Neutral Citation Number: [2021] EWCA Civ 1575

Case No: C3/2020/1966 & C3/2020/1720

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
UPPER TRIBUNAL JUDGE PEREZ, MS MARGARET DIAMOND AND MR BRIAN CAIRNS
V/2641/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2021

Before:

LADY JUSTICE MACUR
LORD JUSTICE MOYLAN
and
LORD JUSTICE LEWIS

- -

Between:

DISCLOSURE AND BARRING SERVICE	**Appellant**
- and -	
AB	**Respondent**

- -
- -

Ben Jaffey Q.C. and Carine Patry (instructed by **DBS Legal Services**) for the **Appellant**
The respondent appeared in person

Hearing dates: 19 and 20 October 2021

- -

Approved Judgment

Reporting restrictions: the identities of the respondent, his wife and the four individuals referred to in the Upper Tribunal decisions as CD, EF, GH and IJ (and referred to in this judgment as the four individuals who made allegations about the respondent's conduct) are not to be disclosed.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be at 10:30am on 1 November 2021.

Lord Justice Lewis:

INTRODUCTION

1. This appeal concerns the powers of the Upper Tribunal hearing an appeal against a decision by the appellant, the Disclosure and Barring Service ("the DBS"), that it was not satisfied that it was no longer appropriate for the respondent, AB, to be included in what is known as the children's barred list, that is, a list of persons barred from engaging in certain activities relating to children.

2. In brief, the respondent was an organist and choirmaster at a church. Allegations were made by four girls who sang in the choir that the respondent had engaged in inappropriate sexual conduct resulting in sexual touching (when the girls were over 16 years old) and, in one case, leading to sexual intercourse (when the girl was over 18 years old). In 2004, the respondent was placed on the predecessor to the children's barred list and, in due course his name was transferred to the children's barred list. In 2014, he applied for a review of the inclusion of his name on the list. The DBS carried out a review but decided that his name should remain on the list. The appellant appealed to the Upper Tribunal.

3. In its interim decision dated 29 June 2019, the Upper Tribunal found that that decision was based on three errors of law, namely (1) it was based on an implied assumption that the respondent's sexual interest in teenage girls created a risk, or more of a risk that that presented by other heterosexual men, of the behaviour being repeated without giving reasons for that assumption (2) the decision did not explain why the respondent's self-interest was less of a mitigating factor than insight into harm and (3) the DBS had failed to enquire into, or make findings of fact about, two incidents in 2002 involving one of the four individuals when she was 19 years old.

4. In its decision disposing of the appeal dated 11 March 2020, the Upper Tribunal held that it had power to determine whether it was appropriate to retain the respondent on the children's barred list and decided it was not for the reasons they gave. They directed the DBS to remove his name from the list.

5. The appellant appeals against both decisions. It contends that the Upper Tribunal erred in finding that it had made any of the three errors identified. It contends that the Upper Tribunal mischaracterised the decision and the DBS did not make the assumption, or the comparison, that the Upper Tribunal says it did. Further, it was not necessary on the facts of this case to make inquiries into the circumstances of the 2002 incidents: the relevant fact was that they occurred which the respondent admitted. Furthermore, the appellant contends that the Upper Tribunal erred in concluding that the Upper Tribunal had power to determine the appropriateness of retaining the respondent's name on the children's barred list as that was a matter for the DBS to determine. If the Upper Tribunal had correctly found that the DBS had made an error of law, then it should have remitted the matter to the DBS for it to re-consider the case rather than directing the DBS to remove the respondent's name.

6. The respondent submitted that the Upper Tribunal was correct to find that the DBS had not given adequate reasons for its conclusion and had failed properly to investigate the circumstances surrounding the 2002 incidents. He submitted that the

Upper Tribunal could decide to direct the removal of his name from the children's barred list, and was not confined simply to remitting the matter to the DBS.

