IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. V/2641/2016

Appellant: Mr AB

Respondent: Disclosure and Barring Service

DECISION OF THE UPPER TRIBUNAL

UPPER TRIBUNAL JUDGE PEREZ
MS MARGARET DIAMOND
MR BRIAN CAIRNS

This decision has been anonymised with the parties' agreement.

There is also an anonymity order in place. Its terms are on the next page.

ON APPEAL FROM:
Decision-making body: Disclosure and Barring Service
Case no: PTW330
Decision: 26 May 2016

IN THE UPPER TRIBUNAL **Appeal No.** V/2641/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Perez
Ms Margaret Diamond
Mr Brian Cairns

Ms Galina Ward of counsel and Ms Carine Patry of counsel for the DBS
The appellant in person

DECISION

Anonymity order

1. Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008[1], we prohibit the disclosure or publication of—

(a) the appellant's name (referred to as "AB" and "Mr AB" in this decision and in our 29 June 2018 interim decision);

(b) the appellant's wife's name (referred to as "Mrs AB" in this decision and in our 29 June 2018 interim decision);

(c) the name of each of the four girls in question (one of them is referred to as "CD", and a second as "EF", in this decision and in our 29 June 2018 interim decision, and a third is referred to as "GH", and a fourth as "IJ", in our 29 June 2018 interim decision);

(d) the name of the person referred to as "Mr KL" in our 29 June 2018 interim decision;

(e) the name of the person referred to as "Ms MN" in our 29 June 2018 interim decision;

(f) any matter likely to lead members of the public to identify any person mentioned in any of subparagraphs (a) to (e) above.

2. Any breach of the order at paragraph 1 above is liable to be treated as a contempt of court and punished accordingly (see section 25 of the Tribunals, Courts and Enforcement Act 2007).

Upper Tribunal final decision

3. We direct the DBS, under section 4(6)(a) of the Safeguarding Vulnerable Groups Act 2006, to remove the appellant from the Children's Barred List. We are unanimous in this.

[1] Statutory instrument number S.I. 2008/2698, as amended.

Background

4. This is Mr AB's appeal against the DBS's decision on review, dated 26 May 2016, not to remove his name from the Children's Barred List. The appellant's inclusion in that list was based on consensual sexual behaviour with teenaged girls aged 16 and 17. It was common ground that the behaviour did not, at the time it took place, constitute a criminal offence. (On 1 May 2004, after the appellant's provisional inclusion in the (predecessor) Protection of Children Act List and before his confirmed inclusion in it, section 16 of the Sexual Offences Act 2003 came into force.)

5. We held two oral hearings in this appeal. At the first, the DBS was represented by Ms Galina Ward of counsel. Following that hearing, we gave a unanimous interim decision on 29 June 2018. This final decision should be read with that interim decision.

6. The background to this case is set out in our interim decision.

Interim decision

7. In our interim decision, we unanimously found the following mistakes of law—

> (1) The DBS decision was based on an implied assumption that the appellant's having a sexual interest in teenaged girls of itself creates a risk of his repeating the behaviour, or at least that it creates more of a risk with this appellant than with other heterosexual men, without explaining the reasons for that assumption (interim decision, paragraphs 39 to 54).
>
> (2) The DBS decision did not explain why self-interest (alternatively described in it as the appellant's "own motivation and restraint") was considered less of a mitigating factor, or a less reliable mitigating factor, than insight into harm. The report commissioned by the DBS from the specialist, Dr Earnshaw, had said at paragraph 67 "I do not consider him likely to repeat the behaviour, largely out of self-interest" (interim decision, paragraphs 56 to 65).
>
> (3) The DBS failed to enquire into, and in any event make findings of fact as to, the circumstances of the two 2002 incidents with EF when she was 19 (interim decision, paragraphs 66 to 77).

8. We also made findings of fact. We return to some of those later in this decision.

9. We directed a further oral hearing to consider, under section 4(6) of the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act"), whether to remit or to direct removal from the list. Ms Galina Ward of counsel, who had represented the DBS at the first hearing, supplied a written submission dated 23 November 2018 on that question. Because of availability, Ms Carine Patry of counsel took over and represented the DBS at the second oral hearing before us. We thank both counsel for their submissions.

10. We also purported in our interim decision to set aside the DBS decision. We did not however have express power to do so. Our express powers in section 4 of the 2006 Act are to confirm the DBS decision, to remit, or to direct removal. Our interim decision took effect only so far as permitted by section 4. If section 4 did not permit us to set aside the DBS decision, then our interim decision did not set it aside. This point makes no difference to the substance or outcome of this appeal however. Moreover, the point was not before us and we are not deciding it. We mention it merely for accuracy.

Further evidence

11. The appellant supplied further evidence on 15 March 2019 (pages 600 to 612). Ms Catherine Nicholas submitted for the DBS that "The new documentation cannot, as a matter of procedure, be considered by the Upper Tribunal at this stage. The Upper Tribunal has already made all its findings of fact. However, if the matter were to be remitted to the DBS, the documentation could be considered as part of the reconsideration" (page 613[2]). At the second oral hearing, Ms Patry maintained the position that the new documentation could not be considered by the Upper Tribunal at that stage.

12. We are grateful to the appellant for supplying the new evidence. But we have not needed to consider any of it and have not taken it into account. We do not mean that we accept the DBS's submission that we may not consider the new evidence at this stage; we make no finding on that. We simply have not needed to consider it. So that question does not arise.

Second oral hearing

Legislation

13. At the time of the decision under appeal, 26 May 2016, section 4 of the 2006 Act provided (as it does now)—

> "**4 Appeals**
>
> (1) An individual who is included in a barred list may appeal to the Upper Tribunal against—
>
> (a) [repealed]
>
> (b) a decision under paragraph 2, 3, 5, 8, 9 or 11 of Schedule 3 to include him in the list;
>
> (c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.
>
> (2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake—
>
> (a) on any point of law;

[2] Submission 31/5/19.

(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.

(3) 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.

(4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.

(5) Unless the Upper Tribunal finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS.

(6) If the Upper Tribunal finds that DBS has made such a mistake it must—

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

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

(7) If the Upper Tribunal remits a matter to DBS under subsection (6)(b)—

(a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and

(b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.".

14. In our interim decision, we did the first part of our job: deciding mistakes under section 4(2). The question for the second oral hearing was what to do for the second part of our job, under section 4(6): should we remit or should we direct removal from the list?

Submissions on whether to remit or to direct removal

Submissions for the DBS

15. Following our interim decision, Ms Ward in her 23 November 2018 written submissions invited us to remit (page 567). So too did Ms Patry at the second oral hearing. Ms Ward and Ms Patry each cited in support *MR v DBS* [2015] UKUT 0005 (AAC) and *CM v DBS* [2015] UKUT 707 (AAC).

16. In *MR*, the Upper Tribunal said—

"8. Where an appeal is allowed, subsection (6) appears at first sight to confer on the Upper Tribunal a broad discretionary power either to remove a person from the list[3] or to remit the matter to the Respondent. However, it is noteworthy that it does not confer a power to confirm the person's inclusion on the list on grounds other than those relied upon by the Respondent and it is important to read subsection (6) in the context of subsections (3) and (5), which make it clear that the Upper Tribunal is not entitled to substitute its own view as to whether or not it is appropriate for an individual to be included in a barred list for that of the Respondent. In

[3] For accuracy, we note that the Upper Tribunal's power in section 4(6)(a) is to direct the DBS to remove the appellant from the list, not actually to remove him from the list. But nothing appears to turn on that distinction in the present case.

> those circumstances, it seems to us that the Upper Tribunal is entitled to remove a person from a barred list under subsection (6)(a) only either if the Respondent accepts that that is the decision that should be made in the light of the error of fact or law found by the Upper Tribunal or if the Upper Tribunal is satisfied that that is the only decision that the Respondent could lawfully make if the case were remitted to it.".

17. But later in the same decision, the Upper Tribunal in *MR* also said—

> "18. We acknowledge that the legislation gives rise to difficulties. However, the fact that the question of appropriateness is in the first instance to be considered by the Respondent does not, in our judgment, necessarily require that cases must always be remitted except where it is clear that it would be inappropriate to include the appellant in the list on the findings made by the Upper Tribunal.".

18. In her 23 November 2018 submission, Ms Ward submitted that "Insofar as there is a conflict between the two passages [in paragraphs 8 and 18 of *MR*], it is submitted that the former is to be approved, as it clearly explains the scheme of the legislation. It has also been followed by the Tribunal in CM v DBS [2015] UKUT 707 (AAC) (at [66])." (paragraph 6, page 568).

19. Ms Patry maintained that position before us at the second hearing. She submitted that *CM* and paragraph 8 of *MR* say that, on a proper construction of section 4(6) of the 2006 Act, the Upper Tribunal can consider removal (by which she meant "direct removal", it seems) only if that is the only decision the Upper Tribunal could make or the only decision the DBS could make. Ms Patry submitted that *CM* was a three-judge panel. She submitted that, if we were not going to follow *MR* and *CM*, the DBS would want time to address us further. Ms Patry made a similar submission in relation to our question about section 4(2), (3) and (6) – see paragraph 22 below. She resiled from her submission that *CM* was a three-judge panel when we pointed out that it was not a three-judge panel, but a three-member panel. It comprised a judge and two non-judge members, as does our panel in the present case. *MR* too was not a three-judge panel.

20. We invited Ms Patry's submission on the following point. Section 4(3) of the 2006 Act provides that "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". That is however expressed in that subsection to be "For the purposes of subsection (2)", whereas we are considering how to exercise the power in subsection (6). Is it significant that there is no similar provision in, or expressly for the purposes of, subsection (6)?

21. Ms Patry replied that the powers in subsection (6) arise "if the Upper Tribunal finds that DBS has made 'such a mistake'". She submitted that "such a mistake" refers to a mistake such as is mentioned in subsection (2) (which we, of course, accept). She submitted that this means that the limitation in subsection (3) for the purposes of subsection (2) applies also to the powers in subsection (6), without the limitation being repeated in, or expressly for the purposes of, subsection (6).

22. Ms Patry invited us however, if we were minded to find the distinction relevant, to give the DBS the opportunity to make further submissions. The submissions would address the significance of the contrast between subsections (2) and (3) on

the one hand, with their express provision as to appropriateness, and subsection (6) on the other, which has no such provision.

23. The DBS should have come to the second oral hearing prepared to address the test for whether to direct removal. The whole question of whether to direct removal, and what questions were relevant to that, was clearly left open by paragraph 124(1)(a) of our interim decision. It was also clear from paragraphs 3 to 7 of Ms Ward's 23 November 2018 submission, made after issue of our interim decision and after we had directed the further oral hearing, that Ms Ward (rightly) believed there was – after our interim decision – a question as to whether we should take the approach seen in paragraph 8 of *MR*. We have annexed to this decision paragraphs 3 to 7 of Ms Ward's 23 November 2018 submission.

24. Nonetheless, we gave the DBS the opportunity to make further written submissions. We said in doing so that we thought the distinction between subsections (2) and (3) on the one hand, and subsection (6) on the other, was potentially relevant.

25. The DBS supplied a further written submission dated 11 January 2020, by Ms Patry. In that submission, Ms Patry cited three authorities: *ISA v SB v RCN* [2012] EWCA Civ 977, *MR* again and *Fileccia v SSWP* (CA) [2018] 1 WLR 4129. Ms Patry submitted as follows—

> (1) The case law makes clear that, as a matter of principle, Parliament has provided that the appropriateness of a person being on a barred list is not a matter for the Upper Tribunal but for the DBS. There can be no sound basis for applying that to step 1 of the Upper Tribunal process (deciding mistake of fact or law) and not to step 2 (deciding what to do under section 4(6)). Ms Patry had made that submission orally. But she took this opportunity to cite *ISA v SB v RCN*. She reminded us also that *MR* is reported and of what *Fileccia* says that means.
>
> (2) Ms Patry also submitted that to allow a consideration of appropriateness at step 2 would be to negate the effect of section 4(2) and (3). This is because it would allow consideration of appropriateness in another subsection when Parliament had made clear that such a consideration of appropriateness is impermissible.
>
> (3) And she submitted that to consider appropriateness of inclusion under section 4(6) would make a nonsense of subsection (6), by rendering devoid of meaning or practical use the provision in it for remittal.

26. We are grateful to the DBS, and to Ms Patry, for that further submission. We return now to her other submissions.

27. In *CM*, the Upper Tribunal directed removal from the list. Ms Patry submitted that, although she wanted us to follow the principle in *CM*, *CM* could be distinguished on its facts. First, she said, the Upper Tribunal in *CM* had concluded that there was no prospect of regulated activity. A second distinguishing factor, she said, was that there had already been two DBS reviews in *CM*. This second factor related to the

Barring Decision Making Process ("BDMP") document mentioned in Ms Ward's 23 November 2018 written submission. That submission said—

> "8. When considering cases afresh (i.e. when a person is referred to the DBS for inclusion on a list, having not been so included previously), the DBS employs the Barring Decision Making Process ("BDMP"), which requires the consideration of a case in a series of stages as set out below. The Court of Appeal in Khakh v DBS [2013] EWCA Civ 1341 has described the BDMP as [6] "*a detailed document designed to ensure that a structured decision is reached, having regard to all relevant matters*".
>
> 9. The BDMP, and the structured judgment process that it contains, is not used as a matter of course when the DBS is reviewing a person's inclusion on a list under paragraph 18 or 18A of Schedule 3 to the 2006 Act (see, generally, PP v DBS [2017] UKUT 337 (AAC)). In a case that has been remitted by the Tribunal, however, the DBS will ordinarily follow the BDMP in order to give structure to the remitted decision and ensure so far as possible that it does not fall into any further error.
>
> 10. If this matter is remitted to it, the DBS therefore proposes to carry out a full consideration of all of the relevant facts using its Barring Decision Making Process ("BDMP") tool." (pages 568 and 569).

28. Ms Patry submitted that, as Ms Ward had said, on a review following remittal the matter is considered more than on a review under paragraph 18 or 18A of Schedule 3 where there has not yet been a remittal. Ms Patry said this was because the DBS uses the BDMP to make a decision following remittal. Ms Patry said that, in *CM*, there had been two review decisions by the DBS. This meant, she said, that "the matter had been fully considered by the DBS twice" in *CM*. She submitted that that was not so in the present case, and that remittal would enable the DBS to consider the matter fully.

29. In reliance on *CM* and paragraph 8 of *MR*, Ms Patry submitted that, if all of the errors of law we found in our interim decision were corrected, and given our findings of fact in that decision, directing removal would not be the only possible outcome. She submitted that it would be very difficult for a particular finding of fact by the Upper Tribunal to point to only one possible outcome. An example of such a finding was, she said, a finding of mistaken identity. Another example she gave was where the Upper Tribunal finds that alleged abuse has not happened. She submitted that the present case fell into neither category.

30. Ms Patry took us to where the DBS decision letter said—

> "The DBS acknowledge the opinion of Dr Earnshaw, that you would be unlikely to repeat your behaviour, largely out of self interest, but also as a result of the decline in sexual preoccupation both through age and impotence." (page 97, penultimate paragraph).

31. She submitted that, although the letter went on to conclude that "the DBS cannot be sufficiently satisfied that, if the restrictions in place were to be removed, you would not be capable of acting in a similar manner again" (page 98), the DBS "did acknowledge Dr Earnshaw's opinion and so did take account of it, albeit that the DBS did not follow it".

32. Ms Patry submitted that it was open to the Upper Tribunal to tell the DBS that the DBS's finding on risk was irrational. But, she said, it was not for the Upper Tribunal to assess risk. She submitted that section 4(3) of the 2006 Act prevents us from considering the appropriateness of inclusion in the list. She asked us to remit for the DBS "to give full consideration to whether to remove the appellant from the list".

Appellant's submissions

33. The appellant submitted that the DBS cannot assert that, because in the past he had a sexual interest in teenaged girls in his forties, he presents a risk now. He submitted that he was now twenty years older. He submitted that the DBS's decision was not based on evidence. In any event, he submitted, having a sexual interest in teenaged girls does not of itself create a risk of his repeating the conduct. He pointed out the conflict between paragraphs 8 and 18 of *MR*.

34. The appellant cited Ms Ward's written submission of 23 November 2018. At paragraph 16 of that submission, she invited the Upper Tribunal, if we decided to remit, "to direct that [the appellant] remain in the list until a full consideration of the continued risk to children has taken place" (page 571). That part of her submission went to whether the appellant should remain on the list pending a new decision following remittal. But both Ms Ward and Ms Patry also submitted that remittal would enable "full consideration" of whether to remove the appellant from the list. The appellant submitted that full consideration of whether to remove him had already been done. Otherwise, he submitted, why did he attend two three-hour-long interviews with a specialist assessor? He submitted that, had the DBS considered appropriateness of inclusion without the errors found in our interim decision, and in light of the findings in our interim decision, the DBS would have removed him from the list. He invited us not to remit and instead to direct his removal from the list.

Discussion

Preliminary point: decision document versus decision letter

35. There was a slight difference in approach between the DBS's two counsel, Ms Ward and Ms Patry. Ms Ward had at the first hearing invited us to rely on a document recording the review decision (at pages 88 to 95 of the bundle) in addition to – or where there was a difference, instead of – the letter notifying the appellant of that decision. We had expressed concern to Ms Ward about that, given (a) that the document recording the decision was not the document sent to the appellant to notify him of that decision, and (b) that there were differences between the letter and the document recording the decision. Ms Patry relied at the second hearing however on the letter, because that was what had notified the appellant of the decision. We considered that, in principle, to be the better approach, as we had pointed out to Ms Ward at the first hearing (interim decision, paragraphs 13, 36 and 41).

36. That distinction would have made a difference to Ms Ward's submission about references to a long-standing sexual interest in teenaged girls. The appellant had challenged the statement in the decision letter that he had "demonstrated" a long-standing sexual interest (page 97). Ms Ward's submission was that the decision document, unlike the decision letter, did not say that he had "demonstrated" such an

interest, but that he "has" a long-standing interest (page 94), and that the decision document was right to say that.

37. By the time we reached the second hearing, however, nothing appeared to turn on the distinction for the purposes of disposal. But we mention the distinction for clarity and in case of any onward appeal. Our interim decision was based on only Ms Ward's submissions – Ms Patry had not by that point been instructed.

