DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow both appeals by the Appellant, CM.

The appeal against the original decision by the Disclosure and Barring Service (DBS) under reference 95/08442W, communicated by letter dated 14 August 2013, is allowed. This is because it involved the making of a mistake on a point of law.

The appeal against the review decision by DBS under reference 95/08442W/APP, communicated by letter dated 14 October 2014, is also allowed. This is because it involved the making of a mistake on a point of law or in a finding of fact.

ORDER: Disclosure or publication of the name of the Appellant or of any matter likely to lead members of the public to identify him is prohibited. Any disclosure or publication in breach of this Order is liable to be treated as a contempt of court and punished accordingly.

REASONS FOR DECISION

Introduction

1. We held an oral hearing of this appeal at Field House in London on 3 March 2015. We apologise for the delay that has followed in finalising and issuing our decision. The delay was principally caused by two factors. First, there were various further written submissions made by the Respondent after the hearing, and we wanted to ensure that the Appellant was given every opportunity to make any further representations in reply. Second, the panel's final deliberations were delayed by a combination of periods of leave and assignment to other duties.

Summary of the Upper Tribunal's decision

2. This is an appeal by CM ("the Appellant"), a gentleman now aged 60, against a decision by the Disclosure and Barring Service (DBS) made under the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act"). The DBS had decided that the Appellant should remain on the Children's Barred List under the 2006 Act. On this appeal, the Upper Tribunal's conclusion is that the DBS decision involved a mistake of law or fact. We further direct that the Appellant's name be removed from the Children's Barred List.

The oral hearing of the appeal to the Upper Tribunal

3. The Appellant attended and represented himself at the oral hearing. The DBS was represented by Ms Zoe Leventhal of Counsel, instructed by the Government Legal Department. We are grateful to them both for their oral and written submissions. Ms Leventhal put the DBS case with clarity and fairness. The Appellant, who had the obvious disadvantage of not being used to such a situation, nonetheless made his points with care and dignity. Furthermore, for the reasons that follow, we have come to the conclusion we can and should overturn the DBS decision.

The two decisions by the Disclosure and Barring Service

4. There are actually two decisions by the DBS which are under appeal in this case. To avoid confusion we call them the *original decision* and the *review decision*.

5. The *original decision* was contained in the DBS letter dated 14 August 2013. In this "Final Decision Letter" the DBS advised the Appellant "that it is appropriate to continue your inclusion in the Children's Barred List". On 8 November 2013 the Appellant sent a letter of appeal to the Upper Tribunal against that decision. On 23 April 2014, and for reasons that we will come to later, Judge Wikeley gave the Appellant permission to appeal to the Upper Tribunal against the original decision.

6. The *review decision* was contained in a subsequent DBS letter dated 14 October 2014, following a "minded to bar" letter dated 24 July 2014. In its October 2014 "Review Findings Letter" the DBS again advised the Appellant "that it is appropriate to continue to include you in the Children's Barred List". The Upper Tribunal has in effect treated the Appellant's appeal against the original decision as also an appeal against the review decision.

7. In her helpful written Response on behalf of the DBS, Ms Leventhal made suggestions as to how we should deal procedurally with the issue of the two decisions (pp.390-392 at paragraphs §33-§41). We agree with her analysis that the appeal against the original decision is now, in effect, redundant. This is because the important decision that today affects the Appellant's continued inclusion on the Children's Barred List is the review decision. We therefore concentrate our own analysis on the Appellant's appeal against the DBS review decision.

Previous problems in the handling of the Appellant's case

8. We must recognise at the outset that there have been procedural problems in the way that the Appellant's case has been handled in at least two respects. The background is that following his acceptance of a police caution in June 1995 for the offence of indecent assault, the Appellant was first included on the Consultancy Service Index (in September 1995) and then on the Department for Education and Employment's "List 99" (in February 1997). Because of that listing, and following a review in 2000, the Appellant's name was transferred to the list held under the Protection of Children Act (PoCA) 1999.

9. The first problem arose when PoCA was itself replaced by the system under the 2006 Act. The Appellant's name was included on the Children's Barred List in 2010 because he had failed to respond to a series of letters from DBS in the spring and autumn of that same year. It is now accepted that the Appellant never received those letters. The Appellant independently made his own request for a review of his listing in 2011. This led to a further review and eventually the original decision letter in August 2013. The mix-up in 2010 and the subsequent delays were undoubtedly unfortunate, but they do not impact on the lawfulness or otherwise of the review decision now on appeal to us.

10. The second problem concerns the original decision itself. In short, as Judge Wikeley noted when giving permission to appeal, it became plain that the original decision was based on a number of matters on which the Appellant had not actually been given a proper opportunity to make representations, as was his right under the 2006 Act. These included two alleged incidents in 1982 and a 2004 conviction. As Judge Wikeley observed, DBS had reached a decision taking those matters into account but without asking the Appellant for his comments on them. That was plainly unfair, as DBS very properly recognised in its letter of 14 May 2014. This in turn led to the reconsideration process resulting in the subsequent review decision. Again, the problems with the process adopted for the original decision do not directly affect the legality or otherwise of the review decision now on appeal to us.

The law governing the scope of any appeal against a DBS listing decision

11. The relevant law is contained in the 2006 Act and is set out clearly in Ms Leventhal's written Response at p.390 (paragraphs §28-§32). We also take into account the relevant Court of Appeal case law, such as *R v Independent Safeguarding Authority (Royal College of Nursing intervening)* [2012] EWCA Civ 977 and *Disclosure and Barring Service v Harvey* [2013] EWCA Civ 180. For present purposes there are three main points to note about the relevant provisions in the 2006 Act.

12. The first point is that an appeal can be made from a DBS decision to the Upper Tribunal but only on the ground that the DBS has "made a mistake" either "(a) on any point of law" or "(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based" (according to section 4(2) of the 2006 Act).

