Neutral Citation Number: [2025] UKUT 171 (AAC)
Appeal No. UA-2024-000385-GIA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

Rabbi Gabriel Kanter-Webber

Appellant

- v -

The Information Commissioner

First Respondent

-and-

The Chief Constable of Hampshire Constabulary

Second Respondent

Before: Upper Tribunal Judge J. Butler

Hearing date: **13 February 2025**
Mode of hearing: **In person, Field House, London**

Representation:
Appellant: Did not take part
1st Respondent: Mr Leo Davidson, Counsel
2nd Respondent: Mr John Goss, Counsel

On appeal from:
Tribunal: First-tier Tribunal (General Regulatory Chamber)
Tribunal Case No: EA/2022/0100
NCN: [2024] UKFTT 00090 (GRC)
Tribunal Venue: CVP
Hearing Date: 08 January 2024
Decision Date: 30 January 2024

SUMMARY OF DECISION

Freedom of information – absolute exemptions (93.4).

The Upper Tribunal considered whether the First-tier Tribunal concluded correctly that a police misconduct panel ("PMP") was a court for the purpose of applying the exemption given in section 32 of the Freedom of Information Act 2000 ("FOIA").

The Upper Tribunal decided the First-tier Tribunal made errors of law in reaching its decision that the PMP was a court.

At the parties' request, the Upper Tribunal addressed whether, as a matter of law, PMPs are courts within the meaning of section 32(4)(a) of FOIA. The Upper Tribunal decided they would not meet that definition.

The Upper Tribunal remitted the appeal to the First-tier Tribunal with directions for it to determine the appeal on the basis that the PMP in question is not a court within the meaning of section 32(4)(a) of FOIA, and to decide whether the other exemptions relied on by the Second Respondent (sections 31(1)(g) and 40 of FOIA) apply to the Appellant's request for information.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 30 January 2024 under case number EA/2022/0100 was made in error of law and is set aside.

The Upper Tribunal remits the appeal to the First-tier Tribunal on the basis that when deciding the appeal:

(a) The First-tier Tribunal is directed to consider the Appellant's appeal on the basis that the police misconduct panel in question is not a court within the meaning of section 32(4)(a) of the Freedom of Information Act 2000 ("FOIA"), including at the date of the Appellant's request for information; and

(b) The First-tier Tribunal is directed to consider the alternative exemptions identified by the Second Respondent of sections 31(1)(g) and 40 of FOIA.

REASONS FOR DECISION

Introduction

1. The Second Respondent convened a police misconduct panel under the Police (Conduct) Regulations 2012 between 19 October 2020 and 08 January 2021. I refer to the Second Respondent in this decision as: "Hampshire Constabulary".

2. The police misconduct panel ("PMP") was convened to consider allegations of gross misconduct against six police officers based within Hampshire

Constabulary's Serious and Organised Crime Unit, based on covert recordings of what appeared to be homophobic, racist and sexist remarks. The hearing led to the PMP dismissing three of the officers without notice for gross misconduct, two would have been dismissed had they remained members of a police force, and one officer was given a final written warning.

3. Paragraph 6 of the PMP's decision recorded that the hearing was held in public, but that due to the need to maintain social distancing as a result of the COVID-19 pandemic, the hearing was fed by live link to another venue where members of the public attended. Certain members of the public, specifically journalists, were permitted to attend the hearing remotely. The hearings were reported in the media.

4. On 18 January 2021, Rabbi Kanter-Webber requested information in respect of the hearing from Hampshire Constabulary. His request stated:

   "*Please disclose an electronic copy of:*

   - *The written outcome,*

   - *The decision on sanction, and*

   - *The transcript, or, if there is no transcript, the audio recording of the disciplinary proceedings reported*."

5. Hampshire Constabulary responded to Rabbi Kanter-Webber's request on 19 February 2021, sending him a link to a short summary of the written outcome and the decision on the sanction. Hampshire Constabulary refused, however, to disclose the transcript or audio recording. It relied on the exemption set out in section 31(1)(g) of FOIA, which in turn relied on the purposes set out in section 31(2)(a) and (b) of that Act.

6. Rabbi Kanter-Webber requested a review and Hampshire Constabulary maintained the decision to rely on the exemption under section 31 of FOIA. On 15 March 2021, Rabbi Kanter-Webber complained to the Information Commissioner ("ICO") about Hampshire Constabulary's reply. The ICO wrote to Hampshire Constabulary on 14 September 2021, which issued a revised response on 29 September 2021. This relied on exemptions provided by sections 32 and 40 of FOIA in addition to the exemption under section 31.

7. On 05 April 2022, ICO issued a decision notice upholding Hampshire Constabulary's reliance on section 31 of FOIA. The ICO decided that as this applied to all of the withheld information, he did not need to consider Hampshire Police's reliance on the other stated exemptions.

Proceedings before the First-tier Tribunal and its decision

8. On 26 April 2022, Rabbi Kanter-Webber appealed to the First-tier Tribunal ("FTT") against the ICO's Decision Notice. Hampshire Constabulary was joined as

Second Respondent to the appeal on 19 August 2022. On 08 January 2024, a FTT held a hearing of Rabbi Kanter-Webber's appeal. This was attended by counsel on behalf of the First and Second Respondents, but Rabbi Kanter-Webber did not attend, on the basis he had childcare commitments. He indicated he was content for the FTT to go ahead in his absence.

9. The FTT's Decision Notice records its decision was given on 30 January 2024. Paragraph 24 of the FTT's Decision Notice explains it indicated to the parties present that it wished to hear submissions on the section 32 exemption first. The FTT wrote that given the nature of that exemption, it would not be an efficient or proportionate use of court time to hear detailed submissions on the other exemptions. The FTT wrote that the parties present agreed with that approach.

10. The FTT wrote the following under the heading "Discussion":

"28. We begin our discussion with whether the audio recordings are "documents" for the purposes of section 32. Having had regard to the principles set out in Edem v ICO and MOJ [2015] UKUT 0210, we are satisfied that they are. We conclude that "document" is not confined to a written document, and we note also that "document" is defined in the 2012 Regulations to include "anything in which information of any description is recorded and includes any recording of a visual image".

29. There is, in our view, no real dispute that the transcript and recordings were created by the administrative staff of the PMP, and for the purposes of proceedings in a particular cause or matter, in this case the disciplinary proceedings against the six officers. We note also, in passing, that rule 37 of the 2012 regulations in force at the time of the hearing (and reproduced as reg 44 of the Police (Conduct) Regulations 2020, the successor to the 2012 Regulations) requires a verbatim record to be taken, and that a copy can be supplied to the officer concerned, if so requested.

30. The question then arises whether the PMP is a court as defined in section 32 (4) (a). The appellant argues that is not, as it does not exercise the judicial power of the state; the respondents argue that it does, and that it is a court for the purposes of FOIA.

31. The appellant submits that the Court of Appeal has twice held that a PMP is not a Court, and while that may be in respect of the Contempt of Court Act 1981, there is no principled reason why section 57 of that Act which uses wording identical to that of FOIA should be interpreted differently.

32. We turn then to the cases cited by the appellant. In Leary v BBC (unreported) (1989), the issue concerned an injunction sought by Mr Leary who was a witness in the proceedings. In that case, the Master of the Rolls stated:

"But Mr Leary is not the subject of any criminal proceedings. He is not the subject of any police disciplinary proceedings, and so far as disciplinary proceedings were concerned, if he was, we should have to consider two further matters: first whether

they were active, and secondly whether the tribunal which hears police proceedings is a court at all. This would turn on section 19 of the Contempt of Court Act which defines a court as including "any tribunal or body exercising a judicial power of the State". I express no view about whether a police disciplinary tribunal is a court within that definition. There is an obvious distinction between such a tribunal and a Mental Health Tribunal in that mental patients do not voluntarily submit to the jurisdiction of a Mental Health Tribunal, whereas police officers do voluntarily submit to the jurisdiction of a police disciplinary tribunal in the sense that nobody is compelled to become a police officer, and it is a part of the incidence of police service.

But as I say I express no view about that. That may have to be decided in some future case where it arises as a matter essential to the decision."

33. *This demonstrates that the Court of Appeal expressly declined to reach any finding as to whether a police disciplinary panel is a court.*

34. *In GMC v BBC [1998] 1 WLR 1573, the Court of Appeal considered whether a disciplinary panel General Medical Council was a court for the purposes of the Contempt of Court Act 1981. The GMC was created by statute, and its procedural rules are established by Statutory Instrument. Its procedures (at least in 1998) were modelled on criminal trials. The Court noted also the distinction drawn in earlier cases between administrative functions and judicial functions, but it did observe that the test set out in the 1981 Act reflects the common law. It was noted also that, certainly by 1981, the courts had recognised that some tribunals had acquired the characteristics of courts. A PMP is no longer held in private by a Chief Constable was the case when Leary v BBC or GMC v BBC were heard. We note also that, as was held in R (Chief Constable of Thames Valley Police) v PMP [2017] EWHC 923, a PMP is now seen as separate entity from a Chief Constable.*

35. *The legal landscape has changed significantly since 1998, and the authorities were reviewed in R (Bailey v Secretary of State for Justice [2023] EWHC 821 at [27] ff. The Divisional Court noted that some tribunals are courts for the purposes of the 1981 Act. Whether a body does exercise the judicial power of the state is an issue to be considered holistically and, as was observed in Bailey at [48], the proposition for determining whether a body is a court should be its ability to deprive a citizen of his liberty was rejected.*

36. *We note that in his skeleton argument at [11], the appellant seeks to rebut Hampshire's submission that certain features of a PMP indicate that it carries out a judicial function.*

37. *We accept that a PMP must sit in public and must be chaired by a legally qualified chair, as is the case with First-tier Tribunals. That is not so with the GMC where there may be a legal assessor to advise the panel as used often to be the case with lay magistrates. It also has clearly laid out rules of procedure, detailing how examination and cross-examination is to be carried out. There is, we find, no meaningful or substantive difference between those and many First-tier Tribunals.*

38. As Mr Goss submitted, a PMP has the right to control its procedure when it comes to making decisions on anonymity, as can be seen from the decision issued by the PMP in this matter - see for example regs 35 and 36 of the 2012 Regulations. As with Courts and Tribunals the extent to which matters are disclosed is a matter for the chair of the panel.

39. Some support for Hampshire's position can be derived from R (IPCC) v Chief Constable of West Mercia [2007] EWHC 1035 at [21] where the High Court proceeded on the effective basis that a PMP was Tribunal but without deciding the issue.

40. As the appellant submits, much of this is also true of the regulators like the GMC. But, there is a crucial difference in the case of police officers, which in our view, sets PMPs apart from other professional regulators. The GMC decides who is, or is not, entitled to practise as a doctors registered with it; it determines who has a license to practice. A PMP has the power to decided, as Mr Goss submitted, who is entitled to be a constable.

41. We accept that, as was submitted, a constable is an office holder under the Crown as opposed to an employee as is set out in R(Victor) v Chief Constable of West Mercia [2023] EWHC 2119 (admin). The appointment of a constable is an act of the state and constables must swear an oath or attestation to carry out their office. They are entrusted with the direct exercise of the coercive powers of the state. Constables, as a matter of law, have powers of arrest, and to compel others to do things or conduct searches which would, if carried out by an ordinary person, be unlawful. That is not the case with doctors or similar regulated professions. Absent the narrow area of compulsory detention under the Mental Health Acts, they can only operate on the basis of consent. If that is not extant, then a court order is needed.

42. A further area of difference is that a GMC hearing may have the effect of making it impossible for a doctor to get employment in that capacity, and while its panels may investigate matters of conduct which could also fall within the remit of Employment Tribunals, they do not decide on issues such as whether a dismissal or other sanction was justified. In contrast, a PMP does in part address these issues, officers being unable to bring claims of unfair dismissal to an Employment Tribunal.

43. We do not accept that, as the appellant submitted, PMPs' functions are administrative rather than judicial. While it is correct to submit that both functions required fairness, impartiality and so on, the rules for courts are different; a key issue is transparency and control over its proceedings and fairness.