Whether directing removal is the only decision the Upper Tribunal could properly make or to remove is the only decision the DBS could properly make

38. Our discussion at paragraphs 39 to 72 below addresses our rejection of the proposition that we may direct removal only if that is the only decision the Upper Tribunal could make or only if to remove is the only decision the DBS could make. That does not however mean we accept that the DBS could, on remittal, properly do other than remove. In view of our decision that the test is not that contended for by the DBS, we have not needed to make a finding on whether a decision to continue inclusion would be open to the DBS on remittal.

The test in section 4(6) of the 2006 Act

Introduction

39. We do not accept that, on a proper construction of section 4(6) of the 2006 Act, we may direct removal from the list only if that is the only decision the Upper Tribunal could properly make, or only if to remove is the only decision the DBS could on remittal properly make.

40. It seems to be common ground that there is no express provision to that effect. The provision in section 4(3) that "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" is there expressed to be "For the purposes of subsection (2)". Subsection (2) provides for an appeal to be made on the grounds that the DBS has made a mistake on any finding of fact on which the decision was based or any point of law. Once we have decided whether there was a mistake of law or fact, we move out of subsections (2) and (3) and into subsection (6). There is nothing express in section 4(6), or anywhere in section 4 or elsewhere in the 2006 Act, prohibiting us from considering appropriateness when deciding how to exercise our section 4(6) powers. The question is however whether that prohibition should be implied.

41. We pause to note that, whether it is labelled "appropriateness" or "rightness" or something else, the label for what is being considered under subsection (6) should not take the focus off the ultimate question. The ultimate question, as formulated by counsel, is whether we may direct removal only if that is the only decision the Upper Tribunal could properly make, or only if to remove is the only decision the DBS could properly make on remittal. We use "consider appropriateness", "considering appropriateness" and "decide appropriateness", in the following discussion as shorthand for the alternative to that proposition.

42. We do not accept that a prohibition on considering appropriateness should be implied into subsection (6). We say that (1) because of the contrast between section 4(3) and 4(6) and the ease with which the drafter could have made such provision;

(2) because we reject counsel's submissions as to *ISA v SB v RCN*; (3) because it is not clear that *MR* did decide the test that counsel say it did, but if we are wrong on that, (a) we disagree with paragraph 8 of *MR,* and (b) we are not in any event bound by paragraph 8 of *MR*; (4) because it is not clear either that *CM* followed paragraph 8 of *MR*, but in any event (a) what we are doing is less radical than what the Upper Tribunal did in *CM*, and (b) we are not bound by *CM*; and (5) because we do not accept that it would make a nonsense of section 4(6) if the Upper Tribunal were permitted to consider appropriateness of inclusion at that stage – to put it another way, we do not accept that it would make a nonsense of section 4(6) if we were permitted to direct removal even where that was not the only decision the Upper Tribunal could properly make or where to remove was not the only decision the DBS could properly make on remittal. We take each of these points in turn.

(1) Drafting of section 4(2), (3) and (6)

43. There is an obvious contrast between subsections (2) and (3) of section 4 on the one hand and subsection (6) on the other. We include them again here for ease of reference—

> "(2) An appeal under subsection (1) 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 mentioned in that subsection was based.
>
> (3) 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.
>
> […]
>
> (6) If the Upper Tribunal finds that DBS has made such a mistake it must—
>
> (a) direct DBS to remove the person from the list, or
>
> (b) remit the matter to DBS for a new decision.".

44. The drafter took the trouble to specify that the prohibition in section 4(3) on considering appropriateness was "For the purposes of subsection (2)". If the prohibition had not been intended to be so limited, there would have been no need to specify that it was for the purposes of just that one subsection.

45. The drafter also specified in section 4(3) that "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". This is very specific language. First, it refers not to "the question whether or not it is appropriate", but to "the decision whether or not it is appropriate". That is a reference to the DBS decision that the Upper Tribunal is considering under subsection (2). The Upper Tribunal is no longer expressly considering a DBS decision by the time it gets to subsection (6). Second, if the drafter had intended that the question of appropriateness was not to be considered at all by the Upper Tribunal, the drafter need not have specified that it was "not a question of law or fact". That is a very particular reference to the first step of the Upper Tribunal's job –

considering whether there was a mistake of law or fact by the DBS, and so in the DBS decision. If the drafter had intended that the question of appropriateness was not to be considered by the Upper Tribunal even in relation to whether to direct removal, the drafter could have said, for example—

> "For the purposes of this section, the question whether it is appropriate for an individual to be included in a barred list [is not a question of law or fact and] is not a matter for the Upper Tribunal", or
>
> "For the purposes of subsections (2) and (6), the question whether it is appropriate for an individual to be included in a barred list [is not a question of law or fact and] is not a matter for the Upper Tribunal".

We have included the text in square brackets merely to mirror the existing subsection in making our point. Regardless of whether the text in square brackets would be needed in our above illustrative drafts, our point is that the words we have underlined could have been used had the drafter intended the effect for which the DBS contends.

46. We move now from the specific label "appropriateness" to the ultimate question of the test for subsection (6). Again, had the drafter of section 4 intended the test to be that advanced by the DBS, the drafter could easily have said so.

47. The drafter could, for example, have done for section 4 what was done for the Upper Tribunal's judicial review jurisdiction. See section 17(1)(b) and (2)(c) of the Tribunals, Courts and Enforcement Act 2007 (our emphasis)—

> "**17 Quashing orders under section 15(1): supplementary provision**
>
> (1) If the Upper Tribunal makes a quashing order under section 15(1)(c) in respect of a decision, it may in addition—
>
> (a) remit the matter concerned to the court, tribunal or authority that made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the Upper Tribunal, or
>
> (b) substitute its own decision for the decision in question.
>
> (2) The power conferred by subsection (1)(b) is exercisable only if—
>
> (a) the decision in question was made by a court or tribunal,
>
> (b) the decision is quashed on the ground that there has been an error of law, and
>
> (c) without the error, there would have been only one decision that the court or tribunal could have reached.".

48. Where there is a contrast between two provisions in the same act, the presence of certain words in one of them can, without more, suggest that the omission of those or similar words from the other was intended to achieve a different effect. (And the inference from the contrast might be stronger the closer the provisions are to each other in the act.) We are not quite saying that here. Section

17 is in a different act from section 4. Section 17 was also enacted after section 4. A construction based purely on a contrast between sections 4 and 17 is not necessarily apt. Nonetheless, they each confer jurisdiction on the Upper Tribunal. Section 17(2)(c) of the 2007 Act is an example of how easily the drafter of section 4 of the 2006 Act could have limited the Upper Tribunal's section 4 jurisdiction, had the drafter intended to do so.

(2) *ISA v SB v RCN*

49. We do not accept that *ISA v SB v RCN* prohibits us from directing removal unless directing removal is the only decision the Upper Tribunal could properly make or to remove is the only decision the DBS could on remittal properly make. We say that for the following reasons.

50. The Court of Appeal in *ISA v SB v RCN* was considering the correct approach to proportionality in relation to the application of section 4(3). The court proceeded from the starting point that "the UT cannot carry out a full merits reconsideration" (paragraph 15 of the judgment). The particular question the Court of Appeal was considering under the proportionality heading was "how … the UT, should approach the decision of the primary decision-maker" (paragraph 17). Maurice Kay LJ, with whom the other members of the court agreed, said "it seems to me that the UT did not accord any particular weight to the decision of the ISA but proceeded to a *de novo* consideration of its own" (paragraph 18). He went on to say that he found it "difficult to escape the conclusion that the UT was simply carrying out its own assessment of the material before it" (paragraph 20). He contrasted that with the ISA caseworker's assessment which he said "was itself a careful compilation produced on a template headed "Structured judgment process"" (paragraph 21). Although accepting that the Upper Tribunal is a specialist tribunal, Maurice Kay LJ remarked that it "is statutorily disabled from revisiting the appropriateness of an individual being included in a Barred List, *simpliciter*" (paragraph 22). And he concluded that "the complaint that the UT did not accord "appropriate weight" to the decision of the ISA is justified" (paragraph 23).

51. We do not consider that what we did in our interim decision, and are now doing, is considering the case *de novo* (although whether we have done so, and erred in law in doing so, will of course be a matter for the Court of Appeal or Supreme Court in any onward appeal). We have considered Dr Earnshaw's specialist assessment and the DBS's reasons for not "following" it, as counsel put it. The DBS gave no reason at all for its apparent view that insight into harm is a greater or more reliable inhibitor than self-interest. And the specialist assessor had not said that such insight was a greater or more reliable inhibitor than self-interest. Moreover, though we do not make much of this distinction, we do note that, in *ISA v SB v RCN,* the ISA decision to which the Upper Tribunal did not give "appropriate weight" was "a careful compilation produced on a template headed "Structured judgment process"". The DBS decision in the present case was not done on such a template. And the DBS submitted that the structured judgment process had not yet been followed in the present case.

52. In addition, the Court of Appeal's statements cited at paragraph 50 above were made in the course of deciding whether the Upper Tribunal had given "appropriate weight" to the ISA decision. The court was not deciding as a matter of principle that being "statutorily disabled" by section 4(3) "from revisiting the

appropriateness of an individual being included in a Barred List, *simpliciter*" meant that the Upper Tribunal simply could not direct removal unless that were the only decision the Upper Tribunal could reach or unless to remove were the only decision the DBS could reach on remittal.

(3) Upper Tribunal decision in *MR*

53. It is not clear that *MR* did decide the test to be that the Upper Tribunal may not substitute its own view on appropriateness and may direct removal only if to remove is the only decision the DBS could lawfully make on remittal. We say that even if the Upper Tribunal did, in drafting paragraph 8 of *MR*, intend that to be the test.

54. In *MR*, the Upper Tribunal said—

> "18. We acknowledge that the legislation gives rise to difficulties. However, the fact that the question of appropriateness is in the first instance to be considered by the Respondent does not, in our judgment, necessarily require that cases must always be remitted except where it is clear that it would be inappropriate to include the appellant in the list on the findings made by the Upper Tribunal." (page 641 of bundle).

55. This does appear to contradict what the Upper Tribunal said in paragraph 8 of the same decision. We do not accept that we should resolve that contradiction by following paragraph 8 of *MR* in preference to paragraph 18 of *MR*. We say that for two reasons. First, assuming for the sake of argument that a paragraph "explaining the scheme of the legislation" should take precedence over another which does not, that is not an option here; paragraph 18 effectively also purports to describe or explain the scheme of the legislation, by saying how it should work. Second and in any event, given the conflict between its paragraphs 8 and 18, *MR* does not clearly set out a test one way or the other.

56. If, however, we are wrong and *MR* did decide the test to be as mentioned in its paragraph 8, then (a) we disagree that that is the test, for the reasons in the rest of this decision, and (b) we are not in any event bound by *MR*.

(4) Upper Tribunal decision in *CM*

57. It is also not clear that the Upper Tribunal in *CM* did, as counsel submitted, follow paragraph 8 of *MR*. In *CM*, a report before the Upper Tribunal assessed that appellant CM "remained a "medium risk" in terms of re-offending for a sexual offence" (paragraph 49 of the decision). The Upper Tribunal went on to say—

> "We did not find this report and correspondence as persuasive as was suggested to us by the DBS, for a number of reasons." (paragraph 49, page 629 of bundle).

58. Having listed those reasons, the Upper Tribunal said (our emphasis)—

> "Ms Stubley's [the report author's] central conclusion was that the Appellant "appears to have contained his behaviour for some 17 years, so I would not regard him as a predatory individual. Nonetheless, little else appears to have changed in risk assessment terms" see §9.6) [sic]. However, for the reasons we have explained earlier, we find in fact that a

> number of important markers demonstrate that there has been significant change in risk assessment terms over the past two decades." (paragraph 53, page 630 of bundle).

59. So, the Upper Tribunal in *CM* not only made its own assessment of risk, but also substituted its own risk assessment for that of the assessor. That does give the impression that the Upper Tribunal considered it open to it, as a matter of principle, to make its own assessment of whether it was appropriate – or right – to direct removal. It did not limit itself to considering whether the DBS's risk assessment was rational, which Ms Patry submitted was the extent of our power.

60. What the Upper Tribunal in *CM* went on to do reinforced that impression, or at least did not detract from it. The panel in *CM* cited paragraph 8 of *MR*, the paragraph relied on by the DBS in the present case. But the *CM* panel went on to say (our emphasis)—

> "67. In our view remittal is not appropriate here. This matter has been before DBS twice already. The process has gone on for some years and the Appellant is entitled to some closure. We take into account the findings of fact we have made above. We are entirely satisfied that there is simply no prospect of the Appellant wishing to engage in any regulated activity and accordingly barring serves no useful purpose. We have also had regard to the importance of public confidence in the barring system. We therefore direct DBS to remove the Appellant from the Children's Barred List with immediate effect." (page 633 of bundle).

61. It appears therefore that the Upper Tribunal in *CM* thought it open to it to decide appropriateness. Although it said "remittal is not appropriate", rather than "directing removal is appropriate", the effect of saying remittal is not appropriate was that the panel considered it appropriate – or right, in any event – to direct removal. It took into account not merely that there was no prospect of the appellant wishing to engage in regulated activity, but also (i) that the appellant "is entitled to some closure" and (ii) "the importance of public confidence in the barring system". It is not clear how those two additional factors would be relevant if directing removal were the only decision the Upper Tribunal could properly make. Both those factors require the exercise of the Upper Tribunal's judgment and do not, on the face of it, militate towards only one outcome.

62. Moreover, counsel invited us to follow the principle adopted in *CM*. What we are doing is less radical than in *CM*. The panel in *CM* considered as a matter of principle that it was open to it to reject the specialist risk assessment and to substitute its own risk assessment. We, by contrast, accept the specialist risk assessment in the present case.

63. We are not, in any event, bound by *CM*.

(5) Section 4(6) would not be a nonsense

64. Ms Patry submitted that it would make a nonsense of subsection (6) if the Upper Tribunal could consider appropriateness of inclusion at the subsection (6) stage. She said this was because that would render devoid of meaning, and of practical use, the provision in that subsection relating to remittal.

65. We agree that it would not be right to say that inclusion (whether appropriateness, rightness, proportionality or rationality of inclusion) can be completely considered under subsection (6); subsection (6) does not give the option of directing that the appellant remain on the list. But what the Upper Tribunal is considering under subsection (6) is whether to direct removal. That is a different question.

66. To say that the Upper Tribunal may consider whether it is appropriate to direct removal does not render redundant the alternative, which is to remit. If the Upper Tribunal does not think it appropriate to direct removal, then it must remit. That makes full use of the two outcomes provided for in subsection (6). Remittal is not otiose. The subsection is not therefore made a nonsense.

67. That construction is also not a nonsense in practical terms. If the appellant is potentially to be made to remain on the list[4], the job of deciding that adverse outcome has been left to the DBS. The Upper Tribunal is not empowered by subsection (6) to direct that he remain on the list. That makes practical sense. If the Upper Tribunal were empowered to make a decision directing remain, how would an appellant seek to undo that? The usual test for appealing to the Court of Appeal would not allow for an appeal on the ground of an error without more by the Upper Tribunal. And paragraph 18A(3) of Schedule 3 to the 2006 Act permits the DBS to review and remove from the list for error only where the error was by the DBS (paragraph 18A(3)(c)), not where the error was by the Upper Tribunal (and it is difficult to conceive of paragraph 18A(3) being amended to permit such action by the DBS). But if the Upper Tribunal is satisfied that it is right (which might be another word for appropriate) to direct removal, it can do so. And if the DBS is not happy with that, then, on the DBS's case as put by Ms Patry, the DBS can put the appellant back on the list. (Although, if the DBS could do that using the same findings and reasons as in the review decision the subject of this appeal, that would effectively undo our decision. The DBS did not appear to suggest that the legislation goes that far. And whether it does is not a question before us.)

68. In other words, Parliament has built in a safety valve: if the appellant is potentially to remain on the list, the DBS gets the job of considering that. Parliament has not however built in that safety valve for directing removal. And it could have done. It could have said that the Upper Tribunal must only remit. Or (as we said above), it could have said that the Upper Tribunal may not direct removal unless no decision other than to remove would be open to the DBS on remittal.

69. Moreover, if the test were that the Upper Tribunal may direct removal only if satisfied that the DBS could not lawfully do other than remove on remittal, that would require the Upper Tribunal either to speculate as to what additional evidence and what better reasons the DBS would be able to cite for a fresh decision, or to require submissions as to exactly what additional evidence and better reasons the DBS can already say it will have. The Upper Tribunal would need one or the other in order to decide that a fresh decision on remittal would nonetheless be unlawful. That was not however how the DBS suggested section 4(6) should work.

70. So, that the legislation does not permit the Upper Tribunal to direct that the appellant remain on the list – in other words, to consider the appropriateness or

[4] Aside from temporarily remaining on it under subsection (7), pending a fresh DBS decision on remittal.

rightness of directing remain – does not, in our judgment, inexorably lead to the conclusion that that was because Parliament thought the Upper Tribunal should not consider the appropriateness of directing removal.

Conclusion: section 4(6) of the 2006 Act

71. There is only so far we can go in construing section 4. We have been able to construe it without rendering any part of it otiose or a nonsense. We do not accept that we are prohibited from considering whether it is appropriate, or right, to direct removal. And we do not accept that we may direct removal only if that is the only decision we could properly make or only if to remove is the only decision the DBS could properly make on remittal.

72. The only limitation on our power in section 4(6)(a) is, in our judgment, that we must exercise that power rationally and, of course, judicially (if "judicially" adds anything to rationally). We think it unnecessary to add that the section 4(6)(a) power must also be exercised proportionately. It is difficult, if not impossible, to conceive of the Upper Tribunal being permitted to exercise it disproportionately. But that might be the subject of argument in another case. Since we consider – of course – that what we are doing is proportionate, our not specifying proportionality as part of the section 4(6)(a) test makes no difference to the outcome of this particular case.

Putting the appellant back on the list

73. We mentioned at paragraph 67 above Ms Patry's submission that the DBS could if it wished put the appellant back on the list after we had directed removal. That submission could on extrapolation suggest that, in considering appropriateness or rightness for the purposes of section 4(6)(a), we are considering not whether removal is in the long or medium term appropriate or right, but whether it is appropriate or right at this point in time to direct removal. It would be about our assessing whether, while the appellant waits to see whether the DBS come up with a lawful decision to reinclude him, the risk is sufficiently low that he should stay off the list in the meantime.