13. The second point is that, according to section 4(3) of the 2006 Act, "the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact." It follows that if the only issue is whether listing, or continued listing, is *appropriate* then this is a matter for the DBS and not for the Upper Tribunal.

14. The third point is that, according to section 4(5) of the 2006 Act, "unless the Tribunal finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS." However, if we conclude that the DBS has made such a mistake, then we may either direct DBS to remove the person from the list or remit the matter to DBS for a fresh decision (section 4(6)).

15. We are acutely conscious that the combined effect of these statutory provisions is to place some limits on the powers of the Upper Tribunal when considering an appeal against a DBS decision. A consequence is that the right of appeal now is therefore now more limited than it was before the 2006 Act.

16. Before the 2006 Act came into force, appeals against listing decisions were heard by the Care Standards Tribunal (the CST). Under the listing regime then in force, the CST carried out what lawyers call a "full merits review" when hearing an appeal. In other words, the CST started entirely afresh when reconsidering the facts and was entitled to form its own independent view of all the facts.

17. The Upper Tribunal's jurisdiction is narrower and its powers are more limited than those of the CST. The views of reasonable people may well reasonably differ, especially in borderline cases, as to whether it is "appropriate" for a person to be kept on a barred list. However, as already noted the 2006 Act makes it clear that the decision on whether it is "appropriate" to bar is neither a question of law nor a question of fact (see section 4(3)), and so is not appealable under section 4(2). So a simple difference of opinion as to the issue of appropriateness on the basis of undisputed facts is non-appealable.

18. This is not to say the balancing exercise conducted by the DBS is immune from challenge at all before the Upper Tribunal. The case law shows us that there are still a number of ways in which a challenge to a DBS decision may succeed.

19. The first way is where the decision is so unreasonable as to be irrational or perverse; this is what lawyers even today still refer to as "*Wednesbury* unreasonableness", after the old decision in *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223. This is a demanding threshold. It is

not enough that reasonable people might reasonably differ in the decisions they reach. So, for example, a mere difference of opinion is not enough. However, a decision may also be *Wednesbury* unreasonable if the decision-maker fails to take into account relevant considerations or takes into account irrelevant factors.

20. The second situation is a potential human rights challenge where Article 8 of the European Convention is engaged and where it is argued that the decision under appeal is disproportionate. The case law tells us that the Upper Tribunal must give due weight to the judgment of the balancing exercise by the DBS, but that we can interfere in that decision if we objectively conclude that the outcome of the DBS assessment was necessarily disproportionate.

21. However, we reject any suggestion that on an appeal under the 2006 Act we are limited solely to considering *Wednesbury* unreasonableness and/or proportionality as the only grounds for challenge. Rather, we gratefully adopt the reasoning of the Upper Tribunal panel in *K v ISA* [2012] UKUT 424 (AAC), where it held as follows (at the time in issue in that appeal, DBS was known under its previous name of the Independent Safeguarding Authority, or ISA):

> "*Law and fact: the extent of the Upper Tribunal's jurisdiction*
> 35. The decision that section 4(3) applies to this appeal raises the inevitable issue of the meaning of that enigmatic provision (as the Upper Tribunal described it in *XY v ISA* [2011] UKUT 289 (AAC) at paragraph [84]). Again leaving aside the question of any incompatibility with the requirements of human rights legislation for discussion below, the issue is to what extent appropriateness can be viewed in isolation from the relevant law and the relevant evidence. And the determination of what is relevant for both purposes must itself be a question of law.
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> 36. It is not surprising that the two parties before the tribunal took strongly divergent views about the limitation inherent in section 4(3) on the jurisdiction of the tribunal. For the appellant a robust approach was argued, while initial arguments for the respondent were couched in terms of deference to an expert body. Since we heard those arguments, and arising from delay caused for the reason described below, we now have the advantage of the decision of the Court of Appeal, noted above, in *SB v ISA.*
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> 37. In the light of that decision in particular, we find neither of the approaches argued before us convincing. Parliament has given the Upper Tribunal this new jurisdiction as a first instance jurisdiction, unlike its previous appellate roles in similar previous cases. And it has clearly given the Upper Tribunal the power to find the facts for itself. So while the tribunal's role is narrower than that of the Care Standards Tribunal it is at the same time greater than the powers of a review court such as the Administrative Court dealing with judicial review. Its power is a general power to consider errors of law, so again it is not subject to the limits of judicial review. Further, the tradition of the Upper Tribunal is a tradition of proactive (indeed at times investigative) justice. It is not confined to the arguments put before it by the parties. It can act on its own initiative, as indeed we did in this appeal (as described below). Similarly, it makes its decisions within the framework of the Tribunal Procedure Rules, including the overriding objective in rule 2 of those rules that it must deal with cases fairly and justly.

> 38. We therefore reject the argument that our jurisdiction is limited to what is often termed *Wednesbury* unreasonableness – that the actions of ISA are so unreasonable that no reasonable body of a similar nature could have reached that decision. The Upper Tribunal will have in all cases the duty to ensure that proper findings of fact are made. This will include both considering any alleged factual errors in the ISA decision and also whether ISA has both identified all relevant evidence and given an appellant a chance to make representations on all relevant evidence. Conversely ISA must ignore irrelevant evidence. In cases of dispute it will be for the Upper Tribunal (and of course the courts on further appeal) to indicate what is relevant.
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> 39. Once the factual basis is identified correctly, then it is for the Upper Tribunal to consider whether ISA adopted and followed both a correct understanding of the law and the correct procedure in taking the decision it is required by law to take and that it took that decision properly on its merits and not, for example, by relying on an over-rigid policy.
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> 40. What the Court of Appeal have now emphasised that the Upper Tribunal cannot do is to go beyond that and impose its own different decision where the decision taken by ISA is one based on properly found facts and properly understood law within the proper area of discretion accorded to ISA as an expert decision maker. It is, in other words, for ISA to have the final say in those cases where there is a proper balance to be struck between the interests of the individual and the interests of children and vulnerable adults generally. And the Court of Appeal has emphasised that in reviewing whether a decision is a matter of balance the Upper Tribunal should follow the lead given by the Care Standards Tribunal in taking into account the significance of public confidence in any decision. As Maurice Kay LJ put it in *SB v ISA* (at paragraph 25):
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> > "True, public confidence is not an inevitable trump card. However, it is something which must be placed in the scales when consideration is being given to the personal characteristics and interests of an individual."'

