a decision *ultra vires*, and making a decision which is wrong but within its jurisdiction (pp.195-196 *per* Lord Pearce and p.207D–H, *per* Lord Wilberforce). The discussion which follows those passages and the case law referred to distinguishes between public law error, which goes to the jurisdiction of the decision-maker, and error on the substantive merits of the matter to be determined, which does not go to jurisdiction.

92. That *Anisminic* was concerned with public law error was confirmed by the House of Lords in *Boddington v British Transport Police* [2009] 2 AC 143. According to Lord Irvine, the effect of the decision of the House of Lords in *Anisminic* was to make "obsolete the historic distinction between errors of law on the face of the record and other errors of law. It did so by extending the doctrine of *ultra vires*, so that any misdirection in law would render the relevant decision *ultra vires* and a nullity" (p.154C) and also Lord Steyn at p. 171D-G. It followed that "the decision of the Commission was wrong in law, and therefore a nullity, rather than a 'determination' within the protection of the ouster clause": see *Boddington* p.154G-H *per* Lord Irvine.

93. In *Anisminic,* and in subsequent decisions applying it, the courts were seeking a solution which would ensure the maintenance of the rule of law. Thus in *Anisminic* itself, the issue was the effect of a statutory ouster clause on the jurisdiction of the courts to control unlawful conduct of a public body. It was only by deploying the doctrine of *ultra vires* that the court could preserve its supervisory jurisdiction. In *Boddington* Lord Irvine considered the reasoning of Lord Diplock in *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227 as to the effect of a determination by the court that a statutory instrument was *ultra vires*. In particular, Lord Diplock observed that as the courts do not act of their own

initiative an instrument may not be found to be invalid until it is challenged in legal proceedings, but that cannot limit the legal invalidity of the instrument. Thus, Lord Irvine held at p. 156D of *Boddington*, the consequence that an invalid instrument has always been invalid "follows from the application of the ultra vires principle as a control on abuse of power; or equally acceptably in my judgment, it may be held that maintenance of the rule of law compels this conclusion."

94. No such issues arise under FOIA. First, the appellate machinery in FOIA is not concerned solely with public law error. As already noted, *Birkett* makes clear that on a proper reading section 58 is concerned with any error of law or fact or even a difference in view. It follows the FTT may allow an appeal because it makes a different assessment to that of the IC even though the IC has not made any error of law in the public law sense. In that case, there can be no question of the Commissioner's decision being *ultra vires* or a nullity. Second, under the FOIA regime it is simply unnecessary to raise any considerations of *ultra vires*. If the FTT decides that the Commissioner's decision was made in error of law but agrees with the decision, then it will dismiss the appeal. If the FTT decides that the IC's decision was not made in error of law but disagrees with it, then the appeal will be allowed and a different decision notice will be substituted. The legal validity of the FTT's decision (which itself is subject to appeal for error of law to the Upper Tribunal) satisfies the rule of law. The considerations which led the House of Lords to deploy the doctrine of *ultra vires* in both *Anisminic* and *Boddington* simply do not arise here.

95. Crucially both *Anisminic* and *Boddington* were concerned with the consequences of an error by the decision-maker where there was no route of challenge other than the supervisory role of the court in public law proceedings. The tribunal in *Anisminic* was in essence an administrative decision-maker which had no appellate function and against which there was by statute no right of appeal. In *Boddington* the concern was with legislation which was presumed valid unless and until successfully challenged. But in FOIA Parliament has provided a bespoke statutory scheme comprising initial decision-making by the public authority, followed by a complaint to a regulator and then a right of appeal to an independent tribunal, and has clearly prescribed the consequence of a successful appeal. As section 58(1) provides, "the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner". In a nutshell, Parliament could have said that, if overturned, the decision notice would be a nullity, or that the tribunal should remit the case to the IC, but it did not.

96. If Ms Stout were correct, every error in a decision notice would render the decision a nullity. It would follow that in every such case, the complaint would have to be remitted to the IC because she had not yet discharged her duty under section 50. But if that was the position, the closing words of section 58(1) would be unnecessary because a decision notice can only be substituted for the original notice if the original notice exists at the point of substitution.