74. We need not decide whether this point would add to what we say above about construing section 4(6). But if we were assessing simply whether the risk is sufficiently low for the appellant to come off the list and stay off it unless and until the DBS were lawfully to put him back on it, we would assess the risk as sufficiently low on the material before us, which included the material on which the DBS had relied in making the decision. We say that for the reasons at paragraphs 76 to 119 below. If, in addition, we had to decide whether the DBS has, on the material before us, a rational basis for a fresh decision to include, we cannot confidently say that we can see such a basis. We say that given the gaps in evidence and in reasoning identified in our interim decision, and in view of Dr Earnshaw's specialist assessment. While the DBS might on remittal provide or seek and provide better evidence, and attempt to give better reasons, those are not presently before us.

Why we are directing removal

75. We think it right to direct removal from the Children's Barred List for the following reasons.

76. We take Dr Earnshaw's specialist assessment as our starting point (page 53). Dr Earnshaw opined that repetition was "unlikely".

77. Ms Patry may have been less generous to her DBS client than was merited when she said that the DBS did take account of Dr Earnshaw's opinion but did not "follow" it. What the DBS decided might be characterised as the DBS accepting that repetition is "unlikely", as Dr Earnshaw said, but deciding that unlikely is not enough.

78. But, however we characterise what the DBS did with Dr Earnshaw's report, we disagree that her assessment of "unlikely" is not enough in the present case. We say that for the following reasons.

(1) Setting the bar too high

79. First, as we said in our interim decision, the submission that "some risk remains" appears to set the bar too high, by requiring that there be no risk. In principle, it is rare that something – at least in terms of human behaviour – can be said to be truly impossible, which is what "no risk" means. And on the facts of this case, it is not clear when there would ever be no risk where a heterosexual man is permitted to be around post-pubescent females.

80. We mention a heterosexual man being permitted to be around post-pubescent females because that is the context in which we are considering a risk of repetition in the present case. "Repetition" in the present case means engaging again in consensual sexual touching with females aged 16 and 17 in relation to whom the appellant is in a position of trust, such as being their choir master (it was common ground that the sexual intercourse with one of the girls took place after she turned 18). The behaviour would even now be a criminal offence only because of the relative positions of the appellant and the female in question. We do not suggest that it would not be a serious offence. But we do think it important to note that (a) there has been no suggestion that the appellant has engaged in sexual activity with anyone without consent, (b) there has been no suggestion that he has, or has ever had, any sexual interest in pre-pubescent girls, (c) there has been no suggestion that he has ever engaged in sexual activity with a girl under the UK age of consent, which is 16, and (d) the DBS accepted that the behaviour had not been motivated by a wish for power or control over the girls. The absence of those factors (a) to (d) means, in our judgment, that there is less to mark out the appellant from the rest of the male population than there would be if any of those factors were present.

81. Moreover, it appears circular to say that the notion that "some risk remains" is relevant to what would adequately mitigate the risk: "that the risk is a risk means nothing can adequately mitigate it".

(2) Dr Earnshaw's opinion as to inhibiting or deterrent factors

82. The second reason we think that "unlikely" is enough in the present case is because of the inhibiting or deterrent factors on which Dr Earnshaw based that assessment. We find those factors persuasive for the reasons at paragraphs 85 to 101 of this decision. Moreover, the weight of one of the factors – declining sexual preoccupation with age – is increasing with time.

83. Dr Earnshaw said (our emphasis, page 64)—

"18. Mr. [AB] arrived early for both appointments, and was polite and co-operative throughout. However, although most of the views he expressed were appropriate, and substantially different from his first responses to the allegations, there was a noticeable lack of emotion in what he said. I did feel that he was now very well aware of the position he needed to take if he wished his bar to be lifted.

19. At the same time I thought it quite possible that his view of his past behaviour had changed, but that this had been occasioned more by self-interest than by penitence, or any profound concern for the wellbeing of the complainants.

[…]

48. Mr. [AB] also admits that the behaviour was sexually motivated. He spoke of finding [EF]'s early sexual activity arousing, of finding [CD] attractive, and of seeking to compensate for the fact that his marriage was not very sexually active. It is also likely that flirtatious and sexual relations with young teenage girls gave him confidence and a feeling of wellbeing at difficult times (such as after the Disciplinary Hearing at […] and when made redundant from his full-time employment). I am not convinced that Mr. [AB] groomed the girls concerned in any calculated way, but more that he took advantage of the many occasions they were in his company to engage in opportunistic sexual behaviour towards them. Whilst the girls may not have resisted his advances to the extent that they would constitute assaults, it appears that he was normally the initiator … .

49. Mr. [AB] does not appear to have had many qualms about his behaviour at the time. He reports fleeting feelings of "*being a bit disloyal to my wife*", and also of feeling "*reckless about my reputation*" after he was dismissed from […]. At the time he recalled finding the flirtation and the physical contact "*nice*" and never asking himself whether or not it was right. At the present time, there is a clear intellectual understanding that the behaviour was wrong and a misuse of power, but although he spoke of feeling ashamed and embarrassed about what he had done after the accident [his 10 May 2000 accident after which he engaged in sexual touching with EF aged 19], I saw little evidence of this, and found it hard to put together with his subsequent denial of the bulk of the 2003 allegations. On the contrary, I thought it more likely that his change of heart in 2000 was related to self-interest, and a desire to continue working with choirs. The fact that he admitted telling [CD] and [EF] at the time that he had changed his view of his past behaviour and intended to change his practice, could be viewed as an attempt to ensure they would not say anything further about his behaviour with them.

50. Despite this caveat, I do think it likely that the combination of increasing age [he was 63 at the date of the report] and his accident have made him less sexually preoccupied than previously, and less likely to turn to sex as a way of feeling better about himself. To the extent that vanity was probably a component in his sexually inappropriate behaviour, I think this may well now be counteracted by his impotence, which is likely to cause embarrassment rather than gratification in a new sexual encounter. I also think he has recognised that the losses associated with his previous conduct far outweighed the transitory benefits, and that he will enjoy a smoother career and leisure path in the future if he respects child protection procedures.

[…]

Opinion

63. There is little that is directly risk-predictive in Mr. [AB's] personal history, although it is possible that an argumentative family background without much expressed warmth, may have contributed to empathy deficits. Although Mr. [AB] described himself as a warm person, whose flirtatious behaviour arose out of general bonhomie, I did not find that he demonstrated much understanding or interest in the feelings of the four complainants.

64. His current lack of a legitimate sexual outlet could be risk-predictive, but, provided he does not foster his sexual interest in teenage girls by looking at under-age or "barely legal" pornographic sites on the internet, it should be manageable. I accept that a measure of embarrassment about his impotence is likely to inhibit him from future affairs like the one with [CD], although it would not necessarily prevent sexual touching. However, I think that the combination of his re-evaluation of his behaviour as going against his self-interest and that of his family, and the deterrent effect of the bar, is likely to deter him from inappropriate sexual behaviour with teenage girls in the future.

Risk Assessment

65. Mr. [AB] now admits most of the inappropriate sexual behaviour alleged against him by four complainants, who were members of his choir at the time. Although the behaviour was not illegal at the time, it would be at the current time, given the change in the law with regard to those in a teaching, tutoring or caring role towards young people. He also admits the behaviour was sexually motivated, and that he had, at the time of the incidents, a sexual interest in teenage girls alongside his legitimate interest in adult females.

66. This sexual interest in teenage girls is unlikely ever to be wholly extinguished, but it can be fuelled further through the use of illegal or 'barely legal' pornography, or through sexual fantasy focussing [sic] on teenagers. If, as Mr. [AB] claims, he restricts his pornography use and his fantasy life to adults, then the inappropriate sexual interest is likely to wane, though not to disappear.

67. Mr. [AB] has not undertaken any kind of treatment work for his behaviour, but claims to have undergone both a change of heart and practice, partly as a result of a road traffic accident and probably partly because of the adverse consequences for him of his behaviour. Given that he probably added to the complainants' distress by largely denying his behaviour for some years after the allegations, I do not find that he demonstrates either insight into his behaviour or empathy for the complainants. However, I do not consider him likely to repeat the behaviour, largely out of self-interest. He does not appear to be as sexually preoccupied as he was at the time of the behaviour, and this is also a risk-predictor which normally declines slowly with age. In his case, the impotence he claims as a result of his accident, may have accelerated the process of declining sexual preoccupation. He appears to have a social group of adult friends, and his wife is likely to support him in maintaining an offence-free future. I therefore would not see him as needing the company

> and attention of young people for emotional validation." (pages 64, 74, 75, 79 and 80).

84. The appellant had attended the assessment with Dr Earnshaw, the assessor, at the DBS's behest. He spent two three-hour-long sessions with Dr Earnshaw.

85. We find persuasive the factors Dr Earnshaw mentioned, for the following reasons.

(a) Dr Earnshaw's expertise and process

86. Dr Earnshaw listed in her CV that she has a BA Honours degree from Cambridge University as well as a PhD, and that she is a psychotherapist. Her CV listed experience that included working for 16 years for the Surrey Probation Service, where her work included preparing assessment reports for the courts. She chaired a working party which researched work with sex offenders and made proposals for a sex offender programme for Surrey. She worked as a therapist to a residential school and treatment programme for children and adolescents with sexually abusive behaviours. Her work there too included carrying out risk assessments. She joined The Lucy Faithfull Foundation in 1998 as a clinical therapist. She was, by the time she assessed the appellant, a senior practitioner there. Her work for the 13 years preceding her report on the appellant included residential assessment and treatment of adult male sex offenders. This included work with non-offending partners and family members, residential assessment and treatment of Roman Catholic priests and brothers who had committed sexual offences against children, assessments and written reports for the criminal and family courts on convicted sex offenders, giving expert witness testimony at family hearings, assessments on behalf of Children's Services and of the Department for Education, consultancy to probation staff working with complex cases, and preparation of a treatment manual for internet offences.

87. Dr Earnshaw listed, by description and date, 144 separate documents which she said she had been supplied with and had read (paragraph 13 of her opinion, page 56). These included testimonials and letters from third parties, minutes of meetings, letters to and from the appellant, a newspaper article and records of police investigations.

88. There has been no suggestion that Dr Earnshaw overlooked any document or piece of information, or that she was not provided with a piece of relevant information. Nor has it been suggested that she was not sufficiently qualified or sufficiently experienced to conduct the assessment and to give the opinion she gave, or that she failed to spend adequate time with the appellant or to ask a necessary question.

89. We turn now from Dr Earnshaw's expertise and process to why the content of her opinion is persuasive.

(b) Content of Dr Earnshaw's opinion

90. There has been no suggestion that there has been a material change in circumstances since Dr Earnshaw's assessment was done, so as to remove or diminish any of the factors on which Dr Earnshaw relied in forming her opinion. (Indeed, as we said above, one of the factors – declining sexual preoccupation with

age – inherently increases in weight over time.) We accept that those factors make repetition unlikely, for the following reasons.

(i) Self-interest

91. We find compelling Dr Earnshaw's reliance on the appellant's self-interest: "I do not consider him likely to repeat the behaviour, largely out of self-interest" (paragraph 67 of her opinion, page 80).

92. Our judgment is that, regardless of insight and of the effect of insight, to which we return below, the factors suggesting self-interest as a deterrent are compelling. The appellant is aware that the behaviour would now be a criminal offence (under section 16 of the Sexual Offences Act 2003). Repetition would also result in fresh inclusion in the Children's Barred List. It was common ground that the appellant is keen to continue working with choirs. We accept that he does not wish to work as choir master for children's choirs in future. But inclusion in the Children's Barred List would, as the DBS accepts, affect the appellant's ability to work even with adult choirs because of the prejudices of others, even though the legislation would not prohibit working at venues where there were children, for example where there were children in the congregation. Moreover, his wife will now be watching like a hawk. We by no means criticise her when we say this. Her commitment to the marriage impressed us greatly (we return to that at paragraph 98 of this decision). In addition, those who know of the ban in the communities the appellant is part of will also be watching. And experience has shown him that he could not rely on the young women keeping secret any such behaviour. Our assessment – from the three and a half days we spent with the appellant – is that he is an extremely intelligent man, if we may say so. Far too intelligent to underestimate, in the light of experience, the consequences of repetition. And for the reasons we have given, we accept that he will not wish to trigger those consequences.

93. We find persuasive too the other factors Dr Earnshaw mentioned – especially the appellant's impotence, his declining sexual preoccupation and his marriage. We take each in turn.

(ii) Impotence

94. In our interim decision, we found that the appellant does not currently rely on his sexual impotence as mitigating the risk of repetition. We also concluded, however, that the fact that the appellant does not rely on his impotence as mitigating the risk was not to say the DBS could not take account of Dr Earnshaw's view that impotence "may well" be a mitigating factor. It does not prevent us from taking account of that view either. And we do take account of it.

95. Dr Earnshaw said—

> "To the extent that vanity was probably a component in his sexually inappropriate behaviour, I think this may well now be counteracted by his impotence, which is likely to cause embarrassment rather than gratification in a new sexual encounter … I accept that a measure of embarrassment about his impotence is likely to inhibit him from future affairs like the one with [CD], although it would not necessarily prevent sexual touching." (paragraphs 50 and 64, pages 75 and 79).

96. Although she said the impotence "would not necessarily prevent sexual touching", if we accept her point about embarrassment, which we do, then the appellant would risk embarrassment even in an episode of sexual touching; he might feel the need to conceal his lack of erection. While it is possible to conceal a lack of erection, it does render the encounter potentially more complicated. Although Dr Earnshaw said embarrassment about his impotence would not "necessarily" prevent sexual touching, repetition does not have to be impossible for us to direct removal. It is still one of the factors she mentioned as rendering repetition unlikely. And we accept that.

(iii) Declining sexual preoccupation

97. As to the appellant's declining sexual preoccupation, Dr Earnshaw stated as a general principle that sexual preoccupation declines with age. She opined that the appellant did not appear as sexually preoccupied as he was at the time of the behaviour in question, and that the process of declining sexual preoccupation may have been accelerated by his impotence. This decline will have increased further since Dr Earnshaw saw the appellant over four years ago, on 11 and 13 November 2015, merely with the passage of time. And she identified no factor whose deterrent nature would decrease with time.

(iv) Marriage as a restraining factor

98. As to the appellant's marriage as a restraining factor, we said in our interim decision—

> "99. We find that the appellant's marriage is an additional factor which will discourage him from repeating the behaviour. Dr Earnshaw's opinion was that—
>
> > "his wife is likely to support him in maintaining an offence-free future" (paragraph 67, page 80).
>
> 100. We have no reason to doubt the accuracy of that opinion, and the DBS accepted it in its post-hearing submission.
>
> 101. Moreover, as the appellant said in his post-hearing submission, his wife demonstrated her support for his maintaining an offence-free future, both by her attendance at the hearing before us and by what she told us during that hearing.
>
> 102. As to her attendance, Mrs AB attended for the whole of the first day of the hearing before us. She sat next to her husband with full sight of all of his papers. She did not attend on the second day of the hearing. But the hearing had been listed only for one day. In other words, her husband had accepted her being there for what he expected to be the entire case. During the hearing, Mrs AB heard and saw the detail of the admitted sexual conduct with all four girls. This included written references to fondling breasts. It also included uncomfortable oral evidence from her husband containing intimate detail of his sexual conduct with the girls – for example, that EF took off her top and bra on two occasions, and that there had been simulated sex over clothes. That the appellant was willing to share all this with his wife, and that she was willing to put herself through the hearing, showed a trust and openness between them,

> and a bond between them, which lent weight to Dr Earnshaw's opinion that Mrs AB is likely to support the appellant in maintaining an offence-free future.
>
> 103. What his wife told us also showed an openness on the appellant's part that lent support to Dr Earnshaw's view. Mrs AB told us – and we find – that the way she had found out about the appellant's full sexual relationship with CD was that the appellant himself had told her. (Mrs AB told us she was very upset about it, understandably. She also told us she had forgiven the appellant but that he had better not do it again.) Ms Ward did not cross-examine Mrs AB on any of this evidence, and we had no reason to doubt it.".

99. Our judgment on the marriage as a restraining factor was reinforced by the appellant's wife's attendance for the whole of the second hearing before us, over two days. Again, there was discussion of uncomfortable details. And again, nothing was hidden from her.

(v) Pornography use and fantasy life

100. Dr Earnshaw did also opine that the appellant's "current lack of a legitimate sexual outlet could be risk-predictive" (paragraph 64 of her opinion) and that his "sexual interest in teenage girls is unlikely ever to be wholly extinguished" (paragraph 66). But she said that, "provided he does not foster his sexual interest in teenage girls by looking at under-age or "barely legal" pornographic sites on the internet, it should be manageable" (paragraph 64 of her opinion). And she said that, if he "restricts his pornography use and his fantasy life to adults, then the inappropriate sexual interest is likely to wane, though not to disappear" (paragraph 66). Her opinion that self-interest will "largely" be what renders repetition unlikely was not, however, expressed to be conditional upon the appellant restricting his pornography use and fantasy life. We need not try to guess whether she thought repetition would be more unlikely if he did restrict his pornography use and fantasy life, or whether she chose to say "unlikely" rather than "very unlikely" because of not knowing whether he would restrict his pornography use and fantasy life. Moreover, whether the appellant does in future "restrict his fantasy life", separate from restricting his pornography use, will not be readily discernible. It would be only in his head, unless and until the DBS or its assessor were to ask him again about it. Dr Earnshaw did not appear to suggest that her assessment that repetition was "unlikely" depended on his being asked in the future whether he had restricted his fantasy life.

(vi) Generally

101. In view of what we say at paragraph 92 above, our view of self-interest as a deterrent is that the appellant will do whatever it takes not to repeat the behaviour, including restraining himself if he has to. We had him before us over the course of two oral hearings, lasting three and a half days. We also had a large amount of written evidence and submissions from him. Matters relating to the bar are more out in the open now – he has told friends and acquaintances about it, and the church knows about it (and indeed stepped in to stop him doing some work). His wife has seen and heard the uncomfortable details. We found in our interim decision that he does not now seek to justify his behaviour (paragraph 95 of our interim decision). We find sincere his expressed keenness to continue the choir work in places where – as was common ground – the stigma if not the law prevents him from going. That, plus (a) our impression of his marriage from the two oral hearings, which reinforced what Dr Earnshaw had said about the marriage, and (b) the passage of time (and so

the further decline of sexual preoccupation), cause us to conclude that any persisting "lack of a legitimate sexual outlet" and the (waning) "sexual interest in teenage girls" which Dr Earnshaw found in 2015, do not vitiate the assessment that repetition is unlikely.