22. The facts of *K v ISA* were a long way removed from the present case, but what matters here are the legal principles laid down. In the event the Upper Tribunal in *K v ISA* dismissed the Appellant's appeal, confirming the decision by ISA (now DBS) that he should remain on both the barred lists. The Appellant in that case then appealed to the Court of Appeal. His further appeal was also dismissed (*Khakh v Independent Safeguarding Authority* [2013] EWCA Civ 1341). The Court of Appeal, in confirming the Upper Tribunal's decision, said nothing that cast any doubt on the lengthy passage cited in the previous paragraph. The Court of Appeal addressed the issue of a *Wednesbury* challenge at paragraphs [18]-[21] of Elias LJ's judgment but that was in the context of an appeal limited to any point of *law*. There was no discussion there of the Upper Tribunal's undoubted jurisdiction to consider errors of *fact*.

23. We turn now to the DBS decision under appeal in this case and the parties' submissions.

The basis of the Disclosure and Barring Service's review decision

24. The basis of the DBS's review decision is contained in the detailed "Barring Decision Process" document. This was helpfully summarised in Ms Leventhal's

written Response at pp.393-395 (paragraphs §42-§55). There were essentially three steps in the DBS process for reaching the review decision.

25. The first step was that the DBS made three specific findings of fact, which were as follows. There is no dispute that each occurred in relation to a child, as all three incidents involved the same 13-year-old boy ("TC"). The three findings were that the Appellant:

(a) had pulled down TC's trousers and smacked his bottom over his shorts;
(b) had allowed TC to stay overnight in his home during the summer of 1994;
(c) had entered into a drinking game with TC in which he gave TC money for each drink he consumed (but no finding could be made that the drink was actually alcoholic).

26. The second step was that according to the DBS there were three separate professional opinions that the Appellant represented a risk towards children. These were the reports by:

(a) Dr Gillian Mezey, Consultant and Senior Lecturer in Forensic Psychiatry (2 July 1996) (pp.27-34);
(b) Dr Diana Ernaelsteen, Consultant Medical Adviser (19 November 1996) (pp.35-47); and
(c) Ms Annie Stubley, Forensic Psychologist (13 June 2012) (pp.88-100).

27. The third step was the conclusion by DBS, having carried out a structured risk assessment, that it was appropriate to maintain the Appellant's inclusion on the Children's Barred List. There was, quite rightly, no suggestion that the Appellant should be put on the Adults' Barred List as regards working with vulnerable adults.

The Appellant's grounds of appeal

28. We recognise, of course, that the Appellant is an individual acting on his own behalf and without the benefit of any legal training or access to professional legal advice. He is, as a result, necessarily at something of a disadvantage in this appeal process. In the course of these proceedings we have therefore sought both to accommodate his needs and to put to Ms Leventhal, for the DBS, any points which we think that an advocate representing the Appellant would have made on his behalf. That said, the Appellant has made his points clearly enough, both on paper and in person. We think we can fairly summarise those arguments as follows.

29. The Appellant pointed out that, given that the DBS were not pursuing any of the other matters which had been relied on earlier, the decision to continue his listing essentially turned on an isolated occurrence in 1994, more than 20 years ago. He had previously worked in the care sector since 1980 without serious incident. Since leaving that line of work in 1995 there had been no other untoward incidents. He recognised that there was the conviction in 2004 but that had come about through inadvertence on his part and not being aware that his driving job had actually involved a breach of the listing requirements. He was concerned that the DBS decision-making process had failed to recognise the long passage of time since the incidents for which he had been listed. He was also concerned that the Barring Decision Process document had failed to quote the relevant evidence accurately and in its full context (see e.g. at p.339).

30. The Appellant also questioned the way in which Ms Stubley's report had been used. He referred to a number of passages in the report which he argued supported

his appeal but had not found their way into the Barring Decision Process document. He also questioned the recommendation in the report that he would benefit from undergoing further therapy. As he put it, "I accept that I have not had a meaningful close relationship for many years and if I feel it necessary I can try to sort these problems out in the future, but I do not understand why I need to be forced to do this by a Government department as this is a very personal matter" (p.333). In particular, it was not clear to him what sort of therapy was envisaged and how he should go about getting it. A prolonged course of therapy involved a considerable financial investment and so he needed to have more details about what was needed. He accepted that he may have problems with forming close intimate relationships, but he pointed out he had worked all his life and had always got on with colleagues. He did not have many close friends and they did not have children. Indeed, he had consciously avoided forming any relationships with children.

31. We think that Ms Leventhal's summary of the Appellant's grounds of appeal is both fair and accurate. He was not really suggesting there was any material mistake of fact in the key findings about the incidents in 1994 on which the DBS assessment was based. Rather, she suggests that the Appellant's objections to the decision fall essentially under two headings. First, for various reasons he argues that the DBS review decision is unreasonable, taking into account the points he made in his earlier representations. Second, in effect he argues that the DBS review decision is a disproportionate interference with his rights to family life and privacy (i.e. under Article 8 of the European Convention).