7. At the outset of the hearing, we granted permission for the 8 page document dated 26 May 2016 recording details of the review and recommendations made, and the specialist risk assessment carried out of the respondent by Dr Judith Earnshaw at the Lucy Faithfull Foundation, to be included in the material before the court. The reasons for that decision are as follows. The two documents had been before the Upper Tribunal and it made reference to the two documents in its decisions. It was necessary for the documents to be included within the evidence before this Court to enable each party to make submissions about the way in which the Upper Tribunal dealt with the documents, and to enable the Court to assess the way in which it had dealt with them. There was no unfairness to the respondent in admitting the material as he had had both of those documents for many years. He confirmed at the hearing that he was familiar with the contents of the documents and he would suffer no prejudice if the documents were admitted in evidence.

THE LEGISLATIVE FRAMEWORK

8. Arrangements for including the name of a person in a list of persons barred from working with children were governed initially by, amongst other things, the Protection of Children Act 1999 ("the 1999 Act"). The respondent's name was originally included in such a list of persons pursuant to that Act.

9. The arrangements for the protection of children and vulnerable adults are now contained in the Safeguarding Vulnerable Groups Act 2006 ("the Act"). Section 2 of the Act provides for the DBS to maintain the children's barred list (and the adults' barred list dealing with people prohibited from activities with vulnerable adults). A person included in the children's barred list is prohibited from engaging in regulated activity relating to children (see section 3 of the Act). That is defined to include, broadly, any form of teaching, training or instruction or care or supervision of children (see section 5 of, and paragraphs 1 and 2 of Schedule 4 to, the Act). Paragraphs 1 and 2 of Schedule 3 to the Act provide that a person is to be included within the children's barred list in prescribed circumstances. Paragraph 3 of Schedule 3 to the Act applies to a person who has, or is or might in future be, engaged in regulated activity relating to children and whom the DBS proposes to include in the list. Such a person must be given an opportunity to make representations. Paragraph 3(3) provides that:

> "(3) DBS must include the person in the children's barred list if–
>
> (a) it is satisfied that the person has engaged in relevant conduct,
>
> (aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and
>
> (b) it is satisfied that it is appropriate to include the person in the list."

10. Paragraph 4 of Schedule 3 to the Act provides, so far as material, that:

> "(1) For the purposes of paragraph 3 relevant conduct is–
>
> (a) conduct which endangers a child or is likely to endanger a child;
>
> (b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;
>
> (c) conduct involving sexual material relating to children (including possession of such material);
>
> (d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;
>
> (e) conduct of a sexual nature involving a child, if it appears to DBS that the conduct is inappropriate."

11. A person has a right of appeal to the Upper Tribunal against a decision including him or her in the children's barred list. In addition, there is provision for a person who has been included within the list to apply for a review of that decision after a certain period of time. Paragraph 18 of Schedule 3 provides so far as material that:

> "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."

12. The minimum period in this case is 10 years from the date of inclusion on the list. There is provision for a review in other circumstances including, if appropriate, within that 10 year period. The material provision is paragraph 18A to Schedule 3 to the Act which provides:

> "18A (1) Sub-paragraph (2) applies if a person's inclusion in a barred list is not subject to—
>
> (a) a review under paragraph 18, or
>
> (b) an application under that paragraph,
>
> which has not yet been determined.
>
> (2) DBS may, at any time, review the person's inclusion in the list.
>
> (3) On any such review, DBS may remove the person from the list if, and only if, it is satisfied that, in the light of—
>
> (a) information which it did not have at the time of the person's inclusion in the list,
>
> (b) any change of circumstances relating to the person concerned, or
>
> (c) any error by DBS,
>
> it is not appropriate for the person to be included in the list."

13. A person has a right to appeal to the Upper Tribunal against a decision on a review not to remove him or her from the list. Appeals against both a decision to include a person in the list and a decision not to remove him or her from the list on a review are governed by section 4 of the Act which provides:

> "4 Appeals
>
> (1) An individual who is included in a barred list may appeal to the Upper Tribunal against–
>
> …..
>
> (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."

