DECISION OF THE UPPER TRIBUNAL – CASE No. V/3118/2017

Before:

Mr E Mitchell, Judge of the Upper Tribunal
Ms H Reid, Member of the Upper Tribunal
Mr B Cairns Member of the Upper Tribunal

Appellant: **Mr B**
Respondent: **The Disclosure & Barring Service**

Attendances: **Mr B appeared in person**
For the Respondent, Mr L Glenister of counsel, instructed by the Disclosure & Barring Service Legal Department

Heard at: Newport Tribunal Centre
Date of hearing: 18 December 2018

DECISION: This appeal is DISMISSED. The DBS, in their decision of 5 October 2017, made neither a mistake on a point of law nor a mistake in a finding of fact on which their decision was based.

REASONS FOR DECISION

Background

The persons involved in this case

1. In 2015, the Appellant, whom we refer to in these reasons as Mr B, was the 45 year old head of mathematics at an independent school in England. In these reasons, we refer to the school as C School.

2. This case arises out of Mr B's actions in relation to a female boarding pupil at the school, whom we shall refer to as Pupil A. In mid-2015, when the relevant events occurred, the foreign national Pupil A was aged 18 (i.e. an adult).

The text messages

3. The principal evidence in this case was comprised of text message sent between Mr B and Pupil A from 10 May 2015 to 10 June 2015. Below in these reasons we refer to some of the messages in further details but we set out certain important features of the messages here:

- 11 May, Mr B apologises to Pupil A for "trying to kiss you like that just now";

- 13 May, Mr B sends Pupil A what he said would be his last ever text, wishing her good luck in her exams and that he will always be there for her;

- 21 May, Pupil A texts Mr B that she is "so high" and, lately, had been taking pills which she found helpful even though they solved nothing. Mr B replied that he would always be there for her;

- 21 May, Pupil A texts Mr B: "sorry I took an overdose, and I cannot really think if I am being inappropriate". Mr B's response continued an earlier discussion about kissing and included "You don't have to tell me where you'd like your kiss, just close your eyes, imagine it, then open them again!";

- 21 May, Mr B texts Pupil A that he first started falling for her in November 2014 which, as we understand it, was before her 18th birthday;

- 24 May Mr B texts Pupil A that he will use all his influence as 'head of a faculty' to secure for her a place at her preferred University;

- 31 May, Mr B responds to Pupil A's concerns about what will happen "if someone finds out", writing "I will probably be told to leave the school...but that will only happen if someone can demonstrate beyond reasonable doubt that we're having a proper relationship, if all we're doing is messaging and meeting somewhere every so often, then nothing will happen";

- 2 June 2015, Pupil A texts Mr B: “when I just need to get drunk + pills : ‘(((Cannot deal with life”. Mr B responds with compliments and “you don’t need pills”. On a later date, Pupil A texts “Pills, alcohol, maths – best combination”. On 9 June she texts “My medicine can 16 Paramol pills, and you cannot move, cannot think, cannot feel happiness of pain […] you have alcohol, I have pills”;

- On the following dates, Mr B sends text messages inviting Pupil A to visit him at home, in most cases for the purpose, at least in part, of drinking alcohol: 2, 6, 7 and 10 June 2015;

- 2 June 2015, Mr B texts Pupil A that, if she were with him, he would want to kiss, touch and caress her;

- 4 June 2015, Mr B texts Pupil A that he would like to massage her with baby oil. A later message states that Mr B would like Pupil A to massage him “all over”;

- Mr B subsequently texts Pupil A that he would like to make love to her until the sun comes up and also asks if she would like to massage his “dick”;

- 7 June, texts indicate that Mr B left cans of cider in a field for Pupil A to collect;

- 10 June, Mr B responds ‘yes’ to the question whether he would pay a million pounds to have sex with Pupil A. Pupil A subsequently stated that this text was sent from her phone by her boyfriend whom she had told about Mr B.

The school’s disciplinary process

4. The notes of a C School meeting on 18 June 2005 state that Pupil A disclosed that Mr B “has been sexually harassing me”. Pupil A supplied her mobile telephone which contained numerous text messages. During the meeting, the police were consulted but informed staff they would take no action because Pupil A was 18 years old. C School decided to hold an ‘investigatory meeting’.

5. The notes of an interview with Pupil A on 18 June 2015 included:

- she had been upset because she could not see her boyfriend much. Mr B saw she was upset, asked if she was okay and gave her his phone number “so if you are upset, you can call, text if need me”;

- while she was alone with Mr B, Pupil A called the number given by Mr B to check it. Mr B phone rang, he said “delete number now” and she stored his number under a false name;

- Mr B took the initiative in contacting her. She responded briefly to his messages but felt uncomfortable because he was a teacher;

- the week before a period of study leave, she was alone with Mr B after a maths lesson. When she stood up to leave, Mr B hugged her, kissed her forehead and said “You know I think a lot about you”. This left her confused;

- during the first week of study leave, Mr B asked Pupil A to visit another town with him. She refused. Mr B threw his glasses on his desk and rubbed his eyes. That night Mr B continually texted her when she was trying to revise. Around this time, Pupil A started to feel uncomfortable in Mr B’s presence so avoided being alone with him;

- a few days later, Mr B kissed her forehead and cheek;

- Mr B’s text messages then became more sexual in content although Pupil A had started to respond more often;

- Mr B knew she had started taking painkillers. She took “from 4 pills up to 14 of codeine and paracetamol” (Paramol) in front of him but he did nothing;

- when she was feeling sleepy after taking pills and had her head on a school desk, Mr B tried to kiss her “possibly on lips ended up kissing temple”;

- the text message ‘would you pay a million pounds to have sex with me?’ was prompted by Pupil A’s boyfriend whom she had told about the situation with Mr B.

6. The papers are not entirely clear but it seems probable that Mr B joined the 18 June 2015 meeting part-way through, after Pupil A's departure. The minutes state that Mr B gave an account similar to pupil A's "with some minor differences over the number of times he kissed her". Mr B said "he was worried about [pupil A] and that he was aware she was taking tablets and drinking" but "had not disclosed this to [appropriate staff member] and so has not followed Safeguarding Policy". The minutes add "it is likely he has depression".

7. On the next day, 19 June 2015, a staff member met Mr B at his home to inform him that he would be suspended on full pay while the matter was investigated. However, Mr B responded that, since he had committed the actions discussed at the previous day's meeting, he believed he would be dismissed and he tendered his immediate resignation.

8. On 29 March 2016, C School referred Mr B to the Disclosure & Barring Service (DBS). The reason given for the referral was that Mr B, while employed as a teacher (Head of Mathematics) at PH College, "sent inappropriate texts to an 18 year old girl/pupil".

The professional conduct proceedings

9. Mr B was also referred to the Secretary of State for Education for consideration as to whether a prohibition order should be made preventing him from carrying out teaching work in England.

10. Mr B's case was investigated on behalf of the Secretary of State by the National College for Teaching and Leadership (NCTL). The NCTL's findings of fact included:

- Mr B "admits that he was aware that [pupil A] was upset and he exchanged telephone numbers". Pupil A "stored his number under a different name so that no one knew she had his number on her telephone";

- Mr B "admits that, in May/June 2015, after a maths lesson he kissed [Pupil A] on the forehead and he hugged her";

- Mr B attempted to kiss Pupil A on her lips;

- Mr B invited Pupil A to his home to drink alcohol and play cards;

- "[Mr B] admits that he failed to take any action or any appropriate action when he became aware that [Pupil A] had taken an excessive number of painkiller tablets. He also admits that [when] he was looking after [Pupil A], after she had taken the tablets, he attempted to kiss [Pupil A] on the lips";

- Mr B admitted that his actions were sexually motivated.

11. Mr B's written representations to the NCTL included the following:

- "the female student…is also entirely blameless";

- His mood was affected after he took up his post at C School. He had separated from his partner and was far from home. His professional judgment became more and more impaired "the most serious consequences of which were the exchange of mobile telephone numbers…and my failure to disclose that she was taking tablets";

- kisses were "offered/exchanged approximately once every two weeks";

- he considered that he lacked the "crucial" skills and experience to maintain necessary boundaries, which influenced his decision to leave the teaching profession;

- he invited the pupil to his home because he was genuinely concerned for her safety. Had she come, he would have given her some water and ensured her safe return to a sixth form boarding house;

- the hug in school was a "reassuring we-can-do-this-together type of hug" at the end of a meeting attended by the 'host parent';

- "I am guilty of all the allegations that have been made against me".

12. The NCTL determined that the allegations proven against Mr B amounted to unacceptable professional conduct. The NCTL recommended a prohibition order without any provision for review. Such an order was subsequently made by the Secretary of State for Education.

Legal framework

The right of appeal to the Upper Tribunal

13. Section 4(1)(b) of the Safeguarding Vulnerable Groups Act 2006 ("2006 Act") provides for a right of appeal to the Upper Tribunal against a decision of the DBS to include a person in the children's barred list (the list of persons barred from working with children).

14. The right of appeal is circumscribed. Section 4(2) of the 2006 Act provides:

> "An appeal...may be made only on the grounds that DBS has made a mistake-
>
> (a) on any point of law;
>
> (b) in any finding of fact which it has made and on which the decision to include a person in the children's barred list was based."

15. A further limitation on the right of appeal is provided for by section 4(3) of the 2006 Act:

> "For the purposes of subsection (2), 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."