44. Taking all these factors into account holistically, we find that a PMP is a body which, when constituted with a legal chair, is a court for the purpose of section 32 of FOIA. Accordingly on that basis, we are satisfied that that absolute exemption conferred by that section applies."

Legal framework

11. Section 32 of FOIA provides the following:

> **32 Court records, etc.**
>
> (1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—
>
> (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
>
> (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
>
> (c) any document created by—
>
> (i) a court, or
>
> (ii) a member of the administrative staff of a court,
>
> for the purposes of proceedings in a particular cause or matter.
>
> (2) Information held by a public authority is exempt information if it is held only by virtue of being contained in—
>
> (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or
>
> (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.
>
> (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this section.
>
> (4) In this section—
>
> (a) "court" includes any tribunal or body exercising the judicial power of the State,
>
> (b) "proceedings in a particular cause or matter" includes any investigation under Part 1 of the Coroners and Justice Act 2009, any inquest under the Coroners Act (Northern Ireland) 1959 and any post-mortem examination,
>
> (c) "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment, and
>
> (d) except in relation to Scotland, "arbitration" means any arbitration to which Part I of the Arbitration Act 1996 applies.

Grounds on which I granted permission to appeal to the Upper Tribunal

12. In an application form dated 11 March 2024, Rabbi Kanter-Webber sought permission to appeal to the Upper Tribunal. He gave detailed appeal grounds, which I addressed at paragraphs 8 to 12 of my decision notice granting permission to appeal. Using my inquisitorial duty, I also identified other matters for consideration in respect of one of the grounds of appeal, set out at paragraphs 13 to 39 of my decision granting permission to appeal. I also identified an issue of potential wider importance at paragraph 43 to 51 of my decision notice

13. The appeal grounds are set out in detail in my decision notice dated 07 May 2024, but a summary of the grounds on which I granted permission to appeal is:

    (a) The FTT had distinguished PMPs from medical disciplinary panels, but I considered Rabbi Kanter-Webber's grounds arguable that the FTT gave unclear reasoning for distinguishing the decision of ***General Medical Council v BBC [1998]*** 1 WLR 1573 (CA) ("***GMC v BBC***");

    (b) In reaching its decision, the FTT placed particular focus on the fact police officers are "entrusted with the direct exercise of the coercive powers of the state". However, it was unclear that there was any specific legal authority supporting this approach. Furthermore, it was not necessarily consistent with the holistic assessment of all the factors indicated by paragraph 54 ***of R (OAO) Bailey and Morris v (1) Secretary of State for Justice and (2) Parole Board) [2023]*** EWHC 821 ("***Bailey***"). The FTT's approach potentially elided the functions of two different entities into each other for the purpose of assessing whether the entity making the decision is exercising the judicial power of the state;

    (c) The FTT's approach was potentially inconsistent with the dictum of Lord Scarman at 359H to 360A of ***Attorney General v BBC [1981]*** AC 303 ***("AG v BBC")***. The FTT appeared to have placed particular weight on the functions held by police officers, rather than identifying clearly the PMP's functions. This indicated the FTT may have taken account of irrelevant matters;

    (d) While the FTT correctly identified the importance of distinguishing between bodies exercising administrative functions and judicial functions, it was arguably unclear from the decision which specific functions the FTT decided the PMP held. The FTT did not appear to focus on the purposes for which the PMP was established and the functions it carried out (***AG v BBC***). Instead, the FTT appeared to focus on the way in which the PMP would perform its functions, without identifying what those functions comprised. This did not clearly reflect the principles established in ***AG v BBC*** or ***GMC v BBC***;

    (e) Elements of the FTT's decision focused on the composition of PMPs provided for in the relevant legislations. However, the composition of PMPs had been changed with effect from 07 May 2024 by amending the Police (Conduct) Regulations 2020. Changes included removing the requirement for a legally qualified chair, instead requiring the chair to be the chief officer of police of

the police force concerned. The PMP would also no longer require a legally qualified member, although a legally qualified person would be appointed as an adviser to the chair and panel.

(f) While the PMP in question was not affected directly by this change, it highlighted that the FTT may have focused on the way a PMP is arranged, without placing the essential focus required on its functions and to decide whether they were administrative or judicial. It would seem unusual that some of the factors relied on by the FTT would tend to indicate a PMP was a court at the date of its decision, but might indicate it was not one at the date the secondary legislation amendments came into force a few months later;

(g) The Divisional Court in ***Bailey*** identified the need to look at a body's powers (which arguably imported processes) as well as its functions. It was arguable the FTT's reasons did not address some of the processes in place for a PMP that militated against considering it to be a court. Examples included that the legally qualified chair did not have to swear a judicial oath and was not recruited through a national state body but taken from a list maintained by a local policing body (allowing for different criteria to apply). Further, the PMP would include a senior police officer appointed by the appropriate authority. This might be perceived as reducing independence of the PMP overall. It had no direct comparator in bodies recognised as being courts (for example, employment tribunals); and

(h) The FTT had referred to some support for Hampshire Constabulary's position being derived from paragraph 21 of ***R (IPCC) v Chief Constable of West Mercia [2007]*** EWHC 1035. However, the paragraph cited by the FTT and its description of a PMP as a judicial tribunal, did not make clear whether the High Court was referring to a PMP exercising judicial functions, or acting judicially in the sense of conducting proceedings fairly and impartially (which would also be expected of a body exercising administrative functions). The FTT did not address whether the decision in ***West Mercia*** was describing the former or the latter. It might therefore have misdirected itself in law.

14. I explained that my observations about the FTT's decision were provisional and were subject to reconsideration once I had received and considered the parties' representations (see paragraph 5 of Decision Notice dated 07 May 2024).

15. I also explained that granting permission to appeal would allow the Upper Tribunal the opportunity to consider whether the Barras principle, or a wider principle of constructive interpretation, applied to the definition of court in section 32 of FOIA. I observed that the Explanatory Notes to FOIA state the definition in section 32(4):

> *"…is the same as in section 19 of the Contempt of Court Act 1981, thereby bringing in tribunals and other bodies exercising the judicial powers of the State."*

16. I observed it therefore appeared that the Government's intention was that in using the definition of court it provided in section 32(4) of FOIA, Parliament would import

the same meaning of "court" used in section 19 of the Contempt of Court Act 1981. The Barras principle is expressed to apply where an enactment uses a processed term that is one upon which whose meaning the courts have previously pronounced. The Barras principle applies to allow it to be presumed that the term was intended to have the meaning that case law had already established.

17. I observed that while the Barras principle is indicated to be at most, a presumption, with a strength varying according to the context, it seemed plausible to infer that Parliament intended the definition of court in section 32(4) of FOIA to have the same meaning as in section 19 of the Contempt of Court Act 1981, especially where the Explanatory Notes drew an explicit connection to the 1981 Act.

The hearing on 13 February 2025 and the parties' submissions

18. Having received my grant of permission to appeal, the ICO indicated it considered the FTT had made material errors of law. Hampshire Constabulary argued that there were no material errors of law by the FTT and invited me to uphold the FTT's decision, with the additional reason that it placed reliance on what the Court of Appeal said about judicial immunity for PMPs in ***Heath v Commissioner of Police of the Metropolis [2004]*** EWCA Civ. 943 [2005] ICR 329.

19. I directed for an oral hearing of the appeal to take place, which occurred on 13 February 2025. On 16 July 2024, Rabbi Kanter-Webber emailed the Upper Tribunal indicating that if a hearing of the appeal was arranged, he would prefer a video hearing as he lives in Brighton and his caring responsibilities meant it would be easier for him to take place in a remote hearing. Hampshire Constabulary's counsel had, however, requested an in person hearing in London. Hampshire Constabulary's counsel also made representations requesting a hearing of 1.5-2 days.

20. In response to the representations, I directed for the hearing to take place in person at the Upper Tribunal's London venue. I did not consider the matter suitable for hybrid hearing arrangements with one party taking part remotely and other parties face to face. I also directed for the hearing to be one day, rather than the longer time estimate requested by Hampshire Constabulary. My approach balanced the time estimate for the hearing with the fact that it would be in person, to minimise the inconvenience for Rabbi Kanter-Webber in taking part at a hearing in London given he lives elsewhere and has caring responsibilities.

21. On 31 January 2025, Rabbi Kanter-Webber emailed the Upper Tribunal, writing that as previously stated, he was unable to attend an in-person hearing in London due to childcare commitments. This appeared to be a reference to his statement that he would prefer a video hearing (although that earlier preference had not been put in terms that Rabbi Kanter-Webber could not otherwise attend). Rabbi Kanter-Webber wrote that he did not propose to submit a skeleton argument, and was content to rely on, and adopt, the ICO's submissions, which he had seen. Rabbi Kanter-Webber also responded to a number of matters raised in the skeleton argument from Hampshire Constabulary.

22. At the hearing on 13 February 2025, the ICO was represented by Mr Leo Davidson of Counsel and Hampshire Constabulary by Mr John Goss of Counsel. I invited representations from each of them about proceeding in Rabbi Kanter-Webber's absence. Both invited me to proceed, on the basis that the position of Rabbi Kanter-Webber and the ICO were broadly aligned, no request had been made to postpone the hearing, and the interests of justice favoured going ahead.

23. Having applied rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I decided to proceed with the hearing. I was satisfied that Rabbi Kanter Webber had been notified of the hearing date. I considered it was in the interests of justice to proceed, broadly for the reasons the other parties gave at paragraph 22 above. I took into account the overriding objective of acting fairly and justly by avoiding delay where compatible with the resolution of the issues. I also took into account that Rabbi Kanter-Webber was adopting the ICO's position and arguments and had not asked for the hearing to be postponed so he could participate.

24. Mr Davidson and Mr Goss both invited me to reach a conclusion whether a PMP is a court for the purpose of section 32 of FOIA. They requested this on the basis that:

    (a) I would receive full argument, all the relevant considerations were before me, and it was not a question of fact so much as a question of law whether a PMP should be treated as a court;

    (b) assuming I decided the FTT had made an error of law, it was proportionate for me to make that determination rather than remit the question of section 32 back to a First-tier Tribunal to decide; and

    (c) There were at least two, possibly more, FTT appeals that are stayed behind Rabbi Kanter-Webber's appeal. There is therefore a strong public interest in having certainty about whether or not PMPs attract the protection of section 32 of FOIA, and for this to have the imprimatur of a decision by the Upper Tribunal.

25. I explored with both counsel whether any decision that PMPs are not courts within the meaning of section 32, might have adverse consequences for the other exemptions Hampshire Constabulary had put forward of section 31(1)(g) and section 40 of FOIA. Counsel and I agreed this would be a potential issue if I decided that PMPs did not fall within the definition in section 32(4)(a) of FOIA. Both Counsel indicated they wished me to go ahead on the basis that they did not consider, in principle, that my findings would impinge on what might need to be considered under the other exemptions, and that of those exemptions, only section 31 might be affected.

26. Although Rabbi Kanter-Webber was not present at the hearing to share his views, his appeal grounds included that there is a public interest in the Upper Tribunal giving an authoritative answer to a question relevant to a significant area of FOIA practice. That argument is broadly consistent with me deciding whether, in principle, PMPs are courts for the purpose of section 32, rather than simply deciding whether the FTT made one or more material errors of law in its decision.

27. The appeal before the FTT included closed material, which was, for obvious reasons, not disclosed to Rabbi Kanter-Webber. When I granted permission to appeal, I invited the parties' views about whether the Upper Tribunal could proceed solely by reference to the open hearing bundle used by the FTT. No party objected to this approach and Hampshire Constabulary actively supported it. There was, in any event, limited need to refer to the open FTT bundle. This is consistent with the observations from Mr Davidson and Mr Goss. I was provided with a joint bundle of relevant documents and authorities running to 1111 pages. At the hearing, Mr Goss also handed up additional authorities, namely ***Anderson Solicitors and others v the Solicitors Regulation Authority [2012]*** EWHC 3659 (Admin) 2013, ***L v the Law Society [2008]*** EWCA Civ. 811, and ***R (Lino Di Maria) v Commissioner of Metropolitan Police and others [2025]*** EWHC 275 (Admin).