THE FACTUAL BACKGROUND

The Original Allegations and Inclusion of the Respondent In the List

14. This summary of the facts is largely taken from the review document dated 26 May 2016. The respondent had been choirmaster and organist at various churches from 1972. In 1998, he was given a verbal warning by the vicar of the church where he was then a choirmaster after allegations were made that he had woken girls up early in the morning at a choir summer camp. In January 1999, he was suspended from his post at that church following further allegations concerning his conduct at the summer camp. These allegations were that he had been part of a group including a 17 year old girl in the choir who had been drinking after hours at a pub and had been alone with the girl in her bedroom at the accommodation. Police investigations were carried out but no action taken as no specific allegations of criminal conduct had been made. The respondent was, however, dismissed from his position at the church in March 1999.

15. In January 2003, a further police investigation was carried out in relation to allegations of sexual activity by the respondent with four young female members of the choir relating back to 1999. No further action was taken as any sexual activity had taken place after the girls had attained the age of 16 and, at that stage, the activity was not a criminal offence.

16. Following a referral by the child protection adviser for the relevant diocese, the respondent was provisionally included on the list maintained under the 1999 Act on 15 October 2003. During an exchange of observations between the respondent and the diocese, the respondent maintained that he had never been questioned by the police about any allegations and that there had been a malicious campaign to discredit him and undermine his position. On 2 November 2004, the respondent's name was confirmed for inclusion on the list maintained for the protection of children under the 1999 Act and the list maintained for the protection of vulnerable adults under the Care Standards Act 2000.

17. The respondent's name was subsequently transferred to the children's barred list and the adults' barred list.

The Review

18. On 2 November 2014, the respondent applied for a review under paragraph 18 of Schedule 3 to the Act. It appears that the information provided by the respondent in support of the request suggested that, whilst recognising that his conducted in 1998 and 1999 was below the standard required, he had demonstrated an ability to modify his behaviour. As this suggested a material change in his circumstances, the DBS granted permission for a review.

19. A specialist risk assessment was carried out by a psychotherapist, Dr Earnshaw of the Lucy Faithfull Foundation. Dr Earnshaw was provided with a great deal of documentary material and had two three-hour interviews with the respondent. During the interviews, the respondent admitted for the first time that he had given lifts home to girls after choir practice, that he had gone to pubs or restaurants with choir members, and had a party at his home on New Year's Eve in 1998 for choir members which continued until 1 a.m. and where alcohol was provided. He admitted that, at the summer camp in 1998, he had gone to the bedroom of one of the female choir members and, on another occasion, he walked her back to her bedroom, hugged her and may have touched her bottom. He accepted that he had kissed a second female choir member, EF, at the New Year's Eve party in 1998. He admitted sexual interactions with EF in 1999 after she became 16 (in April 1999). He had taken EF and another female choir member for a curry. Whilst driving them home, and whilst the other female was out of the car, he leaned over, kissed EF and touched her over her clothing. Later that evening, having dropped off EF, he kissed and fondled the other female choir member. He continued sexual contact with EF whilst she was 16 and 17. This involved kissing and touching of her breasts and genitals over her clothing. He admitted that he had kissed a fourth female member of the choir and "may have touched her bottom and breasts outside her clothing". He explained that he had a serious road accident in 2000 and since that time he had been unable to maintain an erection or engage in sexual intercourse. He admitted that, at a choir camp in 2002 , EF (then aged 19) sent him text messages, came to his room and sexual touching occurred. There was also a second incident where he drove with EF, after choir practice and on the way to a pub, to a secluded car park and sexual touching occurred.

20. Dr Earnshaw's report needs to be read in full and large parts are set out in the decisions of the Upper Tribunal. For present purposes it is sufficient to note that Dr Earnshaw expressed her opinion on the respondent's attitude to the activity, and on

relevant risk predictive factors arising out of the respondent personal family, sexual and relationship history. Her risk assessment was expressed as follows:

> "**Risk Assessment**
>
> "65. [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 on teenagers. If, as [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. [AB] has not undertaken any kind of treatment work for his behaviour, but claims to have undergone both a change of heart in 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 this case, the impotence he claims as a result of his accident, may have accelerated the process of declining sexual pre-occupation. He appears to have a social group of adult fiends, 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 peopled for emotional validation.
>
> 68. In my opinion, were his bar to be lifted, it would be of benefit for [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."