102. Dr Earnshaw did also say that the appellant had "not undertaken any kind of treatment work for his behaviour" (paragraph 67 of her opinion). She opined that "were his bar to be lifted, it would be of benefit for [him] to engage in further training in child protection procedures before taking up any role in which he might have contact with young people under the age of 18" (paragraph 68, page 80). The appellant told us, and we accept, as the DBS appeared to, that he does not wish to work with children's choirs, or with choirs which comprise partly children. He also told us he did not have the energy for that in any event, as he had told Dr Earnshaw. We accept that that is his view. It is not clear whether the appellant might still want "occasionally [to] be able to stand in and direct other choirs in order to help out on a temporary basis" as Dr Earnshaw had reported (her paragraph 46). But even if he were contemplating working with choirs which included children, Dr Earnshaw's opinion that repetition was unlikely seemed to be despite his not having had treatment, and did not appear conditional upon his receiving further training. Her reference to treatment and training does not, therefore, vitiate our own reliance on her view that repetition is unlikely.

(3) DBS considerations

103. Despite Dr Earnshaw's opinion, the DBS decided that the risk of repetition – "unlikely" according to Dr Earnshaw – was not low enough for the DBS to remove the appellant from the Children's Barred List.

104. We reject the following crucial elements of the DBS's reasoning. We dealt with them in our interim decision in relation to the DBS's defence of its decision. But our judgment on whether those elements can support inclusion in the list is relevant also to whether to remit.

Behaviour which led to inclusion in the list

105. The DBS relied, among other things, on the behaviour which had led to inclusion in the list. But as we said in our interim decision, if the conduct which led to the listing is of itself a reason to keep an appellant on the list, there seems nothing an appellant can ever do to argue against his continuing inclusion, assuming he does not attempt to argue that the conduct did not take place.

106. In deciding that the risk of repetition was not low enough to remove the appellant from the list, the DBS also relied on the appellant's sexual interest in teenaged girls. As we said in our interim decision, however, "having the sexual interest is one thing, acting on it is another" (paragraph 49 of our interim decision). Dr Earnshaw opined that he is unlikely to act on it. She also said that it is waning.

Insight

107. In deciding that the risk of repetition was not low enough to remove the appellant from the list, the DBS also relied on a lack of insight on the appellant's part.

It did so even though Dr Earnshaw's opinion that repetition was unlikely was for reasons other than insight into the risk of harm to the girls.

108. We do not accept that we should not direct removal if the improbability of repetition arises from self-interest rather than from insight into harm. We say that for two reasons.

109. First, Dr Earnshaw did not suggest that there was a difference in the quality or degree of improbability as between insight on the one hand and self-interest on the other.

110. Second, even if the appellant has insight into the effect his behaviour had on the girls, that does not of itself necessarily mitigate the risk of repetition. We said in our interim decision—

> "63. The proposition that self-interest is "less ingrained", as counsel submitted, is far from obvious. If anything, it might be said that – with the probable exception of many or most parents towards their children – self-interest is both more ingrained and more likely to inhibit behaviour than insight into the harm that would or might be caused to others by that behaviour. So it might even be that self-interest is more of a mitigating factor – a more ubiquitous or more reliable inhibitor – than insight. Reliance on insight into harm as an inhibitor requires a two-step process. First, there has to be insight. Second, the insight has to act to inhibit the potentially harmful behaviour. That second step is by no means a given. In other words, having insight into the harm you will or might cause someone does not necessarily make you decide not to cause them the harm. Human nature is not so straightforward or so universally decent. Whether that insight inhibits you from causing the harm will vary according to the kind of person you are. It might also vary according to who it is you risk harming. Whereas being aware of the harm you will cause to yourself by your behaviour might be said to operate as an inhibitor even if you do not have insight into the harm you might cause to someone else, or if you have that insight but are willing to cause the harm anyway." (page 540).

111. In other words, whether any insight the appellant has would prevent repetition would depend on his caring not to have the effect on young women in the future that he has had on the girls in the present case. The DBS did not suggest that that extra step is satisfied or even that it would on remittal be investigated. We are amply satisfied, by contrast, that the appellant's self-interest, especially when taken with the other factors we mention at paragraph 101 above, renders repetition unlikely.

Full consideration on remittal

112. We found in our interim decision that it was an error of law for the DBS to fail to explain why self-interest (alternatively described by the DBS as the appellant's "own motivation and restraint") was considered by the DBS to be less of a mitigating factor, or a less reliable mitigating factor, than insight into harm.

113. In support of her request for remittal, Ms Patry submitted that that error of law could be corrected. But Dr Earnshaw, the DBS's own specialist assessor, did not say that self-interest is less of a mitigating factor, or a less reliable mitigating factor, than insight into harm. The DBS knew that when it incorporated into its decision its

reasoning that self-interest, or the appellant's "own motivation and restraint", was not enough. We do not think it appropriate that the DBS should at this stage be given the opportunity (1) to try to obtain an opinion that (a) supports the DBS's reliance on lack of insight and (b) relies less or not at all on self-interest, or (2) to try to explain that reliance in any other way, or (3) to find and cite other reasons for refusing to remove the appellant from the list. There has to be some end in sight for the appellant.

114. That there has to be some end in sight goes too for the DBS's submission that remittal will give the DBS the opportunity to follow the steps in the BDMP document and thereby to give "full consideration" to the matter as Ms Ward put it[5], and to "consider the matter fully" as Ms Patry put it (paragraph 28 above). The appellant submitted that the DBS should not wait for an appeal to be allowed before considering the case thoroughly. We agree. The DBS had the opportunity "to consider the matter fully", as counsel put it, when it made the review decision the subject of this appeal. If the DBS considers that it could do more to get it right, it should be doing that first time round, not merely after remittal by the Upper Tribunal.

115. It is of course in the nature of the appeal process, and of remittal, that the Upper Tribunal will tell a decision-making body that the body has made a specific error in a specific case, and that the body will then know to try to avoid repeating the error in that case if the case is remitted. But we do not consider it acceptable for the DBS to wait for remittal before following an approach which it considers to be sufficiently or more thorough and sufficiently or more structured – and more likely to avoid errors – as compared with the approach it took when first making the decision in question. And that was effectively what both Ms Ward and Ms Patry submitted in the present case. They both submitted that remittal would allow for "full" consideration. (We pause to note that doing more to get it right first time round might reduce the number of cases in which the DBS, on receiving from the Upper Tribunal notice of a permission to appeal application, seeks a stay of the application on the ground that the DBS has spotted "potential errors of fact or law" and wishes to review the case.)

116. Ms Patry expressed concern at the hearing that we were considering finding the review process unlawful. She submitted that the Upper Tribunal in *PP v DBS* [2017] UKUT 337 (AAC) held that the DBS is entitled to use the process it follows on review. We explained that we were not considering making such a finding – we were exploring her submission (a) that a reason to remit is that the DBS will give full consideration to the matter next time round, if we remit, and (b) that public confidence would be helped by our remitting because the public would be assured of a more structured and more thorough approach next time round, if we remit.

117. The Upper Tribunal in *PP* found that the DBS did not err in law in not applying the "structured judgment process" within the Barring Decision Making Process. We have not needed to make a finding as to whether the DBS erred in law in failing to apply that structured judgment process in the present case. And to make such a finding would potentially require an examination of whether the errors of law we did find arose perforce from failing to following the structured judgment process. That was not however the focus of the present case.

[5] Counsel Ms Ward's submission 23/11/18, paragraph 16, page 571.

118. That does not alter our judgment at paragraph 115 above, however. The effect on an individual of being wrongly barred is greater than its effect on the DBS. For a person to have to appeal to the Upper Tribunal to obtain from the DBS "full consideration" of the case is in our judgment unacceptable. We do not accept either that public confidence in the barring process would be helped by our saying that we were remitting to enable full consideration of the case. The obvious question would be: "Why hasn't that happened already?".

(4) Closure

119. We said at paragraphs 113 and 114 above that there has to be some end in sight for the appellant. The need for closure does not however, of itself, persuade us to direct removal (and whether it could, in principle, suffice is not before us). It is a factor, as it was for example in *CM*.

Conclusion

120. It is for all these reasons that we are directing removal from the Children's Barred List.

Rachel Perez
Judge of the Upper Tribunal
11 March 2020

Annex to Upper Tribunal decision

Extracts from DBS counsel's 23 November 2018 submission (page 567)

"3. For the reasons set out below, the DBS will invite the Tribunal to remit the matter back to it.

Legal framework

4. As the Tribunal has concluded that there were errors of law and fact in the DBS's decision, the options available under section 4(6) of the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act") are those that it has identified: it must either direct the DBS to remove [the appellant] from the list, or remit the matter to the DBS for a new decision. It cannot confirm the decision of the DBS: this reflects the statutory position that the decision on appropriateness is for the DBS and is not itself a question of fact or law.

5. The DBS submits that the correct approach is as set out by Judge Rowland in MR v DBS [2015] UKUT 5 (AAC) at [8]:

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

6. It is right to say that the Tribunal in MR appeared to take a different view later in the same judgment, saying at [18] that "*However, the fact that the question of appropriateness is in the first instance to be considered by the Respondent does not, in our judgment, necessarily require that cases must always be remitted except where it is clear that it would be inappropriate to include the appellant in the list on the findings made by the Upper Tribunal*". Insofar as there is a conflict between the two passages, it is submitted that the former is to be approved, as it clearly explains the scheme of the legislation. It has also been followed by the Tribunal in CM v DBS [2015] UKUT 707 (AAC) (at [66]).

7. The DBS accordingly submits that as [sic] (as set out below) it does not accept that [the appellant] should necessarily be removed in the light of the errors found by the Tribunal, the matter should be remitted unless the Tribunal is satisfied that the DBS could not lawfully decide that [the appellant] should remain on the list if the matter were to be remitted to it."

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. V/2641/2016

Appellant: Mr AB

Respondent: Disclosure and Barring Service

DECISION OF THE UPPER TRIBUNAL

UPPER TRIBUNAL JUDGE PEREZ
MS MARGARET DIAMOND
MR BRIAN CAIRNS

This interim decision has been anonymised with the parties' agreement.

There is also an anonymity order in place. Its terms are on the next page.

ON APPEAL FROM:
Decision-making body: Disclosure and Barring Service
Case no: PTW330
Decision: 26 May 2016

IN THE UPPER TRIBUNAL **Appeal No.** V/2641/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Perez
Ms Margaret Diamond
Mr Brian Cairns

Ms Galina Ward of counsel for the DBS
Mr AB appeared in person

INTERIM DECISION

Anonymity order

There is an anonymity order in this case. It is set out in paragraph 1 of our final decision dated 11 March 2020. The consequences of any breach are set out in paragraph 2 of that decision. Those paragraphs say—

"1. Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008[1], we prohibit the disclosure or publication of—

(a) the appellant's name (referred to as "AB" and "Mr AB" in this decision and in our 29 June 2018 interim decision);

(b) the appellant's wife's name (referred to as "Mrs AB" in this decision and in our 29 June 2018 interim decision);

(c) the name of each of the four girls in question (one of them is referred to as "CD", and a second as "EF", in this decision and in our 29 June 2018 interim decision, and a third is referred to as "GH", and a fourth as "IJ", in our 29 June 2018 interim decision);

(d) the name of the person referred to as "Mr KL" in our 29 June 2018 interim decision;

(e) the name of the person referred to as "Ms MN" in our 29 June 2018 interim decision;

(f) any matter likely to lead members of the public to identify any person mentioned in any of subparagraphs (a) to (e) above.

2. Any breach of the order at paragraph 1 above is liable to be treated as a contempt of court and punished accordingly (see section 25 of the Tribunals, Courts and Enforcement Act 2007)."

[1] Statutory instrument number S.I. 2008/2698, as amended.

Upper Tribunal decision

1. The appeal is allowed to the extent that the decision of the Disclosure and Barring Service ("the DBS") of 26 May 2016 not to remove the appellant's name from the Children's Barred List is set aside. We also make findings of fact on certain matters. If we remit and if the DBS decides to take those matters into account at all, those findings must form the basis for the DBS's new decision. Directions for the next stage – our consideration of disposal – are at paragraph 124 below.

2. We direct that time for appealing this interim decision will not start to run until the date on which our final decision is issued disposing of the entire appeal.

Background

Inclusion in lists

3. On 17 September 2003, the appellant's name was provisionally included in the Protection of Children Act List maintained under the Protection of Children Act 1999. This was a list of individuals considered unsuitable to work with children. There was no prohibition on the appellant applying for employment during this provisional inclusion (in contrast to section 35 of the Criminal Justice and Court Services Act 2000[2] which applied on his confirmed inclusion). But section 7 of the Protection of Children Act 1999 required child care organisations to check the Protection of Children Act List[3]. They were prohibited from offering employment in certain roles to an individual included in that list, whether that inclusion was provisional or confirmed.

4. On 2 November 2004, the appellant's inclusion in the Protection of Children Act List was confirmed by the Secretary of State for Education and Skills, and he was included in the Protection of Vulnerable Adults List by the Secretary of State for Health. The appellant's inclusion in the lists was based on consensual sexual behaviour with teenaged girls aged 16 and 17. It was common ground that the behaviour did not, at the time it took place, constitute an offence. (On 1 May 2004, after the appellant's provisional inclusion in the Protection of Children Act List and before his confirmed inclusion in it, section 16 of the Sexual Offences Act 2003 came into force. We come to the relevance of that later.)

5. The appellant's name was migrated to the replacement lists under the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act"), that is, to the Children's Barred List and the Adults' Barred List. Those lists were maintained by the DBS's predecessor, the Independent Safeguarding Authority ("the ISA"), whose functions the DBS took over on 1 December 2012. The minimum barred period applicable to the appellant expired after 10 years, on 2 November 2014.

Review of inclusion in lists

6. On 18 November 2014, the appellant applied for review of his inclusion in both lists, under paragraph 18 of Schedule 3 to the 2006 Act (paragraph 18 is reproduced

[2] Section 35(1) and (4)(a) of the Criminal Justice and Court Services Act 2000 (c. 43).
[3] Child care organisations were also required to check a list called List 99, a list of persons subject to a direction made by the Secretary of State under section 142 of the Education Act 2002. The appellant was included in that list on 9 November 2004.

at Annex A to this decision). The DBS – who had by this time taken over from the ISA – considered that the documentary evidence the appellant had provided in support of his application (pages 32 to 50) indicated that he may have demonstrated an ability to modify his earlier behaviour and behave in a more appropriate manner towards children. The DBS therefore granted permission to review under paragraph 18(4) of Schedule 3 to the 2006 Act. This was on the ground that there had been a change of circumstances since inclusion in the lists. The DBS appeared to rely on its letter of 24 August 2015 at page 51 as showing that permission to review was granted. But that letter does not actually say that. The permission to review may have been in a letter dated 2 June 2015 (referred to on page 51), to which we were not taken. But it was in any event common ground that permission to review had been granted.

7. Counsel for the DBS, Ms Ward, told us that the change of circumstances had actually occurred before the appellant's inclusion in the lists. She said this did not satisfy the test for granting permission to review. This seemed to imply that the change of circumstances had to be that the relevant conduct had stopped. But given that inclusion in the list is to prevent an appellant from engaging further in the relevant conduct, the conduct should in any event have stopped on inclusion in the list. So it seems the change of circumstances since inclusion, referred to in Schedule 3 to the 2006 Act, must be something other than that the relevant conduct has stopped. Counsel did not, in the event, seek to go behind the grant of permission to review.

Specialist risk assessment

8. As part of the review into the appropriateness of ongoing inclusion, the appellant was invited to participate in a specialist risk assessment. This he did. The assessment was done by Dr Judith Earnshaw PhD, psychotherapist and senior practitioner to the Lucy Faithfull Foundation (pages 53 to 82).

9. Dr Earnshaw's report dated 21 December 2015 was based on two three-hour interviews with the appellant. Dr Earnshaw was also supplied with a large amount of documentation (listed by her at pages 56 to 63), which she said she had read. This included police documents, DBS documents, letters from the appellant's friends and acquaintances, letters from […] County Council Children's Services, the Department for Education and Skills, a church diocese and others, and letters and submissions from the appellant himself.

10. The appellant is now aged 65. At the date of Dr Earnshaw's report, the appellant was 63. Dr Earnshaw concluded that—

> "67. … I do not find that he demonstrates either insight into his behaviour or empathy for the complainants. However, I do not consider him likely to repeat the behaviour, largely out of self-interest. He does not appear to be as sexually preoccupied as he was at the time of the behaviour, and this is also a risk-predictor which normally declines slowly with age. In his case, the impotence he claims as a result of his accident, may have accelerated the process of declining sexual preoccupation. He appears to have a social group of adult friends, and his wife is likely to support him in maintaining an offence-free future. I therefore would not see him as needing the company and attention of young people for emotional validation.

> 68. In my opinion, were his bar to be lifted, it would be of benefit for Mr. [AB] to engage in further training in child protection procedures before taking up any role in which he might have contact with young people under the age of 18." (page 80).

11. We address below other parts of Dr Earnshaw's report where relevant to the issues we discuss.

Removal from Adults' Barred List

12. Following Dr Earnshaw's specialist assessment, the DBS removed the appellant's name from the Adults' Barred List. This was on the ground that the appellant did not meet the statutory test for regulated activity with adults.

DBS review decision under appeal

13. The DBS concluded however that the test for regulated activity in relation to children – in section 5 of and Schedule 4 to the 2006 Act – was met by the appellant's occupation as a choirmaster. The appellant does not dispute that this test was met. The DBS told the appellant by letter dated 26 May 2016 (pages 96 to 104) that the DBS remained of the view that it was not appropriate to remove the appellant's name from the Children's Barred List, effectively dismissing his application under paragraph 18(5) of Schedule 3 to the 2006 Act. A further document dated 26 May 2016 purporting to be the actual review decision ("the Decision"), rather than the letter notifying the appellant of the Decision, was also in the bundle (pages 88 to 95).