The DBS response to the grounds of appeal

32. Ms Leventhal argued that in the context of this appeal the Appellant could only succeed if he could show an error of law in the DBS decision (the basic facts of the incidents in question in 1994 not being in dispute). She reminded us (as we have noted above) that this was not a full merits review appeal. Her fundamental submission was that the DBS decision was neither unreasonable nor disproportionate and involved no error of law. Ms Leventhal submitted that the Barring Decision Process document for the review decision involved a careful evaluation of both the underlying facts and the Appellant's representations. The conclusions were based on an assessment of the relevant conduct shown by the events of 1994 and 2004. The balancing exercise had involved a careful risk assessment, informed by expert and independent advice, which had indicated definite concerns in certain risk areas. Taking into account all the factors, including the length of time since the incidents in question, she argued the DBS decision to keep the Appellant's name on the list was both reasonable and proportionate. The DBS had also taken into account the impact of barring on the Appellant, but had reasonably concluded that this was outweighed by the nature and extent of the risk involved. The Barring Decision Process document had also recognised that there was an opportunity for further review in the event that the Appellant undertook the recommended course of further therapy.

Our conclusions on the appeal against DBS's review decision

(1) Was the DBS review decision Wednesbury unreasonable?

33. We have had the advantage the DBS decision maker did not have of meeting the Appellant and hearing from him in person in the course of a lengthy hearing lasting the best part of a day. He was an impressive witness in a number of ways. Although naturally a rather shy or retiring individual, he gave straightforward but considered answers to straightforward questions. He made his arguments carefully without any hint of exaggeration. Where he had made mistakes, he admitted them and did not seek to explain them away. However, we accept this only takes us so far.

The fact that we may have found some of the Appellant's arguments reasonable does not, of itself, mean that the DBS decision was itself unreasonable in the strict legal sense of that term. It is clear from both the 2006 Act and the case law that we cannot rely on the mere fact that we saw and heard the Appellant give evidence as a way of opening up to challenge the appropriateness of the decision to retain the barring (see e.g. *R v Independent Safeguarding Authority (Royal College of Nursing intervening)* at [18]-[21]). Appropriateness itself remains off limits to us. We bear those considerations very much in mind.

34. Furthermore, as we explained above, it is not enough that the Appellant subjectively thinks the DBS review decision is unreasonable. Indeed, it is not enough that we may subjectively think the decision was unreasonable. Rather, we can only interfere on this basis on a point of law if the DBS decision was *Wednesbury* unreasonable. *Wednesbury* unreasonableness may be demonstrated in a number of different ways. One is that the decision is unreasonable in the sense of being perverse or irrational. As we have already noted, this is a high threshold to satisfy. An initial reading of the Barring Decision Process document might suggest that all the important factors (including, for example, the time that has elapsed) were taken into account by the DBS decision maker. Of course, the weight or importance to attach to particular factors is very much a matter of judgment for the DBS decision maker. A test based on *Wednesbury* unreasonableness does not allow us to intervene simply because we might have attached more importance to one factor and less significance to another.

35. However, a challenge on the basis of *Wednesbury* unreasonableness can also succeed if a decision maker fails to take into account relevant considerations or has regard to irrelevant matters. Despite the apparent care with which DBS approached its review decision, we have serious reservations about the way in which the Structured Judgment Process (SJP) – Stage 3 of the Barring Decision Process document – was conducted in this case, together with the consideration of the Appellant's representations at Stage 4. We remind ourselves – as the Upper Tribunal explained in *K v ISA* – that it is our duty "to ensure that proper findings of fact are made. This will include both considering any alleged factual errors in the [DBS] decision and also whether [DBS] has both identified all relevant evidence and given an appellant a chance to make representations on all relevant evidence. Conversely [DBS] must ignore irrelevant evidence" (Upper Tribunal decision in *K v ISA* at [38], see [21] above).

36. The purpose of the SJP itself is to identify and quantify particular risk factors as a means of informing the decision on whether to bar. There are a total of 16 separate risk factors divided equally into four broad categories or 'fields' (namely predispositional factors, cognitive factors, emotional factors and behavioural factors). Each risk factor is then evaluated and given a ranking as to whether there is 'no information' or whether the evidence gives rise to "no concerns", "some concerns", "definite concerns" or "critical concerns". As a starting point, DBS guidance is that a critical concern in at least one risk factor or definite concerns across two or more fields indicates that a positive barring decision is required. This is, however, not intended as an inflexible formula.

37. The DBS decision maker when applying the SJP in the Appellant's case found that there were no *critical* concerns against any of the 16 risk factors. However, the decision maker identified *definite* concerns in relation to three risk factors across two different fields. These were: (i) an emotional congruence with children and (ii) poor intimacy skills (both within the field of emotional factors – relationships), along with

(iii) an irresponsible and reckless pattern of behaviour (in the field of behavioural factors – self management and lifestyle). Based on the high level guidance, this was sufficient to flag the case up for barring. But we observe that this was a borderline case – if there had only been "some concerns" about an irresponsible and reckless pattern of behaviour then the two "definite concerns" would not have triggered consideration for barring as they both lay within the same field, and on the basis of the DBS's own guidance the matter may well have gone no further.

38. We start from the position that the evaluation of these various risk factors in the course of the SJP necessarily involves making certain underlying findings of fact. We thus reject any suggestion that the assessment of risk somehow takes us outside the scope of section 4(2)(b) of the 2006 Act. In this regard we agree with the Upper Tribunal in *VW v Independent Safeguarding Authority* [2011] UKUT 435 (AAC), where the panel dismissed the argument that a finding by DBS that an Appellant had a significant sexual interest in young teenage girls was not a conclusion of fact, but rather an assessment of risk and was outside section 4(2)(b) of the 2006 Act. As the panel explained (at [66]], "It may be a finding of secondary rather than primary fact (such as which movie the appellant had viewed) but examples abound within the law of where such conclusions on a secondary level are nonetheless matters of fact (the reasonableness of an employer's actions in unfair dismissal being but one example)." This approach is entirely consistent with the analysis of the extent of the Upper Tribunal's jurisdiction as regards matters of law and fact as set out in *XY v ISA* (see [21] above).