16. In *Khakh v Independent Safeguarding Authority* [2013] EWCA Civ 1341, the Court of Appeal held:

> "18…A point of law…includes a challenge on *Wednesbury* grounds and a human rights challenge. But it will not otherwise entitle an applicant to challenge the balancing exercise conducted by the ISA [*now DBS*] when determining whether or not it is appropriate to keep someone on the list. In my view that is plain from traditional principles of administrative law but in any event it is put beyond doubt by section 4(3) which states in terms that the decision whether or not it is appropriate to retain someone on a barred list is not a question of law or fact. It follows that an allegation of unreasonableness has to be a *Wednesbury* rationality challenge i.e. that the decision is perverse."

17. Despite the exclusion of 'appropriateness' from the Upper Tribunal's appellate jurisdiction, it is "empowered to determine proportionality" (*B v Independent Safeguarding Authority* [2012] EWCA Civ 977; [2013] 1 WLR 308).

18. If the Upper Tribunal finds that DBS made a mistake of law or fact, as described in section 4(2), section 4(6) requires the Upper Tribunal to either:

(a) direct DBS to remove the person from the list, or

(b) remit the matter to DBS for a new decision.

Regulated activity relating to children

19. Section 7(1) of the 2006 Act provides that an individual commits an offence if he-

(a) seeks to engage in regulated activity from which he is barred;

(b) offers to engage in regulated activity from which he is barred; or

(c) engages in regulated activity from which he is barred.

20. The meaning of regulated activity relating to children is provided for by Part 1 of Schedule 4 to the 2006 Act. Any form of "teaching, training or instruction of children" is a regulated activity relating to children if it is carried out frequently by the same person (Schedule 4, paragraphs 1(1) and 2(1)). As we note below, this description is wider than the "teaching work" to which a prohibition order relates.

The DBS decision-making process

21. Schedule 3(3) to the 2006 Act, sub-paragraphs (1) & (2), requires DBS to provide a person with the opportunity to make representations as to why he should not be included in the children's barred list if:

(a) it appears to DBS that the person has at any time engaged in relevant conduct;

(b) it appears to DBS that the person is, has been, or might be engaged in regulated activity relating to children; and

(c) DBS propose to include the person in the children's barred list.

22. "Relevant conduct" is defined by Schedule 3(4)(1) to the 2006 Act. It includes "conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger [the child]". This conduct (the conduct which may be repeated) must, of necessity, be conduct in relation to a person who is not a child.

23. A person's conduct endangers a child if, amongst other things, it harms a child or puts a child at risk of harm (Schedule 3(4)(2) to the 2006 Act).

24. After the representations stage, DBS is required to include the person in the children's barred list if:

(a) DBS is satisfied that the person has engaged in relevant conduct; and

(b) DBS has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children; and

(c) DBS it is satisfied that it is appropriate to include the person in the list. (Schedule 3(4)(3) to the 2006 Act.)

Findings of fact made by competent bodies

25 The opportunity to make representations before DBS' final barring decision "does not include the opportunity to make representations that findings of fact made by a competent body were wrongly made" (Schedule 3(16)(3) to the 2006 Act). This includes "findings of fact made in proceedings before the Secretary of State in the exercise of the Secretary of State's functions under section 141B of the Education Act 2002" (Schedule 3(16)(4)). This includes proceedings before the NCTL conducted for the purposes of the Secretary of State for Education's prohibition order functions.

Prohibition orders under the Education Act 2002

26. Following the NCTL's findings, the Secretary of State for Education made a prohibition order in respect of Mr B under section 141B of the Education Act 2002. Such orders prohibit a person from carrying out teaching work in England in various

types of educational institution including schools and sixth form colleges (sections 141A(1) and 141B(4)).

27. The Secretary of State's arrangements for discharging her prohibition order functions were recently described by the High Court. In *Lone v Secretary of State for Education* [2019] EWHC 531 (Admin) William Davis J said:

> "7. Operation of this [prohibition order] statutory scheme is conducted by an agency within the Department for Education. Initially the agency was the Teaching Agency. Between April 2013 and March 2018 the agency was known as the National College for Teaching and Leadership. Since 1 April 2018 that role has been taken on by the Teaching Regulation Agency ("TRA")... Whatever the title each agency was in reality the same thing, a department or section of the Department for Education. Those who worked in the agency were civil servants employed by the Department.
>
> 8. The TRA employs caseworkers. When a case is referred to the TRA a caseworker will consider the allegations made. He or she will decide whether, if proved, they might amount to unacceptable professional conduct or conduct that might bring the teaching profession into disrepute. If that threshold is met, the TRA will investigate the allegations...
>
> 9. Once the investigation process is complete a TRA caseworker will assess the material provided and decide whether a hearing is required... Where a hearing is required an independent panel will be appointed from the list of approved panel members. The appointment process for panel members ensures their independence. A panel will consist of three members, one of whom has to be a teacher and another of whom must be a lay representative. The TRA will appoint an external lawyer to act as legal adviser to the panel. Another external lawyer will act as presenting officer. That lawyer's task is to present the evidence gathered in the course of the investigation, to cross-examine any witness called by the teacher and to make submissions on the issues of conduct.
>
> 10. The panel then reaches a decision on the facts and provides its written reasons together with its recommendation as to sanction. It is on the basis of that document alone that the Secretary of State makes his decision on sanction. In no case will the Secretary of State see any of the evidence or other core material considered by the panel. The Secretary of State himself does not make the

decision. A duly authorised civil servant takes the decision. In law that will be the decision of the Secretary of State: *Carltona v Commissioners of Works* [1943] 2 All ER 560...".

28. For prohibition order purposes, "teaching work" is defined by regulation 3(1) of the Teachers' Disciplinary (England) Regulations 2002:

> "...each of the following activities is teaching work for the purposes of these Regulations—
>
> (a) planning and preparing lessons and courses for pupils;
> (b) delivering lessons to pupils;
> (c) assessing the development, progress and attainment of pupils; and
> (d) reporting on the development, progress and attainment of pupils."

29. We did not hear submissions on whether a section 141B prohibition order would have the effect of preventing a person from doing teaching work in parts of the United Kingdom other than England. Given Mr B's family ties, it is conceivable he might wish to pursue teaching or private tuition work in a part of the UK other than England.

30. The list of persons of persons prohibited from teaching, maintained by the Secretary of State under section 141C of the 2002 Act, may include the name of any person who has been prohibited from teaching in Wales, Scotland or Northern Ireland (section 141C(2)). If the education legislation in other parts of the United Kingdom makes reciprocal provision, Mr B's prohibition order may prevent him from doing teaching work there as well. At the hearing of this appeal, counsel for DBS was uncertain whether Mr B's prohibition order restricted his ability to do teaching work in other parts of the UK. Whatever the effect of prohibition orders in different parts of the UK, it is clear that, in England, such an order would not prevent a person from carrying out private tuition since that is not teaching work carried out in an institution referred to in section 141A.

DBS' decision

DBS' 'minded to bar' letter

31. DBS' letter set out the following provisional findings of fact, stated to have been made on a balance of probabilities:

- Mr B exchanged text messages of a sexual nature with Pupil A;

- Mr B hugged and kissed Pupil A, invited her out for a meal and, on more than one occasions, invited her his home;

- Mr B failed to report safeguarding concerns regarding Pupil A's misuse of alcohol and pills;

- Mr B supplied Pupil A with alcohol.

32. DBS' letter went on:

> "it...appears to us that you have engaged in relevant conduct in relation to children, specifically conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him or her."

33. DBS informed Mr B that, in their view, it might be appropriate to include him in the children's barred list "because we have significant concerns about the risk that you may pose to children in the future". The letter went on to explain why the DBS had those concerns:

> "you initiated a relationship with a vulnerable, isolated 18 year old pupil, who was in your care as her teacher. Once you established this relationship you quickly turned your contact messages sexual, seeking to form a relationship with her to meet your own emotional and sexual needs. Your contact with her was manipulative, given you knew she was depressed and abusing drugs and alcohol. You failed in your duty to report these serious safeguarding concerns. We have concerns that you have a sexual interest in teenage girls, which coupled with your exploitative and manipulative behaviour indicates that you pose a future risk of sexual and emotional harm to children in your care."

Mr B's representations

34. Mr B's detailed written representations began by informing DBS that he had "passed conduct of this case to my solicitor", to whom future correspondence should be sent. In summary, Mr B argued:

- his inclusion in the children's barred list was disproportionate and inappropriate because the case concerned his conduct with an adult, not a child. Mr B asked DBS to explain the statement in the 'minded to' letter that he had engaged in relevant conduct in relation to children;

- in the 2 years and 3 months since he resigned his teaching post, Mr B had not sought employment with any school or college nor did he ever intend to do so. The same applied to other forms of regulated activity relating to children;

- he did not have a sexual interest in teenage girls, which he took to mean aged under 18;

- there was no evidence to indicate that he posed a future risk of sexual and emotional harm to children in his care;

- Pupil A was neither vulnerable nor isolated. She lived in a dedicated sixth-form boarding house with a number of other female students and a resident housemistress. Pupil A had numerous individuals to whom she could turn if she had any concerns. She also came from a wealthy, privileged background and she was not vulnerable due to English not being her mother tongue, her spoken English was immaculate;

- before the NCTL, Mr B was not required to answer any allegation described using the word 'drugs'. The 'drugs' in question were off-the-shelf medication. He suspected 'drugs' was mentioned in an attempt to prejudice him in the mind of any reader of the 'minded to' letter;

- before the NCTL, Mr B was not required to answer the allegation that he supplied Pupil A with alcohol;

- no one involved with Pupil A ever had concerns that she was abusing drugs or alcohol in any way, nor that she was depressed;

- the DBS had not explained why actions in relation to an adult showed that he posed a future risk to children;

- the DBS had no evidence to support their assertion that he was exploitative and manipulative;

- he was guilty of a one-off error of professional judgement that would never be repeated. It was brought about partly by his failure to adapt to a change of personal circumstances and other family concerns that he was unable to address because his family lived 200 miles away.