The Decision of the DBS

21. The decision of the DBS is contained in a letter dated 26 May 2016. The DBS decided to remove the respondent's name from the adults' barred list as it appeared that there was no basis for concluding that he had, or might in future, be engaged in regulated activity with vulnerable adults.

22. The DBS decided, however, not to remove the respondent from the children's barred list. Given the importance of the decision, it is necessary to set out in full the relevant part of the decision (I have added paragraph numbers for convenience):

> "**The Children's Barred List**
>
> 1. Your previous role as Choirmaster was one which falls within the law's definition of regulated activity and we are satisfied, therefore, that you have previously engaged in regulated activity with children.
>
> 2. Having considered the information before us, which includes the original case material, the new information that you have provided to us in your request for review and the specialist assessment report undertaken by Dr Judith Earnshaw of The Lucy Faithfull Foundation, we remain of the view that it is not appropriate for your name to be removed from the Children's Barred List.
>
> 3. This is because you have admittedly to sexually touching four female children for whom you held a position of trust and that this was motivated by sexual interest in teenage girls. Therefore Relevant Conduct towards children is clearly established.
>
> 4. You have gone to great lengths over the past 15 years to conceal your behaviour and convince officials, acquaintances and colleagues that you present no danger to children. However, despite your recent honesty, you have demonstrated little insight into the implications of your behaviour on the girls involved. Whilst you now acknowledge that your behaviour was harmful, you have not demonstrated any real understanding of their statements that they only complied with your behaviour because they felt they had to and that it was something that you did with all the girls of the choir; or that the reasons those interviewed in 1999 gave for not disclosing the full extent of your behaviour was because they believed they would get into trouble. 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 you and respected you.

5. You have stated that the injuries you sustained in a road traffic accident in 2000 have had a lasting physical effect on you and that, even if you had been a risk to children previously, the results of your injuries would eliminate any such risk in the future since you are no longer able to maintain an erection or engage in sexual intercourse. However, at least one of the incidents of abuse that you have admitted to occurred after this accident. You have also confirmed that you still have sexual thoughts and are capable of orgasm through masturbation. The specialist assessment report also notes that your impotence would not preclude sexual touching which, when considering the description of your previous behaviour, remains concerning as this was characterised by your sexual touching of the girls, rather than of them touching or performing sexual acts on you. Therefore, the DBS consider that little weight can be given to your claim that you physically longer present a sexual risk towards children.

6. 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.

7. However, it is also noted that this observation relies solely on your motivation and restraint. You have demonstrated a long-standing sexual interest in teenage girls and have previously acted on this attraction. You have shown little credible insight into your behaviour and have in fact admitted that, even after your road traffic accident, which you describe as a life changing event, you continued to engage in sexual touching which somewhat weakens your assertion that the accident was a 'turning point' in your life which caused you to modify your behaviour.

8. Whilst it is accepted that your harmful 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 you in 2004 by your original inclusion in PoCA/PoVA Lists removed the opportunity for you to form any further abusive relationships in the environment where your previous behaviour occurred. Whilst the risk of you committing further abusive behaviour may be decreasing, 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.

9. It is acknowledged that your retention in the Children's Barred List may have a detrimental impact on you. However, any detriment to you is entirely outweighed by

> the need to protect children from the potential future risk of harm that repetition of your previous behaviour could cause if you were allowed unsupervised access to children within a Regulated Activity setting.
>
> 10. There are no less onerous safeguarding measures in place that DBS could consider. You were not convicted of any offence and any enhanced disclosure you may apply for in the future would be reliant on any soft intelligence disclosed by the Police to inform a prospective employer's decision regarding your suitability. Although it is possible that such information may be disclosed, there are no guarantees in this regard, and the case evidence indicates that you were previously able to secure employment with [a church] despite the [Parochial Church Council] being aware of the allegations that led to your dismissal from your previous position.
>
> 11. Taking all of the above into consideration, there are no other adequate safeguards in place which could negate the necessity to continue your inclusion in the Children's Barred List and provide the necessary preventative measures required to safeguard children in a Regulated Activity setting and therefore your name remains included in the Children's Barred List."