Upper Tribunal appeal

Introduction

14. The appellant appealed with the permission of the Upper Tribunal (page 485) to the Upper Tribunal under section 4 of the 2006 Act (section 4 is reproduced at Annex A to this decision). His appeal was against only the part of the Decision refusing to remove him from the Children's Barred List. His choir work is now only with adult choirs. But it is common ground that there are occasions in that work where his inclusion in the Children's Barred List would prevent him from visiting certain venues.

Grounds of appeal

15. The appellant asserted mistakes of both fact and law. He said that—

(1) the DBS had judged the circumstances / conduct which led to his inclusion in the list rather than judging his current circumstances / conduct, and had given inadequate reasons for dismissing his supporting evidence;

(2) the DBS had unreasonably disregarded the specialist risk assessment;

(3) the DBS was mistaken (a) in saying that the appellant had gone to great lengths over the past 15 years to conceal his behaviour and convince

officials, acquaintances and colleagues that he presented no danger to children, and (b) in saying that the appellant had demonstrated little insight into the implications of his behaviour on the girls;

(4) the DBS had taken account of an irrelevant factor in saying that the appellant's lack of awareness was further demonstrated by his assertion that he would have stopped had the girls indicated that they did not want him to carry on;

(5) the DBS was mistaken in saying that the appellant had stated that the impotence from his road traffic accident ("RTA") injuries eliminated future risk;

(6) the DBS was mistaken in saying that at least one incident of abuse occurred after the appellant's RTA;

(7) the DBS was mistaken in saying that the appellant had demonstrated a long-standing sexual interest in teenaged girls and previously acted on that attraction;

(8) the DBS had taken account of an irrelevant factor because the post-RTA sexual touching with one of the girls, EF, aged 19 was not relevant to the appellant's conduct with children;

(9) the DBS had failed to take account of the reasoning behind the appellant's prolonged concealment; and

(10) the DBS had erred in concluding that, even though the risk of repetition may be decreasing, the DBS could not be sufficiently satisfied that, if the bar were lifted, the appellant would not act in a similar manner again.

16. Following the Upper Tribunal's grant of permission, both parties made further written submissions. We held an oral hearing of the appeal. The appellant, keen not to be repetitious, explained that the last three of his 10 grounds were just further explanation of points he had previously made. He therefore initially sought to withdraw those last three grounds. We were grateful to him for the spirit of that. But we explained that we were able to take the last three grounds into account on the basis he had explained, without his actually withdrawing them. So that is what the appellant invited us to do.

17. In the event, we have not needed to address whether each of the appellant's 10 grounds of appeal justifies setting aside the Decision, because we have found three fundamental errors of law for which we must set it aside. Since those fundamental errors do not fit neatly into any of the appellant's grounds as framed (although they do overlap with them to some extent), we address those fundamental errors separately at paragraphs 37 to 82 below. First though, given the appellant's submission that upholding all of his grounds would mean there was no point in remitting, we thought it would help the parties' consideration of next steps if we addressed all of the grounds as framed by the appellant.

Upper Tribunal's consideration of grounds of appeal

Ground (1): (a) Inadequate weight given to supporting letters and (b) decision based on circumstances / conduct which led to listing rather than on current circumstances / conduct

(a) Supporting letters

18. The appellant said the letters he had supplied in support of his application for review showed that he had modified his behaviour after his RTA of 10 May 2000 and before his confirmed inclusion in the Children's Barred List on 2 November 2004. Ms Ward for the DBS said the letters showed something the DBS did not dispute because the DBS did not dispute that the behaviour did not continue after 2000. She asked what else the DBS was meant to do to show that it had taken the letters into account.

19. One of the supporting letters was from CD's mother. CD is one of the girls with whom the appellant engaged in consensual sexual conduct leading to his inclusion in the list. We find that the DBS did not weigh the letter from CD's mother in an irrational manner. As the Decision pointed out, that letter said—

> "My daughter is perfectly happy for me to be writing to you to confirm that there never was and never has been any incident of any type or any occasion when she has felt uncomfortable in [the appellant's] presence." (page 42).

20. The rest of the letter was to the effect that there was no substance to the allegations. But as the Decision said, the behaviour later alleged by CD – including the full sexual relationship with her – had already taken place by the time her mother's letter was written on 9 July 2002. In other words, the mother of one of the girls wrote a supporting letter in ignorance of what had actually happened. The DBS was entitled to give that letter no weight.

21. As to whether the other letters were weighed rationally or not, on the one hand they did appear different from CD's mother's letter; they spoke of behaviour the authors themselves had witnessed. But on the other hand, the letters could not speak of behaviour the authors had not witnessed, and the letters were as much about what the appellant had not done as about what he had done. It could be said that, as CD's mother had made a statement unaware that it was false, it was rational to consider that that cast doubt on what the authors of the other letters knew when writing their letters of support.

22. However, we need not decide whether the other supporting letters were weighed irrationally because of our finding at paragraph 23 below as to how the DBS took account of the appellant's past conduct.

(b) Past conduct

23. We find that the DBS did err in law in how it took account of the appellant's past conduct. The DBS erred in law on this in at least one way. Contrary to what counsel said, it was not quite the case that the DBS did not dispute that the appellant's "behaviour" did not continue after 2000. The DBS may not have labelled the two incidents in 2002 with EF when EF was 19 as "relevant conduct", and so may

not have technically relied in the Decision on conduct which led to the listing. But the DBS still took account of the 2002 incidents as "weaken[ing] his claim" to have modified his behaviour (Decision, page 94, second paragraph). We explain why that was an error of law at paragraphs 66 to 82 below.

24. It seemed to us that an error of law might also be revealed by how the DBS took account of the fact that the appellant had previously acted on his sexual interest in teenaged girls. The Decision said—

> "Dr Earnshaw's opinion was that Mr [AB] would be unlikely to repeat his behaviour, largely out of self interest, but also as a result of the decline in sexual preoccupation both through age and impotence. However, it is also noted that this observation relies solely on Mr [AB]'s own motivation and restraint. Mr [AB] has a long-standing sexual interest in teenage girls and has previously acted on this attraction" (our emphasis, page 93 bottom, page 94 top).

25. The statement in this passage that the appellant "has previously acted on this attraction" shows that the DBS did take account of the appellant's past conduct, that is, the conduct which led to his inclusion in the list. It must have, because merely having the sexual interest was not the conduct which led to inclusion in the list. Moreover, the statement in the Decision that "he has a long-standing sexual interest…and has previously acted on [it]" immediately follows the DBS's statement in the Decision that Dr Earnshaw's view that repetition was unlikely "relies solely on Mr [AB]'s own motivation and restraint". This suggests the DBS was saying not simply that the risk exists because the appellant has previously acted on his sexual interest, but that the risk is not adequately mitigated because he has previously acted on his sexual interest. Counsel confirmed this; she told us the existence of the sexual interest itself created the risk (paragraph 43 below).

26. But if the conduct which led to the listing is of itself a reason to keep an appellant on the list, there seems to be nothing an appellant can ever do to argue against his continuing inclusion, assuming he does not attempt to argue that the conduct did not take place. If we had to decide whether the DBS had erred in law by taking into account, in the way it did, the fact of the appellant's having engaged in the conduct which led to his listing, we might well conclude that the DBS did err in law. The error would be that it took that fact into account as relevant to mitigating the risk rather than as relevant to the existence of the risk. That the appellant had engaged in the conduct in the past did not of itself mean he would repeat it. Although we need not decide whether there was an error of law on this, our observations on it may help the parties' consideration of next steps.

Ground (2): Specialist risk assessment unreasonably disregarded

27. Dr Earnshaw's opinion was that the appellant was unlikely to repeat the behaviour which led to his inclusion in the list. But this was for reasons other than insight into the risk of harm to the girls. Counsel submitted that the DBS had not in fact disregarded Dr Earnshaw's assessment. Counsel submitted rather that the DBS had – as she said it was entitled to do – made its own decision as to risk of repetition, having sought the assessment for that purpose and considered it.

28. We accept that the DBS did not completely disregard Dr Earnshaw's specialist risk assessment; the DBS addressed the assessment in the Decision. However, self-interest was one of the factors which Dr Earnshaw thought rendered repetition unlikely. We find at paragraphs 56 to 65 below that the Decision erred in law in failing to explain why self-interest (alternatively described as the appellant's "own motivation and restraint") was considered less of a mitigating factor, or a less reliable mitigating factor, than insight into harm.

Ground 3: Mistake of fact to say appellant had gone to great lengths over the past 15 years to conceal his behaviour and convince officials, acquaintances and colleagues that he presented no danger to children, and mistake of fact to say he had demonstrated little insight into the implications of his behaviour on the girls

29. The appellant said his changed behaviour from 2000 to 2004 (when his name was confirmed on 2 November on the Protection of Children Act List) was not an attempt at concealment, but an actual change of conduct. He said he was not for that period disqualified from working with children, and that something other than being so disqualified must therefore have caused his change in behaviour. As to the length of the period of disqualification, the DBS said that, although the appellant was right to say section 35 of the Criminal Justice and Court Services Act 2000[4] did not apply to his provisional inclusion, child care organisations were still prevented during provisional inclusion from offering him employment (section 7 of the Protection of Children Act 1999). The appellant said however that he did work with children until 2004 by directing a choir and in his work as office manager of a music education charity (page 34). He said he had had to resign from that managerial position when his name was confirmed on the Protection of Children Act List in November 2004 (page 34). So from the appellant's point of view, the incident-free gap on which he based some of his submissions continued past the date of his provisional inclusion until the day before his confirmed inclusion. (It is unclear whether he was aware of the commencement on 1 May 2004 of section 16 of the Sexual Offences Act 2003, which made it an offence to commit conduct of the kind which led to the listing. If he was not aware of that, then it could be said that commencement of that section 16 did not act as a deterrent to him personally either.)

30. The DBS did not accept that any change in behaviour (which itself was in issue) was caused by insight. We are not persuaded that we have enough evidence to decide whether or not the appellant has insight. And we do not at this stage need to decide that point, given our decision on other errors of law. We do however find force in the appellant's point that his behaviour did in fact change, and that there was a period after his RTA and before his name was confirmed on the list on 2 November 2004 (or at least, before commencement on 1 May 2004 of section 16 of the Sexual Offences Act 2003) that could be described as incident-free, and for reasons other than being prevented or prohibited from behaving in the way which led to his listing; see our discussion at paragraphs 39 to 53 below about the two 2002 incidents with EF. As to the extent to which any disclosure to third parties means the appellant did not conceal his behaviour for 15 years, we address that below under "other matters".

[4] Section 35(1) and (4)(a) of the Criminal Justice and Court Services Act 2000 (c. 43).

Ground 4: DBS took account of an irrelevant factor in saying appellant's lack of awareness was further demonstrated by his assertion that he would have stopped had the girls indicated that they did not want him to carry on

31. We need make no finding as to whether there was a mistake of fact or law in how the DBS took account of Dr Earnshaw's report that the appellant had said "I wouldn't have done it if anyone froze, moved away, or said they didn't want it" (page 71, paragraph 36). But we do make a finding of fact about it at paragraphs 87 to 95 below. That finding will form part of the basis for a new DBS decision if we remit.

Ground 5: Mistake of fact to say appellant had stated that impotence from his RTA injuries eliminated future risk

32. The Decision said—

> "Mr [AB] … has stated that the injuries he sustained in 2000 had a lasting effect on him physically and that, even if he had been a risk to children previously, the results of his injuries would eliminate any such risk in the future" (emphasis added, page 93, fourth paragraph).

33. This was not a mistake of fact. The appellant had in fact stated, in his letter of 17 May 2003 13 years previously, that—

> "Many of the injuries have had a lasting effect on me physically. Even if these latest allegations of a sexual nature had been true and that I was previously a risk to children, the results of my injuries eliminate any such risk in future" (page 122).

The appellant told us that that past statement does not reflect his current position. But he had in fact said it, albeit 13 years previously. So the DBS were, strictly speaking, right to say he had said it.

34. We do however address, in our findings of fact at paragraph 104 below, the appellant's contention that it is not his current position that his impotence mitigates the risk of repetition.

Grounds 6 and 8: Mistake of fact to say at least one incident of abuse occurred after the RTA, and account taken of irrelevant factor

35. The appellant said the post-RTA sexual touching with EF in 2002 when she was 19 was not abuse and was not relevant to his conduct with children. We find, for the reasons at paragraphs 66 to 82 below, that the DBS erred in law in relation to the two 2002 incidents with EF aged 19.

Ground 7: Mistake of fact to say appellant had demonstrated a long-standing sexual interest in teenaged girls and had previously acted on that attraction

36. The appellant said it was a mistake of fact to say he had "demonstrated" the sexual interest over a long-standing period, because he had "demonstrated" it only over a period of some 18 months, from late 1998 to early 2000. Ms Ward for the DBS submitted that there was no mistake of fact because the Decision document said "has a long-standing sexual interest" not "has demonstrated" such an interest, even though the letter notifying the appellant of the Decision did say "demonstrated".

We have made observations at paragraphs 24 to 26 above about the reference to "has previously acted on this attraction". And we deal at paragraphs 39 to 53 below with a fundamental error of law as to the relevance of the existence of the sexual interest.

Errors of law

37. We unanimously conclude that there are three errors of law for which we must set aside the Decision. Those errors are—

(1) that the Decision was based on an implied assumption that the appellant's having a sexual interest in teenaged girls of itself creates the risk of his repeating the behaviour, or at least that it creates more of a risk with this appellant than with other heterosexual men, without explaining the reasons for that assumption;

(2) that the Decision did not explain why self-interest (alternatively described as the appellant's "own motivation and restraint") was considered less of a mitigating factor, or a less reliable mitigating factor, than insight into harm; and

(3) that the DBS failed to enquire into, and in any event make findings of fact as to, the circumstances of the two 2002 incidents with EF when she was 19.

38. We so find for the following reasons.

<u>(1) Failure to explain assumption that having a sexual interest in teenaged girls creates the risk of repetition or creates more of a risk of repetition than with other heterosexual men</u>

39. The appellant has admitted to sexual behaviour with four girls aged 16 and 17, which started when he was a choirmaster. He has also admitted to a full sexual relationship (that is, to sexual intercourse on repeated occasions) with one of the girls, CD. It is common ground that that full sexual relationship started after CD turned 18. The appellant has admitted to two further incidents of sexual touching with one of the girls, EF, when – as seems to be common ground – EF was 19, after a gap of some two years and three months from May 2000 to August 2002. Counsel did not suggest any criminal offence had been committed. She also accepted that an incident where the appellant commented to CD when CD was 13 about CD having dyed her hair (referred to by Dr Earnshaw at page 66, paragraph 25) was not sexual conduct. Counsel said the behaviour underlying the bar was sexual conduct, including a full sexual relationship with CD which started when CD was 18, and starting with touching of girls aged 16 and 17. It was common ground that the appellant had had a serious RTA on 10 May 2000 which had rendered him unable to maintain an erection.

40. The Decision said—

> "The specialist risk assessment is clear that Mr [AB]'s abusive sexual behaviour towards four female children for whom he held a position of trust was motivated by a sexual interest in teenage girls and therefore Relevant

> Conduct towards children is clearly established. As the relevant conduct is of a sexual nature involving children, consideration has been given to the Secretary of State's guidance that the conduct is inappropriate." (page 93, first summary paragraph)
>
> "at least one of the incidents of abuse that Mr [AB] has now admitted occurred after [his accident of 10 May 2000]. He also confirms that he still has sexual thoughts and is capable of orgasm through masturbation. The report also notes that Mr [AB]'s impotence would not preclude sexual touching which, when considering the description of his previous behaviour remains concerning as this was characterised by his sexual touching of the girls" (page 93, second summary paragraph)
>
> "Despite Mr [AB]'s recent honesty, he has demonstrated little insight into the implications of his behaviour for the girls involved" (page 93, third summary paragraph)
>
> "Dr Earnshaw's opinion was that Mr [AB] would be unlikely to repeat his behaviour, largely out of self interest, but also as a result of the decline in sexual preoccupation both through age and impotence. However, it is also noted that this observation relies solely on Mr [AB]'s own motivation and restraint. Mr [AB] has a long-standing sexual interest in teenage girls and has previously acted on this attraction." (page 93, last paragraph)
>
> "As previously stated, Mr [AB] has not shown any credible insight into his behaviour…" (page 94, second paragraph)
>
> "Whilst the risk of him committing further abusive behaviour may be decreasing, the DBS cannot be sufficiently satisfied that, if the restrictions in place were to be removed, he would not be capable of acting in a similar manner again." (page 94, third paragraph).

41. Although the Decision document said "Mr [AB] has a long-standing sexual interest in teenage girls" (page 94), the DBS letter notifying the appellant of the Decision said he had "demonstrated a long-standing sexual interest in teenage girls" (page 16). The appellant argued that he had demonstrated the sexual interest over a period of only some 18 months. He submitted that the sexual interest could not therefore be said to have been demonstrated over a "long-standing" period. Ms Ward for the DBS said we should look at the Decision document itself rather than at the notification letter. She submitted that the Decision document said "has" a long-standing interest not "has demonstrated", that the appellant has had an interest in teenaged girls since 1998, and that the period from 1998 to the present is indeed "long-standing". (The appellant pointed out that, in making his appeal, he saw only the letter notifying him of the Decision, not the Decision document itself, and that the letter said "demonstrated" which was what he had based his appeal on. In the event, we need not decide whether the effect of that difference on his ability to prepare his case was itself an error of law in this particular case.)

42. In asking us to rely on the word "has" in the Decision document ("has a long-standing sexual interest") as opposed to "have demonstrated" in the notification letter, Ms Ward explained that the point was that the sexual interest in teenaged girls is still there. She submitted that the starting point is that sexual touching of 16 and 17 year olds by a 45 year old man in a position of responsibility in relation to them gives rise to a risk of harm (and is relevant conduct). So she submitted that a large

part of the DBS's consideration of whether it is appropriate for the appellant to remain on the list related to the risk that such conduct may occur again. She submitted that, in that context, the DBS considered it relevant to consider firstly why that conduct took place, and whether in particular it was motivated by a sexual interest in teenaged girls.

43. Ms Ward explained that "it is the existence of the sexual interest that matters, not the sexual restraint", and that "the sexual interest creates the risk". She submitted that it was relevant that the behaviour was motivated, as the appellant himself had admitted to Dr Earnshaw (page 79, paragraph 65), by sexual interest rather than, for example, by a wish for power or control. It was not clear however why that created more of a risk with this appellant than with any other heterosexual man. Counsel submitted that it is because "most grown men do not have a sexual interest in teenage girls".