35. Mr B's representations also included arguments about the applicable legislation. He submitted that there could be no relevant conduct in his case because it involved conduct towards an adult. The representations went on to address Schedule 3(3) to the 2006 Act, in particular the provision which refers to conduct which, if repeated in relation to a child, would be likely to cause harm etc. He argued that Schedule 3(4) made it clear that relevant conduct for the purposes of Schedule 3(3) must be in relation to a child.

36. Mr B also sought confirmation whether DBS relied on Schedule 3(5) to the 2006 Act (risk of harm).

37. Finally, Mr B "admitted full culpability for my conduct at [C School]" and unreservedly apologised for his "unacceptable behaviour" and failing to follow safeguarding procedures and inform colleagues of his concerns for Pupil A. Since these events, he was becoming a new person, had established a successful private tutoring practice, started a degree course and ghost-written a biography. His tutoring practice had never received negative on-line feedback but he would have to close it down if included in the children's barred list.

DBS' decision

38. DBS's final decision relied on more detailed reasoning than had its 'minded to' decision. The additional reasons were:

- Mr B repeatedly attempted to progress to a sexual relationship, despite Pupil A's rejections;

- ‘prescription drugs’ was referred to instead of ‘drugs’;

- Mr B ignored the emotional impact of his behaviour on Pupil A. He manipulated her to such an extent that she believed herself responsible for his ‘pain’;

- Mr B’s representations failed to articulate any insight into the significant emotional distress he caused Pupil A. Of particular concern was his attempt to minimise her emotional distress, claiming she was not depressed only unhappy and comparing her depressive state to his own after he resigned his teaching post;

- DBS acknowledged that this was an isolated incident, which had a significant personal impact on Mr B. However, the severity of the incident and the lack of insight shown indicated that he posed a future risk of sexual and emotional harm to teenage female children;

- while barring would limit Mr B’s career prospects, the risk he posed of sexual and emotional exploitation meant barring was an appropriate and proportionate safeguarding measure.

The grounds of appeal

39. The Upper Tribunal granted Mr B permission to appeal against DBS’ decision on the following grounds;

> (a) If the National College’s activities involved the exercise of the Secretary of State’s functions under section 141B of the Education Act 2002, it may have resulted in a prohibition order under section 141B(2)… Arguably, the existence of a prohibition order was a relevant matter that should have been taken into account. If Mr B had already been prohibited from teaching, that may have raised questions as to whether it was really appropriate to include him on the barred list and call for further enquiry into the likelihood of him seeking to engage in some form of regulated activity that did not involve teaching;

(b) On the assumption that Mr B was included in the children's barred list on the 'risk of harm' statutory ground, arguably DBS gave inadequate reasons for their decision since he had not in fact harmed a child The DBS decision letter made a finding that Mr B may pose "a risk" to teenage female children but did not calibrate the degree of risk. Was it in DBS's view a high risk? Or was it a medium or low risk? Arguably, by failing to calibrate the degree of risk posed, the DBS did not give adequate reasons for their determination that it was appropriate to include Mr B on the children's barred list;

(c) One of the considerations relied on by DBS was that Mr B "failed to report serious safeguarding concerns" in relation to Pupil A. Pupil A was an adult. For that reason, it was arguable unclear why Mr B was thought to be under a duty to report what is described as Pupil A's abuse of "prescription drugs and alcohol". Arguably, DBS erred in law by taking an irrelevant consideration into account or failed to give adequate reasons why they took into account a failure to raise 'safeguarding concerns' about an adult's use of prescription drugs and alcohol;

(d) The DBS decision letter referred to the National College's findings of fact but some of them were very vaguely expressed. Did the NCTL really make no findings about the "number of tablets", the content of text message and the inappropriate words spoken. DBS may have erred in law by failing to take into account the National College's full findings of fact;

(e) DBS's letter inviting Mr B to make representations indicated they were minded to include him on the children's list on the basis that he had harmed (engaged in relevant conduct with) a child when he had not. Arguably, the representations procedure was operated unfairly because, at this point, DBS misunderstood the nature of their powers and in consequence did not give Mr B the opportunity to make properly informed representations. It is true that the representations letter also gave DBS's provisional view that Mr B posed a risk of future harm but, reading the representations letter as a whole, it arguably implied that, if Mr B could show he had not harmed a child, DBS would not place him on the barred list. Mr B's representations stated they were written on the understanding that DBS were not minded to make a decision under Schedule 3(5) and he went on to

request that, if a Schedule 3(5) decision was contemplated he be given the opportunity to "make detailed representations";

(f) Arguably the DBS failed to give adequate reasons for their finding that Mr B "failed to articulate any insight into the significant emotional distress [he] caused to [Pupil A]". Why did the finding that Mr B suggested to Pupil A that she was unhappy rather than depressed demonstrate a failure to recognise significant emotional distress. The other reason for this finding is that Mr B compared Pupil A's condition to his own depressive state following the loss of his teaching post. Additionally, Mr B's representations dealt with his remorse in some detail. Arguably, DBS's decision gave inadequate reasons for rejecting these representations

The arguments on this appeal

Mr B

40. Mr B's submissions were not structured according to the grounds on which permission to appeal was granted:

(a) he now accepts that the 2006 Act does provide for the inclusion in the children's barred list of a person who has not engaged in relevant conduct in relation to children. It seems to us, however, that his solicitor, at the DBS representations stage, did appreciate that a person could be barred from working with children on the basis of conduct in relation to adults. We deal with this below;

(b) DBS maintained that he did engage in relevant conduct in relation to a child although, in their skeleton argument for the hearing of this appeal, this changed to 'relevant conduct which, if repeated in relation to a child, would endanger that child or would be likely to'. This 'discrepancy' renders DBS' overall analysis null and void;

(c) a list of agreed facts produced by DBS referred to no evidence that he had engaged in relevant conduct in relation to children and so should be rejected 'for the purpose of these proceedings';

(d) DBS' decision relied on his lack of insight. If this was so important, emphasised Mr B at the hearing, it should have been mentioned in DBS' 'minded to bar' letter; he

was not a ‘mind-reader’. Insofar as it was argued that ‘insight’ should have been fresh in his mind, the Upper Tribunal should take into account that it took DBS eight months to issue their minded to bar letter, which was itself 16 months after the relevant incidents. But, in any event, his written representations included “I would like here to offer her a complete and unreserved apology for all of the distress my odious actions created. Throughout what follows, please be aware that the confusion and anguish I have caused her is at the forefront of my mind”;

(e) he had “developed appropriate insight” and his only mistake was failing to write that down;

(f) if he did pose a risk to children, surely that would have become manifest during the significant period of time he spent providing private tuition in the period between his resignation from C School and inclusion in the children’s barred list;

(g) DBS did not know about his private tutoring work when he was placed on the children’s barred list so their reasons could not have included any intention to prevent him from doing such work;

(h) Mr B disputes that most of his arguments go to whether it was appropriate to include him in the children’s barred list although he does not identify those which are about matters other than appropriateness. Mr B also argues that, if expressions of appropriateness are not acceptable to DBS, why were testimonials sought in their minded to bar letter?

(i) DBS mistakenly describe Pupil A as vulnerable and isolated. She was, in fact, “surrounded by a support network so stifling that it would have made any feelings of vulnerability and isolation a virtual impossibility for any pupil boarding there”. And she was not ‘pining for her family and homeland’ having lived in the UK for four years. At the hearing Mr B asked why, if pupil A was abusing alcohol and drugs, no one within her support network noticed? We had difficulty linking these arguments to the grounds of appeal in this case;

(j) in the light of Mr B’s prohibition order, barring him from working with children was unnecessary. But he also expressed the view that the prohibition order would have little effect on him since he intended to live in Wales for the foreseeable future;

(k) the ‘conduct if repeated in relation to a child’ barring ground gives DBS an unacceptable amount of latitude. It should not be applied without a calibration of the risk posed by an individual towards children;

(l) had he been made properly aware of the basis for DBS’ proposal to bar him, he would have made very different representations;

(m) DBS now argue that that they were not required to calibrate risk. However, their final decision letter clearly stated that, in their view, he posed a future risk of sexual and emotional harm;

(n) it was for DBS to demonstrate to the Upper Tribunal that they dealt with his case thoroughly, consistently and fairly. If they could not do so, the Upper Tribunal should reverse DBS’ decision;

41. We note that some of Mr B’s arguments go beyond the grounds on which permission to appeal was granted, such as those relating to the question whether Pupil A was in fact isolated or vulnerable and his contention that DBS pre-determined his case once they realised they could not include him on the list of persons prohibited from working with vulnerable adults. He also submits that, at no point, has he tried to justify, or impede any investigation into, his conduct.

DBS’ arguments

42. DBS emphasise that the 2006 Act prevent an appellant from challenging the appropriateness of a decision to include a person in a barred list, although they accept that a mistake of law includes a disproportionate barring decision (*Khakh v ISA* [2013] EWCA Civ 1341).