97. For all these reasons we conclude that under FOIA a decision notice which is "not in accordance with law" is not for that reason a nullity. It follows that the IC's functions do not revive following a successful appeal and so there is no question of the FTT remitting the case to be determined by the IC.

98. That does not mean that there are no circumstances in which a decision of the Commissioner will be a nullity. Upper Tribunal Judge Jacobs at paragraph 23 of *Bell* identified one circumstance in which a notice may be a nullity, namely where there had in fact been no complaint. We agree that in such a case the FTT could not substitute another notice because it would have no jurisdiction to do so. In that case, it would be sufficient for the FTT to allow the appeal and declare that the notice was invalid. Of course, there would be no question of the IC making another decision in such an unusual case. The IC would have no jurisdiction to do so in the absence of a complaint under section 50.

99. We doubt, however, that the second example in paragraph 23 of *Bell*, where the notice was "so completely incoherent or unconnected with" the Commissioner's legal powers, is strictly speaking a case of nullity. The notice would simply not be in accordance with the law and so the FTT would allow the appeal and substitute another notice (see paragraph 103 below). We acknowledge that the Tribunal of Social Security Commissioners in *R(IB)2/04* intimated that there may be decisions which have so little coherence or connection to legal powers that they do not amount to decisions at all (at paragraph 72). However, that observation was not necessary to the decision on the issue in that appeal, which was that where an appeal tribunal (in the social security jurisdiction) finds that the Secretary of State's decision was defective it has jurisdiction to make the decision which the Secretary of State should have made (thereby remedying any defects in the decision, whether properly regarded as defects of form or substance) and should not simply set such a decision aside as invalid or "inept". This, if anything, supports our analysis as to the principal issue in the present appeal. Moreover, it is important to bear in mind that the Tribunal of Commissioners in *R(IB)2/04* was concerned with legislation which did not in terms prescribe the function or duties of the appeal tribunal, unlike FOIA, and where the Secretary of State was concerned that tribunals should not simply refer the majority of defective decisions back to him for remaking.

100. Mr Lockley suggested other instances of nullity as, for instance, where the decision was tainted by bias or where the person holding the office of IC had not been properly appointed. But in those instances the FTT would have jurisdiction to determine the appeal – see *Boddington* and also *Chief Adjudication Officer v Foster* [1993] AC 754 and *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1623 – and, if the FTT were to find such a flaw, the correct response would simply be to find that the decision notice was not in accordance with the law and to substitute another notice.

101. We would simply add that where the FTT itself has no jurisdiction, it follows it must strike out the appeal (see by analogy *Kirkham v Information*

Commissioner [2018] UKUT 6 (AAC)) and so in those circumstances it cannot remit the matter to the IC.

102. These conclusions are entirely consistent with the wide scope of the tribunal's duties and powers under section 58. The decision in *Birkett* means that there is no limitation on the issues which the FTT can address on appeal, and the focus of its task is the duty of the public authority. This means that the tribunal must consider everything necessary to answer the core question whether the authority has complied with the law, and so includes consideration of exemptions not previously relied on but which come into focus because the exemption relied upon has fallen away. It cannot be open to the FTT to remit consideration of new exemptions to the Commissioner, because to do so would be incompatible with the FTT's obligation under section 58 to consider those matters for itself.

103. If the FTT decides that the decision notice was not in accordance with the law, section 58(1) says that the tribunal must allow the appeal or substitute another decision notice. What is the consequence of allowing the appeal? The decision notice which the tribunal has found not to be in accordance with the law cannot be allowed to stand. It cannot have been the intention of the legislation that the parties should continue to be bound by the consequences of a notice which is wrong. Nor can it have been the intention that the parties should simply ignore the notice because it is wrong, as that would mean that there is no decision notice setting out what the authority must do. The only way in which allowing the appeal can be given practical effect is if the FTT is also able to substitute a correct notice. It follows that in our view Upper Tribunal Judge Jacobs was wrong when he said, at paragraph 25 of *Bell*, that "it is sufficient for the tribunal to allow the appeal and, in doing so, to identify the mistake in the notice".