44. It was by no means self-evident to us that "most grown men do not <u>have</u> a sexual interest in teenage girls" (as opposed to not <u>acting</u> on that interest). In other words, it was not self-evident that the implied premise in the Decision – that the sexual interest of itself creates the risk – is true. Nor was it self-evident that the sexual interest creates more of a risk with this appellant than with any other heterosexual man. We asked counsel therefore to address us as to the evidence or other source for that implied premise (which she paraphrased as "most grown men do not have a sexual interest in teenage girls"). Counsel submitted that the very fact that the DBS had asked Dr Earnshaw, the specialist assessor, whether the appellant acknowledged his behaviour to be sexually motivated (page 55, paragraph 12, second bullet) showed that the DBS did not think all men have this interest. She submitted that the DBS – the body given the task by parliament – had exercised professional judgment, and that all of the research and evidence which had informed the Decision was not put before the Upper Tribunal.

45. We gave counsel the opportunity to take instructions as to the basis for her submission that "most grown men do not have a sexual interest in teenage girls". Counsel's response was that "if this was a case in which a sexual interest in teenage girls may be considered non-problematic, for example involving a much younger man, then the Decision probably would have contained a discussion of whether that was an inappropriate sexual interest or not". She said the DBS did not accept that all heterosexual men have a sexual interest in teenaged girls. She was unable however, despite being given repeated opportunities, to explain the source of this proposition.

46. We asked counsel if she could at least make it more precise, that is, to explain what she meant by "grown men" in the proposition "most grown men do not have an interest in teenage girls", given that an adult man is aged 18. She was unable to draw a line and said it would depend on the particular case.

Discussion

47. The idea that this appellant's sexual interest in teenaged girls aged 16 to 19 or 16 to 18 of itself creates the risk, or at least that it creates more of a risk with this appellant than with any other heterosexual man, was clearly an implied premise for the Decision. This is clear from the following parts of the Decision (our emphasis)—

> "Mr [AB] admitted that his behaviour was sexually motivated and that, at the time of the incidents, he had a sexual attraction to teenage girls." (Decision page 92, third paragraph)
>
> "The specialist risk assessment is clear that Mr [AB]'s abusive sexual behaviour towards four female children for whom he held a position of trust was motivated by a sexual interest in teenage girls ... Dr Earnshaw's opinion was that Mr [AB] would be unlikely to repeat his behaviour largely out of self interest, but also as a result of the decline in sexual preoccupation both through age and impotence. However, it is also noted that this observation relies solely on Mr [AB]'s own motivation and restraint. Mr [AB] has a long-standing interest in teenage girls and has previously acted on this attraction" (Decision page 93, third paragraph and bottom and page 94 top).

48. Although the Decision went on to consider the risk of the sexual interest being acted on, it appears from the underlined text above that it was not simply the risk of its being acted upon that the DBS considered key. Counsel confirmed this. She told us "it is the existence of the sexual interest that matters, not the sexual restraint", "the sexual interest creates the risk" and "most grown men do not have an interest in teenage girls". When we asked her to explain the source of this last proposition, counsel submitted that we had to look at what the Decision said, not at what she submitted. But of course, her submissions were an attempt to explain the Decision. In any event, it is clear from the text we have underlined at paragraph 47 above that the Decision was based on the proposition either that the sexual interest of itself creates the risk, or that it creates more of a risk with this appellant than with any other heterosexual man.

49. We are not persuaded that that proposition is so self-evident that it required no explanation whatsoever in the Decision or decision letter. We do not say we find that proposition to be untrue; we do not have evidence for that. It is just that we are unanimously of the view that we cannot understand the basis of it. Having the sexual interest is one thing, acting on it is another. While it may or may not be self-evident that most men in the position the appellant occupied in relation to these girls would not act on their sexual interest in the girls, that is not the same as saying it is self-evident that they would not have a sexual interest in teenaged girls; biology might suggest otherwise (and if that is right, then the reason they do not act on it would appear to be self-restraint, whatever the reason for the self-restraint). It is reasonable that if we, a three-member mixed-sex panel of the Upper Tribunal, cannot understand the proposition even after having it supplemented by oral submissions, then the appellant deserved some explanation of it in the Decision or decision letter.

50. This is especially so given that the Decision did not suggest that the appellant had a sexual interest only in teenaged girls, or even that he had more of a sexual interest in them than in females aged 20 upwards. The Decision needed in our judgment to explain why this appellant was different from other "grown men" as counsel put it (in terms of having a heterosexual interest, rather than in terms of acting on it, which is a separate point).

51. In addressing us as to why self-interest was not an adequate restraining factor (in relation to the second error of law, below), counsel also submitted that a key point about Dr Earnshaw's report was that Dr Earnshaw's finding was not that there was no risk of repetition, but that repetition was "not likely". Counsel said this meant that

"some risk remains". That submission does not seem to us to help counsel's case in relation either to the point about the motivation being sexual or to the point about self-interest as a restraining factor. It appears to set the bar too high by requiring that there be no risk. It is not clear when there would ever be no risk where a heterosexual man is permitted to be around post-pubescent females.

52. From counsel's submissions, a further implied basis for the Decision appeared to be that sexual behaviour motivated by a sexual interest in 16 and 17 year olds, 16 to 18 year olds, or 16 to 19 year olds (counsel did not seek to argue a sexual interest in under-sixteens) was considered more of a risk than behaviour motivated by a wish for power or control. We find that baffling. A sexual interest in a post-pubescent female aged 16 or over seems prima facie more towards the "normal" end of the scale than a wish for power or control over her. We do not go so far as to find it untrue to say that sexual interest is more of a motivation, or to find it untrue to say it is a more harmful motivation, than a wish for power or control; again, we do not have evidence for that. But we do find that, baffled as we are by that proposition, the appellant deserved some explanation of its source (if it was indeed, as counsel suggested, a basis for the Decision).

53. We are not saying that, as counsel put it, "all of the research and evidence which informed the Decision should have been put before the Upper Tribunal" or set out in the Decision. But the proposition had to have come from somewhere. It is common ground that no explanation at all of its source appears in the Decision. If there is research or evidence giving rise to the proposition that having a sexual interest in teenaged girls is somehow unusual in a "grown man" as counsel put it, or in men over a certain age, then there is no reason why that could not at least have been mentioned in the Decision, even if not at length.

54. None of the above discussion is to suggest that the appellant's behaviour in acting on the sexual interest with girls in relation to whom he held a position of trust was acceptable or did not merit his original inclusion in the list.

55. We turn now to the point about the risk of the appellant acting on the sexual interest.

(2) Failure to explain why self-interest (or the appellant's "own motivation and restraint") was considered less of a mitigating factor, or a less reliable mitigating factor, than insight into harm

56. Dr Earnshaw said in her specialist assessment (our emphasis)—

> "18. Mr. [AB] arrived early for both appointments, and was polite and co-operative throughout. However, although most of the views he expressed were appropriate, and substantially different from his first responses to the allegations, there was a noticeable lack of emotion in what he said. I did feel that he was now very well aware of the position he needed to take if he wished his bar to be lifted.
>
> 19. At the same time I thought it quite possible that his view of his past behaviour had changed, but that this had been occasioned more by self-interest than by penitence, or any profound concern for the wellbeing of the complainants.
>
> […]

46. Since the imposition of the bar, Mr. [AB] said he had directed one adult choir and he felt that in future, he would not seek to direct a choir involving children because "*that needs more energy and motivation than working with adults and I don't have the energy or time for that any more. Children need musical training and preparation for exams, and adults usually already have this*." However, he said that if he were no longer barred, he would occasionally be able to stand in and direct other choirs in order to help out on a temporary basis, or he could play the organ if needed. He said the choir he currently directs goes to some cathedrals, but that some venues needed a declaration that no-one involved with the choir had any convictions or barring issues, and his choir was therefore unable to go to these.

[…]

48. Mr [AB] also admits that the behaviour was sexually motivated. He spoke of finding [EF]'s early sexual activity arousing, of finding [CD] attractive, and of seeking to compensate for the fact that his marriage was not very sexually active. It is also likely that flirtatious and sexual relations with young teenage girls gave him confidence and a feeling of wellbeing at difficult times (such as after the Disciplinary Hearing at […] and when made redundant from his full-time employment). I am not convinced that Mr. [AB] groomed the girls concerned in any calculated way, but more that he took advantage of the many occasions they were in his company to engage in opportunistic sexual behaviour towards them. Whilst the girls may not have resisted his advances to the extent that they would constitute assaults, it appears that he was normally the initiator … .

49. Mr. [AB] does not appear to have had many qualms about his behaviour at the time. He reports fleeting feelings of "*being a bit disloyal to my wife*", and also of feeling "*reckless about my reputation*" after he was dismissed from […]. At the time he recalled finding the flirtation and the physical contact "*nice*" and never asking himself whether or not it was right. At the present time, there is a clear intellectual understanding that the behaviour was wrong and a misuse of power, but although he spoke of feeling ashamed and embarrassed about what he had done after the accident [his accident of 10 May 2000 after which he engaged in sexual touching with EF aged 19], I saw little evidence of this, and found it hard to put together with his subsequent denial of the bulk of the 2003 allegations. On the contrary, I thought it more likely that his change of heart in 2000 was related to self-interest, and a desire to continue working with choirs. The fact that he admitted telling [CD] and [EF] at the time that he had changed his view of his past behaviour and intended to change his practice, could be viewed as an attempt to ensure they would not say anything further about his behaviour with them.

50. Despite this caveat, I do think it likely that the combination of increasing age [he was 63 at the date of the report] and his accident have made him less sexually preoccupied than previously, and less likely to turn to sex as a way of feeling better about himself. To the extent that vanity was probably a component in his sexually inappropriate behaviour, I think this may well now be counteracted by his impotence, which is likely to cause embarrassment rather than gratification in a new sexual encounter. I also think he has recognised that the losses associated with his previous conduct far outweighed the transitory benefits, and that he will enjoy a smoother career and leisure path in the future if he respects child protection procedures.

[…]

> 64. His current lack of a legitimate sexual outlet could be risk-predictive, but, provided he does not foster his sexual interest in teenage girls by looking at under-age or "barely legal" pornographic sites on the internet, it should be manageable. I accept that a measure of embarrassment about his impotence is likely to inhibit him from future affairs like the one with [CD], although it would not necessarily prevent sexual touching. However, I think that the combination of his re-evaluation of his behaviour as going against his self-interest and that of his family, and the deterrent effect of the bar, is likely to deter him from inappropriate sexual behaviour with teenage girls in the future.
>
> 67. … I do not find that he demonstrates either insight into his behaviour or empathy for the complainants. However, I do not consider him likely to repeat the behaviour, largely out of self-interest. He does not appear to be as sexually preoccupied as he was at the time of the behaviour, and this is also a risk-predictor which normally declines slowly with age. In his case, the impotence he claims as a result of his accident, may have accelerated the process of declining sexual preoccupation. He appears to have a social group of adult friends, and his wife is likely to support him in maintaining an offence-free future. I therefore would not see him as needing the company and attention of young people for emotional validation." (pages 64, 74, 75, 79 and 80).

57. The Decision said (our emphasis)—

> "Dr Earnshaw's opinion was that Mr [AB] would be unlikely to repeat his behaviour, largely out of self interest, but also as a result of the decline in sexual preoccupation both through age and impotence. However, it is also noted that this observation relies solely on Mr [AB]'s own motivation and restraint. Mr [AB] has a long-standing sexual interest in teenage girls and has previously acted on this attraction. [page 93 bottom, page 94 top]
>
> As previously stated, Mr [AB] has not shown any credible insight into his behaviour and has in fact admitted that, even after his road traffic accident, which he states was a life changing event, he continued to engage in sexual touching with [EF], which somewhat weakens his claim that the accident was a 'turning point' in his life which caused him to modify his behaviour. [page 94, second paragraph]
>
> Whilst it is accepted that the behaviour occurred some 15 years ago, it is only now being admitted and even then only whilst undergoing a formal risk assessment process. It is reasonable to conclude that the restrictions placed on Mr [AB] in 2004 by his original inclusion on PoCA/PoVA Lists, removed the opportunity for him to form any further abusive relationships in the environment where his previous behaviour occurred. Whilst the risk of him committing further abusive behaviour may be decreasing, the DBS cannot be sufficiently satisfied that, if the restrictions in place were to be removed, he would not be capable of acting in a similar manner again" [page 94, third paragraph].".

Discussion

58. It is clear from these Decision extracts that – as counsel accepted – in weighing Dr Earnshaw's opinion that the behaviour is unlikely to be repeated, the decision maker considered it key that "this observation relies solely on Mr [AB]'s own motivation and restraint" and that "Mr [AB] has not shown any credible insight into his behaviour". We put to counsel that it was not however apparent from the Decision

why these factors were considered not to mitigate the risk sufficiently. Counsel referred us to paragraph 49 of Dr Earnshaw's report, where Dr Earnshaw said—

> "At the present time, there is a clear intellectual understanding that the behaviour was wrong and a misuse of power, but although he spoke of feeling ashamed and embarrassed about what he had done after the accident, I saw little evidence of this, and found it hard to put together with his subsequent denial of the bulk of the 2003 allegations. On the contrary, I thought it more likely that his change of heart in 2000 was related to self-interest, and a desire to continue working with choirs" (page 75, paragraph 49).

59. Counsel submitted that what Dr Earnshaw said here showed that, while the appellant is unlikely to recommit, it is not due to loss of interest or to insight, but to self-interest. Why that matters was not however, as was common ground, explained in the Decision. Counsel submitted that it matters "because of how strong those protective feelings are. Unlikely is not impossible". She submitted that a key point about Dr Earnshaw's report was that Dr Earnshaw's finding was not that there was no risk of repetition, but that repetition was "not likely". Counsel submitted that this meant that "some risk remains".

60. It remained unclear however why self-interest differed materially from another reason. In particular, it was unclear why it differed materially from insight. Counsel submitted that it is "because it is perhaps less ingrained, so it is about the quality of the self-restraint". We asked when wouldn't there be self-restraint, with any heterosexual man who chooses not to engage in sexual behaviour with a female in whom he has a sexual interest? Counsel replied that it is "absolutely not the case that the reason most heterosexual men don't engage in sexual behaviour with teenage girls is self-interest".

61. That was not however what we needed to know. We needed to know when wouldn't there be self-restraint, not when wouldn't the self-restraint be motivated by self-interest. Counsel repeated her submission that "most grown men do not have a sexual interest in teenage girls". She said "it is not about whether they are pretty, or whether a man might look and say 'if I was 20 years younger I might be interested'. It is about whether a man aged 45 wants to engage in sexual conduct with a girl of that age" (which she clarified to mean "16 onwards"). But that seemed to conflate having the sexual interest with being willing to act on it (it also ignored that the appellant is now 65 not 45, and that Dr Earnshaw considered age relevant to risk). We are at this part of the discussion considering the effectiveness of the mitigating factors identified by Dr Earnshaw to stop the appellant acting on his sexual interest. It remained unclear why the DBS considered self-interest to be less of a restraining factor than insight, which was the contrast drawn in the Decision. Counsel explained that, for example, the risk may be mitigated by restraint based on real insight into the harm to the girls, or equally by the appellant undertaking treatment work for his behaviour (which Dr Earnshaw said he had not done, paragraph 67, page 80).

62. We must remember that, as appeared to be common ground, the question is what will adequately mitigate the risk of the appellant engaging in sexual behaviour with teenaged girls in relation to whom he occupies the kind of position he occupied in relation to the four girls in question. That one restraining factor may not be as morally palatable as another does not of itself mean it is a weaker restraining factor. We do not consider that it is so self-evident that restraint motivated by insight is more

of a mitigating factor than restraint motivated by self-interest that this proposition needed no explanation in the Decision or decision letter. We say that for the following reasons.

63. The proposition that self-interest is "less ingrained", as counsel submitted, is far from obvious. If anything, it might be said that – with the probable exception of many or most parents towards their children – self-interest is both more ingrained and more likely to inhibit behaviour than insight into the harm that would or might be caused to others by that behaviour. So it might even be that self-interest is more of a mitigating factor – a more ubiquitous or more reliable inhibitor – than insight. Reliance on insight into harm as an inhibitor requires a two-step process. First, there has to be insight. Second, the insight has to act to inhibit the potentially harmful behaviour. That second step is by no means a given. In other words, having insight into the harm you will or might cause someone does not necessarily make you decide not to cause them the harm. Human nature is not so straightforward or so universally decent. Whether that insight inhibits you from causing the harm will vary according to the kind of person you are. It might also vary according to who it is you risk harming. Whereas being aware of the harm you will cause to yourself by your behaviour might be said to operate as an inhibitor even if you do not have insight into the harm you might cause to someone else, or if you have that insight but are willing to cause the harm anyway.

64. Counsel submitted that Dr Earnshaw's report did not mean that there was no risk of repetition, and reminded us that repetition was not impossible. That does not however help counsel's case in relation to the point about self-interest as a restraining factor. As we said above in relation to the first error of law, focusing on repetition not being impossible appears to set the bar too high by requiring that there be no risk. Moreover, to the extent that it was said to be relevant to what would adequately mitigate the risk, it appears circular: "that the risk is a risk means nothing can adequately mitigate it".

65. The appellant's past behaviour, if repeated now – and assuming the bar had been lifted – would mean a fresh inclusion in the Children's Barred List. That would stop the appellant doing some of his choir and organ work. But repetition could also result in a criminal conviction, which was not so at the time of the incidents in question; the behaviour was consensual and preceded commencement – on 1 May 2004 – of section 16 of the Sexual Offences Act 2003 ("abuse of position of trust: sexual activity with a child"). Both of these factors are clearly against the appellant's self-interest, and were so at the time of the Decision. Dr Earnshaw considered that self-interest would be an inhibiting factor in this particular case. There was no explanation at all in the Decision for the Decision's implied premise that insight was a greater inhibitor than self-interest. So it was not apparent why any lack of insight on the appellant's part would render him more likely to repeat the behaviour than the self-interest which Dr Earnshaw said he had, and which the DBS do not appear to dispute exists. If there is research or other evidence to show that self-interest is less of an inhibitor – or a less reliable inhibitor – than insight, we do not say it all had to be set out in the Decision or put before the Upper Tribunal. But some explanation for the source of that implied premise needed to be included in the Decision given our view that the premise is not self-evident. The complete lack of explanation for it rendered the Decision fundamentally flawed in our judgment.