28. I record my gratitude to Mr Davidson and to Mr Goss for their thoughtful submissions and their engagement with the legal issues arising in this appeal.

29. A full day was taken up in legal argument. To manage the length of this decision, I have not set out the detail of the written arguments and have sought to distil the parties' oral arguments, rather than reflect them verbatim. I have, however, taken full account of the parties' written and oral submissions before reaching my decision.

Rabbi Kanter Webber's submissions

30. Rabbi Kanter Webber adopted the position taken by the ICO in its Reply to the Appeal dated 13 June 2024 (see his email dated 16 July 2024).

31. In his email dated 31 January 2025, Rabbi Kanter-Webber disagreed with the argument that the open justice principle can only apply to a PMP if it is in fact exercising the judicial power of the state. Rabbi Kanter-Webber argued this is undermined by decisions in ***TZ v GMC [2015]*** EWHC 10001 and ***R(D) v SSHD [2006]*** EWCA Civ. 143 and in ***SRA v Spector [2016]*** EWHC 37 (Admin). Rabbi Kanter-Webber argued that these cases confirm that the open justice principle is not synonymous with a body exercising the judicial power of the state.

The ICO's submissions

32. In his submissions, Mr Davidson emphasised the importance of Parliament actively choosing to adopt the same definition of "court" in section 32(4)(a) of FOIA that is provided for in section 19 of the Contempt of Court Act 1981 ("the 1981 Act"). Mr Davidson argued the Barras principle was effectively "turbo charged" in this situation. A clear line of intention could be drawn by the words used being the same as in the 1981 Act which itself drew on earlier case law (in particular, the decision in ***AG v BBC***). The same test had been adopted expressly when legislating FOIA and the Explanatory Note confirmed this intention.

33. Mr Davidson argued that the case law about open justice and judicial immunity provides less assistance in identifying whether a PMP is a court for the purpose of section 32. He acknowledged the case law is circling the same gravitational

centre as section 32 of FOIA (i.e., considering a court of some description). Mr Davidson argued, however, that they are not focused on the same test and the Upper Tribunal should be wary of adopting them in construing what is meant by a definition Parliament intended should be based on contempt of court. He submitted that the question about when judicial immunity is engaged is about whether proceedings can properly be described as "judicial" without necessarily representing they are courts by reason of exercising the judicial power of the state.

34. Mr Davidson acknowledged disciplinary bodies, such as the GMC disciplinary tribunal, are required to comply with Article 6 of the European Convention on Human Rights ("ECHR"), and therefore have their own form of open justice, are required to be in public, and have to apply fairness in their decision-making. He argued, however, that it doesn't follow from the fact that they can be said to be acting judicially, within the meaning given by Lopes LJ in ***Royal Aquarium [1892]*** 1 Q.B. 431 at page 452, that they are exercising the judicial power of the state.

35. Mr Davidson agreed Article 6 of the ECHR applies to PMP proceedings and that that its decision-making requires a judicial level of fairness, procedural rules and to be set out in legislation. Mr Davidson argued, however, that none of those matters tell you anything about whether the PMP is a court exercising the judicial power of the state. He argued that a PMP's function inevitably means it must adopt fairness requirements. Mr Davidson argued, however, that the range of bodies carrying out that function extends well beyond the boundary of the definition of court in section 32 of FOIA.

36. Mr Davidson argued that in ***AG v BBC***, Lord Edmund-Davies used the description of "trappings" to mean things that may indicate a body is making decisions judicially but are not sufficient to mark it out as a court for a particular purpose. Mr Davidson emphasised that a body might assume procedures to support standards of fairness and procedural regularity, but doing so does not confer on it the judicial power of the state.

37. Mr Davidson acknowledged the test to be applied is, as explained in paragraph 54 of ***Bailey***, to perform a holistic assessment of the function and powers of the body in question. Mr Davidson emphasised that in setting out this test, the analysis the Court of Appeal had given to the earlier case authorities fed into its assessment. Those earlier case authorities included ***AG v BBC, AG v Associated Newspaper Group plc [1989]*** 1 WLR 322, ***Pickering v Liverpool daily Post and Echo Newspapers [1991]*** 2 AC 370), ***Peach Grey & Co v Sommers [1995]*** ICR 549 and ***GMC v BBC***.

38. Concerning a PMP's functions, Mr Davidson placed particular importance on paragraph 43 (and its footnote) of ***Eckland v CC of Avon and Somerset Constabulary [2022]*** ICR. Mr Davidson argued this paragraph confirms a PMP makes the decision affecting the relationship between a chief officer and a member of their force that would ordinarily be the responsibility of the chief officer as a quasi-employer. Mr Davidson argued that the decision made is no higher than a self-regulatory disciplinary decision by a professional regulatory authority

such as the GMC. Mr Davidson argued this is what ***Eckland*** squarely addressed and the kinds of factors and standards it applied in reaching that decision.

39. Mr Davidson argued that the scope of the PMP's decision-making is confined to those who voluntarily submit to its jurisdiction by becoming a police officer. He argued the sanctions a PMP may apply are limited to those affecting a person's employment as a police officer.

40. Mr Davidson argued the approach to be taken reflects that in ***GMC***, and the binding authority pre-dating FOIA (explaining how the section 32 definition is to be applied). He argued the process reflects a (quasi) employment decision where the employer itself makes the decision about whether the person should remain in its employ, albeit with the quirks and procedural requirements that apply.

41. In terms of composition of the panel, Mr Davidson returned to what Underhill LJ explained in paragraph 43 of ***Eckland*** and emphasised that it remains the chief officer (with his or her interest in the outcome of proceedings) who appoints the panel. Mr Davidson emphasised that it does not follow from this that a PMP cannot be independent or act judicially in its decision-making (applying "judicially" with the meaning given by Lopes LJ in ***Royal Aquarium***).

42. At the time of Rabbi Kanter-Webber's information request, there was a requirement for a PMP to have a legally qualified chair ("LQC"). Mr Davidson argued that requiring LQCs had been introduced to improve PMP procedure, rather than as a necessary feature of what they did. He argued the presence of a LQC did not help in identifying the functions of a PMP or whether it exercised the judicial power of the state. Mr Davidson argued it represented a trapping of the kind described by Lord Edmund-Davies in ***AG v BBC***. Otherwise, the fact that the police conduct regulations had been amended and this requirement removed, would mean the PMP's essential functions had changed. Mr Davidson argued the fact the legislator's discretion allowed it to add, and to remove, this requirement, indicated it is not a fundamental feature of a PMP, but an optional add-on.

43. Mr Davidson argued the absence of a centralised qualification process for eligibility to sit on a panel and no standard or independent processes to regulate those appointments is consistent with a PMP's function being about the relationship between the police force and officer.

44. While Mr Davidson argued the trappings a body gives itself offer limited assistance to identifying whether it is a court, he singled out for consideration the limited power for a PMP to call witnesses. If a PMP exercises the judicial power of the state, and one with state level importance, it would be surprising if a member of the public as opposed to someone already subject to the PMP's jurisdiction, could refuse to assist the PMP.

45. Dealing with paragraph 54 of ***Bailey***, Mr Davidson argued that decision is an authority for the proposition that all functions and powers are to be weighed in the balance (holistically). Mr Davidson argued that while Lord Edmund-Davies identified in ***AG v BBC*** that there is no checklist or sure guide for identifying whether a body is carrying out the judicial power of the state, the Upper Tribunal

was entitled to weigh in the balance the fact that a PMP cannot call witnesses, as part of the holistic assessment ***Bailey*** has identified.

46. Mr Davidson argued regulation 39 of the PCRs 2020 implicitly recognised the weaknesses in what a PMP can do by way of reporting restrictions. Mr Davidson acknowledged regulation 39(3)(c) provides for directions imposing reporting restrictions, but argued it lacks teeth for enforcement. He argued the mechanism for managing disclosure of information relating to the proceedings is largely controlled by regulation 39(4) and (7). These empower the PMP to make persons not party to the proceedings withdraw while evidence is being given that may disclose information of kinds set out in paragraph (7).

47. Mr Davidson argued the fact the PCRs 2020 provide for an alternative procedure (formerly a special case hearing, now an accelerated misconduct hearing) involving a chief officer alone and no panel, emphasises the nature of the quasi-employer relationship between the chief officer and the officer concerned. He argued that as a matter of logic, this adjustment cannot change the function carried out by a decision maker.

48. Mr Davidson argued that the decision a person cannot continue as a police officer is entirely akin to a medical practitioners tribunal upholding confidence in the medical profession and does not tell you anything more than that. He confirmed he accepted this represented a purpose (and in turn, a function) of a PMP, as indicated in paragraph 71 of ***R (Victor v Chief Constable of West Mercia Police [2024]*** EWHC 2119 (Admin) ("***Victor***"). Mr Davidson argued, however, that this represents an equivalent purpose to a disciplinary regulatory body. These are established, not only to make decisions about individuals, but also to have an effect on the broader confidence of the public in that particular profession. Mr Davidson argued this would therefore feed into a PMP's functions, whether or not it was exercising the judicial power of the state.

49. Mr Davidson argued the FTT made a material error of law to the extent that it placed weight on the functions of the police officers subject to decisions by a PMP. More generally in terms of the test the FTT applied, Mr Davidson argued that the FTT focused too much on the "trappings" of a PMP and focused too little on the fundamental functions of a PMP. He argued this was an error of approach and, in consequence, a material error of law.

50. Mr Davidson submitted the FTT's conclusion that a PMP was a court when constituted with a legal chair, reiterated that the FTT had focused too much on the trappings of the PMP rather than its functions. Mr Davidson argued the FTT made an error of law by using this feature to tip its decision over into deciding a PMP is a court.

Hampshire Constabulary's submissions

51. Mr Goss did not dispute the relevance of the same wording in different statutes in terms of the Barras principle and statutory interpretation principles in considering the Explanatory Note to FOIA. He argued for caution, however, in applying those principles to a definition that is common across multiple different

statutes and contexts. Mr Goss argued the risks include broadening the definition inappropriately, or introducing inconsistencies because it means something different for FOIA to the Contempt of Court Act 1981.

52. Mr Goss agreed with Mr Davidson's submissions that a judicial tribunal in the sense referred to in paragraph 21 of ***R (IPCC) v West Mercia [2007]*** 1 WLR 1077 ("***West Mercia***"), refers to a tribunal acting judicially, and covers whether a PMP is a tribunal exercising judicial power. Mr Goss argued that this was what he had argued before the FTT, at a time when Rabbi Kanter-Webber disputed a PMP falling within all parts of the definition of court in section 32(4). Mr Goss submitted that he neither argued, nor had the FTT understood him to assert, that ***West Mercia*** decided a PMP is exercising the judicial power of the state. Mr Goss argued that the wording at paragraph 39 of its decision confirms the FTT understood the argument in the terms he had put it.

53. Turning to the composition of a PMP, Mr Goss argued that removing the requirement for having a legally qualified chair ("LQC") from 07 May 2024 onwards should be considered in the context that other bodies without LQCs may still exercise the judicial power of the state (for example, lay magistrates).

54. Mr Goss submitted that the chief officer of a police force does not decide appointments to a PMP. They are instead made on a fair and transparent basis by the local policing body. See regulation 28(4) of the PCRs 2020, which Mr Goss argued was substantially the same on this issue as the PCRs 2012. Mr Goss submitted that the local policing body is separate from the police force in question and is democratically elected. He argued this was part of the checks and balances that Parliament has put in place for oversight of police forces – to have a lay majority on the panel not appointed by the police force itself.

55. Acknowledging there is no single set of criteria for appointment, Mr Goss argued that local policing bodies often operate shared regional lists of lay members. He confirmed there could be a difference in approach between different regions in terms of who is treated as having qualifications or experience relevant for disciplinary proceedings for the purpose of regulation 28(4)(b)(i) or who is selected to a list of candidates for the purpose of regulation 28(c).