23. The last sentence in paragraph five must have accidentally omitted the word "no" before longer. The sense of the sentence is clearly that the respondent claimed that he "no longer" presented a sexual risk towards children.

The Appeal

24. On 15 August 2016, the respondent applied for permission to appeal against the decision. Permission was granted by Upper Tribunal Judge Perez on 4 January 2017. The respondent put forward ten grounds of appeal which are summarised in the interim decision in the following way. The DBS

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

    (2) had unreasonably disregarded the specialist risk assessment;

    (3) was mistaken in saying that (a) the respondent had gone to great lengths in the past 15 years to conceal his behaviour and convince officials, acquaintances and colleagues that he presented no danger to children and (b) he demonstrated little insight into the implications of his behaviour on the girls;

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

(5) was mistaken in stating that the respondent submitted that his impotence (as a result of his road traffic accident) eliminated future risk;

(6) was mistaken in saying that at least one incident of abuse had occurred after his road traffic accident;

(7) was mistaken in saying that he had demonstrated a long-standing sexual interest in teenage girls and previously acted on that attraction;

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

(9) had failed to take into account the reasons behind his prolonged concealment;

(10) 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 respondent would not act in a similar manner again.

The Interim Decision

25. The Upper Tribunal held an on oral hearing on 21 September 2017. It gave an interim decision nine months later on 29 June 2018 allowing the appeal and setting aside the decision of the DBS. The Upper Tribunal concluded that it did not need to address whether each of the respondent's 10 grounds of appeal justified setting aside the decision as it had found three fundamental errors of law for which it had to set the decision aside. It considered that those three fundamental errors could not be fitted neatly any of the appellant's grounds of appeal so it dealt with them separately.

26. The Upper Tribunal identified the three errors of law in the following terms:

> "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 [AB]'s having a sexual interest in teenage 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 [AB]'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."

27. The Upper Tribunal deal with the first error at paragraphs 39 to 54. The Upper Tribunal considered that it was "clearly an implied premise" of the decision that the respondent's sexual interest in teenage girls created a risk, or more of a risk with this appellant that with any other heterosexual man, of repetition of the behaviour. The Upper Tribunal stated that it could not decide whether that proposition was true but it did not have evidence to support what it regarded as the implied premises and it did not understand the basis for the premise. Consequently, the Upper Tribunal concluded that the failure to provide an explanation for what they regarded as an implied premise underlying the decision involved an error of law.

28. The second error was based on the view that the appellant had failed to explain why self-interest on the part of the respondent was less of a mitigating factor, or a less reliable mitigating factor, than insight into harm. The Upper Tribunal appeared to form the view that Dr Earnshaw considered that the respondent would be unlikely to commit similar behaviour again because of self-restraint and the DBS had not given an explanation in those circumstances as why that self-restraint was a less restraining factor than insight. Again, at paragraph 65, the Upper Tribunal expressed the view that it was an implied premise of the decision that insight was a greater inhibitor than self-interest but no adequate explanation had been provided for that implied premise.

29. In relation to the third error, the Upper Tribunal took the view that it was relevant to determine whether the incidents in 2002 could be described as a continuation of previous inappropriate or abusive behaviour. If not, there would be a period of about 3 and ½ years between the last incident of inappropriate behaviour and the provisional listing (some time in about 2000 and 17 September 2003 respectively) and four and a half years between the last incident and the confirmation of the listing on 2 November 2004. The Upper Tribunal concluded that the DBS had erred in not investigating the two 2002 incidents or making relevant findings of fact.

30. The Upper Tribunal went on to set out findings of fact pursuant to section 4(7) of the Act on which the DBS would have to base a new decision if the question of whether it was appropriate to retain the respondent on the children's barred list was remitted to the DBS. These included: a finding that the respondent did not currently rely on his sexual impotence as mitigating the risk of repetition of the behaviour; a finding that the respondent had not said certain words to Dr Earnshaw about the way the girls responded to his behaviour or, if he did say those words, he did not intend the words to be a justification of his behaviour, or if he did, he no longer relied upon that as justifying his behaviour. It also made a finding of fact about whether not seeking out the girls to apologise was concealment. It also found as a fact that the appellant's marriage was a factor which would discourage him from repeating the behaviour.