(3) Failure to enquire into, and in any event make findings of fact as to, the circumstances of the two 2002 incidents with EF aged 19

66. It was common ground that there were two incidents of sexual touching with EF when she was aged 19. One of those incidents was at a choir camp in, the appellant told us, August 2002. The other was, he said, around a month later in his car. Counsel said these had not been described as "abuse" in, as she put it, the relevant section of the Decision. She said she meant by this the second paragraph on page 94. But the Decision did specifically use the word "abuse" on the previous page—

> "However, at least one of the incidents of abuse that Mr [AB] has now admitted occurred after this accident." (our emphasis, Decision, page 93, fourth paragraph).

67. The Decision took account of the two 2002 incidents as follows—

> "His assertion that the afore mentioned [sic] road traffic accident in 2000 was a pivotal point in his life, which caused him to reconsider his attitudes towards young people, is also undermined by his admission that there had been some sexual touching with [EF] subsequent to this event." (Decision, page 92, bottom)
>
> "As previously stated, Mr [AB] has not shown any credible insight into his behaviour and has in fact admitted that, even after his road traffic accident, which he states was a life changing event, he continued to engage in sexual touching with [EF], which somewhat weakens his claim that the accident was a 'turning point' in his life which caused him to modify his behaviour." (Decision, page 94, second paragraph).

Submissions

68. The appellant said the two incidents in 2002 with EF when she was 19 were not abuse (his grounds 6 and 8). He pointed out that, as was common ground, EF was an adult at the time. He said EF had in any event been the initiator; see the note of his oral and written evidence at Annex B to this decision. He also said the incidents were not a continuation of his previous behaviour because of the gap of some two years and three months – May 2000 to August 2002 – from the last of his pre-RTA sexual encounters with EF to the first of the two 2002 incidents with her. The appellant told us that, by contrast, he viewed his full sexual relationship with CD as wrong even though CD was 18 when it started, because he saw it as a continuation of behaviour which had occurred with CD before she was 18. The appellant said his changed behaviour in the period 2000 to 2004, over which period he still worked with girls under 18, was not an attempt at concealment but an actual change of conduct.

69. Counsel's submissions about the two incidents with EF aged 19 focused on whether it was rational for the DBS to take them into account (a) in relation to insight and (b) as showing that the RTA was not a turning point in the appellant's attitude towards "young people", as the Decision put it. Counsel submitted that it was disturbing that the appellant "insisted there was nothing wrong with it" (which was not

quite the appellant's position[5]). Counsel submitted that, even if the appellant's account of those two incidents was all true, it would still be rational for the DBS to take them into account. She pointed out that the fact taken into account by the decision maker was that there was some sexual touching with EF subsequent to the appellant's RTA (Decision, page 92 bottom). So, counsel submitted, it was not about who initiated it. What was relevant, she said, was that it had happened, that the appellant had not prevented it happening (although, counsel conceded, the appellant did say he felt bad afterwards), and that he had put himself in a position where it could happen again.

Discussion

70. Counsel's submission was about whether the DBS erred in law in taking the 2002 incidents into account. But we think it relevant to consider how the DBS took them into account. The DBS appears from the extracts at paragraph 67 above to have taken account of the two 2002 incidents with EF in three ways. First, it considered the incidents relevant to whether the appellant now has insight, as counsel confirmed. Second, it considered them relevant to whether the appellant had changed his attitude towards "young people", as the Decision put it. And third, it appeared to consider the incidents relevant to whether the appellant had "modified his behaviour", as the Decision put it. The appellant's point was that the incidents should not have been taken into account as breaking what would otherwise be an incident-free period of some four years before his inclusion in the list.

71. Regardless of what the two 2002 incidents with EF said about insight or "attitudes towards young people", we agree with the appellant that it is relevant whether or not the incidents can be described as abuse or as a continuation of previous inappropriate or abusive behaviour. If they were neither abuse nor a continuation of previous behaviour then, as the appellant said, the two incidents were not a continuation or repetition of the behaviour which led to his inclusion in what is now the Children's Barred List. This would mean that the last evidenced or admitted incident of behaviour of the kind which led to the listing occurred in 2000 – around the end of April or beginning of May – before the appellant's RTA. So there would be a period of nearly three and a half years between the last pre-RTA incident with any of the girls and the appellant's provisional inclusion in the Protection of Children Act List on 17 September 2003. There would be a period of four and a half years between the last pre-RTA incident and the appellant's confirmation on that list on 2 November 2004. And there would be a period of four years between the last pre-RTA incident and the commencement on 1 May 2004 of section 16 of the Sexual Offences Act 2003.

72. For the four and a half years from the last pre-RTA incident until his confirmation on the Protection of Children Act List on 2 November 2004, the appellant had contact in his choir and managerial roles with girls under 18. For the first four years of that period, to and including 30 April 2004, section 16 of the Sexual Offences Act 2003 was not in force and so could not yet be a deterrent. So if the two incidents with EF in 2002 were not a continuation or repetition, the DBS would have to take account of at least the four years from the last pre-RTA incident to 30 April 2004 as a period when, for reasons other than being confirmed on the list and other than its being a criminal offence, the appellant did not engage in the kind of

[5] He had said, for example, that he regretted the two incidents (page 12).

behaviour which led to his inclusion in what is now the Children's Barred List. That in turn would be relevant to the risk of repetition, as the appellant himself pointed out. This is not about whether there was insight or changed attitude after the RTA, but about whether there was changed behaviour – for whatever reason – for a period of time before the appellant was denied the opportunity for the behaviour by inclusion in the list and before section 16 could act as a deterrent.

73. It is not clear whether or not the appellant's accounts of these two 2002 incidents were before the DBS when it made the Decision. It seems the DBS may only have seen the police notes at page 251 and the references in Dr Earnshaw's report. The police notes recorded EF describing previous incidents then saying—

> "I got new boyfriend and wasn't around for him [the appellant]
>
> Week away in […] – I was in his room – simulating sex over clothes and he asked for sex story with me and my boyfriend
> I told him stories and he got off on it.
>
> Now working ..." (page 251).

Dr Earnshaw's report said—

> "He made some allegations of his own about the promiscuous character of [EF]" (paragraph 10, page 55)
>
> "Mr. [AB] admitted to having twice fondled [EF's] breasts under her clothing, but said this was after [EF] was 18 – once in his car, and once on a choir outing with the […] Singers to […]. He claimed that [EF] too had remained a close friend and a committed member of the choir up until the 2003 allegations." (paragraph 39, page 72).

74. Neither of these accounts said who started the two 2002 incidents. But the DBS does not appear to have enquired beyond these accounts into the circumstances of the two incidents. As counsel pointed out, the fact taken into account by the decision maker was merely that there had been "some sexual touching with EF subsequent to" the RTA. Counsel's submission was that the circumstances of that sexual touching made no difference.

75. We disagree. If the circumstances of those two incidents were indeed as the appellant described, in particular that he was not the initiator and that EF even went to the lengths of crossing a campus to go to his room, then the incidents were not in our judgment a continuation or repetition of the behaviour which led to the appellant's inclusion in the list. This is not simply because the appellant was not the initiator. It is also because EF was well over the age of 18 and, as the appellant said, "knew exactly what she was doing", as clearly appears from his account. On his account, EF had a choice not to contact the appellant to ask to come to his room. And on his account, she was not reacting to him. There is nothing in his account to suggest that EF felt she had to do something "to shut him up" as she had told the police with regard to previous incidents (page 251). On her own account, when she got a new boyfriend at 17, her sexual encounters with the appellant stopped: "I got new boyfriend and wasn't around for him" (police notes, page 251). That suggested she had made a choice to stop. It was equally her choice to start again when she was 19, on the appellant's account. There was nothing in his description of the two

incidents to suggest that EF felt she had to make those advances to him because of his position or because of any situation they were in together.

76. It may not have been good judgment to agree to EF's request that she come across campus to his room or to let either of the 2002 incidents continue once started (if this is indeed what happened). But that is not the same as saying the two incidents were abusive or an abuse of power or a continuation of previous behaviour. This is especially so given the gap of some two years and three months between the last pre-RTA incident and the first 2002 incident with EF. That the appellant did not prevent either of the 2002 incidents and – in the case of the car incident – allowed the opportunity for that further incident, does not alter the fact that on his account the incidents were instigated by EF when she was an adult and after a gap of nearly two and a half years.

77. The circumstances of the two 2002 incidents with EF, and the time gap before the first of them, were therefore relevant. The reference in the Decision to the appellant not having modified his behaviour after the RTA was effectively an assumption that the two incidents with EF in 2002 were the same kind of behaviour as the relevant conduct which led to the listing. For the reasons set out above, that was not necessarily so. We find that the DBS erred in law in failing to enquire – and, even if it did enquire, in failing to make findings – as to the circumstances of those two 2002 incidents and as to the time gap between the last pre-RTA incident and the first 2002 incident.

78. EF's age was also relevant. She was more than a year into adulthood at the time of the first 2002 incident. Although her age was said to be over 18 in Dr Earnshaw's report, the DBS did not expressly take that into account in the Decision. Nor did the DBS check how far over 18 EF was. Given the other errors of law we have found, we need not decide whether the failure to take into account EF's age was itself an error of law. But if we remit, the DBS will need to take it into account in view of what we say above.

Insight

79. What the two 2002 incidents with EF say about insight is a different question. Given our finding that the DBS erred in law in failing to explain why self-interest was not an adequate mitigating factor (paragraphs 56 to 65 above), we need make no finding as to whether the appellant has sufficient insight into the risk of harm. If we did have to consider what the 2002 incidents said about insight, we might well consider that they did not show a lack of insight into the risk of harm. We say that because of EF's age, because she was the initiator (if she was) and because of the time gap before the first of the two 2002 incidents. That might be reinforced by the awareness evidenced by the appellant's drawing of a contrast between the 2002 incidents with EF on the one hand and, on the other, the full sexual relationship started with CD aged 18 (paragraph 68 above).

What the DBS must do if we remit

80. Neither Dr Earnshaw's report nor the police notes of the interview with EF said who started the EF incident at choir camp (paragraph 73 above). Nor did the police notes record EF mentioning the second 2002 incident – the one in the car. The appellant told us he is the one who mentioned it. We think it would be unfair to EF

for us to make a finding that she was the initiator of either incident, and that the circumstances were as the appellant described, when EF is not there to give us her side of the story. It may be that, given the opportunity, she would prefer not to be further involved and so not to give her side of the story beyond what she has already told the police about the choir camp incident. But without that opportunity having been given, we prefer to make no finding as to whether the circumstances of either 2002 incident were as the appellant described.

81. So if we remit, and if the DBS is still minded potentially to take account of the two 2002 incidents with EF aged 19, we will leave to the DBS to make findings as to whether the circumstances of those incidents were as the appellant described. We will leave to the DBS to consider, bearing in mind previous dealings with EF, whether it would be inappropriate for it to approach her for her side of the story before making its finding.

82. If we remit, and if the DBS finds that the circumstances of both 2002 incidents were as the appellant describes and that they occurred after the time gap he asserts, the DBS must not take account of those incidents as a continuation or repetition of the behaviour which led to the appellant's listing.

Findings of fact

83. Section 4(7) of the 2006 Act provides—

> "(7) If the Upper Tribunal remits a matter to DBS under subsection (6)(b)—
>
> (a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and
>
> (b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.".

84. Although we have not needed to address all 10 grounds of appeal, and have not needed to rely on any mistake of fact to set aside the Decision, we make the following findings of fact, prompted in part by the appellant's grounds of appeal. If the DBS seeks remittal and if we do remit, these findings will – to the extent the DBS considers them relevant for its new decision – form part of the basis for its new decision. Before making these findings, we gave the parties the opportunity to make any submissions on them that they had not already made.

(1) Whether appellant relies on impotence as mitigating factor

85. We find that the appellant does not currently rely on his sexual impotence as mitigating the risk of his repeating the behaviour. We think we need to make a finding on this because the DBS said the appellant "has stated that … the results of his injuries would eliminate any such risk in the future" (Decision, page 93, fourth paragraph). Strictly speaking this said "has stated" rather than "currently states". So it was correct because the appellant did in effect state it in his letter of 17 May 2003 (page 122), as counsel pointed out. And the DBS in their post-hearing submission of 4 January 2018 said "this" was not weighed against him or in his favour. But the way in which it was taken into account in the Decision did imply that the decision maker

thought the appellant currently presents his impotence as an inhibiting factor. So we mention it now to make the position clear.

86. The appellant told us he does not rely on his impotence as the reason he would not repeat the behaviour. We accept that. And the DBS in their post-hearing submission accepted that that had been the appellant's position at the hearing. So if we remit, the DBS must make the new decision on the basis that the appellant accepts that his impotence is not a factor that will mitigate the risk (unless of course he expressly tells the DBS he has changed his position on that since the hearing). This does not however stop the DBS taking into account Dr Earnshaw's view on that (see paragraph 104 below).

(2) "I wouldn't have done it if anyone froze, moved away, or said they didn't want it"

87. The Decision said—

> "Your lack of awareness is further demonstrated in your assertion that you would have stopped if the girls had indicated that they didn't want you to carry on. There is no understanding that the girls felt unable to object to your kissing and touching them because they looked up to and respected you." (page 97, fourth paragraph).

88. The appellant told us – and we accept – that this must be a reference to the part of Dr Earnshaw's report which said—

> "he disputed that he had ever demanded sexual contact in return for favours (such as giving lifts or singing tuition), and said that, "*I wouldn't have done it if anyone froze, moved away, or said they didn't want it*"" (page 71, paragraph 36).

89. The appellant told us—

> "I can't remember if I actually repeated her words [that is, the words "*I wouldn't have done it if anyone froze, moved away, or said they didn't want it"*], but it started out as a question from [Dr Earnshaw]. And it reinforces that I didn't volunteer it because I wouldn't use "freeze" in that context. But also it was never meant to be a current justification of my past conduct".

90. The appellant submitted that, when you added together three other passages from Dr Earnshaw's report, it was difficult to view the passage above from paragraph 36 of her report as being meant as current justification. The three Dr Earnshaw passages he referred to were those at paragraphs 19, 35 and 43 of her report (we include the end of Dr Earnshaw's paragraph 18 for context, our emphasis)—

> "18. … I did feel that he was now very well aware of the position he needed to take if he wished his bar to be lifted." (page 64)
>
> "19. <u>At the same time I thought it quite possible that his view of his past behaviour had changed</u>, but that this had been occasioned more by self-interest than by penitence, or any profound concern for the wellbeing of the complainants." (page 64)
>
> "35. … he did accept that, as the older person, who had been in a position of authority over [CD], he "*should have been more careful. I shouldn't have had*

> *a sexual relationship. I should have put up appropriate barriers when she was 16 or 17. I should have refrained from flirtatious comments and physical contact. I don't justify it now*."" (page 70)
>
> "43. … Mr. [AB] said …"I realised I hadn't put up the barriers I should. I felt embarrassed and ashamed."" (page 73).

91. Counsel for the DBS did not cross-examine on the appellant's oral evidence that he had been responding to a question from Dr Earnshaw rather than volunteering the phrase beginning "I wouldn't have done it if". Counsel also told us "I am not inviting you to disbelieve his evidence regarding that quotation". In its 4 January 2018 post-hearing submission, the DBS said it had not approached the Decision on the basis that the phrase had been advanced as "justification", but rather on the basis that the phrase showed a lack of awareness. The appellant in reply disputed that.

92. Regardless of whether the appellant volunteered the phrase "I wouldn't have done it if anyone froze, moved away, or said they didn't want it", or repeated it or said "yes" to a question in those terms, we find that he was explaining to Dr Earnshaw that it was consensual behaviour. He was explaining that it was not coercive in the sense of demanding it in return for favours, and that it was not an assault. That is clear from the context; it followed on from the appellant's denial that he had wanted something in return.

93. We find in any event that the appellant did not volunteer the phrase "I wouldn't have done it if anyone froze, moved away, or said they didn't want it". We have no reason to disbelieve his evidence that he did not volunteer it, or his evidence that he would not use "freeze" in that context. In addition, counsel did not seek to cross-examine the appellant's assertion that he did not volunteer it, and said she was not inviting us to disbelieve that assertion.

94. We also find that the appellant did not, in talking to Dr Earnshaw, rely on the phrase "I wouldn't have done it if anyone froze, moved away, or said they didn't want it" as current justification for the behaviour in question. First, the appellant told us he does not justify the behaviour now. Second, although his statement to Dr Earnshaw that "I don't justify it now" was about the affair with CD, it is unlikely that he would say in one part of his interview that he does not justify his affair with CD, yet in another part of the same interview make a statement – "I wouldn't have done it if.." – intended to justify either that affair or his other behaviour. The appellant is clearly an intelligent man. He would, we find, have foreseen at the time that there would be an inconsistency in doing that. Third, we have accepted that he did not volunteer that statement (paragraph 93 above).

95. Even if he did rely on that phrase as justification to Dr Earnshaw, the appellant told us he does not now seek to justify his behaviour. We have no reason to disbelieve that, especially in the absence of cross-examination on how the phrase came to be included in the report. We therefore accept that the appellant does not now seek to justify his behaviour.

96. If we remit and if the DBS again considers self-interest an inadequate mitigating factor and comes to consider insight, it must consider it on the basis of our findings at paragraphs 92 to 95 above.

(3) Past concealment of behaviour

97. In addressing us about the statement in the Decision that the appellant had "over the past 15 years gone to great lengths to conceal this behaviour", counsel for the DBS submitted that there was "no suggestion he sought out the girls to apologise for lying". Expecting him to seek them out seemed to us to be unrealistic however. Is it likely that he could have approached them without being considered to be acting inappropriately? In any event, not apologising is self-evidently not the same as concealment. We therefore told the parties we were considering finding that, if the appellant has not sought out the girls to apologise for lying, that was not concealment of his behaviour. The DBS legal adviser, Clare Burrows, sensibly resiled from counsel's submission, and accepted that not seeking out the girls to apologise for lying was not concealment.

98. We find that, if the appellant has not sought out the girls to apologise for lying, that was not concealment of his behaviour.

(4) Appellant's marriage as a restraining factor

99. We find that the appellant's marriage is an additional factor which will discourage him from repeating the behaviour. Dr Earnshaw's opinion was that—

> "his wife is likely to support him in maintaining an offence-free future" (paragraph 67, page 80).