104. This analysis is reinforced by the syntax of the last two lines of section 58(1). It is clear from the concluding phrase "and in any other case the Tribunal shall dismiss the appeal", that the words before that describe the Tribunal's duty where it *allows* the appeal. That means that the substitution of a decision notice must occur where an appeal is allowed. It is not an alternative to allowing an appeal and so the word "or" must be read as meaning "and". It follows that we agree with the analysis of the information tribunal in *Guardian Newspapers and Brooke* at paragraphs 18-23 and in particular the conclusion at paragraphs 22 and 23:

> "22. In the circumstances we can only make sense of s 58(1) by interpreting the word "*or*" disjunctively in the context of appeals by public authorities and conjunctively in the context of appeals by applicants for information. In other words, we construe the subsection as if it read:
>
> > *the Tribunal shall allow the appeal <u>and/</u>or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
>
> 23 In our judgment the Tribunal has power, in the case of an appeal by an applicant for information, to allow the appeal and substitute such notice as could have been served by the Commissioner."

105. In support of her submissions Ms Stout relies by analogy on immigration and social security cases in which, on allowing an appeal, the FTT sets aside a decision-notice so that the decision-maker can issue a fresh one. However, there are two fundamental problems with these arguments by analogy. The first is that considerable caution needs to be exercised when seeking to make such cross-jurisdictional comparisons when each different regime has its own very individual decision-making and appellate machinery. The second is that in any event the practice in the immigration tribunals appears to be that a decision is only remitted to the Secretary of State where the original decision was invalid rather than wrong. Thus in *R(Abdi) v Secretary of State for the Home Department* [1996] Imm AR 148 statute reserved a specific exercise of discretion to the Secretary of State, making remittal the only viable option. Likewise *O (Nigeria)* [2004] UKIAT 26 and *MO (Iraq)* [2008] UKIAT 61 were both cases where there was no decision as such.

106. Furthermore, although we acknowledge the case was not cited before us, the observations of Ryder LJ, Senior President of Tribunals, in *Singh (India) v Secretary of State for the Home Department* [2017] EWCA Civ 362 at paragraph 33, summarising the well-established merits review nature of the jurisdiction exercised by immigration tribunals in human rights cases, certainly do not assist Ms Stout's argument:

> "33. When doing so the tribunal is not limited to a secondary reviewing function such as would be appropriate in judicial review unless Parliament constrains the function of the tribunal in that or any similar way. Parliament has done so on more than one occasion, for example by removing a right of appeal or by imposing a judicial review test rather than a merits test upon certain appeals. When not so constrained, the tribunal is part of the decision-making process. Its appellate function is an extension of the decision making function. The tribunal stands in the shoes of the decision maker. It is independent of the Executive but undertakes the same task by applying the Immigration Rules and such other policy guidance as the Executive may lawfully promulgate within the statutory scheme. The tribunal may differ from the Secretary of State's view about a particular public interest that is in play in a particular case but must always in so doing provide a reasoned conclusion including by reliance upon country guidance or other authoritative specialist materials."

107. Nor do we consider the analogy with social security cases to be sound. The social security decision-making and appellate machinery, as prescribed by the Social Security Act 1998 and the Tribunals, Courts and Enforcement Act 2007, is very different to that established by FOIA. The 1998 Act makes highly complex provision for benefit decisions to be revised or superseded in certain specified circumstances, meaning that the Secretary of State's decision-maker may well have an ongoing involvement in decisions on benefit claims. In information rights cases, by contrast, a public authority's refusal to disclose information effectively crystallizes at the point of refusal (see *R (on the application of Evans) v Attorney General* [2015] UKSC 21 *per* Lord Neuberger at paragraphs 72-74). It follows that the statutory role of the decision-maker under the Social Security Act 1998 is materially different to that of the Commissioner under FOIA.