39. It will be recalled that the DBS found "definite concerns" across three separate risk factors, namely poor intimacy skills, emotional congruence with children and irresponsible and reckless behaviour. We should say at the outset we are satisfied that the DBS decision maker was correct to find that there were definite concerns as regards the Appellant's poor intimacy skills. The Appellant himself was candid enough to concede that this had long been the case for him. There was no error of law or mistake of fact in this respect by DBS.

40. However, we have very real concerns over the DBS finding that there are today "definite concerns" as regards emotional congruence with children. The events of 1994 (summarised at [25] above) were certainly inappropriate, as the Appellant recognised. They also gave rise to concern and at the time led quite properly to the steps that were taken then by the relevant authorities.

41. However, the DBS finding of "definite concerns" today as regards emotional congruence with children was largely reliant on these three isolated but connected incidents in 1994 and failed to have proper regard to events since then. For example, one of the indications relied upon by the DBS was the report from 1996 (i.e. nearly 20 years ago) that at the time the Appellant's non-work interests centred around activities with boys and adolescents, e.g. football coaching. Reliance was also placed on the Appellant's admission in 2012 that "little had changed in terms of his personal life since 1996". However, this failed to distinguish between his personal life and friendships and wider issues of lifestyle. Thus there was no reference at all to the fact that in the two decades since then the Appellant had not pursued any such child-centred activities and indeed had consciously avoided forming close relationships with any adults who had children of their own. This is not simply a question of the weight to be attached to a particular question of fact. Rather, the DBS assessment entirely ignored a highly relevant fact. The DBS's own internal guidance indicates that a finding of *definite* concerns in relation to this risk factor is appropriate e.g. where "the individual repeatedly makes attempts to be in the company of children to

ensure that his or her emotional intimacy needs are met. They have a lifestyle that is characterised by child-orientated activities, hobbies or employment" (*Master SJP Caseworker Guidance Manual* para 4.2.9, emphasis added). On all the evidence before us, we simply do not recognise the Appellant from that description. The same official guidance suggests that a finding of *some* concerns is apt where "the risk factor is relevant but was only present in a one-off incident or with respect to one person" (para 4.2.8). We do certainly recognise the Appellant from that description, given our factual findings on the 1994 incidents, which could have been written specifically with him in mind. In our assessment the finding that there were "definite concerns" as regards emotional congruence with children involved a plain failure to take into account relevant considerations (namely other material facts and the DBS's own guidance).

42. We are even more concerned about the DBS's findings in relation to the next risk factor with "definite concerns", namely the Appellant's alleged irresponsible and reckless pattern of behaviour. It seems to us that this element of the assessment was fundamentally flawed. The minded to bar assessment in the review decision, as part of the SJP, asserted that there were "clear indicators of irresponsible and reckless behaviour across a range of contexts and over an extended period of time" (p.368) and relied on three matters in particular to support the conclusion that there were "definite concerns" in relation to this risk factor.

43. The first was the finding that the Appellant had been reprimanded by his then employers in relation to two incidents of allegedly irresponsible behaviour in 1982 – although we note at the outset that, whatever the merits of these two matters, they were not regarded by his employers as sufficiently serious to prevent him working with children in a residential setting; nor did they later prevent him finding further employment in the same sector. These incidents were known as Allegation 3 at Stage 2 of the Barring Decision Process (p.347). The conclusion at the end of Stage 2 was that these matters remained proven on the balance of probabilities. However, it was acknowledged that the allegations were "minor in nature", that the Appellant had been allowed to return to work and that limited information was available. Accordingly, the decision-maker recorded at that point that "*for the purpose of progressing the case these findings will not be considered further*" (p.351). The same point was again made in the course of the SJP at Stage 3 of the Barring Decision Process (pp.363-365), namely that these allegations were now to be disregarded.

44. Yet at the end of Stage 3, these matters having previously been discounted, they suddenly reappeared as one of the "clear indicators of irresponsible and reckless behaviour" (p.368, emphasis added). Following the Appellant's representations at Stage 4 of the Barring Decision process, the 1982 allegations were once again discounted (p.372), and the final review of appropriateness at Stage 5 stated again that they had been disregarded (p.373). This confused and at time contradictory approach does not instil confidence. How can we be satisfied that they had truly been discounted? We have already been categorically told twice that they had been put to one side only for them to re-appear at a later stage. In addition, it is not apparent that the finding that there were indeed "definite concerns" in relation to this risk factor was revisited once the 1982 allegations were abandoned.

45. The second matter relied on to justify an assessment of "definite concerns" in this regard was the finding by DBS that the Appellant had persistently failed to take responsibility for the actions that had led to the 1995 caution. In particular, it was noted he had not sought any form of therapy until 2012 and that he had adopted a "passive stance" in this regard. Whilst the failure to explore the possibility of therapy

might well justify some concerns, it is difficult to characterise it as "irresponsible and reckless" to the extent of raising "definite concerns". Given the factual matrix of this case, it is simply wrong as a matter of fact to characterise a failure to undertake a course of therapy or counselling as reckless behaviour. Irresponsible and reckless behaviour by definition involves acting in a way that has an adverse impact on those around. The Appellant, by contrast, has largely withdrawn into himself.