100. We have no reason to doubt the accuracy of that opinion, and the DBS accepted it in its post-hearing submission.

101. Moreover, as the appellant said in his post-hearing submission, his wife demonstrated her support for his maintaining an offence-free future, both by her attendance at the hearing before us and by what she told us during that hearing.

102. As to her attendance, Mrs AB attended for the whole of the first day of the hearing before us. She sat next to her husband with full sight of all of his papers. She did not attend on the second day of the hearing. But the hearing had been listed only for one day. In other words, her husband had accepted her being there for what he expected to be the entire case. During the hearing, Mrs AB heard and saw the detail of the admitted sexual conduct with all four girls. This included written references to fondling breasts. It also included uncomfortable oral evidence from her husband containing intimate detail of his sexual conduct with the girls – for example, that EF took off her top and bra on two occasions, and that there had been simulated sex over clothes. That the appellant was willing to share all this with his wife, and that she was willing to put herself through the hearing, showed a trust and openness between them, and a bond between them, which lent weight to Dr Earnshaw's opinion that Mrs AB is likely to support the appellant in maintaining an offence-free future.

103. What his wife told us also showed an openness on the appellant's part that lent support to Dr Earnshaw's view. Mrs AB told us – and we find – that the way she had found out about the appellant's full sexual relationship with CD was that the appellant himself had told her. (Mrs AB told us she was very upset about it,

understandably. She also told us she had forgiven the appellant but that he had better not do it again.) Ms Ward did not cross-examine Mrs AB on any of this evidence, and we had no reason to doubt it.

Other matters

Effect of impotence

104. We have found as a fact that the appellant does not currently rely on his sexual impotence as mitigating the risk of his repeating the behaviour (paragraph 85 above). The appellant said he can still masturbate to orgasm. And it was common ground that he engaged in sexual touching with EF after he became impotent. However, that is not to say the DBS cannot take account of Dr Earnshaw's view that impotence "may well" be a mitigating factor in addition to self-interest. Dr Earnshaw said the appellant's impotence "may have accelerated the [age-related] process of declining sexual preoccupation" (paragraph 67, page 80). She also opined that "To the extent that vanity was probably a component in his sexually inappropriate behaviour, I think this may well now be counteracted by his impotence, which is likely to cause embarrassment rather than gratification in a new sexual encounter" (paragraph 50, page 75). She accepted that embarrassment about the impotence would likely inhibit the appellant from future affairs like the one with CD entailing sexual intercourse (although she said "it would not necessarily prevent sexual touching": paragraph 64, page 79).

Who the appellant told of his behaviour and when

105. The Decision said the appellant "has over the past 15 years gone to great lengths to conceal this behaviour and convince officials and acquaintances/ colleagues that he presented no danger to children in his care" (Decision, page 93, fourth paragraph). If we had to decide whether this finding was in error of law for being inadequately explained, we might well conclude that it was. As the appellant pointed out, it did not appear that the DBS had information about who he had or had not told.

106. We have considered whether to replace this DBS finding with our own finding of fact as to who the appellant had told of his behaviour. He told us in particular that he had told Mr KL (author of one of the supporting letters, dated 27/04/15, page 45). The appellant also told us that he had told Ms MN (author of another supporting letter, dated 25/04/15, page 49).

107. However, it is unclear how much the appellant told either of these two individuals. He told us he told Ms MN "about misconduct about three or four years before she wrote the letter of 25/4/15".

108. As to what he told Mr KL, the appellant told us that, some time between November 2003 and November 2004, he told Mr KL that he had had a full sexual relationship – entailing sexual intercourse – with CD. As to his sexual touching of CD and the other three girls, the appellant gave the following evidence before us—

> Ms Ward: "In 2010 when you told [Mr KL] you accepted the allegations, did you tell him the details?"
>
> Appellant: "Can't recall, not full details, but more than I told him in 2003."

> Ms Ward: "So detail of how many times with each girl?"
>
> Appellant: "I'd have told him in 2010 that it was with [EF] 'on a number of occasions', and with [GH] and [IJ] just once or twice."
>
> Ms Ward: "Not 100% sure you gave him full details, what did you tell him? For example, sexual touching described above or just 'over-familiar'?"
>
> Appellant: "I'd have described 'sexual touching'. Madam, you can imagine it was very embarrassing to go into huge detail.".

109. The appellant's statement that "I'd have described" rather than "I described" suggests he was estimating what he would have said rather than giving evidence as to what he definitely recalled saying.

110. Given that the DBS considered relevant the extent to which the appellant had concealed his behaviour from "acquaintances / colleagues", we think it better to leave that question open for the appellant to provide to the DBS more detailed evidence as to who he told, when he told them, and how much he told them. This evidence can come both from the appellant and from those he says he told (who were not present to give evidence before us). If we do remit for a new decision, the DBS will need to give the appellant the opportunity to provide that further evidence if the DBS again considers relevant the extent to which the appellant concealed his behaviour.

Grooming

111. We remind the DBS that Dr Earnshaw said in her report—

> "I am not convinced that Mr. [AB] groomed the girls concerned in any calculated way, but more that he took advantage of the many occasions they were in his company to engage in opportunistic sexual behaviour towards them." (paragraph 48, page 74).

112. This could well be relevant not only to the DBS's new decision if we remit, but to whether the DBS invites us to remit at all.

"There was a noticeable lack of emotion in what he said"

113. Dr Earnshaw said in her report—

> "However, although most of the views he expressed were appropriate, and substantially different from his first responses to the allegations, there was a noticeable lack of emotion in what he said. I did feel that he was now very well aware of the position he needed to take if he wished his bar to be lifted." (our emphasis, paragraph 18, page 64).

114. There is however evidence about individuals avoiding uncomfortable emotions by focusing on facts and logic, so that emotion is not shown, and/or not felt, while for example recounting situations or events. Such individuals might include those with a certain level of intelligence, or having other common characteristics. A useful

starting point might be this website (we have reproduced in full at Annex C to this decision the first webpage that comes up in this link)—
http://changingminds.org/explanations/behaviors/coping/intellectualization.htm

115. The first webpage in this link says, for example—

> "Intellectualization is a 'flight into reason', where the person avoids uncomfortable emotions by focusing on facts and logic … Intellectualization protects against anxiety by repressing the emotions connected with an event. It is also known as 'Isolation of affect' as the affective elements are removed from the situation.
>
> […]
>
> When people treat emotionally difficult situations in cold and logical ways, it often does not mean that they are emotionally stunted, only that they are unable to handle the emotion at this time.".

116. But it is not clear in any event what emotion Dr Earnshaw expected the appellant to feel or show while expressing views to her. As between the appellant and the girls, one would not expect the appellant to be the one traumatised by the behaviour which led to his listing. Possibly remorse is what Dr Earnshaw had in mind, although how she expected that to be evinced in ways other than words is unclear. Was she expecting to see distress for example? In any event, we mention the above website evidence in case we remit. The point is that the appellant's reported lack of emotion – especially in the comparatively formal setting of an interview to be used for a legal process – may not have meant a lack of remorse or lack of insight, or anything negative in terms of the risk of repetition.

117. So if we remit, the appellant may wish to consider obtaining his own psychologist's or psychotherapist's report if the DBS continues to take the view that self-interest is not an adequate mitigating factor. Such a report may be able to opine on what any lack of apparent emotion does or does not mean in the appellant's case. It might cite studies or other evidence of persons who show no emotion when recounting certain types of experience, and might report what that evidence said that did or did not mean.

118. Of course, there was no evidence about that before us. So we are in no position to make findings about what the reported lack of demonstrated emotion meant in this case. But we do not in any event need to make such findings; we are not making findings as to whether there is or is not insight, and it is not clear at present to what else the kind of evidence we mention at paragraph 117 above might be relevant.

119. We emphasise that we mention the webpage merely as a possibly useful starting point. There might be other evidence that the appellant or those reporting on his behalf wish to cite to the DBS if we remit. We also emphasise that we have not taken the webpage, or the proposition it mentions, into account; we have not had submissions on it and it is not in any event relevant to our findings.

Disposal

120. Section 4(5) to (7) of the 2006 Act provides as follows—

> "(5) Unless the Upper Tribunal finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS.
>
> (6) If the Upper Tribunal finds that DBS has made such a mistake it must—
>
> (a) direct DBS to remove the person from the list, or
>
> (b) remit the matter to DBS for a new decision.
>
> (7) If the Upper Tribunal remits a matter to DBS under subsection (6)(b)—
>
> (a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and
>
> (b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.".

121. We did not get as far as submissions on what we should do under section 4(6) if we were to decide – as we now do – that the Decision must be set aside. The parties said they would like the opportunity to say, in light of our decision on that, whether they would want an oral hearing to address us on which of the two disposal options in subsection (6) we should take.

122. Counsel said the DBS submission on whether it seeks remittal or accepts that we should direct removal will depend on what we say in this interim decision. We remind the DBS of the findings of fact we have made, and of our comments under "other matters" above. The DBS will need also to consider carefully whether, if it were to make a new decision to the same effect, it would have the evidence to substantiate the findings it makes as the basis for its new decision.

123. We remind the parties that, if we remit, the DBS is obliged by section 4(7)(b) of the 2006 Act to remove the appellant from the Children's Barred List until the DBS makes its new decision, unless we direct otherwise. If the DBS is going to ask us to direct otherwise, it can include a reasoned request for that when making its substantive submissions on whether we should remit or should direct removal (although the question will of course arise only if the DBS seeks remittal). If the DBS asks us to direct that the appellant stay on the list pending its new decision, we will give the appellant the opportunity to comment on that request.

CASE MANAGEMENT DIRECTIONS

124. We direct as follows—

> (1) The parties must each, within one month of the date on which this notice is sent, tell the Upper Tribunal—
>
> (a) whether they want an oral hearing of the question of whether we should (i) direct the DBS to remove the appellant from the Children's Barred List or (ii) remit the matter to the DBS for a new decision; and

(b) if they do not want an oral hearing of that question, how long they will need to make written submissions. We would normally invite sequential submissions, appellant first, the DBS second, appellant last. But if the DBS is going to invite us to make a direction under section 4(7)(b), it may be more appropriate for it to go first so that the appellant can respond.

(2) Once we know whether either party wants an oral hearing, we will issue further directions, either for an oral hearing, or for written submissions to a timetable that we will decide in light of responses to direction (1)(b) above.

Rachel Perez
Judge of the Upper Tribunal
29 June 2018

Annex A to Upper Tribunal decision

Legislation

Section 4 of the Safeguarding Vulnerable Groups Act 2006 (c. 47)

"**4 Appeals**

(1) An individual who is included in a barred list may appeal to the Upper Tribunal against—

(a) [repealed].

(b) a decision under paragraph 2, 3, 5, 8, 9 or 11 of Schedule 3 to include him in the list;

(c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.

(2) An appeal under subsection (1) 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 mentioned in that subsection was based.

(3) 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.

(4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.

(5) Unless the Upper Tribunal finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS.

(6) If the Upper Tribunal finds that DBS has made such a mistake it must—

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

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

(7) If the Upper Tribunal remits a matter to DBS under subsection (6)(b)—

(a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and

(b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise."

Annex A continued

Paragraph 18 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 (c. 47)

"*Review*

18

(1) A person who is included in a barred list may apply to DBS for a review of his inclusion.

(2) An application for a review may be made only with the permission of DBS.

(3) A person may apply for permission only if—

(a) the application is made after the end of the minimum barred period, and

(b) in the prescribed period ending with the time when he applies for permission, he has made no other such application.

(4) DBS must not grant permission unless it thinks—

(a) that the person's circumstances have changed since he was included in the list or since he last applied for permission (as the case may be), and

(b) that the change is such that permission should be granted.

(5) On a review of a person's inclusion, if DBS is satisfied that it is no longer appropriate for him to be included in the list it must remove him from it; otherwise it must dismiss the application.

(6) The minimum barred period is the prescribed period beginning with such of the following as may be prescribed—

(a) the date on which the person was first included in the list;

(b) the date on which any criterion prescribed for the purposes of paragraph 1, 2, 7 or 8 is first satisfied;

(c) where the person is included in the list on the grounds that he has been convicted of an offence in respect of which a custodial sentence (within the meaning of section 76 of the Powers of Criminal Courts (Sentencing) Act 2000 (c. 6)) was imposed, the date of his release;

(d) the date on which the person made any representations as to why he should not be included in the list."

[End of Annex A]

Annex B to Upper Tribunal decision

Appellant's oral and written evidence about two incidents in 2002 with EF when EF was 19

Written evidence

Application for permission to appeal to Upper Tribunal, paragraph 34, page 12—

"**34. However, at least one of the incidents of abuse that you have now admitted to occurred after this accident.**

This statement is factually incorrect.

I have not admitted to any incident of abuse from any time after my accident. I presume this is referring to my statement about touching [EF]'s breasts in the summer of 2002. She was by then aged 19. This was referred to at paragraph 39 of the Specialist Assessment Report. Whilst I regret the two incidents now, they cannot be claimed to be abusive in any way. On both occasions I was reacting to her sexual advances, after she had removed her top and bra without any prompting or provocation from me. I do not believe that she has claimed this to be abusive and there was never any other occasion of such sexual touching during the whole period of three years after my accident, when we enjoyed a perfectly normal and friendly relationship and during which time she gave very positive support to my work with choirs."

Appellant's response dated 27/8/16 to the DBS submission, paragraphs 30 and 31, Page 481—

"30. As I have already stated in my Application for Leave to Appeal, I was only reacting to her sexual advances after she removed her top and bra without any prompting or provocation from me [para 34, UT bundle p 12]. She had to walk at night from one building to another at the [Campus] where we were staying in order to come to my room, which she did of her own volition, not at my invitation.

31. I do not know why she instigated this when there had not been any incidence of sexual touching during a period of more than two years. It happened in August 2002 and she made her complaints to the Police in January 2003. It would not be beyond reason that in August 2002 she was already of the mind to go to the Police, which would raise questions as to why she made her sexual advances at that time."

Oral evidence

Appellant: "I had been friendly. And from May 2000, no instance of sexual touching. Then, August 2002 (a gap of over two years), The […] Singers were singing at […] in […], for a week, we were all staying in […] Campus. I received a text message from her about 11pm, asking if she could come and have a chat. I didn't see that as unusual – we talked a lot about various things. When she came to my room, she almost immediately removed her top and bra, within the first minute or two, and made sexual advances towards me. I don't recall what happened immediately after she came in – just chatted about our day or whatever.

I readily admit I didn't resist it to begin with. However, it was clear she didn't

have much to talk about. She stayed 15 to 20 minutes then had gone."

Judge: "You've glossed over the visit a bit."

Appellant: "Around page 251, the police notes. The bit about simulating sex over clothes is true."

Judge: "What brought it to an end?"

Appellant: "I think I did, but I can't be sure. Also, the [Campus], the walls are paper thin. Possibly I said 'you can't stay because there are people either side of us'. It didn't progress any further than her taking her top off. DBS said this was 'abuse'. My point is that this was not a continuation of my earlier manipulative behaviour; she wasn't a child, she instigated it, knew exactly what she was doing. I don't know why she did it. But it was only a few months before she went to the police. But wouldn't be beyond reason that she did it to go to the police."

Cross-examination

Ms Ward: "Page 12, the grounds of appeal paragraph 34, the two incidents."

Appellant: "The other one was in my car also in summer 2002. Dr Earnshaw mentions it at page 72, paragraph 39 [*"Mr. [AB] admitted to having twice fondled [EF's] breasts under her clothing, but said this was after [EF] was 18 – once in his car, and once on a choir outing with the […] Singers to […]*]. The circumstances of it, it was in my car. She took off her top and bra in a secluded car park, but it was a public place and didn't last anywhere near as long. And [EF] never mentioned that in her statement to the police. I was the one who mentioned it."

Ms Ward: "You're saying there is no link between the two 2002 events and when she was under 18?"

Appellant: "My case is that it was not 'abuse' because she was an adult and initiated it."

Ms Ward: "But was it linked?"

Appellant: "She might have known I'd react in that way. But there was no link with the pre-2000 incidents, we have quite a different relationship then."

Judge: "What do you mean?"

Appellant: "It was not a continuation of earlier manipulative behaviour. Because it was two and a half years later. She wanted it, for her own reasons. It wasn't anything I initiated or instigated."

Judge: "Was the car incident before or after the [Campus] incident?"

Appellant: "After, within one month. Also, for rest of 2002 into January 2003, we maintained a perfectly friendly relationship, and nothing else happened. She came and sang with the choir."

[End of Annex B]

Annex C to Upper Tribunal decision: Extract from website
http://changingminds.org/explanations/behaviors/coping/intellectualization.htm

"**Intellectualization**

Explanations > Behaviors > Coping > Intellectualization
Description | Example | Discussion | So what?

Description

Intellectualization is a 'flight into reason', where the person avoids uncomfortable emotions by focusing on facts and logic. The situation is treated as an interesting problem that engages the person on a rational basis, whilst the emotional aspects are completely ignored as being irrelevant.

Jargon is often used as a device of intellectualization. By using complex terminology, the focus becomes on the words and finer definitions rather than the human effects.

Example

A person told they have cancer asks for details on the probability of survival and the success rates of various drugs. The doctor may join in, using 'carcinoma' instead of 'cancer' and 'terminal' instead of 'fatal'.

A woman who has been raped seeks out information on other cases and the psychology of rapists and victims. She takes self-defense classes in order to feel better (rather than more directly addressing the psychological and emotional issues).

A person who is in heavily debt builds a complex spreadsheet of how long it would take to repay using different payment options and interest rates.

Discussion

Intellectualization protects against anxiety by repressing the emotions connected with an event. It is also known as 'Isolation of affect' as the affective elements are removed from the situation.

Freud believed that memories have both conscious and unconscious aspects, and that intellectualization allows for the conscious analysis of an event in a way that does not provoke anxiety.

Intellectualization is one of Anna Freud's original defense mechanisms.

So what?

When people treat emotionally difficult situations in cold and logical ways, it often does not mean that they are emotionally stunted, only that they are unable to handle the emotion at this time. You can decide to give them space now so they can maintain their dignity, although you may also decide to challenge them in a more appropriate time and setting.

When you challenge a person who is intellectualizing, they may fight back (which is attack, another form of defense) or switch to other forms of defense.

See also

Denial, Dissociation, Rationalization, Repression"

[End of Annex C]