108. Finally Ms Stout submits that it is inconvenient to limit the power of the FTT to remit a case to the Commissioner as the Upper Tribunal has done in *Bell*. We do not consider that arguments based on convenience (and, after all, what is convenient may well turn on the perspective of the party concerned) can trump a conclusion soundly based on analysis of the legal framework. It is an argument which may assist where alternative constructions of the Act are open. But in any event the convenience submissions do not favour Ms Stout's position. On the contrary, remittal to the Commissioner is likely to make the process more cumbersome and lengthier than if the FTT itself considers all relevant exemptions.

109. We summarise the effect of our analysis on the role of the FTT where a public authority has relied on two exemptions ('E1' and 'E2') and the Commissioner decides that E1 applies and does not consider E2. If the FTT agrees with the Commissioner's conclusion regarding E1, it need not also consider whether E2 applies. However it would be open to the FTT to consider whether E2 applies, either by giving its decision on the appeal in the alternative (e.g. E1 applies but, if that is wrong, E2 applies in any event) or by way of observation in order to assist the parties in assessing the prospects of appeal or, in the event of an appeal to the Upper Tribunal, so that that Tribunal has the benefit of consideration of all exemptions which may be in play including relevant findings of fact. It is a matter for the FTT as to how it approaches such matters, taking into account all relevant considerations including the overriding objective. On the other hand, where the FTT disagrees with the Commissioner's conclusion on E1 it must consider whether E2 applies and substitute a decision notice accordingly.

Conclusion and disposal

110. We conclude that the decision of the First-tier Tribunal involves an error of law. We allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)).

111. At the beginning and end of the hearing there was an interesting discussion about whether the Upper Tribunal should remake any part of the decision, should it decide that the FTT erred in law. As things turned out, time constraints meant that there was no closed hearing at which we could consider the closed material (which we would need to do, even to consider whether section 36 was engaged) nor were the parties able to address us on the application of the public interest test. Moreover, the parties were agreed that, should the tribunal decide that the material was not exempt under section 36, it would be necessary for further evidence to be adduced in respect of section 40.

112. It is not appropriate for the Upper Tribunal to consider the section 40 exemption, should it arise. The exemption has not been considered by either the Commissioner or the FTT. There have been no findings of fact in that regard. It is not the Upper Tribunal's task to act as primary fact finder. To do so has implications for onward appeal, which would have to satisfy the second appeals test. There was some suggestion by Mr Lockley that

the Upper Tribunal could consider whether section 36 applied and, if the decision was that it did not, it could remit consideration of section 40 to the FTT. There is nothing to commend this approach. Our consideration of the appeal has not required us to engage in any detail with the facts and context so we are not particularly well placed to determine the relevant issues under section 36. It may be some time before the Upper Tribunal hearing on section 36 could be listed and if the outcome is that the section 40 issue must be remitted to the FTT, the approach is likely to involve greater delay than simply remitting all issues to the FTT now. We agree with Ms Stout that if section 40 arises it should be considered by the same tribunal as considers section 36. For the above reasons, it is appropriate that the appeal is remitted to the FTT to do so.

113. It follows that we do not need to determine a question which was flagged before us but on which we heard no argument, as to whether the public interest requires separate consideration in relation to each exemption. That is something that might arise for consideration by the FTT to which this appeal is remitted.

114. It will therefore be for the next FTT to decide whether section 36(2) is engaged and, if so, whether the public interest favours disclosure or not. If the information is not exempt under section 36 the FTT will need to consider whether the information is exempt under section 40. It may decide to do so in any event. It will be for the FTT whether it decides to hear evidence and submissions in relation to the public interest as it applies to both exemptions or whether it deals with the exemptions and the evidence in relation to them sequentially. The approach will be determined in part by the view that the tribunal takes as to whether the public interest on the exemptions can be aggregated and in part by case management considerations.

Signed on the original
on 1st March 2018

Nicholas Wikeley
Judge of the Upper Tribunal

Stewart Wright
Judge of the Upper Tribunal

Kate Markus QC
Judge of the Upper Tribunal