56. Mr Goss referred to Home Office statutory guidance, issued under the Police Act 1996, about how the disciplinary powers should be exercised. This includes the broad mechanics of how the policy disciplinary system works. Mr Goss also referred to the College of Policing providing guidance on outcomes, but stated it was more akin to sentencing outcomes guidance. The parties had discussed including these documents in the authorities bundle but had ultimately decided against doing so.

57. Mr Goss submitted that a PMP could be seen as appropriately independent from the executive and that this is inherent in the misconduct regime. Mr Goss submitted the second requirement is to be independent of the parties. When asked about the fact the PCRs 2020 provide for the police force to be the appropriate authority and (now) provide for the chief officer of that force to be the chair, Mr Goss submitted it would be unthinkable that the chief officer would chair

the panel and also perform the functions of the appropriate authority. He acknowledged the regulations do not themselves require this separation but argued that it would be contrary to the requirement that it is a judicial tribunal acting judicially.

58. Mr Goss argued there is a mechanism in the regulations where if an officer is made aware of the panel, they are entitled to object – regulation 21 of the PCRs 2012 and regulation 35 of the PCRs 2020. He confirmed that the objection can be ignored but argued this would provide an immediately reviewable ground for appeal or on which to base a claim for judicial review.

59. Mr Goss argued the emphasis on independence was supported by paragraphs 78 to 81 of ***R (Wheeler) v Police Appeals Tribunal and Chief Constable of Cumbria [2022]*** EWHC 117("***Wheeler***"). Mr Goss argued that it was necessary for Article 6 compliance for the PMP to be independent and impartial. He acknowledged the chief officer of the police force in question would (now) chair the PMP, but while not independent of the police force, the chief officer would be independent of the allegations put, and the manner in which they were put.

60. Mr Goss acknowledged that being able to compel attendance at a hearing was relevant to the holistic approach envisaged in ***Bailey***, but not determinative. He argued that paragraph 45 of ***Bailey*** also confirmed that compelling attendance is not an essential feature of exercising the judicial power of the state, by confirming the county court or the High Court can issue a witness summons in support of an inferior court or tribunal. Mr Goss argued that regulation 32(5) of the PCRs 2020 permits a PMP to compel a witness to attend, underpinned by the process described in paragraph 45 of ***Bailey***.

61. Mr Goss argued that Lord Donaldson MR's remarks in ***Leary v BBC*** are firmly obiter. He acknowledged that ***Leary*** was one of a number of decisions that the Court of Appeal in ***GMC*** said were in line with its conclusion. Mr Goss argued that what can be drawn from this is no more than that the remarks expressed in ***Leary*** do not contradict the findings in ***GMC***. Mr Goss submitted it goes too far to say that Lord Donaldson's obiter comments were in any way incorporated into the reasoning in ***GMC***.

62. Mr Goss argued that the reference to self-regulatory power and duty of the medical profession in 1580E of ***GMC*** was not a reference to voluntary submission by the person to the jurisdiction. Mr Goss argued this must be right, otherwise a wide variety of bodies and courts accepted as exercising the judicial power of the state would not satisfy the definition in section 32 of FOIA. Mr Goss argued that no-one is compelled to join the armed forces, but there is no doubt that the courts martial are courts. He acknowledged the courts martial have a power to imprison, which is not available to a PMP. Mr Goss also acknowledged that this might undermining drawing a comparison between the two bodies.

63. Mr Goss argued that the ICO's interpretation of ***GMC*** was too broad, and it should not be taken as applying to all forms of disciplinary proceedings. Mr Goss observed that since 2015 there has been a distinct Medical Practitioners Tribunals Service ("MPTS") with a Medical Practitioners Tribunal ("MPT"). He

argued this is distinct from the position in 1998 when the professional conduct committee of the GMC was exercising considerably more discretion and had set the applicable processes and rules itself. He argued the Law Commission's observation in a recent Consultation Paper supports this. Mr Goss submitted he was not arguing ***GMC*** was no longer good law, but medical disciplinary proceedings now involve a very different factual situation. Mr Goss argued it is wrong to look at ***GMC*** and to regard it as preserving the position in aspic.

64. Mr Goss contrasted the historic position for GMC regulatory action with the regime for PMPs. He described PMPs as having, for many years, involved a highly prescriptive statutory regime in primary legislation with exacting detail for the form, procedure and process to be applied. Mr Goss submitted that an officer may appeal to the Police Appeal Tribunal against the finding or sanction on relatively narrow grounds. Mr Goss submitted the appropriate authority has no right of appeal to the Police Appeals Tribunal but, where a decision has been appealed to the Police Appeals Tribunal, the appropriate authority can seek judicial review in respect of its outcome decision.

65. Mr Goss argued the regime for police officer discipline is very far from self-regulatory; see, for example, the decision in ***R (Lino Di Maria) v Commissioner of the Metropolitan Police and others [2025]*** EWHC 275 ("***Di Maria***"). Mr Goss argued that ***Di Maria*** demonstrated how the Metropolitan Police cannot dismiss someone who does not meet the basic conditions for vetting or has had their vetting removed.

66. Mr Goss argued paragraph 44 of the FTT's decision was <u>not</u> saying that a PMP constituted without a legal chair was not a court. Mr Goss stated that if pushed to accept it, he accepted the reasoning in my decision dated 07 May 2024 that it would be surprising that the change in composition of a PMP would change whether or not it was exercising the judicial power of the state.

67. Mr Goss argued the changes to PMP composition were made for a variety of reasons but did not affect the fundamental attributes like independence and the need to act judicially. He explained Legally Qualified Chairs ("LQCs") were introduced in 2015 to prevent (the perception of overly) supportive police officers chairing PMPs affecting the decisions. In practice LQCs had proven far more lenient than expected. In order to tackle this, the regulations were amended in 2024 to restore having the chief officer as chair of the PMP (the position pre-2015).

68. Mr Goss argued that a key difference between the position when ***GMC*** was decided in 1998 and the position now, has been the influence of Article 6 of the ECHR and the requirement for tribunals to be independent, impartial, and to sit in public (subject to various qualifications). Mr Goss argued that a PMP complies with the post-Human Rights Act model recognised in ***Di Maria***. Mr Goss argued that each of the requirements to be independent, impartial, fair and to have a decision-making function are present in a PMP and were considered in ***Bailey*** at paragraphs 47 to 52 to be characteristics of a court.

69. Mr Goss argued his position went further than the argument that police officers exercise powers of the state given to them by the state. He argued that PMPs have functions and powers that go beyond that. Mr Goss argued that paragraph 20 of ***Eckland*** has to be read alongside paragraph 43. He argued that if one does so, it is clear the proceedings before PMPs cannot simply be equated to ordinary disciplinary proceedings.

70. Mr Goss argued an employer can generally operate on the basis there are reasonable grounds for the allegation and then has the protection of the Employment Tribunal process that if it is asked to review the decision, the Tribunal will look at whether it was within the range of reasonable responses. Mr Goss contrasted this with the process before a PMP, where the appropriate authority must prove their case on the balance of probabilities. He argued there is no right to representation in a pure employment case, but every right to legal representation in a police case.

71. Mr Goss accepted that misconduct proceedings represent part of the purpose of a PMP. He argued, however, that as indicated in paragraph 69 of ***Victor***, the PMP's functions go further than the disciplinary function common to all employers and quasi-employers and protects the public interest in the independence of police officers. He argued paragraph 71 of ***Victor*** is also relevant to a PMP's functions.

72. Mr Goss argued a vital part of a PMP's function is protecting the political independence of police officers, and to provide an independent scrutiny. Mr Goss argued that if police officers were only given the protection of ordinary employees, they could be compelled to use their coercive powers in particular ways, including misuse. Mr Goss argued this would collapse the political independence of policing, a crucial part of separating the powers of the state.

73. Mr Goss argued a PMP is there to ensure the features common to any regime, namely professional conduct and upholding high standards, as indicated in the cases of ***L v Law Society [2008]*** EWCA Civ 811 and ***Bolton v Law Society [1994]*** 1 WLR 512. He submitted that what is different about policing, however, is that the disciplinary regime is also there to provide protection for the officers as well as the public. Mr Goss argued that this is why it ensures independence of decision-making.

74. In terms of the accelerated misconduct hearing procedure, Mr Goss argued it applies where the public interest in removing someone from the office of constable is high because the case is clear cut. He submitted it is most commonly used for criminal conviction cases, or where an officer fully admits very serious misconduct. In those cases, the public interest balance is different; the interests of protecting police officers' independence gives way to the public interest in resolving matters quickly. Mr Goss argued the procedure still requires proof on balance of probabilities and an officer remains legally represented.

75. Mr Goss argued regulation 39 of the PCRs 2020 provides, in practice, for protection against contempt of court. He argued regulation 39(4) and (7) provide a narrow subset of the power to exclude people from a hearing, but only cover

where someone is giving evidence. They cannot exclude a party to proceedings. Mr Goss argued there have been cases where a PMP has ordered reporting restrictions about the identity of a witness. He argued this binds the officer subject to proceedings as well as everyone else. Mr Goss argued that deciding there is no contempt of court protection for an order made under regulation 39 would mean that an officer could ignore a reporting restrictions order and say whatever they liked. He argued it was unrealistic to use private law to enforce an order.

76. Mr Goss confirmed that Hampshire Constabulary does not know of any proceedings where action had been taken under the 1981 Act because of a person breaching a reporting restrictions order. Mr Goss acknowledged that Hampshire Constabulary's Response to the Upper Tribunal appeal had not set out an emphatic position whether a PMP was a court for the purpose of the 1981 Act. Mr Goss explained it had initially considered section 19 an unhelpful diversion from addressing section 32 of FOIA. Mr Goss submitted that, having reflected on the force of the submissions about the link between section 19 of the 1981 Act and section 32 of FOIA, Hampshire Constabulary now accepted this was a point that needed to be confronted head on.

77. Mr Goss acknowledged it might be considered unusual for PMPs to exercise the judicial power of the state and for police forces not to know they were doing so for contempt of court purposes. He stated it should have been considered when the relevant regulations for the PMPs regime were being drafted.

78. Mr Goss's skeleton argument addressed open justice principles despite these not being mentioned by the parties in the FTT proceedings. Mr Goss explained Rabbi Kanter-Webber had argued that open justice was a key principle supporting disclosure of information in other FOIA cases he had brought. Mr Goss stated he agreed with Rabbi Kanter-Webber that open justice applied to PMPs, but for different reasons. Mr Goss argued PMPs operate open justice principles because they are exercising the power of the state. If the Upper Tribunal was against him on the issue of whether a PMP was a court, Mr Goss explained his fallback position was that the open justice principle did not apply to PMPs. This was more consistent than PMPs not being courts but open justice applying to them.

79. On judicial immunity. Mr Goss argued that this is one of the features a PMP enjoys, which is part of the holistic approach, but he would not press for it as a necessary and sufficient condition. He argued it might be necessary, but he would accept it is not sufficient.

80. Mr Goss argued the FTT reached the right outcome, although he conceded its reasoning could have been tauter in places. He argued that if the FTT did go wrong in its reasons or reasoning, nonetheless it reached the right outcome.

Did the FTT make an error of law in its decision dated 30 January 2024?

81. The FTT made a number of errors of law in its decision dated 30 January 2024.

82. Having correctly identified it needed to carry out a holistic assessment of the PMP's functions, at paragraph 43 of its Decision, the FTT's Decision referred to

functions that demonstrated the PMP was a body that needed to act "judicially", rather than demonstrating it was exercising the judicial power of the state. The features the FTT identified of: "*fairness, impartiality, transparency and control over proceedings*" were consistent with a body acting judicially within the meaning given by Lopes LJ and Fry LJ in ***Royal Aquarium*** (and confirmed by Viscount Dilhorne and Lord Edmund-Davies in 339H to 340B of ***AG v BBC***).

83. Although the FTT labelled these as judicial functions, it did not address the case law confirming that there is a distinction between acting judicially and exercising the judicial power of the state and why it was that features consistent with the former indicated the PMP was performing the latter. The FTT therefore misdirected itself in law. It also made an error of law by failing to provide adequate reasoning to confirm that it applied the correct legal test.