Ground (a)

43. As was shown by the DBS Barring Decision Making Process (BDMP) document, provided after Mr B was granted permission to appeal, DBS did take into account the restrictions to which he was already subject by virtue of a section 141B Education Act 2002 prohibition order. And DBS also took into account that the prohibition order would not prevent Mr B from providing private tuition.

Ground (b)

44. Since Mr B was not included in the children's barred list under the 'risk of harm' route, the 2006 Act did not require DBS to calibrate the risks posed by Mr B.

45. DBS were under no express statutory duty to give reasons for their decision. However, they concede that they had a common law duty to give reasons as described in *Khakh*:

> "23…the ISA [now DBS] must give sufficient reasons properly to enable the individual to pursue the right of appeal. This means that it must notify the barred person of the basic findings of fact on which its decision is based, and a short recitation of the reasons why it chose to maintain the person on the list notwithstanding the representations. But the ISA is not a court of law. It does not have to engage with every issue raised by the applicant. It is enough that intelligible reasons are stated sufficient to enable the applicant to know why his representations were to no avail".

46. However, that duty did not extend in a case such as this to explaining how DBS calibrated the risk posed by Mr B "in relation to appropriateness". That would subvert Parliament's intention in excluding questions of appropriateness from the right of appeal against a DBS barring decision. But, in any event, the BDMP document demonstrated an assessment of risk as a result of which DBS decided it was appropriate and proportionate to include Mr B in the children's barred list.

Ground (c)

47. Even though Pupil A was an adult at the relevant time, DBS were entitled to take into account Mr B's failure to report her use of prescription drugs and alcohol. Mr B was in a position of trust yet his responses to Pupil A's disclosures included that, when she said she did not want to "get that ill high again", his response was "it does not matter to me whether you are high or not" and an offer to supply her with cider.

48. Mr B's responses were a breach of the teaching standards but, even if not, Mr B's conduct in this respect was a matter that DBS were entitled to take into account. Pupil A was vulnerable, living away from her home country and family in a boarding school environment, and said she felt both depressed and suicidal. Mr B was also aware that her drug use was "in relation to his obsessive pursuit of her" as shown by

Mr B's view that Pupil A's mother knew "her maths teacher was in love with her and that's why [she] was taking pills". Finally, Pupil A's excessive use of alcohol and pills was likely to have taken place on the school site and the school owed her a duty of care.

Ground (d)

49. Even though the NCTL findings did not specify the number of pills taken by Pupil A, it was not unlawful for DBS to reflect the NCTL's findings about pill use in its own decision since they found that she took enough pills to be "ill high".

Ground (e)

50. DBS do not accept that their 'minded to bar' letter was materially unclear concerning the basis for their proposed decision. It was quite clear that their proposal to bar was based on conduct in relation to an adult. Mr B could not properly argue that he thought that, if he could show he had not harmed a child, he would not be placed on the list. The 'minded to bar' letter also referred expressly to 'conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him or her'. While Mr B's representations focussed on whether he had committed relevant conduct in relation to a child, it was clear why DBS proposed to include him in the barred list. It was on the basis that, if the conduct in question were repeated in relation to a child, it would be likely to cause the child harm.

Ground (f)

51. DBS' final decision letter explained its finding that Mr B lacked insight into Pupil A's emotional distress. Its reasons were elaborated in the BDMP document: his representations sought to minimise his role, did not articulate any insight into the significant emotional distress he caused and sought to focus on the impact on himself. For example, Mr B asserted that Pupil A was simply 'unhappy' which he compared with his own post-resignation knowledge or experience of depression. These features of the case illustrated the risk that Mr B would repeat this type of behaviour if placed in a similar position of trust and power.

52. Absent irrationality, the weight given to any particular factor is not something that can be appealed (*Khakh*). Mr B's perceived lack of emotional insight was a factor put in the balance when DBS considered the appropriateness of barring. Given all the

relevant factors set out by DBS, their reliance on their finding that Mr B lacked emotional insight was plainly rational. DBS draw particular attention to Pupil A having informed Mr B that she felt suicidal and her frequent apologies for having let him down. They also rely on Mr B having made representations that maintained that Pupil A was not depressed and, rather than being vulnerable and isolated, she came from a privileged background.

53. Both parties also made submissions about how the Upper Tribunal should dispose of the appeal, should it succeed. Since the appeal does not succeed, we need not deal with these arguments.

Conclusions

Ground (a)

54. We are satisfied that the NCTL's findings of fact were made in proceedings for the purposes of the exercise of the Secretary of State's functions under section 141B of the Education Act 2002. Therefore, the NCTL's findings of fact were findings of a competent body for the purposes of Schedule 3(16)(3) to the 2006 Act. The right to make representations to DBS against a proposed barring decision do not extend to representations that findings of a competent body were wrongly made. It follows that, for present purposes, DBS did not err if they refused to consider any representation criticising findings of fact made by the NCTL.

55. The actual ground of appeal is whether the DBS erred in law by failing to take into account a prohibition order imposed by the Secretary of State under section 141B of the Education Act 2002. DBS' decision letter did not refer to a prohibition order but this ground is not so much concerned with the adequacy of the reasons given for DBS' decision than the matters which were or were not taken into account. It is now clear that Mr B's prohibition order was taken into account by the DBS when they took their decision.

56. The BDMP document, within a section headed 'MTB [*minded to bar*] Appropriateness & Proportionality', includes "a bar on the Children's list will limit his career options, albeit he has already been barred from teaching" and "a bar on the Children's list may also affect Mr [B's] personal well-being given he has attempted to move on with his life in the intervening two years".

57. The BDMP's reference to Mr B's attempts to move on with his life must be read, in relation to his working life, as a reference to the steps he took to establish a private tutoring business. We are satisfied that such work falls outside the ambit of a prohibition order since it does not involve teaching work in one of the various types of educational institution referred to in section 141A of the Education Act 2002. We are further satisfied that the DBS were aware that Mr B's prohibition order would not prevent him from providing private tutoring services. This must be why the BDMP document acknowledged that including Mr B in the children's barred list would have an adverse attempt on the attempts he had made to 'move on with his life'.

58. To conclude, we decide that the DBS took into account Mr B's prohibition order and the relevant scope of the activities to which it did, and did not, relate. This ground does not succeed.

Ground (b)

59. In the light of DBS' submissions and the material disclosed after the Upper Tribunal granted Mr B permission to appeal, we are satisfied that Mr B was not in fact included in the Children's barred list under the 'risk of harm' ground. It follows that this ground cannot succeed.

Ground (c)

60. The issue here is whether DBS erred in law by taking into account an irrelevant consideration namely their finding that Mr B failed to report serious safeguarding concerns or, alternatively, gave inadequate reasons for making such a finding.

61. We note that, before the NCTL, Mr B accepted that his actions amounted to unacceptable professional conduct (p.4 of the NCTL's outcome decision, at p. 372 of the Upper Tribunal bundle). The NCTL also made the following findings:

- "it was more likely than not that [C School] had policies in place, at the relevant time, which would have indicated that [Mr B's] behaviour towards Pupil A was inappropriate". This finding related to Allegation 1 which included "failed to take any action or any appropriate action when Pupil A took a number of tablets";

- Mr B's conduct "involved breaches of the Teachers' Standards". The Standards cited by the NCTL included: "Teachers uphold public trust in the profession and maintain high standards of ethics and behaviour, within and outside school, by…having regard to the need to safeguard pupils' well-being";

- Amongst Mr B's acts that fell significantly below the standards expected of 'the profession' were "failing to act appropriately when [Pupil A] had apparently taken a significant amount of medication".

62. In the light of the NCTL findings, we are satisfied that, if Mr B knew that Pupil A was misusing medication, he had a professional obligation to report that to an appropriate person or body. It follows that the DBS did not err in law by taking into account an irrelevant consideration. Since Mr B had an obligation to report this type of safeguarding concern, DBS' finding that he failed to do so was a relevant consideration.

63. We accept that DBS' decision letter did not, in terms, identify the obligation to report safeguarding concerns that they considered breached by Mr B. We do not, however, accept that this amounted to a failure by DBS to give adequate reasons for their decision. Mr B knew the basis for the NCTL's findings of fact and its recommendation to the Secretary of State for Education. He must therefore have known what lay behind DBS' finding that he failed to report safeguarding concerns that he should have reported.

64. We agree with Mr B that the NCTL did not make a finding that he knew Pupil A was abusing alcohol yet failed to report this as a safeguarding concern. But the DBS' fact-finding was not constrained by the NCTL's findings. While Mr B had no right to make representations criticising the NCTL's findings of fact, DBS were permitted to make and rely on further findings of fact. We are satisfied that, if Mr B was under a professional obligation to report misuse of regular medication, he would also have been under an obligation to report a pupil's misuse of alcohol, even if aged 18, to the extent that such use raised safeguarding concerns.

65. In our judgement, however, the evidence did not disclose problematic use of alcohol by Pupil A that is use of alcohol giving rise to safeguarding concerns. The evidence about Pupil A's use of alcohol may be contrasted with the evidence about her use of medication (see below). The text messages in relation to alcohol included

Pupil A's requests for Mr B to supply her with cider and that she intended to get 'hell drunk' on the weekend. In our judgement, taking into account our own knowledge of young people, these text messages did not disclose a genuine safeguarding concern that Pupil A was putting her health at risk by misusing alcohol. The same applies, in our judgement, in relation to Pupil A's four 2015 text messages in which she informed Mr B, on separate days, that she was drunk. The fact than an 18 year old is drunk is not, in itself, a safeguarding concern.