31. Finally, in the interim decision, the Upper Tribunal commented on other matters intending, it seems, that the DBS have regard to them if the matter was remitted to the DBS. These other matters included references to the view of Dr Earnshaw that impotence may well be a mitigating factor and on whether the actions of the respondent constituted grooming. The Upper Tribunal referred to two other matters about which the respondent might wish to adduce further evidence before the DBS took a new decision. This was evidence about whom he had told about the behaviour and evidence, possibly a further psychological report, about why he had not shown emotion during the interview. To that end, the Upper Tribunal attached an extract

from a website that it had found suggesting reasons why a person might have not shown emotion.

The Decision

32. On 11 and 12 June 2019, another oral hearing was held before the same panel of the Upper Tribunal to consider the question of remedy. On 11 March 2020, 9 months later, the Upper Tribunal handed down its final decision.

33. Section 4(6) of the Act provides that, where the Upper Tribunal finds there has been an error of law or fact, it may direct the DBS to remove the person from the list or may remit the matter to the DBS for it to take a new decision. The Upper Tribunal rejected the submission of the DBS that it should only direct removal if that was the only decision that the DBS could lawfully reach and that, otherwise, it should remit the matter for the DBS to decide. The Upper Tribunal held that it could determine whether it was no longer appropriate for the respondent's name to be included in the children's barred list.

34. It set out its reasons for that conclusion. It considered that "a prohibition on considering appropriateness" should not be implied into section 4(6) of the Act. It noted that an express prohibition on considering appropriateness had been included in section 4(3) of the Act "for the purposes of subsection (2)", that is for the purposes of deciding whether the DBS had made an error of law or fact. No such provision had been included in section 4(6) dealing with the powers of the Upper Tribunal where it has found such an error. Further, the Upper Tribunal considered that section 4 of the Act could easily have been drafted differently if it had been the intention of Parliament that the Upper Tribunal should not consider the appropriateness of including a person in the list when dealing with disposal of an appeal. It considered the decision of the Court of Appeal in *Independent Safeguarding Authority v SB (Royal College of Nursing Intervening)* [2012] EWCA Civ 977 [2013] 1 WLR 308 dealing with the role of the Upper Tribunal on appeals. It noted that that case was not dealing with the question of the scope of the powers of the Upper Tribunal under section 4(6) of the Act. It also considered the decision of the Upper Tribunal in *MR v Disclosure and Barring Service* [2015] UKUT 005 (AAC). There, the Upper Tribunal had said at paragraph 8 of its decision that the Upper Tribunal should only direct removal if that was the only decision that the DBS could reach. The Upper Tribunal in this case considered that that indication was contradicted by what the Upper Tribunal had subsequently said at paragraph 18 of its decision. In any event, the Upper Tribunal considered that if *MR* did establish the test for deciding whether to direct remove under section, it was wrong and the Upper Tribunal in the present case was not bound to follow the decision. It also considered that the Upper Tribunal in the case of *CM v Disclosure and Barring Service* [2015] UKUT 707 (AAC) had assessed for itself the question of appropriateness in deciding whether to direct removal of CM's name from the children's barred list.

35. The Upper Tribunal then set out its reasons for concluding that it was no longer appropriate for the respondent o remain on the children's barred list. It directed the DBS to remove his name from that list.

THE APPEAL

36. The appellant, the DBS, appealed against both the interim decision of 29 June 2018 and the decision of 11 March 2020 directing it to remove the respondent's name from the children's barred list. The three grounds of appeal are that the Upper Tribunal:

    (1) erroneously identified errors of law in the DBS decision of 26 May 2016;

    (2) erred in its findings of fact;

    (3) erred in its disposal of the appeal as it misinterpreted section 4(6) of the Act in its approach to remittal and incorrectly decided the question of appropriateness of the inclusion of the respondent in the list itself rather than remitting the matter to the DBS.