84. At paragraphs 40 and 41 of its Decision, the FTT expressly identified the powers or functions of police officers subject to the PMP jurisdiction as a crucial difference allowing it to distinguish PMPs from other professional regulators, such as the GMC. The approach of not looking at the functions and powers of the body, but instead considering the functions of the persons about whom it makes decisions, is not supported in any of the relevant case law applicable to determining whether PMPs are courts for the purpose of section 19 of the Contempt of Court Act 1981. In particular, it is not consistent with the holistic assessment described in ***Bailey***. The FTT therefore elided the functions and powers of the PMP with those of the police officers subject to its decision-making.

85. As a result, the FTT took into account immaterial matters (the powers and functions of the police officers about whom the PMP made its decisions) in reaching its decision. Alternatively, the FTT failed to provide adequate reasoning to support its decision on this issue. This was an error of law.

86. At paragraph 44 of its Decision Notice, the FTT concluded that when constituted with a legal chair, a PMP is a body that is a court for the purpose of section 32 of FOIA. The wording of paragraph 44 of the Decision Notice suggests the FTT treated the presence of a legally qualified chair as a condition precedent for a PMP satisfying the definition in section 32 of FOIA. The FTT made an error of law in reaching a conclusion based on the composition of the PMP rather than its functions and powers.

87. Further or alternatively, the FTT did not explain what it was about the composition of a PMP that changed its functions so that having a LQC was a decisive indicator whether the PMP exercised the judicial power of the state. The FTT therefore made an error of law by failing to provide adequate reasoning for this part of its decision.

88. Applying the test set out in paragraph 10 of the Court of Appeal's decision in ***R (Iran) v SSHD [2005]*** EWCA Civ. 982, the errors of law identified at paragraphs 82 to 87 above were material. Having misdirected itself in law, and having failed to provide adequate factual findings and reasoning about for its decision that PMPs were courts within the meaning of section 32 of FOIA, it cannot be said

that the FTT's errors of law would have made no difference to the outcome of Rabbi Kanter-Webber's appeal.

Disposal of appeal

89. Having decided the FTT's decision involved material errors of law, it is appropriate to exercise my discretion to set aside the Tribunal's decision dated 30 January 2024 under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Having done so, section 12(2)(b) of that Act provides that I must either remit the case to the First-tier Tribunal with directions for their reconsideration or remake the decision.

90. At the hearing on 13 February 2025, Counsel representing the ICO and Hampshire Constabulary both invited me to go on to decide, as a matter of law, whether PMPs exercise the judicial power of the state. Counsel for the parties present at the hearing submitted that this approach was consistent with the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, for the reasons set out in paragraph 24 above.

91. At paragraph 15 of ***Sarkar v Secretary of State for the Home Department [2014]*** EWCA Civ. 195, the Court of Appeal stated the following:

"15. If it finds that the First-tier Tribunal has made a material error of law the Upper Tribunal may (but need not) set aside its decision. If it decides to do so, it has only two options: to remit the case with directions for its reconsideration or to re-make the decision itself. Remission, however, does not necessarily require the First-tier Tribunal to start all over again; the Upper Tribunal has power to give directions which limit the scope of the reconsideration."

92. The FTT made its decision by only considering the exemption in section 32 of FOIA. The power in section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 allows the Upper Tribunal to remit the case to a FTT with directions. The use of "case" is distinct from the wording in section 12(2)(b)(ii), which provides for remaking the *decision* (my emphasis added). Having considered ***Sarkar*** and having considered section 12 of the 2007 Act, I am satisfied that, in the event of concluding the FTT made a material error of law, it is open to the Upper Tribunal to take any of the following steps: (a) decide not to set aside the FTT's decision, (b) set it aside and remit the case (appeal) to a new FTT with directions about the basis on which the FTT is to decide it or (c) remake the decision (and not remit it to the FTT).

93. I have therefore proceeded on the basis that all the options set out above are open to the Upper Tribunal. I have decided to set aside the FTT's decision and to either remake the decision or to remit it to a new FTT with directions about the basis on which the FTT is to decide it (which can include limiting the scope of the reconsideration).

Is a PMP a court within the meaning and application of section 32 of FOIA?

94. In addressing this, I consider the matters set out in the sub-headings below:

(a) What is the status of the Explanatory Note for section 32 of FOIA?

(b) Does the Barras principle apply when considering the definition in section 32 of FOIA?

(c) Which case law is relevant when determining whether a PMP is a court for the purpose of section 32 of FOIA?

(d) A summary of the relevant principles; and

(e) My analysis: Does a PMP exercise the judicial power of the state within the meaning and application of section 32 of FOIA?

(a) What is the status of the Explanatory Note for section 32 of FOIA?

95. As Mr Davidson helpfully set out in his skeleton argument for the ICO, the relevant case law concerning the admissibility of Explanatory Notes to Acts of Parliament was summarised in paragraph 64 of ***International Game Technology plc and others v Gambling Commission [2023]*** EWHC 1961 (TCC) ("***IGT***").

96. Paragraph 64C of ***IGT*** confirmed the text of an Act of Parliament does not have to be ambiguous before a court is permitted to consider an Explanatory Note in order to understand the contextual scene of the statute.

97. I am satisfied I can, and should, consider paragraph 120 of the Explanatory Notes for FOIA to consider the contextual scene in which the definition of "*court*" was being enacted and what it was intended to address.

(b) Does the Barras principle apply when considering the definition in section 32 of FOIA?

98. As Mr Davidson also helpfully set out in his skeleton argument, the Barras principle was recently reaffirmed by the Supreme Court at paragraph 52 of ***Centrica Overseas Holdings Ltd v Commissioners for His Majesty's Revenue and Customs [2024]*** UKSC 25. The Supreme Court confirmed the principle applies where Parliament re-enacts a statutory provision which has been the subject of authoritative judicial interpretation so that the court will readily infer Parliament intended the re-enacted provision to bear the meaning already established in case law.

99. As Mr Davidson acknowledged, the Barras principle is a presumption of what it is reasonable to assume Parliament intended. It requires authoritative judicial interpretation over a period (***B v SSWP [2005]*** EWCA Civ. 929). That process has happened here. The Barras principle can be applied to infer that Parliament intended section 32 of FOIA to have the meaning already established for the 1981 Act in case law.

100. I agree with Mr Davidson's submission in his skeleton argument that Parliament adopted a term of art used in longstanding legislation on essentially the same question – namely the definition of a court. I also agree with Mr Davidson's oral submission that the combination of the Explanatory Notes and the application of the Barras principle here, allows me to conclude that when Parliament legislated

for section 32 of FOIA, it intended that "*court*" should bear the same meaning that it does in section 19 of the 1981 Act.

101. As a result, the case law relevant to what is meant by "*court*" in section 19 of the 1981 Act, is also relevant to the meaning of section 32(4)(a) of FOIA. In reaching this conclusion, I accept Mr Goss's argument that it is relevant to consider the underlying purpose of section 32 of FOIA, namely that courts and tribunals can rule on disclosure of their own records (see ***Edem v ICO [2015]*** UKUT 210 (AAC) by Upper Tribunal Judge Wikeley).

102. I do not, however, accept Mr Goss's argument that applying case law relevant to the Contempt of Court Act 1981 to section 32 of FOIA will introduce inconsistency within FOIA itself. This fails to recognise Parliament's specific intention that section 32(4)(a) should bear the same definition as in section 19 of the 1981 Act. The same test is being applied for the meaning of court in different contexts. I am satisfied that I should apply the same test, mindful of the specific context in which I am being asked to do (namely FOIA).

(c) Which case law is relevant when determining whether a PMP is a court for the purpose of section 32 of FOIA?

103. The case law dealing with whether a body is exercising the judicial power of the state for the purpose of contempt of court, both pre- and post- the 1981 Act, is relevant to whether a body is a court within the meaning of section 32 of FOIA. This includes assessing whether a PMP falls within section 32(4)(a).

104. The definition in section 32(4)(a) requires consideration of whether the body is exercising the judicial power of the state. This requires a holistic assessment of the function and powers of the body in question (***Bailey***, at paragraph 54). At paragraphs 27 to 29 of ***Bailey***, the Divisional Court summarised elements of the speeches of Lords Edmund-Davies and Scarman and Viscount Dilhorne in ***AG v BBC***. This included the distinction drawn by Viscount Dilhorne and Lord Scarman between the exercise of judicial power and administrative and executive powers.

105. While the Divisional Court appeared to provide a qualified endorsement of this distinction by stating: "*to the extent that [it] remains relevant*" (paragraph 51 of ***Bailey***), I do not consider that this was casting doubt on what was said in ***AG v BBC*** generally, including that there is a distinction between exercising judicial powers and administrative or executive ones.

106. Rather, it appears to reflect the fact that the outcome of the assessment whether the Parole Board was exercising judicial powers and functions, or administrative / executive ones, has changed. As explained in paragraphs 51 and 52 of ***Bailey***, the characterisation of the Parole Board's functions as administrative had been authoritatively superseded during a period when it had taken on new statutory responsibilities for making decisions on early release on licence before a court's sentence had ended.

107. What also emerges from the decision in ***Bailey*** is that in performing a holistic assessment of the functions of the body, individual features of the body's

functions or powers are not decisive. See paragraphs 54 to 57 of ***Bailey***, where the Divisional Court explained that not having a power to summon witnesses was not determinative of whether the body was exercising the judicial power of the state.

108. As explained above, the case law about whether a body is exercising the judicial power of the state for contempt of court purposes is relevant generally to what I need to resolve. I consider the decision in ***GMC v BBC*** to be relevant because it is a binding authority of a senior court considering the functions of a specific professional disciplinary body (the GMC panel) carrying out disciplinary proceedings. The reasoning informs some of what the Upper Tribunal has to address in this appeal.

109. Mr Goss confirmed he would not go so far as to argue that ***GMC v BBC*** is no longer good law. He argues that it is good law for the terms in which it was decided, but that changes in (what was) a GMC panel are potentially relevant to whether ***GMC v BBC*** would be decided in the same way today. Mr Goss argued this is consistent with the Law Commission's Consultation Paper's suggestion that MPTSs might now merit being treated as a court for contempt purposes. It is, however, one paragraph in a report providing high level proposals to reform contempt of court generally. I do not consider the suggestion by the Law Commission takes me substantially further in what I need to decide.

110. I agree with Mr Goss's submissions that Lord Donaldson's observations in ***Leary v BBC*** are obiter and cannot be relied on to resolve this appeal. Lord Donaldson MR was explicit that he was not deciding the issue of whether a police disciplinary tribunal was a court under the 1981 Act. I also agree with Mr Goss's submissions that while the Court of Appeal in ***GMC v BBC*** considered Leary as part of the recent authorities cited to it, it did not proceed to deal specifically with whether it agreed with the obiter comments by Lord Donaldson MR.

111. I have found the case law cited regarding police disciplinary procedures, including ***Victor, Wheeler, Eckland,*** and ***Di Maria***, to be helpful, in terms of analysing and identifying the powers and functions of a PMP. A number of those cases have also pointed to the statutory guidance about the purpose of police disciplinary / misconduct proceedings, which I have also considered and applied.

112. I have found the case law cited about judicial immunity and open justice to be less helpful. Elements of Auld LJ's judgment in ***Heath*** appear to suggest that when considering judicial immunity for a police conduct board, the Court of Appeal had in mind a subtly different test to the test defined in section 19 of the 1981 Act. See, for example, the statement at paragraph 21 that:

> "*It [the exercise of assessing judicial immunity] is one in determining [a body's] similarity in function and procedures to those of a court of law*".

113. This indicates a different test was being applied since it was based on similarities with functions and processes of a court, rather than considering specifically whether the body was exercising the judicial power of the state. See also paragraph 41 of ***Heath***, where Auld LJ stated, in the context of submissions that

aspects which are present or absent in the procedures of the police conduct board, might deprive its procedures of a judicial character:

> "*If one looks here at those typically judicial features that are present in the board's conduct of its inquiries that I have summarised, alongside those that Miss Booth identified as absent, the overall picture is that as stated by the appeal tribunal, an "essential similarity with the procedure adopted by the courts of justice*"."