66. In relation to medication, the text messages included:

- Pupil A: "I am so high...very sorry Shouldn't tell you that really...You should go to bed […]". Mr B's response included "It doesn't matter to me whether you're high or not because you're still the woman I think the world of";

- Pupil A: "I never used to take pills before. It's just lately I feel very depressed and I find the pills helpful even though I know it's doesn't solve anything...Thank you for your support, this means a lot to me!". Mr B's response included "I'll always, always be there for you, you are an absolutely fabulous and beautiful woman who is being thought of constantly", which, we note, did not express concern or give guidance about what appears to us to have been a disclosure that Pupil A was using medication in a risky manner;

- Pupil A wrote "I took pills". Mr B's response did not deal with 'pills'. Instead, he made it clear that Pupil A was welcome to come over to his place;

- Mr B sent a text message in which he described alcohol as 'much-needed medicine'. Pupil A wrote "My medicine can 16 Paramol pills, and you cannot move, cannot think, cannot feel happiness of pain […] you have alcohol, I have pills…". Mr B's response did not express any concern or give any guidance about the risks of an excessive intake of Paramol;

- There was a text message exchange in which Mr B, in response to Pupil A's disclosure that she had a panic attack, asked whether it was a side-effect of her pills. But he did not counsel against taking pills, only recommending that Pupil A have plenty of rest.

67. The DBS could not rely on any NCTL findings in relation to Pupil A's alcohol misuse since the NCTL findings concerned use of 'pills' rather than alcohol. In our

judgment, the DBS mistakenly found that Mr B failed to report safeguarding concerns concerning Pupil A's use of alcohol. Pupil A's use of alcohol, unlike her use of medication, could not reasonably be considered a safeguarding concern. The evidence did not indicate that Pupil A was relying on alcohol to function day-to-day or placing herself in risky situations when drinking. However, this does not necessarily justify allowing this appeal. By virtue of section 4(6) of the 2006 Act, when read with section 4(2), the Upper Tribunal may only allow an appeal due to a mistake in a DBS finding of fact if the finding was one on which the barring decision was based.

68. We decide that DBS' decision to include Mr B in the children's barred list was not, in substance, based on its finding that he failed to report safeguarding concerns about Pupil A's misuse of alcohol. We accept that the BDMP document refers to the alcohol issue in a number of places. Nevertheless, we are satisfied that DBS would have made exactly the same decision had they ignored the evidence about Pupil A's use of alcohol and Mr B's response to it, especially given their legitimate reliance on a proper finding that he failed to report safeguarding concerns regarding misuse of medication. In those circumstances, DBS' decision to include Mr B in the children's barred list cannot be said to have been based on its finding that he failed to report safeguarding concerns about Pupil A's use of alcohol.

69. For the above reasons, this ground does not succeed.

Ground (d)

70. Now that the full NCTL outcome document and the BDMP document are before the Upper Tribunal, we are satisfied that the DBS did not fail to take into account the full range of findings of fact made by NCTL. The matters referred to in the Upper Tribunal's grant of permission to appeal – numbers of pills and wording of text messages – were the subject of more detailed NCTL findings than the general description given in DBS' barring decision letter. This is not surprising since it is now clear to us that the NCTL must have been supplied with some if not all of the text messages between Mr B and Pupil A, much of the contents of which we set out in various parts of these reasons. This ground of appeal does not succeed.

Ground (e)

71. Mr B was not in fact included in the children's barred list on the 'risk of harm' ground. Mr B now accepts this. He was included in the list on the ground that he had

engaged in relevant conduct involving "conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger [the child]" (Schedule 3(4)(1) to the 2006 Act).

72. We do not think that DBS' 'minded-to' letter can properly be described as a model of clarity. The letter included the following passages:

(a) "This [i.e. certain specified acts in relation to Pupil A] falls within the law's definition of relevant conduct. It therefore appears to us that you have engaged in relevant conduct in relation to children, specifically conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger that child or would be likely to endanger him or her";

(b) "…you initiated a relationship with a vulnerable, isolated 18 year old pupil, who was in your care as her teacher";

(c) "we have concerns that you have a sexual interest in teenage girls, which coupled with your exploitative and manipulative behaviour indicates that you post a future risk of sexual and emotional harm to children in your care".

73. Wording (a) was ambiguous. It asserted that Mr B had engaged both in conduct in relation to children and, if he repeated that conduct in relation to a child, it would be likely to endanger the child. The first assertion infers conduct in relation to a child so that it made no sense then to refer to the consequences if that conduct were then repeated in relation to a child, since that infers that the conduct was not originally done in relation to a child. However, when the letter turned to deal with the particular circumstances of Mr B's case, the gist was in our view clear. Mr B had acted in a particular way towards an adult, an 18 year old girl, which suggested that he had a sexual interest in teenage girls whether or not children.

74. As suggested by the DBS' minded to bar letter, Mr B sought and obtained legal advice. He informed the DBS by letter dated 4 September 2017 that "I have passed conduct of this case to my solicitor". Mr B's solicitor supplied detailed written representations the contents of which included:

- "...the current case centres around my conduct with an individual who was <u>not</u> a child. Therefore, I respectfully request that you supply my solicitor with an

explanation of why you have used the phrase “relevant conduct in relation to children”;

- in relation to DBS’ provisional finding that Mr B posed a future risk of sexual and emotional harm to children in his care, the representations stated:

> “I cannot imagine that...DBS would make such a sensitive statement using groundless guesswork alone, nor do I think it would seek to make such a statement on the basis of my conduct with an adult, and so I must therefore conclude that you have in your possession irrefutable evidence that confirms that I have offended against children at some time(s) in the past, or have done so more recently [and the representations went on to ask DBS to disclose such evidence];

– “Why...end your appraisal by stating that you regard me to be a future risk to children? Again I would be grateful if you could supply my solicitor with an answer to this question.”;

– “I must...object to your use of these words [*this refers to the DBS’ provisional finding that Mr B was exploitative and manipulate*], like the vast majority of people, I consider it morally offensive to make such judgments about a person’s character without first making their acquaintance by, for example, picking up the telephone and speaking to them...I would be grateful if you could supply my solicitor with any evidence you have which offers incontestable evidence that my behaviour is currently “exploitative” and “manipulate””;

– “if the pupil was not a vulnerable adult [*as defined for the purposes of the 2006 Act*] there cannot be relevant conduct upon the facts of this particular case which involved a student who at the time was 18 years of age and therefore an adult and not a child, in respect of either adults or children.

– “On the basis of the above, I do not need to address any further than that which I have set out elsewhere within these representations, the issue of “relevant conduct” in relation to adults and, in particular, whether or not, even if the student was a “vulnerable adult” the findings of the National College for Teaching and Leadership would actually fulfil the definition of relevant conduct...and my position in relation to this remains fully reserved.”;

- "I note that the only legislative provision that is specifically referred to within your letter...which is specific to me is a reference to Schedule 3 paragraph 3 of SVGA [the 'conduct which if repeated in relation to a child' ground for including a person in the children's barred list]...it is this specific provision that I seek to address and in relation to this I would respectfully comment as follows:

  You have asserted in relation to me that your findings on the balance of probabilities fall within the [law's] definition of relevant conduct. With respect, I do not accept this...**It is incorrect to use accusations of conduct in relation to an adult as alleged examples of relevant conduct in relation to children**...

  ...I would respectfully point out that [Schedule 3(3)] actually states "this paragraph applies to a person if it appears to the DBS that the person has "at any time" engaged in relevant conduct". It is therefore necessary for the criteria of paragraph 3 to be satisfied for it to appear that I have engaged in relevant conduct. Paragraph 4 then provides:

  > "(1) For the purposes of paragraph 3, relevant conduct is -
  >
  > (a) conduct which endangers a child or is likely to endanger a child;
  >
  > (b) conduct which, if repeated against or in relation to a child, would endanger that child or be likely to endanger him or her".

  ...the criteria of paragraph 3 is that the person has engaged in relevant conduct. Paragraph 4 then makes it clear that this relevant conduct for the purposes of paragraph 3 must be in relation to a child. I would respectfully submit that in relation to the failure on my part to maintain appropriate professional boundaries and standards as found by the National College...(all of these I again repeat being in relation to an 18 year old student) do not in any way constitute evidence or in any way suggest that any such conduct would be repeated against or in relation to a child."

- "I would also further respectfully submit that, as I have already stated, as far as I am concerned there is no prospect of me again behaving in that manner

towards a student and there is most certainly no basis or support for any contention to the effect that I would behave in that manner towards a child.

I wholly and totally refute the abhorrent suggestion that I pose a future risk of sexual and emotional harm to children."

75. The DBS minded-to-bar letter could have been better worded regarding the proposed ground for barring Mr B from working with children. The letter departed from the statutory wording in that it began by suggesting that Mr B had done something in relation to a child when the barring ground relied on refers to conduct which 'if repeated in relation to a child' would have certain consequences. However, as we are about to explain, we are satisfied that, looked at in the round, Mr B had a fair opportunity to make properly informed representations before DBS made their barring decision.

76. The parts of the DBS minded-to letter that discussed the merits of Mr B's case made it quite clear that their proposal to bar him from working with children relied on acts done in relation to an adult, and explained why. Subsequently, Mr B's solicitor took conduct of his case and supplied written representations which addressed the question whether his conduct in relation to an adult might be repeated in relation to a child. Overall, the barring representations process was operated fairly in Mr B's case in that he knew, in substance, why the DBS were minded to bar him from working with children and was able (through his solicitor) to make coherent representations on that point.