46. The third matter relied on was the conviction in 2004 for breach of the bar between 2001 and 2004. This was again characterised by the DBS as "highly irresponsible and reckless behaviour" (p.370). The suggestion was that he "was within or seeking a job role which included access to children between the dates of the conviction" (p.368). Obviously we cannot go behind the fact of the conviction and on one level any conviction is evidence of irresponsible behaviour. The Appellant also recognises that he made an error. However, it is relevant to consider the wider circumstances of the offence. The Appellant was employed as a driving instructor for a coach company at the time. A small ancillary part of the job involved driving children on the 'school run' at the beginning and at the end of the day. He was unaware that by doing so he was working in breach of the bar. On all the evidence we have considered we are satisfied as a matter of fact that this was an offence committed by inadvertence rather than a reckless disregard of the rules. To be reckless connotes a deliberate decision to run a known risk. The Appellant may well have been negligent in regard to this matter, but as a matter of fact he was not reckless. We also note that there is no suggestion whatsoever of any inappropriate behaviour on the Appellant's part whilst engaged in such work over a period of some years.

47. Taking all these matters into account, we do not accept as a question of fact that there has been an irresponsible and reckless pattern of behaviour such as to give rise to definite concerns. The DBS's own guidance indicates that "definite concerns" are appropriate where "the individual may have repeatedly acted in an irresponsible and reckless manner with little regard of the impact of this behaviour on those around him" (para. 5.3.9). In the present case, once the 1982 incidents are (quite properly) disregarded, there is really nothing to justify a finding that the Appellant has *repeatedly* acted in an irresponsible and reckless manner. Rather, as a matter of fact this is a case in which the known information "indicates that irresponsibility and recklessness, whilst present, is not a predominating feature of their life" (para.5.3.8), namely an exemplar of "some concerns". The DBS finding of fact that there were "definite concerns" in relation to this risk factor involved making mistakes of fact, taking into account irrelevant matters and disregard of the DBS's own guidance as explained above.

48. In sum, while we recognise that the DBS decision maker was entitled to find "definite concerns" with regard to the Appellant's poor intimacy skills, the underlying primary facts point to there being at most "some concerns" with the two other risk factors in question, namely emotional congruence with children and irresponsible and reckless pattern of behaviour. In this regard we also note that at Stage 4 of the Barring Decision Process document, i.e. the juncture at which the Appellant's representations were considered, the document records that these representations did not challenge the risk assessment (p.372). This was a further mistake of fact. In his representations the Appellant had specifically challenged this assessment. He wrote that "you accuse me of showing reckless and irresponsible behaviour, this I contest. I admit by allowing a pupil to stay at my home and for what followed my behaviour was stupid and irresponsible but not reckless" (p.333). We therefore find that a rationality challenge based on *Wednesbury* unreasonableness succeeds. The

DBS review decision failed to take into account a number of relevant considerations and had regard to others which should have been disregarded, as explained above. Even putting *Wednesbury* unreasonableness to one side for a moment, the DBS decision also involved a series of material mistakes of fact, again as set out above.

49. In reaching our conclusions we have not ignored the various reports relied on by the DBS (see [26] above), and in particular the recent 2012 report by Ms Stubley along with her follow-up letter after the Upper Tribunal oral hearing. Ms Leventhal repeatedly referred us back to Ms Stubley's report, and her assessment that the Appellant remained a "medium risk" in terms of re-offending for a sexual offence. We did not find this report and correspondence as persuasive as was suggested to us by the DBS, for a number of reasons.

50. First, as Ms Stubley herself recognised, the initial characterisation of the Appellant as a medium risk in terms of re-offending is based on the scoring in Dr David Thornton's *Risk Matrix 2000*. This necessarily involves a process of extrapolation under which risk is assessed from aggregate data. The *Risk Matrix 2000* itself cannot be fine tuned to take into consideration the whole range of factors that may be present in any individual case. It is, at best, a default setting. It is a starting point but does not pretend to provide definitive answers in individual cases as to the assessment of risk.

51. Second, Ms Stubley plainly regarded the most significant area of ongoing concern in the Appellant's case as being his "deficits with interpersonal relationships" (see §9.4). Indeed, she argued that "until he has completed a programme of therapy it is my opinion that his longstanding interpersonal and intimacy deficits preclude his risk being downgraded to 'low'" (see §9.5). We accept, as we have recognised above (at [39]) that there are undoubtedly "definite concerns" as regards the Appellant's intimacy skills. However, the conclusion that this issue alone warrants no change to the overall risk assessment generated by the *Risk Matrix 2000* fails to have proper regard to how the Appellant has conducted himself over the past two decades. Furthermore, on the DBS's own guidelines, if this was the only area in which there are now "definite concerns" (as we find), this case would never have been flagged for potential barring in the first instance.

52. Third, we found no support in Ms Stubley's report for the DBS conclusion that the Appellant displayed ongoing "definite concerns" as regards irresponsible and reckless behaviour. Indeed, Ms Stubley herself regarded the Appellant's "hitherto somewhat passive stance to getting therapeutic help" as an illustration of a problem with self-management skills, but she then concluded (quite correctly, in our view) that these problems were "not severe", not least given his relatively stable employment record and the progress he had made in addressing his debts (see §9.4).

53. Fourth, we return to our point that the assessment of risk ultimately involves an evaluation of all the evidence and the making of findings of fact. We must consider expert evidence and give it appropriate weight, but we are not bound by it. In our judgment Ms Stubley's report and in particular her conclusions give undue prominence to the default setting under the *Risk Matrix 2000* and place unwarranted emphasis on the omission to undertake an extended programme of psychotherapy. Those conclusions fail to take sufficient account of her earlier admittedly rather tentative finding that the Appellant "has moved on from his desire to offend and is not a predatory individual who is seeking opportunities to offend against more children" (see §8.2). In addition, Ms Stubley found that there was "nothing in his comments to me to suggest ongoing distorted attitudes regarding his victim or other children" (see

§9.3). Ms Stubley's central conclusion was that the Appellant "appears to have contained his behaviour for some 17 years, so I would not regard him as a predatory individual. Nonetheless, little else appears to have changed in risk assessment terms" see §9.6). However, for the reasons we have explained earlier, we find in fact that a number of important markers demonstrate that there has been significant change in risk assessment terms over the past two decades.