114. These elements of Auld LJ's judgment are consistent with Mr Davidson's argument that case law about judicial immunity applying to bodies has tended to focus on whether the body's proceedings can properly be described as "judicial" (in the sense described by Fry and Lopes LJJ in ***Royal Aquarium***) rather than whether they are exercising the judicial power of the state. I agree with Mr Davidson's submissions that they may be circling the same gravitational centre in considering what resembles, or even is, a court, but they are not doing so by reference to whether it is exercising the judicial power of the state.

115. For these reasons, I do not place any particular reliance on the case law provided to me dealing with questions of judicial immunity.

116. Turning to arguments about open justice principles, Mr Goss's submissions confirmed he addressed this issue to respond to Rabbi Kanter-Webber's arguments that open justice applies to PMPs. Mr Goss and Mr Davidson confirmed Rabbi Kanter-Webber has raised in a number of his appeals. As an observation, it does not appear to have been argued in any particular detail to the FTT in the present appeal because the FTT has not addressed it in the decision dated 30 January 2024.

117. Mr Goss's position is that open justice does apply to PMPs, because they are exercising the judicial power of the state. This argument is, however, contingent on the central issue to be determined, rather than an indicator either way, of how to determine that issue. Mr Goss acknowledged there is no case authority dealing with whether the open justice principle applies to a PMP on the basis that it exercises the judicial power of the state. Mr Goss confirmed his secondary position is that open justice does not apply to a PMP if it does not exercise the judicial power of the state.

118. Mr Davidson did not argue that the case law about open justice would assist me in determining the central issue about section 32; his position is that it would not particularly assist the Upper Tribunal for similar reasons to judicial immunity case law.

119. Rabbi Kanter-Webber has argued that the principle of open justice applies more widely than only to bodies exercising the judicial power of the state (his written observations dated 31 January 2025).

120. This issue has not been argued fully before me. It appears to draw on arguments the parties have developed in other proceedings rather than those reflected in the cases advanced to the FTT. Having considered the case law cited and

provided about open justice, I do not consider it helps me determine the central issue that I have to resolve of whether PMPs exercise the judicial power of the state. I have therefore not placed any particular reliance on the cases dealing with open justice, in resolving the question whether PMPs are courts within the meaning of section 32(4)(a) of FOIA.

(d) A summary of the relevant principles

121. The following is a summary of the principles I consider to be relevant when determining whether a body is a court within the meaning of the definition in section 32(4)(a) of FOIA:

(a) Determining whether a body is exercising the judicial power of the state involves a holistic assessment of its functions and powers;

(b) The nature of a holistic assessment and the requirement to carry one out indicates that the absence (or presence) of a particular individual feature is less likely to be decisive;

(c) A body's functions may evolve over time, and therefore the holistic assessment of whether it is exercising the judicial power of the state may also change;

(d) One should avoid focusing on whether a body has procedures or processes that are particularly similar to, or distinct from, a body that has been held to exercise the judicial power of the state. That approach risks applying the incorrect test and not the one prescribed by section 32 of FOIA;

(e) Exercising the judicial power of the state should not be confused with "acting judicially" in the sense of performing functions with a judicial mind and applying principles of natural justice;

(f) In a similar way, the fact a body is subject to requirements in term of how it approaches its decision-making, as a result of being subject to Article 6 of ECHR, should not be confused with a confirmation that those requirements, of themselves, indicate it is exercising the judicial power of the state; and

(g) A body does not become a court within the meaning of section 32(4)(a) of FOIA by adopting particular processes or nomenclatures for itself / its actions. The test is, and remains, whether it is exercising the judicial power of the state and requires an assessment of its functions and powers.

(e) My analysis: Does a PMP exercise the judicial power of the state within the meaning and application of section 32 of FOIA?

122. In considering a PMP's powers and functions, I start with the Police Act 1996 ("the 1996 Act"). Section 50 of that Act gives the Secretary of State for the Home Department ("SSHD") the power to make regulations for police forces. Section 50(1) gives the power to make regulations as to the government, administration and conditions of service of police forces. Section 50(2) provides more specific regulation-making powers, including for making regulations with respect to the

conduct, efficiency and effectiveness of members of police forces and the maintenance of discipline (section 50(2)(e)).

123. Section 50(3) of the 1996 Act requires regulations to be made establishing, or providing the establishment of, procedures for taking disciplinary proceedings in respect of the conduct, efficiency and effectiveness of members of police forces, including procedures for cases in which they may be dismissed.

124. The SSHD used section 50 of the 1996 Act to make the PCRs 2012 and the PCRs 2020 (including the amendments to the PCRs 2020 that came into effect on 07 May 2024).

125. Sections 87 and 87A of the 1996 Act give the SSHD and, with her approval, the College of Policing, the power to issue guidance as to the discharge of disciplinary functions (section 87) and about matters of conduct, efficiency and effectiveness (section 87A).

126. The power to issue guidance about disciplinary proceedings under section 87(1) allows the SSHD to issue guidance about discharge of their disciplinary functions to: (a) local policing bodies, (b) chief officers of police, (c) other members of police forces, (d) civilian police employees and (e) the Director General of the Independent Office for Police Conduct. The SSHD has used this power to issue statutory guidance called "Home Office Guidance Conduct, Efficiency and Effectiveness: Statutory Guidance on Professional Standards, Performance and Integrity in Policing" (version 1, published 05 February 2020) and "Home Office Guidance Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures" (revised June 2018). I have read and taken both sets of guidance into account.

127. Paragraph 2.3 of the 2018 Guidance states that the misconduct procedures aim to provide a fair, open and proportionate method of dealing with alleged misconduct and that the procedures are intended to encourage a culture of learning and development for individuals and / or the organisation. Paragraph 2.4 refers to disciplinary action having a part, when circumstances require, but that improvement is always an integral dimension of any outcome. Paragraph 2.11 states that the misconduct procedures should not be used as a means of dealing with unsatisfactory performance and explains this should be dealt with using unsatisfactory performance procedures instead.

128. Paragraph 2.6 of the 2018 Guidance states:

> "*The police misconduct procedures are designed to reflect what is considered to be best practice in other fields of employment while recognising that police officers have a special status as holders of the Office of Constable. The police service is committed to ensuring that the procedure is applied fairly to everyone*."

129. Section 87(1B) allows the College of Policing to issue guidance to the persons mentioned in section 87(1)(a) to (c) about the discharge of their disciplinary functions in relation to members of police forces, special constables and former

members. The College of Policing has issued guidance called: "Guidance on outcomes in police misconduct proceedings" (latest version 2023). I have read and taken into account this Guidance.

130. Paragraph 1.2 of the College of Policing ("CoP") Guidance explains it is intended to assist persons appointed to conduct misconduct proceedings, including misconduct hearings, under Parts 4 and 5 of the PCRs 2020. Paragraph 2.3 of the Guidance states:

"The purpose of the police misconduct regime is threefold:

1. *To maintain public confidence in, and the reputation of, the police service*

2. *To uphold high standards in policing and to deter misconduct*

3. *To protect the public."*

131. Paragraph 2.4 explains these aims derive from specific authorities on the nature and purpose of professional disciplinary proceedings. The extracts from authorities listed at paragraph 2.4 of the CoP Guidance are the following:

(a) ***Bolton v Law Society [1994]*** 1 WLR 512 at page 518H, (in which Sir Thomas Bingham MR stated "*The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied readmission… A profession's most valuable asset is its collective reputation and the confidence which that inspires*";

(b) ***Redgrave v Commissioner of Police of the Metropolis [2003]*** 1 WLR 1136 at paragraph 33, where Lord Justice Simon Brown stated by reference to the dental profession: "*The purpose of disciplinary proceedings against a dentist who has been convicted of a criminal offence by a court of law is not to punish him a second time for the same offence but to protect the public who may come to him as patients and to maintain the high standards and good reputation of an honourable profession"*;

(c) ***R (Green) v Police Complaints Authority [2004]*** UKHL 6 at paragraph 78, where Lord Carswell stated, in relation to the police service: "Public confidence in the police is a factor of great importance in the maintenance of law and order in the manner which we regard as appropriate in our polity. If citizens feel that improper behaviour on the part of police officers is left unchecked and they are not held accountable for it in a suitable manner, that confidence will be eroded."; and

(d) ***R (Coke-Wallis) v Institute of Chartered Accountants [2011]*** UKSC 1 at paragraph 60, in which Lord Collins reaffirmed the purpose of professional disciplinary proceedings to be: "..*to protect the public, to maintain public confidence in the integrity of the profession, and to uphold proper standards*

of behaviour: see e.g. Bolton v Law Society [1994] 1 WLR 512, 518 per Sir Thomas Bingham MR; Gupta v GMC [2002] 1 WLR 1691, para 21, per Lord Rodgers of Earlsferry.".

132. Paragraph 2.7 of the CoP Guidance states misconduct proceedings are not designed to punish police officers and cites Laws LJ in ***Raschid v GMC [2007]*** 1 WLR 1460 at paragraph 18 ("*The panel then is centrally concerned with the reputation or standing of the profession rather than the punishment of the doctor*"). Paragraph 2.11 emphasises that misconduct proceedings (which includes misconduct meetings and misconduct hearings) must only be used to deal with misconduct that is so serious as to justify disciplinary proceedings. It includes a reminder that misconduct is defined as "a breach of the Standards of Professional Behaviour that is so serious as to justify disciplinary action" (regulation 2 of the PCRs 2020).

133. Each of the PCRs 2012 and the PCRs 2020 operate by reference to whether an officer has committed misconduct or gross misconduct. Both are defined by reference to a breach of the Standards of Professional Behaviour, with the difference between them being that gross misconduct is a breach so serious it justifies dismissal. The Standards of Professional Behaviour are set out in Schedule 2 to both sets of regulations.

134. Paragraphs 65 to 79 of ***Di Maria*** provide a useful and concise summary of the PCRs 2020 and the disciplinary regime in which they sit. The structure described is similar to the disciplinary regime under the PCRs 2012, which applied to the PMP about which Rabbi Kanter-Webber sought information. Differences in substance between the PCRs 2012 and the PCRs 2020 that are relevant when considering this appeal are:

    (a) Regulation 25(4) of the PCRs 2012 provides for the composition of a PMP to be: a LQC, a member of a police force of the rank of superintendent or above (provided they are more senior than the officer concerned) and a person selected by the appropriate authority from a list of candidates maintained by a local policing body for the purposes of the PCRs 2012. The position described in paragraph 78 of ***Di Maria*** represents the position for the amended PCRs 2020 from 07 May 2024 onwards;

    (b) The PCRs 2020 place specific duties and responsibilities on chairs of misconduct hearings (regulation 29). However, the PCRs 2012 provide no direct equivalent for regulation 29 of the PCRs 2020;

    (c) The PCRs 2012 makes provision for the PMP Chair to consider and order the attendance of police officers or give notice to witnesses to attend (regulation 23). Regulation 27 of the PCRs 2012 deals with the provision of documents to the PMP and to the officer concerned (regulation 27). Neither regulation provides stated timescales (as opposed to the PCRs 2020, which do). The wording of the duty on the PMP chair about requiring or giving notice for the attendance of witnesses is the same in both sets of regulations;

(d) Regulation 32 of the PCRs 2012 provides the chair of a PMP with a similar power to that in regulation 39(4) of the PCRs 2020 to exclude persons attending the hearing from being present while information is given that ought not to be disclosed to attendees. Regulation 4 of the PCRs 2012 provides a harm test for determining whether information should be disclosed to the officer subject to proceedings. The test in regulation 32 is based on the harm test in regulation 4, applying it to persons attending the hearing instead;

(e) Regulation 31(6) of the PCRs 2012 provides equivalent powers to control the attendance of others at a misconduct hearing to those set out in regulation 39(3)(a) and (b) of the PCRs 2020. However, unlike regulation 39(3)(c) of the PCRs 2020, the PCR 2012 do not provide a dedicated power to prohibit the publication of matters relating to the proceedings (the power that would reflect the description of "reporting restrictions" in the heading to regulation 39 of the PCRs 2020); and

(f) Regulation 41 of the PCRs 2012 provides for a special case hearing where the appropriate authority has determined the special conditions (defined in regulation 3) are satisfied. The special conditions are that there is sufficient evidence in the form of written statements or other documents, without the need for further evidence (written or oral) to establish on the balance of probabilities that the officer's conduct constitutes gross misconduct, and that it is in the public interest for the officer concerned to cease to be a police officer without delay. Regulation 49 of the PCRs 2020 provides for a similar test to determine whether a case should be referred to an accelerated misconduct hearing. In both sets of regulations, where the officer subject to proceedings is not a senior officer, the hearing must be conducted by the chief officer of police of the police force concerned, where available (unless the metropolitan police force, in which case it is an assistant commissioner).