Ground (f)

77. DBS' minded to bar letter did not in terms address Mr B's insight into the emotional distress caused to Pupil A. What the minded to bar letter did refer to was DBS' proposed finding that Mr B rapidly sought to form a relationship to meet his own emotional and sexual needs and did so manipulatively since he knew Pupil A was depressed and abusing drugs and alcohol. A factsheet sent with the letter also informed Mr B that his representations could include specialist assessments or reports from medical experts.

78. While the DBS letter did not use the term 'insight', its proposed finding was that Mr B manipulatively sought a relationship to meet his own emotional and sexual needs. It seems to us that such behaviour, if found to have taken place, could be

explained by either a lack of insight into the effects on Pupil A or worse, namely deliberate exploitation regardless of the consequences for Pupil A. The word 'insight' was not in our view necessary to ensure that Mr B could make informed representations against DBS' proposed decision.

79. Mr B's written representations included:

- assertions that Pupil A was not in fact vulnerable and isolated given the boarding pupil support arrangements at the school, her privileged background and was as proficient in the English language as a native speaker;

- no one within the school's support network raised concerns that Pupil A was abusing 'drugs and alcohol';

- in response to the suggestion that Pupil A was depressed, while she was known to be 'generally unhappy' at the school "in my view and by thinking back to my own state of well-being during the months after my resignation, I can regrettably confirm that there is a world of difference between describing someone as unhappy and describing them as 'depressed'". Mr B objected to DBS' suggestion that Pupil A was depressed;

- Mr B refuted DBS' suggestion that he was, at the time of their letter, exploitative and manipulative. It seems to us that Mr B objected to the indication that he had these personality traits;

- He wished to "unreservedly apologise once again for my conduct…most particularly [to] the student at the centre of this case" and the headmistress" and "my remorse and guilt for my unacceptable behaviour and also for my failure to follow safeguarding procedures and inform [the school] of my concerns regarding the student in question have never diminished and, through the bitterest of regret for my actions, I think about what happened…each day without fail";

- he was guilty of a one-off error of judgement that would never be repeated. The error did not reflect his general behaviour and was partly brought about by his failure to adapt to a change in his personal circumstances and other family concerns which, having relocated 200 miles from his former home, he was unable to address;

- he co-operated fully with the NCLT's investigation and, not wanting to prolong the process for any of the parties involved, in particular Pupil A, admitted his guilt at the outset;

- he had gone through the difficult process of re-assessing every aspect of his personality, attitude and awareness around others. He was now, or closer to becoming, the person he wanted to be;

- the representations included a detailed passage setting out the professional and emotional damage he had experienced. Mr B added that he had become a stronger and wiser person for having survived it.

80. We shall also refer to the representations that Mr B previously submitted to the NCTL:

- A "genuinely heartfelt apology to the many people I have let down with my disgraceful behaviour, and in particular Mrs [X], the headmistress of [the school]. I also apologise unreservedly to all of the other teachers, the governors, the girls and, finally, their parents";

- "the female student in question…is also entirely blameless in this situation. I would like here to offer her a complete and unreserved apology for all of the distress that my odious actions created. Throughout what follows, please be aware that the confusion and anguish that I have caused her is at the forefront of my mind";

- "I am guilty of inviting the student around to my home…given the situation that she was describing herself to be in on that particular occasion. I do remember having genuine concerns for her safety and I recall texting her to that effect. My sole intention at the time would have been to give her some water and then ensure that she returned, safely and hopefully more sober, to the sixth form boarder house";

- in relation to his decision not to seek to return to the teaching profession, Mr B wrote that he now realised "as a teacher, I was too naïve, too timid and too trusting. My classroom manner was too open and accommodating, while my armour was pitifully thin. I was, not to put too fine a point on it, a soft touch.

This, in turn, could breed susceptibility and vulnerability, and the likely impairment of professional judgement";

- "some might say that I'm now in a position to understand some of the strains that my actions put the female student under. That's fair enough, and I take that point entirely. Surely, though, with the hardest and most painful lesson of my life very safely and indelibly learned, the punishment has to end sometime".

81. DBS' final decision letter included the following passages:

"We remain of the view that you pursued an 18 year old student, exploited and manipulated her to meet your own emotional and sexual needs. You repeatedly attempted to progress your relationships with [pupil] to a sexual basis, despite her rejections. You failed to report serious safeguarding concerns in relation to [pupil] abusing prescription drugs and alcohol, evidenced by her text messages to you. In addition, you ignored the emotional impact that your behaviour was having upon [pupil], even when she pointed this out to you. You manipulated her to such an extent she believed herself responsible for your 'pain'.

Whilst your representations expressed remorse and regret for your behaviour, and provided apologies to all concerned (including [Pupil A]), you failed to articulate any insight into the significant emotional distress you caused to [Pupil A], both in the short term during the relationship and longer term in relation to her educational future and well-being. Of particular concern was your attempt to minimise the emotional distress of [Pupil A] during your relationship, refuting her assertion, evidenced by text messages, that she felt depressed and suicidal, instead claiming she was not 'depressed' only 'unhappy', and comparing this to your own depressive state since your resignation as a teacher.

We acknowledge that this was an isolated incident in your teaching career, which has had significant personal impact on your personal and financial well-being. However, the severity of the incident and your lack of insight into the impact of your behaviour on [Pupil A] indicates that you pose a risk of future risk of sexual and emotional harm to teenage female children in your care…".

82. In our view, the DBS relied on findings that Mr B lacked insight at two stages, that is during his contacts with Pupil A and subsequently when seeking to address the consequences of his actions.

83. DBS' conclusion that, while Mr B and Pupil A were in contact, he lacked insight into the effect of his behaviour was explained by DBS' reference to findings that he pursued a relationship despite initial rejections, failed to report safeguarding concerns, and ignored the emotional impact of his conduct. DBS' decision letter does not link these findings with the contemporaneous evidence (i.e. text messages) but this was not a flaw in its approach since there were hundreds of pages of text messages, which were available to both parties. The question whether this insight finding was adequately reasoned really turns on the content of the various text messages. Mr B must have known that this was the evidence relied on by the DBS in finding that, during his contact with Pupil A, he lacked insight as set out in DBS's decision.

84. We are satisfied that the text messages exchanged between Mr B and Pupil A properly supported DBS' finding that, during their contacts, he lacked insight into the consequences of his actions for Pupil A. It follows that we find that DBS's finding was adequately reasoned and properly supported by the evidence. For example:

- 11 May 2015, Mr B texted Pupil A "My apologies for trying to kiss you like that just now, I definitely didn't want to make you feel that uncomfortable and I promise it won't happen again...so, let's get cracking on FP1 tomorrow nite!". This was on the first day of recorded text messages;

- Nearly all of the text message exchanges were initiated by Mr B;

- 13 May 2015, Mr B texted pupil A: "I'm sorry to pester you [Pupil A] after all that I've said, but I promise that this will be the last text I ever send you...". It was not;

- 17 May 2015 Mr B texted Pupil A at 11.54 p.m: "I'm really hoping you're asleep but if you're struggling and you'd like some company for a little while then I'm here okay? :)";

- 19 May, at 10.12 p.m. Mr B texted asking Pupil A how her revision was going. She responded on 20 May at 1.13 a.m: "revision is killing me...Thank you so much for helping me with C2!". Mr B replied at 2.50 a.m. ending his

message with “I’m here and wide awake now though just in case you’d like some company for a while okay? :)”. Pupil A responded “Go to bed please! You really shouldn’t stay awake for me”. She sent a similar message after Mr B replied “Yes, I should stay awake for you...” and, after her next response, sent the message: “At the moment, the woman I think heaven and earth of is pushing herself to the limit to succeed, I promise I will get to sleep later but, for a little while at least, I feel I need to be there for her...”;

- During a text message exchange on 21 May, Pupil A wrote “I am so high...very sorry Shouldn’t tell you that really...You should go to bed […]”. Mr B’s response included “It doesn’t matter to me whether you’re high or not because you’re still the woman I think the world of”. Pupil A’s next message said “I never used to take pills before. It’s just lately I feel very depressed and I find the pills helpful even though I know it’s doesn’t solve anything...Thank you for your support, this means a lot to me!”. Mr B’s response included “I’ll always, always be there for you, you are an absolutely fabulous and beautiful woman who is being thought of constantly”. We note that Mr B’s response did not express concern for Pupil A’s health;

- The above text exchange continued and, after giving Pupil A further compliments, Mr B texted “:))) Hope you won’t mind a little one of these as well... x” / Pupil A: “A kiss?” / Mr B “Yep!:)”; Pupil A: “Depends where you kiss...Sorry, I took an overdose, and I cannot really think if I am being inappropriate or how to say things in a polite way So sorry!” / Mr B: “[…] You don’t have to tell me where you’d like your kiss, just close your eyes, imagine it, then open them again! :)” / Pupil A: “Do you like kissing me?”; Mr B: “Yes, I do”;

- Later during that same exchange: Mr B: :Okay, I’ll ask you something. What do you see when you look at me?”’ / Pupil A: “[…] I guess some kind of friend, maybe more, I don’t know...I trust you, I tell you things that I wouldn’t tell other people. I find it difficult to see what you are thinking off maybe because I don’t expect some stuff”, and subsequently: “Last thing I want is to break your heart. I hate it making you sad. You are honestly a very nice man with a big, loving heart!”;

- 24 May 2015, Mr B replied to message in which Pupil A expressed concern about obtaining a place at her preferred University: “[…] I promise you that