(2) Was the DBS review decision disproportionate?

54. In the circumstances, given our conclusions above, we do not need to address the further question of whether or not it was proportionate to keep the Appellant on the Children's Barred List in any great detail. However, we summarise our conclusions as follows.

55. Ms Leventhal very properly conceded on behalf of the DBS that the decision to retain the Appellant's name on the Children's Barred List interfered, to some extent at least, with his Article 8 rights as regards his right to a private life and in respect of his employment. Her central argument was that continued listing was proportionate in this case given the DBS finding that the Appellant represented a medium risk of reoffending unless and until he engaged in the recommended extended period of psychotherapy.

56. As regards the Appellant's personal life, we are inclined to agree with Ms Leventhal's submission that it is not the fact of the bar itself which has had a significant impact on his personal life. Rather, it is the background facts relating to the events of 1994 which have cast something of a shadow over the Appellant's ability to form close, intimate relationships. He has friends, but not very close and emotionally intimate friends. On balance we do not consider that listing represents a significant or disproportionate interference in his personal life.

57. We take a different view as regards the Appellant's employment opportunities. In our view both the DBS and Ms Leventhal took an unduly sanguine view as to the effect of listing on the Appellant's job prospects. We do not take their view that there is no significant impact on his employment. It is accepted on all sides that the Appellant has no plans or wish to work in a regulated area of activity. We also find he has made no attempt to do so since leaving the residential care sector in 1995 (the 2004 conviction being explicable for the reasons set out above). However, he has already experienced a considerable degree of interference from the fact of listing. The Appellant told us, and we accept, that he was suspended for some 8 months from his driving duties when his name came up on an enhanced CRB check carried out by his employer. He also had to attend a hearing to justify his continued holding of a PSV licence. Ms Leventhal reminded us that the Appellant had not lost his job and sought to persuade us that any responsible employer would act fairly. That may be as may be, but we are satisfied that listing has already had a significant and disproportionate impact on the Appellant's position in his employment.

58. We have already taken into account DBS's expertise in these matters. We remind ourselves of that consideration again. But we have already concluded that there are fundamental mistakes of fact and significant departures from its own guidance in the DBS assessment. In all those circumstances we also conclude that continued listing is a disproportionate interference in the Appellant's Article 8 rights.

59. This is an opportune juncture at which to make some observations on issues of respective expertise. The Court of Appeal recognised in *B v ISA* that the Upper Tribunal is a specialist tribunal but expressed the view that it "is designed not to

consider the appropriateness of listing but more to adjudicate upon 'mistakes' on points of law or findings of fact" (at [21]). Maurice Kay LJ, giving the leading judgment for the Court, also identified two limitations on the Upper Tribunal's expertise. The first is the restriction contained in section 4(3), and considered above. The second is that the Upper Tribunal's non-legal members "come from a variety of relevant professions ... [and] are or may be less specialised than the ISA decision-makers who, by paragraph 1(2)(b) of schedule 1 to the 2006 Act, 'must appear to the Secretary of State to have knowledge or expertise of any aspect of child protection or the protection of vulnerable adults'" (at [21]).

60. We simply observe, with respect, that it is not clear whether the attention of the Court of Appeal was drawn to the Practice Statement on the composition of Upper Tribunal panels. The current version is the Practice Statement on the *Composition of Tribunals in relation to matters that fall to be decided by the Administrative Appeals Chamber of the Upper Tribunal on or after 26th March 2014*, issued by the Senior President of Tribunals in exercise of his powers under articles 3 and 4 of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 (SI 2008/2835). The previous version was the same in all material respects. This provides that safeguarding appeals are typically to be head by an Upper Tribunal Judge sitting with two other members (paragraph 3(b)). Those other members must then meet either the requirements of paragraph 5 or those of paragraphs 6 and 7 (see paragraph 4). Those requirements are as follows:

> "5. The requirements of this paragraph are—
>
> a. experience in the provision of services
>
> i. which must or may be provided by local authorities under the Adoption Act 1976, the Children Act 1989 or the Adoption and Children Act 2002 or which are similar to such services;
>
> ii. for vulnerable adults; or
>
> iii. in a residential family centre; and
>
> b. experience in relevant social work.
>
> 6. The requirements of this paragraph are—
>
> a. experience in the provision of services by a Health Authority, a Special Health Authority, a National Health Service trust, an NHS foundation trust or a Primary Care Trust;
>
> b. experience in the provision of education in a school or in an institution within the further education sector; or
>
> c. experience of being employed by a local education authority in connection with the exercise of its functions under Part I of the Education Act 1996.
>
> 7. The requirements of this paragraph are—
>
> a. experience in the conduct of disciplinary investigations;
>
> b. experience on an Area Child Protection Committee, or similar experience;
>
> c. experience of taking part in child protection conferences or in child protection review conferences, or similar experience; or
>
> d. experience in negotiation the conditions of service of employees."

61. These paragraphs replicate, with a minor amendment, the effect of regulation 41(1) of the Protection of Children Act Tribunal Regulations 2000 (SI 2000/2619), which dealt with membership of what became known as the Care Standards Tribunal – the non-statutory name given in 2002 to the tribunal established under the

Protection of Children Act 1999, when it became concerned not just with the protection of children but also with the protection of vulnerable adults under Part VII of the Care Standards Act 2000. Furthermore, the effect of the Transfer of Tribunals Functions Order 2008 (SI 2008/2833) was that those members of the CST who were qualified to consider cases concerned with the protection of children or the protection of vulnerable adults were transferred to the Upper Tribunal in anticipation of the 2006 Act coming into force (although they also became members of the First-tier Tribunal – see section 4(3)(c) of the Tribunals, Courts and Enforcement Act 2007).