135. Paragraphs 88 to 90 of ***Di Maria*** also provide a useful summary of the right to appeal to the Police Appeals Tribunal ("PAT") from a decision of a PMP. The officer concerned can appeal to the PAT but the appropriate authority (i.e., the police force) cannot and may only bring judicial review proceedings in respect of a PMP's decision.

136. As explained in a Home Office Review called "The process of police officer dismissals" ("the Review"), published on 18 September 2023, police officers are office holders, rather than employees and do not have the ability to pursue unfair dismissal claims at the Employment Tribunal (apart from on unlawful discrimination grounds). Police officers instead have a statutory right of appeal to the PAT.

137. Paragraph 9(1) of Schedule 6 to the 1996 Act provides for all the costs and expenses of an appeal under section 85 of the Act to be paid from the police fund of the relevant local policing body. This includes the police force's costs and any remuneration or expenses paid to the PAT members. Appellants are required to pay their own costs unless the PAT directs some or all of them are to be paid from the police fund of the relevant local policing body. The Review observes that

there is no cost to the officer to appeal to the PAT although the officer may need to meet their own legal costs.

138. Paragraph 1 of Schedule 6 to the 1996 Act provides for the composition of a PAT, which consists of a legally qualified person, the Chief Inspector of Constabulary (or an Inspector of Constabulary nominated by that person) and the permanent secretary to the Home Office (or a Home Office director nominated by that person. The legally qualified person must satisfy the judicial appointment eligibility condition on a five-year basis and have been nominated by the Lord Chancellor (meaning they are on a list maintained by the Home Office).

139. As Mr Goss explained at the hearing on 13 February 2025, the rights of appeal to the PAT against a decision of a PMP are set out in rule 4 of the Police Appeals Tribunals Rules 2020. There is a right of appeal against a finding made by a PMP and also in respect of any decision to impose disciplinary action under the PCRs. PMP decisions must set out the right to appeal to a PAT (regulation 63 of PCRs 2020). The PAT is convened by a local policing body. An officer does not need to obtain permission to appeal to a PAT, although the PAT legally qualified chair is required to review the appeal documents and determine whether or not the appeal should be dismissed or proceed to a hearing. Hearings are held in public. A decision of the PAT is amenable, in principle, to judicial review.

140. As Mr Goss explained, there are defined categories of appeal grounds available to appeal to the PAT. The grounds of appeal in rule 4 are:

    (a) that the finding or decision to impose disciplinary action was unreasonable;

    (b) that there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on disciplinary action, or

    (c) that there was a breach of the procedures in the PCRs or unfairness which could have materially affected the finding or decision on disciplinary action.

141. The Review reported that some Chief Constables raised concerns about the significant impact of officers not being dismissed by misconduct panels, where the Chief Constable believed that decision to be unreasonable and lenient (paragraph 6.2 of Review). The Review recommended amending the 1996 Act to provide a statutory right of appeal for Chief Constables to the PAT.

142. The Review confirms gives additional information about Mr Goss's helpful explanation of what led to the PCRs 2020 being amended (from 07 May 2024). The Executive Summary of the Review explained the recommendation to have Chief Constables chair PMPs was responding to the system being unhelpfully imbalanced, leaving Chief Constables with insufficient responsibility over proceedings relating to their own workforce (page 6 of Review).

143. Paragraph 4.1 of the Review (page 51) emphasised the importance that any changes made to the (then) disciplinary system were rightly focused on improving public trust and confidence in policing. The Review explained that following

events about high profile police officer abuses of power and breaches of public trust, some parts of the sector called for Chief Constables to have a greater say in deciding whether a police officer in their force should be dismissed or not. The Review stated that it is ultimately the Chief Constable as the corporation sole who is held to account for the standards and conduct of the officers operating under their direction and control, raising the question of how they can be held to account in this way, without being able to determine who they recruit *and* who they dismiss.

144. Paragraph 4.2 of the Review (page 53) explained that disciplinary arrangements differ amongst professional jurisdictions, but that the one key difference between policing and other professions is that LQCs, sitting as part of a PMP, are empowered to ultimately dismiss an officer. This is contrasted with other jurisdictions where panels operate to determine an individual's "fitness to practise". The Review explains this distinction as: "*In effect, police misconduct panels make "employer" decisions, in a way that does not happen in other professional bodies*.".

145. Paragraph 4.3 of the Review (page 54) highlights some views were expressed that LQC decision-making was too lenient, although in a context where the outcome decisions were majority decisions by the PMP as a whole and therefore a LQC view was not determinative. The Review identified that evidence also showed LQCs had brought much needed levels of independence, transparency and legal fairness to the system, but that it was challenging for Chief Constables to be held (appropriately) to account on the culture and standards in their forces, when they did not have a leading role in proceedings deciding whether or not to retain an officer in their force (paragraph 4.8, page 60). The Review recommended that responsibility for chairing misconduct hearings be returned to Chief Constables (or their delegated senior officers), presenting this as striking a crucial balance of retaining independence while strengthening the role of Chief Constable.

146. There is also a useful summary of the development, over time, of the PCRs 2012 and their subsequent replacement by the PCRs 2020, in paragraphs 12 to 18 of the decision in ***Eckland*** (pages 909-10 of authorities bundle).

147. In my assessment, paragraphs 20, 30, 36 and 43 of ***Eckland*** are particularly relevant when identifying the powers and functions of a PMP. These include emphasis that misconduct proceedings against police officers are very unlike disciplinary proceedings by an ordinary employer and the clear purpose of the legislative scheme is that decisions about guilt and sanction should be taken out of the hands of the chief officer and be made by a process that is transparently independent (paragraph 20). Underhill LJ stated that PMPs were functionally wholly independent of the chief officer, even under the PCRs 2008 and the earliest version of the PCRs 2012 (before they were amended in 2015) with clear blue water between the chief officer and the panel (paragraph 30).

148. Set against this, however, Underhill LJ explained that even if the peculiarities of the police disciplinary system mean misconduct issues fall to be determined by an independent body exercising public functions, those functions nevertheless

arise out of, and in the context of, the employment relationship (paragraph 36). He decided that the primary purpose of a PMP is to decide whether to take steps which will affect the relationship between a chief officer and a member of their force (whether by dismissal or imposing some lesser sanction). Underhill LJ assessed that the PMP is thus doing what would in ordinary circumstances be the responsibility of the chief officer as quasi-employer, reflected in the fact that the chief officer appoints the panel (paragraph 43). Underhill LJ explained it was unsurprising for the relationship of a chief officer and a PMP to be treated as analogous to that of common law principals / employers and their agents / employees, notwithstanding the PMP's functional independence.

149. I also consider the analysis at paragraphs 78 of 81 of ***Wheeler*** to be relevant and helpful. Mr Justice Julian Knowles ("Knowles J.") emphasised the role of a PMP as a statutory panel in adversarial proceedings between the appropriate authority (i.e. Chief Constable) and the officer. He described the PMP members in the specific case as understanding their function to be quasi-judicial, and that there was a statutory right of appeal. Knowles J. explained that the PMP members knew they had a duty to act fairly towards all parties, including the duty to be independent and impartial. He highlighted the LQC as understanding his role was to make sure the PMP acted lawfully and fairly. Knowles J. emphasised that the members of the PMP knew it would not be proper for the appropriate authority to instruct, or seek to pressurise, them to reach a particular decision and that if this were given, it would be a serious interference with the administration of justice, and one the PMP must ignore.

150. Finally, I consider the analysis in ***Victor*** to be relevant and helpful. At paragraph 69, Eyre J. emphasised that police officers are office-holders, not employees, and are answerable for the way in which they exercise their powers as a constable. He emphasised the public interest in maintaining an officer's independence and protecting constables from being at risk of sanction for refusing to comply with potentially unlawful commands (or which would breach their independent exercise of their own judgment). Eyre J. explained that for this reason, a constable has protection going beyond that of other office-holders.

151. Eyre J. explained that this is a factor of weight but that the public interest in the independence of a constable is not the only relevant public interest. He stated there is a potent public interest in ensuring the highest standards of integrity, professionalism and performance by police officers. At paragraph 71 of his judgment, Eyre J. highlighted the objectives of the PCRs (and the Vetting Code of Practice) are to maintain public confidence in the police service, the upholding of high standards and the protection of the public.

152. Having taken account of all these matters, and the parties' submissions, my analysis is that the functions of a PMP are essentially disciplinary functions in respect of conduct matters, performed on behalf of the chief officer of a police force. This is consistent with the legislative powers available to make the relevant conduct regulations, which set out what PMPs must or may do, and how they are to do it. It is consistent with the stated aims and purposes of the police misconduct regime, which is set out in statutory guidance (see paragraphs 128 and 130 above). The SSHD and CoP statutory Guidance are expressly directed at PMP

members, and sections 87 and 87A of the 1996 Act allow guidance to be issued to specific persons about discharge of their disciplinary functions, of which PMP members would likely fall within the category of "chief officers of police". In my assessment, this is consistent with the PMPs acting analogously to agents to the chief officer as their principal (see ***Eckland*** at paragraph 43).

153. As confirmed in ***Eckland*** and ***Victor***, the purpose of PMPs is to make decisions about the relationship between the chief police officer and members of their force. This is consistent with the Home Office Review's recommendation to change the composition of PMPs on the basis that Chief Officers should be given (back) greater responsibility over proceedings relating to their own workforce. It is also an indication that the SSHD exercises her legislative powers to make regulations about how police disciplinary matters are carried out, with the understanding that they relate to disciplinary arrangements within a quasi-employer and employee relationship.

154. The focus of the SSHD statutory Guidance is on a police misconduct regime operated on behalf of the chief officer in respect of his or her police force. The CoP statutory Guidance confirms the regime has the aims of maintaining public confidence in the police force, upholding policing standards and deterring misconduct and protecting the public. These stated aims and purposes have been incorporated into case law in terms of the aims of the PCRs themselves (see, for example, paragraph 71 of ***Victor***).

155. In my assessment, it is relevant that the stated aims of the regime and its approach towards misconduct have been taken directly from caselaw about the nature and purpose of professional disciplinary proceedings (see paragraphs 131 and 132 above). This is consistent with the 2018 Guidance emphasising that the police disciplinary procedures are designed to reflect what is considered to be best practice in other fields of employment (see paragraph 128 above).

156. Set against this is the emphasis, also in cases such as ***Eckland, Victor*** and ***Wheeler***, that PMPs are, and must remain, functionally independent of chief officers of police. The case law highlights the need to have, and to be seen to have, clear blue water of independence between PMP and chief officer and to maintain that independence, as well as emphasising the importance of the public interest of protecting the independence of police officers in performing their duties.

157. I acknowledge there are differences between a chief officer's relationship with their police force members compared with a traditional employer / employee relationship, and between police disciplinary proceedings and other types of disciplinary proceedings. I do not, however, accept Mr Goss's arguments that these differences mean PMPs are exercising the judicial power of the state when carrying out their disciplinary functions.

158. Firstly, ***Eckland*** is confirmation that even if the relationship between chief officer and police officer is determined by a disciplinary system involving an independent body exercising public functions (a PMP), those functions still arise out of, and in

the context of a quasi-employment relationship (see paragraph 36 and the footnote to paragraph 46, of ***Eckland***).