I'm going to do everything I possibly can to get you in there, I'm head of a faculty and I vow to you here and now that I will use all the influence that position gives me, I'll leave no stone unturned!";

- 2 June 2015, Mr B: "[…] Hey, don't forget to txt if you're staying up okay? No more heavy love talk from me, and that's a promise! […]";

- 2 June 2015, Pupil A "[…] when I just need to get drunk + pills : '(((Cannot deal with life : '((((" / Mr B: "[…] please don't talk like that because it hurts me even more...you are an absolutely fantastic woman, beautiful, intelligent, wonderful company, awesome personality, and a smile from heaven...you don't need cider, and you don't need pills...: '("; and subsequently "[…] I've changed my mind, I'm NOT giving up on you and I'm NOT taking no for an answer. You know what I think of you, and I'll be damned if I'm not going to fight and fight and fight to my last living breath for you!!! […] Please understand me here, I won't ever again pester you, or annoy you, or ask for hugs, or make you in any way feel uncomfortable...I'll be very very patient and I'll be very very well behaved, and I'll give myself back the hope that hurts so much because the thought of spending just one day with you is worth all of that hurt, but I'll be damned if I'm just going to walk away from you! No way! […]";

- 2 June 2015 Mr B: "[…] Right, well if you want when the end of term comes, you and I will have our own little party somewhere, a few cans, a few games of cards, and a few laughs... : -)" and "[…] if you were here now I'd want to kiss you properly, touch you gently, caress you a little too...", to which Pupil A responded "Aww you are very tipsy ;) What are you doing now?" after which the discussion turned to Pupil A's studies;

- 4 June 2015, Mr B: "Laying here as indecently as I am at the moment, and with my imaginary bottle of baby oil slowly being drained. I'm finding it very hard to think of [female staff member]"/ subsequently, Pupil A: "In what way can you imagine her and me together? :)" and "I thought you wanna give the massage to us both ;) just kidding!" / Mr B: "[…] nah, the baby oil and the massage are all yours I'm afraid! ;-)";

- 5 June 2015, Pupil A: "What would you do if I came around?" / Mr B: "I'd lay you down on my sofa, you could chill out a bit, I'd open another can if you

wanted one and I'd make you some food too..." / Pupil A: "You would get me even drunk ;) what for? […]" / Mr B: ": -) No, not more drunk, just more chilled out if you needed to be...";

- 6 June 2015: Mr B: "Hi [Pupil A], how you doing?" / Pupil A "[Mr B], I am drunk" / Mr B "…Would you like to come round here for a little while?" / Pupil A: "Where?', after which Mr B texted his address / Pupil A: "I cannot […] [staff member] will check if I am at [accommodation]";

- Some point in early June 2015, Mr B: "So wot are you thinking deeply about at the moment?" / Pupil A: "My life is a mess I want to be like I was in September. Being deeply in love with maths I enjoy my life though…Pills, alcohol, maths – best combination […]" / Mr B: "You've had a horrible few weeks with everything plus the exams, but I really want to bring that love of maths back to you somehow";

- Some point in early June 2015: Mr B: "You looked absolutely stunning in your white dress that nite, that's all I really want to remember about it!" / Pupil A: "Were you in love?" / Mr B: "Was I in love with you at that point? Well, let's put it this way…when I arrived there you were the first person I looked for and, when I left, you were the last person I looked at so, yeah, I think you could say my heart was beating for you back then!" / Later…, Pupil A: "What happens then?" / Mr B: "I make love to you until the sun comes up in the morning…" / Later, Pupil A: "I understand. What if I get pregnant?" / Mr B: "[…] You wouldn't get pregnant…I'd wear the proper protection";

- Some point in early June 2015, Mr B: "Okay, I'm going to get myself dressed and ready, but I won't leave here unless you want me to come okay? […]" / Pupil A: "I took pills" / Mr B: "I guessed it might be too risky, but I'm still dressed and ready in case you still want me to come okay? Thinking of you at the moment, thinking about you loads…" and, later, Mr B: "[…] if I'm causing any part of the pain that you're feeling, you would tell me wouldn't you?"/ . Pupil A: "No" / Mr B: "Why won't you tell me? Am I causing it? Please [Pupil A], tell me if I am to blame for it all" / Pupil A: "Forget about it" and, later, "I am high" to which Mr B responded: "That's okay, I'm right back at your side and here for you 24/7, no matter how high or low you're feeling I'll be there for you okay?";

- Later during that exchange, Mr B: “Okay, well, let me tell you what I’m doing at this very moment. I’m laying on top of my bed as it’s quite warm here tonight, wearing nothing but a T-shirt, slightly physically aroused, and texting an absolutely amazing, phenomenal, incredible lady […]” / Pupil A: “Why aren’t you wearing any pants?” / Mr B: “I never do when I’m on/in bed […] And, of course with the pants off, it gives things more fs a chance to…er…grow, shall we say?!” / pupil A: “What’s gonna grow?”; Mr B: “What I had in my hand just a few minutes ago…” / Pupil A: “So what was growing down there ;) just say it […]”; Mr B: “… would you like to massage my dick for me?” and “[…] I want you massaging my dick and no-one else…” / Pupil A: “Will you sing hymns for me?” / Mr B: “Yes, okay Well? Do we have a deal?” / Pupil A: “Deal? What do I get out of it?” / Mr B: “Okay, well, is there any part of your body that you’d like me to massage for you in return?” / Pupil A: “Nothing I cannot massage myself” / Mr B: “Okay, well, what CAN I do for you then in return […]” / pupil A: “Teach me maths” / Mr B: “Oh…is that all” / Pupil A: Yeah That’s all” / Mr B: “Okay I can take a hint” / Pupil A: “What do you mean?” and “Do you still want massage?”;

- Later in that same exchange: Mr B: “So wot are you doing this afternoon?” / Pupil A: “Can I have your cider, pls?” / Mr B: “Of course you can […] are you coming around here for it, or shall I meet you somewhere?” / Pupil A: “Can you leave it somewhere?” / Mr B: “Okay, but where would be a good place for you?” and, later, “you may just as well come here for an hour or so…” / Pupil A: “Where shall I come? Around yours?” / Mr B: “Well, you might as well [directions then given]” / Pupil A: “What are we gonna do?” / Mr B: “[…] all we’ll do is chat for an hour and have a cider okay, I’m not bothered about massages or anything like that […]” / Pupil A: “Can I, please, stay outside in the field?”;

- 9 June 2015: Pupil A: “I am moving schools most likely…” / Mr B: “I hope that isn’t because of me…” / Pupil A: “I guess there is more than one reason” / Mr B: “Well, I’ll take that as a ‘yes’, partly at least, I must say sorry of course but it’s with a broken heart…” / Later, Pupil A: “I hope you aren’t too upset” / Mr B: “I am very upset at the moment…” / Pupil A: “I am so sorry Is there anything I can do?”;

- 9 June 2015, after a discussion about feeling down in which Mr B refers to alcohol as ‘much-needed medicine’: Pupil A: “My medicine can 16 Paramol

pills, and you cannot move, cannot think, cannot feel happiness of pain […] you have alcohol, I have pills…" / Later, Pupil A: "I gonna get high";

- 10 June 2015: Pupil A: "I am high…I had something similar to panic attack, cannot explain it, as I have never had it before […]" / Mr B: "You need plenty pf rest tonite by the sounds of it […] Is this all a possible side-effect of your pills?" / Pupil A: "Might be…But I didn't take any since Sunday";

- The last day of text messaging (unspecified date): Pupil A: I'm drunk right now Wanna know something Sorry…" / Mr B: "What do you want to know [pupil A]?" / Pupil A: "Would you pay a nullin to have sex with meh? Million I meant Sorrrrry [Mr B]" / Mr B: "Yes, I would pay a million, one night in bed with you would be worth every single last penny of that million…" / Pupil A: "I am so drunk No jokes" / Mr B: "[…], when you get your taxi back, if you want the driver to drop you round here then you'd be more than welcome okay? You could just chill for an hour or so before your take away […]" / Pupil A: "Everything starts with a chill ;) ha if you know what ama talking about" / Mr B: "[…] if you came round here then you could just relax, we'd chat, and then you'll be ready for dinner with [another] I think too much of you to trick you into coming here for anything else, and that's a promise you can trust okay?" / Pupil A: "All men want sex without a expansion I don't blame you though" and, later, "would you have sexy with me if I asked (I won't ask thoug) ??" / Mr B: "Yes, I would sex with you if you asked, but ONLY if you asked…" / Pupil A: "Sex is nice isn't it?" / Mr B: "[Pupil A], it's wonderful!! I love it too" / Pupil A:: "Haha I know you thinking of it ;))))".

85. As we have said, the first reason for DBS' lack of insight finding, concerning the period during which Mr B and Pupil A were in contact, namely that Mr B pursued a relationship despite pupil A's rejection of him, was supported by the evidence within the text messages. We have read the 254 pages of text messages (pp. 114 to 368 of the Upper Tribunal bundle) and only quoted those of most relevance to the issues arising on this appeal. The messages indicate that the running, as it were, was made by Mr B. He nearly always initiated text message contact and always did so at the start of the secret interaction between himself and Pupil A. With a couple of exceptions, it was always Mr B who sought to introduce sexual topics. He intimated that he could provide preferential treatment for pupil A in preparing University applications. On a number of occasions, Mr B texted that he would no longer pursue a romantic interest in Pupil A yet he continued to do so.