62. It follows that a member of the Upper Tribunal sitting on an appeal under section 4 of the 2006 Act must have not just the professional qualification or experience required by the Qualifications for Appointment to the First-tier Tribunal or the Upper Tribunal Order 2008 (SI 2008/2692) but also the more specific experience required by the Practice Statement.

63. Given the prescribed requirements for appointment to the CST lay panel, it is arguable that all the relevant "transferred-in other members" must have appeared to the Secretary of State, or at least to the Lord Chancellor, "to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults". Today selections for appointment of members to the Upper Tribunal are made by the Judicial Appointments Commission, but in fact there have been no new appointments of members to hear appeals under section 4 of the 2006 Act since the Upper Tribunal was created. It follows that the only relevant members are the "transferred-in other members". We also note for the record that both the expert members sitting on the panel in this appeal were formerly such members of the CST and meet the requirements of paragraphs 5 and 7 of the Practice Statement, having extensive relevant professional experience in these fields (including in particular both paragraph 7(b) and (c) relating to senior level child protection work, and one meets the terms of paragraph 6 as well).

64. Accordingly, while the experience of the members of the Upper Tribunal may be different from that of DBS decision-makers, it is plainly arguable (if not inevitable) that they would satisfy the statutory qualification applicable to those decision-makers. With the greatest respect to the Court of Appeal, to suggest that Upper Tribunal expert members "are or may be less specialised" than DBS decision makers does not provide the full picture. Given its extensive and collective practical experience and the fact that the Upper Tribunal always has laid before it the DBS's reasoning, the Upper Tribunal is, in practical terms, very well equipped to consider the fact-finding and reasoning used to justify including a person in the barred list. It could also consider the issue of appropriateness, although of course that is "off limits" by statute.

(3) Our conclusion on the appeal against the DBS review decision
65. The DBS review decision was flawed for the reasons set out above. It follows we allow the Appellant's appeal against the DBS review decision.

66. In these circumstances we may either direct DBS to remove the Appellant from the list or remit the matter to DBS for a fresh decision (section 4(6)). Another panel in the Upper Tribunal has provided the following guidance on the proper application of section 4(6) (see *MR v Disclosure and Barring Service (Safeguarding vulnerable groups: Adults' barred list)* [2015] UKUT 5 (AAC) at [8]):

> "8. Where an appeal is allowed, subsection (6) appears at first sight to confer on the Upper Tribunal a broad discretionary power either to remove a person

> from the list or to remit the matter to the Respondent. However, it is noteworthy that it does not confer a power to confirm the person's inclusion on the list on grounds other than those relied upon by the Respondent and it is important to read subsection (6) in the context of subsections (3) and (5), which make it clear that the Upper Tribunal is not entitled to substitute its own view as to whether or not it is appropriate for an individual to be included in a barred list for that of the Respondent. In those circumstances, it seems to us that the Upper Tribunal is entitled to remove a person from a barred list under subsection (6)(a) only either if the Respondent accepts that that is the decision that should be made in the light of the error of fact or law found by the Upper Tribunal or if the Upper Tribunal is satisfied that that is the only decision that the Respondent could lawfully make if the case were remitted to it."

67. In our view remittal is not appropriate here. This matter has been before DBS twice already. The process has gone on for some years and the Appellant is entitled to some closure. We take into account the findings of fact we have made above. We are entirely satisfied that there is simply no prospect of the Appellant wishing to engage in any regulated activity and accordingly barring serves no useful purpose. We have also had regard to the importance of public confidence in the barring system. We therefore direct DBS to remove the Appellant from the Children's Barred List with immediate effect.

Where does this leave the DBS's original decision?

68. The unfortunate sequence of events resulting in the DBS's original decision has been summarised above. The Appellant was given permission to appeal against that initial decision, but latterly the case has been treated as an appeal against the DBS review decision. This is for the very simple reason that the DBS review decision in effect supplanted the original decision and rectified the procedural errors that had undermined the original decision. It was the review decision which is the currently operational decision that is keeping the Appellant on the barred list and which he is challenging. This was also the basis on which the appeal was argued at the oral hearing.

69. The relationship between original decisions and review decisions on appeal to the Upper Tribunal was considered by the panel in *KM v DBS* [2014] UKUT 66 (AAC). In that case the Upper Tribunal ruled that there were really only two options; either both decisions were extant and both must be determined or both continued to exist but in general the Upper Tribunal would stay the first one (at [28]). The Upper Tribunal added (also at [28]) that what

> "should happen will depend on the circumstances of the case. In many situations, whether a person's name should continue on the Barred List will be a matter whose principal importance is looking forward. In such a case, what is most important in terms of protecting vulnerable groups, defining an individual's freedom of activity and making effective use of Upper Tribunal and other resources, is the second decision, taken with the benefit of further information, taking account of recent changes of circumstances or having rectified any error which may have occurred."

70. In the particular circumstances of that case the Upper Tribunal dismissed the appeal against the review decision and also dismissed the appeal against the original decision, on the basis that the shortcomings in the original decision were not material, i.e. the actual outcome of that earlier decision was correct.

71. In the present case the procedure adopted in the original decision was undoubtedly flawed, as DBS has recognised. We do nobody any favours by staying the first appeal (i.e. indefinitely postponing it). The simplest and fairest method of disposal is to allow the appeal against the original decision as well, but in the knowledge that it is our decision in the appeal against the review decision that really matters.

Conclusion

72. We therefore allow both appeals for the reasons set out above. The result is that the Appellant should be removed from the Children's Barred List.

Signed on the original
on 29 June 2015

Nicholas Wikeley
Judge of the Upper Tribunal

Caroline Joffe
Member of the Upper Tribunal

Keith White
Member of the Upper Tribunal