159. Secondly, the argument that the differences present in the police disciplinary system reflect the PMP procedure exercising the judicial power of the state is arguably undermined by the accelerated misconduct hearing / special case hearing procedure used for some police misconduct hearings. For non-senior officers, the accelerated misconduct hearing procedure removes the process of having a PMP entirely and instead uses a single decision-maker through the chief officer (or senior equivalent) of the police force employing the police officer. The chief officer will make findings about conduct and decide the disciplinary action to take.

160. Mr Goss argued this substantive difference is explained by serious, clearly demonstrated serious misconduct cases justifying the public interest of resolving matters quickly ousting the public interests of protecting police officers' independence. There are special conditions to satisfy before using the accelerated misconduct hearing procedure, but they are not restricted to admitted misconduct or conviction cases. The SSHD Guidance indicates it is designed for cases where the evidence is incontrovertible in the form of statements, documents or other material (e.g., CCTV), and sufficient, without further evidence to prove gross misconduct (paragraph 12.5 of SSHD Guidance). It is reserved for specific types of case, but the chief officer will still need to make findings about conduct (including where disputed) and disciplinary action.

161. The SSHD Guidance indicates the key public interest in these cases is to remove the police officer as soon as possible. It may be that this demonstrates one public interest being given particular prominence over another, as Mr Goss argued. However, the difficulty with elevating the public interest in a PMP protecting the independence of police officers to itself indicating the PMP is exercising the judicial power of the state, is what happens when police disciplinary proceedings operate without that specific requirement in place (for example, through the accelerated misconduct hearing procedure).

162. In my assessment, the specific public interest of maintaining the independence of police officers in their work, and the requirement for functional independence of a PMP as part of this, can more effectively be seen as part of the context within which a PMP is required to apply a "judicial mind" when making its decisions, rather than an indication that a PMP is thereby exercising the judicial power of the state. In my assessment, these types of public interest are also consistent with the aims and purposes taken from other professional disciplinary procedures, identified in the CoP statutory Guidance, set out at paragraphs 131 and 132 above.

163. The existence and operation of the accelerated misconduct hearing procedure also undermines Mr Goss's argument that a PMP effectively exercises the judicial power of the state by stepping into, and absorbing, the empty space where employment tribunal proceedings would otherwise operate for an employee. An accelerated misconduct hearing must still apply the standards of balance of probabilities, and an officer is entitled to representation by a police friend or

lawyer at the hearing. However, within the PCRs structure, the nature of the single decision-maker, and their role within the police force, emphasises that the decision being made clearly remains one equivalent to an employer (or quasi-employer) deciding whether to discipline or dismiss an employee (office holder).

164. In any event, I do not consider that police disciplinary proceedings before a PMP represent the equivalent or near equivalent to what would be available through "ordinary" employment tribunal proceedings. Disciplinary outcomes from a PMP hearing could involve a police officer receiving a written warning (including a final one), being reduced in rank or being dismissed without notice. This is the first occasion when such disciplinary outcomes could be applied, rather than an assessment of whether outcomes already applied by the chief officer were ones he or she was entitled to impose. It deals with a stage before the point at which an employee would generally start employment tribunal proceedings. This is consistent with the fact that the PMP is "…*doing what would in ordinary circumstances be the responsibility of the chief officer as the quasi-employer*" (***Eckland***, at paragraph 43).

165. In my assessment, the argument that PMPs reflect the function otherwise available through employment tribunal proceedings also fails to recognise the fact a police officer has a statutory right of appeal to a PAT, as well as how PATs are convened and composed. In terms of composition, the legally qualified chair is drawn from a Home Office list, not a legal policing body list, and the members of the PAT are each entirely separate from the relevant police force. I acknowledge the right of appeal to a PAT is not unlimited, however, there are a broad set of grounds on which an officer may bring an appeal to a PAT, including challenging the findings made by the PMP (or chief officer in an accelerated misconduct hearing) and the outcome it reached, on grounds of reasonableness. In ***R (Chief Constable of Durham) v Police Appeals Tribunal and others [2012]*** EWHC 2733, Moses LJ held that the test imposed was not the test of Wednesbury reasonableness but something less, although it did not permit the PAT to substitute its own approach unless it considered the previous (i.e., PMP) decision was unreasonable.

166. One of Mr Goss's arguments was that police officers are required to uphold the rule of law and maintain law and order, and almost uniquely, abuse of power by them can directly undermine the rule of law. This argument also drew on the aims of the police misconduct regime summarised at paragraph 130 above, and the public interest in maintaining independence of police officers. I did not, however, find this argument compelling. The assertion about the effects of abuse of power might equally be directed at civil servants, who are required to comply with the Civil Service Code and whose actions uphold (and are also capable of undermining) the rule of law. The disciplinary process for civil servants does not amount to the exercise of the judicial power of the state by reason of what damage could, or might, be done to the rule of law by a civil servant who breaches the Civil Service Code.

167. In terms of the aims summarised at paragraph 130 above, these have been developed by drawing expressly on case law focusing on the nature and purpose of professional disciplinary proceedings. That case law includes case law about

solicitors and chartered accountants. The CoP Guidance on the purpose of misconduct proceedings draws on case law about regulation of doctors that focuses on the reputation or standing of the profession. The development of the police misconduct regime has focused on best practice expected across several different professions. Those professions emphasise the importance of the reputation and integrity of the professions and in maintaining public confidence in them. I did not find his part of Mr Goss's argument compelling either.

168. I have also taken into account the suite of legislative changes that have been made to the relevant PCRs since 2015. There is a danger in seeking to define a body's functions by reference to its processes, which risks straying away from considering the body's powers and functions, and whether it is exercising the judicial power of the state. In my view, however, the contextual history for the processes used for PMPs is relevant, because it demonstrates a shift towards using LQCs, followed by a decisive shift away from using them, and the reasoning for making those changes.

169. Mr Goss's helpful explanation of why this occurred, given the additional context and explanation provided by the Home Office Review, indicates that LQCs were introduced to prevent unduly lenient outcomes, and were, in turn, viewed as having instead contributed to overly lenient outcomes. The Home Office Review emphasised that LQCs had brought much needed levels of independence, transparency and legal fairness to the system, but that Chief Constables should hold the leading role in proceedings to decide whether or not to retain an officer in the force. In my assessment, this demonstrates the relevance of legally qualified persons bringing a judicial mind to a PMP's decision-making, rather than confirming it is exercising the judicial power of the state. It also indicates that a key purpose of the involvement of a PMP remains to allow Chief Constables to lead disciplinary proceedings in respect of their police officers.

170. I have also taken into account other changes in the processes that the PCRs provide for PMPs. Mr Goss's skeleton argument argued that when analysed properly, the procedural powers of a PMP support it being a court, using examples of a power to impose reporting restrictions of regulation 31(6)(b) of the PCRs 2012, and regulation 39(3) of the PCRs 2020. Mr Goss also referred in his skeleton argument to these powers allowing a PMP to confer anonymity on a witness and that it happened with the particular PMP in respect of which Rabbi Kanter-Webber sought information.

171. Mr Goss argued that if a PMP is exercising the judicial power of the state, then the orders a PMP might make have teeth, as breach of them could be punished by the High Court's jurisdiction in cases of contempt. He argued that if PMPs are not courts within the meaning of section 32 of FOIA then reporting restrictions could be breached with impunity and witnesses could never be given clear assurances as to anonymity (but would need to be considered under the balancing test in section 40 of FOIA).

172. Regulation 39(3)(c) of the PCRs 2020 provides a power to prohibit publication of specific matters (which Mr Goss described as a reporting restrictions power). There is no equivalent dedicated power in the PCRs 2012. I do not agree that

regulation 31(6)(b) of the PCRs 2012 provides one. Regulation 31(6)(b) is the same provision as regulation 39(3)(b) of the PCRs 2020. If the legislators had thought that the power in regulation 39(3)(b) were sufficient to allow a PMP to make a reporting restrictions order, it is unlikely they would have drafted a dedicated power for it in regulation 39(3)(c). This indicates that in the absence of a specific power in the PCRs 2012, the 2012 regulations did not give PMPs the power to make a reporting restrictions order. This is also signalled by the differences in the headings for the two sets of regulations. The heading of regulation 31 of the PCRs 2012 makes no reference to reporting restrictions, but the heading of regulation 39 of the PCRs 2020 does.

173. In my assessment, the PCRs 2012 did not provide PMPs with a power to make a reporting restrictions order. They have been given that power in matters covered by the PCRs 2020. It does not provide for a specific method of enforcement. I agree with Mr Davidson that other powers in the conduct regulations are effectively self-policing. See, for example, regulation 39(4) of the PCRs 2020 allowing a PMP chair to require attendees at a hearing to withdraw while evidence is given containing information in regulation 39(7). This means a hearing will not continue until the person has withdrawn. Mr Goss referred to the PMP in this appeal making an anonymity order. Again, there is no clear provision given in the PCRs for enforcing that order.

174. I consider it relevant that the Second Respondent is unaware of any proceedings where action has been taken under the Contempt of Court Act 1981 for a breach of a PMP's order. I recognise that there has been a period of just over 5 years for reporting restrictions ones to be made, rather than the longer period since the PCRs 2012 came into force. It appears, however, that the Second Respondent had not considered the issue of contempt of court relevant to PMPs before this appeal and, when asked about it, initially considered it largely to be a distraction. It is unusual for a PMP to exercise the judicial power of the state without police forces knowing it is doing so for the purposes of considering contempt of court proceedings to protect its orders. Nor do the legislators drafting the relevant regulations (including substantial amendments in recent years) appear to have viewed PMPs as exercising the judicial power of the state.

175. I agree with Mr Davidson's submission that Mr Goss's argument places the metaphorical cart before the metaphorical horse. The cart is that protection such as contempt of court is needed to guard against breaches of orders. The horse is that the body exercises the judicial power of the state. It is the consequence of a body exercising the judicial power of the state that its orders should be capable of protection (and in the event of breach, that such breaches are dealt with effectively). I do not accept Mr Goss's argument that PMPs should be seen as exercising the judicial power of the state on the basis that it is desirable or important for their orders to have contempt of court protection.

Conclusion

176. Applying the holistic assessment I am required to perform, I am satisfied that a PMP exercises a disciplinary function regarding conduct matters, on behalf of a chief officer. The function relates to the chief officer's role to decide whether to

retain police officers in his or her force, and if so, on which terms. The PMP does this in a position analogous to an agent acting on behalf of a principal within a disciplinary regime, the purpose of which to maintain public confidence in, and the reputation of, the police service, to uphold high standards in policing and to deter misconduct, and to protect the public. The PMP is making the disciplinary decision that the chief officer, as quasi-employer, would otherwise make.

177. A PMP has the public interest of protecting the independence of police officers in carrying out their duties. A PMP has to act judicially, in the sense that it has to act fairly to all parties and apply an impartial and independent mind to the tasks it has to carry out. Article 6 of the ECHR applies to its proceedings.

178. The legislation governing PMPs gives it a suite of powers that have been adjusted over time, without giving clear mechanisms for enforcing its orders. Its procedures have also been adjusted over time, in response to perceived overly lenient outcomes, to restore the ability to decide who is dismissed, to chief officers of police forces. The justification for these adjustments is that the chief officer who must account for the standards and conduct of the officers under their direction and control, should not be held to account for them without being able to determine who to recruit and who to dismiss.

179. Based on the holistic assessment set out at paragraphs 176 to 178 above, I am satisfied that a PMP acts in the public interest and has to act judicially when it does so, but it does not exercise the judicial power of the state. I have therefore decided that it does not satisfy the definition of a court for the purpose of section 32(4)(a) of FOIA.

180. On this basis, and, given the Second Respondent relied on other exemptions not considered by the FTT, the matter needs to be remitted to a new FTT to consider whether the other exemptions of section 31(1)(g) or 40 of FOIA apply. My directions include for the FTT to approach the appeal on the basis that a PMP is not a court for the purpose of section 32 of FOIA.

181. I therefore allow the Appellant's appeal, and I direct for this appeal to be remitted to a fresh FTT to determine.

Judith Butler
Judge of the Upper Tribunal

Authorised by the Judge for issue: 03 June 2025