86. We are also satisfied that the second reason relied on by DBS – failure to report safeguarding concerns – was supported by the text message evidence. On a number of occasions, Pupil A disclosed that she was misusing medication. In most cases, Mr B's response was not to give any advice or guidance about the risks of doing so. Typically, he skirted over the issue or suggested that she come to him for help with her underlying problems. For example:

- on one occasion Mr B's response to Pupil A's disclosure that she was "so high" was that this did not matter to him and she was still the woman he thought the world of. No advice was given about the risks of misusing medication;

- when Pupil A texted that she 'took an overdose' Mr B's response was to persist with a preceding discussion about kissing and, on another occasion, he continued trying to make arrangements for Pupil A to visit him at home;

- on another occasion, Mr B's response to Pupil A's disclosure about taking pills was that he wanted to bring back her love of Maths, rather than express concern about her disclosure that she had taken pills;

- When Pupil A disclosed that she was 'high', Mr B's response was to inform Pupil A that he could solve her problems;

- In one text message Mr B responded to Pupil A's disclosure that she had had a panic attack by asking if this was a side-effect of her pills but without any advice about safe use of medication.

87. The final reason relied on by the DBS – that Mr B ignored the emotional impact of his conduct – was also supported by the text message evidence:

- in the very first text message exchange, Mr B apologised for having attempted to kiss Pupil A, stated he did not want to make her feel that uncomfortable and promised it would not happen again. However, he persisted with his attempts to establish a romantic relationship over the next month or so;

- on 13 May 2015, Mr B wrote that he was sorry to pester Pupil A after all that he had said and would never send her a text message again;

- in response to Pupil A's disclosure that she had felt very depressed lately and found pills helpful even though they solved nothing, Mr B persisted with text messages about kissing;

- some of Pupil A's texts expressed concern that she was making Mr B sad. While there was one occasion on which he texted Pupil A asking her if he was the cause of any of her pain, at no point did he genuinely seek to end their text messaging. On the contrary, he continued to initiate contact;

- Mr B complied with Pupil A's request to supply her with cider – to be left in a field – without enquiring why she wanted to drink alcohol in the afternoon. In fact, he tried to persuade Pupil A to visit his home to drink cider;

- when pupil A informed Mr B that she would probably be moving schools, Mr B's texts focussed on the upset this would cause him rather than the impact on her.

88. For the above reasons, we decide that the DBS gave adequate reasons for their finding that, while Mr B and Pupil A were in contact, he lacked insight into the effect that his conduct had on her.

89. In relation to the post-contact period, the DBS relied on Mr B's representations to find that he lacked insight. In those representations, Mr B objected to the finding that Pupil A had been depressed rather than only "generally unhappy". The representations also stated that, as he cast his mind back to his own well-being in the months after his resignation, he "can regrettably confirm" there is a world of difference between describing someone as unhappy and describing them as depressed.

90. DBS interpreted Mr B's representation as an attempt to minimise Pupil A's emotional distress. They were entitled to do so. We do not see how this representation could have been interpreted as anything other than Mr B contrasting his own suffering with that which he assumed Pupil A to have suffered and suggesting that he had fared worse. DBS' finding – their interpretation of Mr B's representation – was not irrational and their reliance on it did not render inadequate their reasons for finding that, post-contact, Mr B lacked insight into Pupil A's emotional distress.

91. We acknowledge that Mr B considers DBS' interpretation of his representation to be quite wrong and asks what more he do to show his regret and remorse for his

conduct. However, we also note that, in the many pages of representations and submissions supplied by Mr B to DBS, the National College and the Upper Tribunal, he does not place himself in Pupil A's shoes and try to view events from her perspective. Mr B's repeated expressions of remorse and regret did not, of themselves, render the DBS' reasons irrational. We also note that Mr B did not take the opportunity of commissioning a medical or psychological report at the DBS representations stage despite (a) the DBS factsheet suggesting that reports could be supplied and (b) he was, by that stage, legally represented. Had Mr B submitted a medical report dealing with matters such as propensity to commit further similar acts and the connected issue of insight, DBS would have needed to explain why they departed from any relevant professional opinion. But, as it was, there was no professional evidence about Mr B's capacity for insight into the effects of his conduct.

92. For the above reasons, this final ground of appeal fails and we must therefore dismiss this appeal. Mr B's name remains included on the list of persons prohibited from working with children.

Whether DBS improperly relied on the 'conduct if repeated in relation to a child' barring ground

93. The question whether DBS improperly relied on the 'conduct if repeated in relation to a child' barring ground, since no other barring ground was available, was not within any of the grounds of appeal. It was, however, discussed at the hearing and so we shall deal with it.

94. The argument that the DBS made a mistake in law by improperly relying on the 'conduct if repeated in relation to a child' ground is an argument that DBS used this ground for an improper purpose. *Padfield & Others v Minister of Agriculture, Fisheries and Food* [1968] AC 997 holds that a public authority acts unlawfully if its exercises a statutory discretion other than for the purpose of promoting the policy and objects of the statute. Mr B contends that DBS, in selecting the 'conduct if repeated in relation to a child' barring ground subverted the purpose of the 2006 Act which cannot have been intended to operate so as to bar from working with children a person in his circumstances who has never harmed a child.

95. We do not accept that DBS, in deciding to rely on the 'conduct if repeated in relation to a child' ground for barring acted contrary to the policy and objects of the 2006 Act. Parliament envisaged that certain individuals might be unsuitable to work

with children despite never having engaged in relevant conduct in relation to a child. The 'conduct if repeated in relation to a child' ground is predicated on that assumption. We accept that, were DBS to rely on this ground in the absence of any proper nexus between the conduct in question and future risks to a child, it would act unlawfully. If for no other reason, that approach would involve operating the 2006 Act in a penal fashion. The Act's purpose is to protect children and vulnerable adults rather than penalise. In the present case, the DBS' decision explained why they linked Mr B's conduct to a future risk to children. In DBS' view, Mr B's conduct in relation to an 18 year old girl disclosed a risk to other teenage girls including those who are children. In our judgment, DBS, in relying on the 'conduct if repeated in relation to a child' ground, were not motivated by an improper purpose.

96. DBS did not rely on the 'risk of harm' barring ground. Contained in paragraph 5(4) of Schedule 3 to the 2006 Act, this refers to a person who may:

(a) harm a child,

(b) cause a child to be harmed,

(c) put a child at risk of harm,

(d) attempt to harm a child, or

(e) incite another to harm a child.

97. DBS' decision to rely on the 'conduct if repeated in relation to a child' barring ground, rather than 'risk of harm', did not involve an improper purpose. In the light of Pupil A's age (in the first year of adulthood) and that conduct had taken place, DBS were entitled to proceed under the 'conduct if repeated in relation to a child' barring ground. There is nothing within the appeal papers to support the argument that DBS chose not to rely on the 'risk of harm' barring ground because they did not want to be put to proof of their calibration of the level of risk posed by Mr S. If the 'conduct if repeated' ground could not permissibly have been relied on in this case, we find it difficult to imagine a case in which it could be relied on.

98. Similarly, the fact that DBS did not seek Mr B's inclusion on the list of persons barred from working with vulnerable adults does not mean that his inclusion on the list of persons barred from working with children was done for an improper purpose. The two 2006 Act lists operate according to different criteria. Inclusion on one list does not necessarily lead to inclusion on the other. If this feature is borne in mind alongside Parliament's enactment of provisions enabling a person to be barred from

working with children, where the conduct relied on involved an adult, it is clear that barring a person such as Mr B from working with children, but not vulnerable adults, is not necessarily improper.

99. The meaning of 'regulated activity in relation to a vulnerable adult' is set out in paragraph 7(1) of Schedule 4 to the 2006 Act and includes activities such as provision of health care and personal care. We have not seen any evidence that Mr B intends to work in sectors involving regulated activity in relation to vulnerable adults. Further, on DBS' findings the risk posed by Mr B concerned a discrete class namely teenage girls. Of course, some teenage girls will be vulnerable adults but, had Mr B been included on the vulnerable adults list simply because he posed a risk to a small section of the vulnerable adult population DBS may well have been faced with the argument that Mr B's inclusion on the list was disproportionate. We are not surprised that DBS did not seek to include Mr B on the list of persons barred from working with vulnerable adults. But, again, this did not preclude Mr B's inclusion on the list of persons barred from working with children if, that is, DBS considered there to be a proper nexus between Mr B's conduct in relation to an adult (Pupil A) and future risks to children. As mentioned above, DBS did consider that Mr B's acts in relation to the adult Pupil A disclosed future risks to children.

100. For the above reasons, we are satisfied that DBS, in including Mr B in the list of persons barred from working from children, despite him not having committed relevant conduct in relation to a child, did not act contrary to the policy and objects of the 2006 Act.

Remaining points

101. Mr B asks why the DBS seek testimonials if "expressions of 'appropriateness' are not acceptable to DBS"? Questions of appropriateness are (indeed must be) considered by DBS as part of making a barring decision. But, as explained above, Parliament has decided that the right of appeal against a barring decision does not extend to DBS's decision that it is appropriate to include a person on a barred list. This explains why, in these proceedings, DBS rightly argue that many of Mr B's submissions cannot succeed.

102. Mr B argues that DBS should be put to strict proof of their compliance with the law and, if they cannot show such compliance, his appeal should succeed. However, the appeal is limited by the grounds of appeal and Parliament's exclusion of questions

of appropriateness from the statutory right of appeal. Further, as the Appellant it is for Mr B to make out his case.

103. These are the unanimous reasons of the Upper Tribunal panel that heard this appeal.

Signed on original 30 June 2019

Upper Tribunal Judge Mitchell.