THE FIRST TWO ISSUES – ERRORS OF LAW AND FACT

Submissions

37. It is convenient to deal with the first two grounds of appeal together as they deal with the interim decision.

38. Mr Jaffey Q.C., with Ms Patry, for the appellant, submitted that the Upper Tribunal erred in finding that the DBS had made each of the three errors of law in its decision of 26 May 2016. In relation to the first alleged error, the decision was not based on any implied premise that the respondent having a sexual interest in teenage girls created a risk of him repeating the behaviour, or more of a risk than that posed by other heterosexual men. Similarly, the decision was not based on any implied premise that self-restraint was less of a mitigating factor, or a less reliable mitigating factor, than insight. Consequently, as these were not implied premises underlying the decision here was no "error" in failing to give reasons for them.

39. Mr Jaffey submitted that the Upper Tribunal had simply misunderstood, or mischaracterised the decision. The DBS considered that the respondent is a person with a sexual interest in teenage girls, and, while in a position of trust, he had acted on his sexual interest with four girls. He had concealed that for many years and lacked insight into his conduct, why it was wrong and the harm it caused. It was not satisfied that the factors relied upon reduced the risk of the respondent acting in a similar manner again, if the restrictions on engaging in regulated activity with children were removed. That reasoning did not display either of the two errors of law identified by the Upper Tribunal.

40. In relation to the third error, Mr Jaffey submitted that the DBS did not err by deciding not to investigate the precise circumstances surrounding the two incidents in 2002. It was the fact of the sexual touching that was relevant. The DBS relied upon the information provided by the respondent who had admitted that there had been two incidents in 2002. The two incidents of sexual touching indicated that the injuries sustained in the 2000 road traffic accident did not have such a lasting physical effect on the respondent that it eliminated the risk to children in future. Rather, the respondent had engaged in sexual touching (which was in fact the sort of behaviour which had led to his inclusion in the children's barred list) after the road traffic accident. Further, the DBS were entitled to consider that the fact that the respondent had engaged in incidents of sexual touching with one of the four females was

something which "somewhat weakens" his assertion that the accident was a turning point in his life which caused him to modify his behaviour.

41. In relation to the second ground of appeal, Mr Jaffey submitted that there was no clear reasoning as to why the Upper Tribunal found it necessary to find facts. Given the nature of the errors of law that the Upper Tribunal said it had found, which were procedural in nature, there was no principled reason for it to make any findings of fact if the matter were to be remitted to the DBS. Further, a distinction had to be drawn between findings and value judgments or expressions of opinion about those facts. The Upper Tribunal may do the former but not the latter. It may identify a fact, but then leave the relevance and weight of that fact for the assessment of the DBS.

42. The respondent set out his submissions in a detailed written skeleton argument and in oral submissions. He submitted that the Upper Tribunal found that there were two errors, namely the failure to explain why he was still considered a risk and why the DBS did not accept the specialist risk assessment (which the DBS itself had commissioned) which found that he would be unlikely to repeat the behaviour largely because of self-interest (but also because of other factors including a declining sexual pre-occupation). The respondent submitted that the DBS should have investigated the circumstances of the two 2002 incidents. It had described the incidents as abuse, and had regarded them as a continuation of the earlier behaviour. He submitted that they were not an abuse and not a continuation of the earlier behaviour with EF as there had been a gap of 2 and ½ years between the earlier incidents of sexual touching and the 2002 incidents. EF was 19 at the time of the later incidents and the respondent submitted that she was the instigator as, for example, in relation to the first incident as she texted him and she came to his room on campus where the incident took place. He speculated (he accepted that he could not know) that EF had decided to go to the police in 2002 and instigated these two incidents before she did so as it would be in some way relevant to, or strengthen her allegations to, the police about his earlier conduct.

Discussion

The respective roles of the DBS and the Upper Tribunal

43. By way of preliminary observation, the role of the Upper Tribunal on considering an appeal needs to be borne in mind. The Act is intended to ensure the protection of children and vulnerable adults. It does so by providing that the DBS may include people within a list of persons who are barred from engaging in certain activities with children or vulnerable adults. The DBS must decide whether or not the criteria for inclusion of a person within the relevant barred list are satisfied, or, as here, if it is satisfied that it is no longer appropriate to continue to include a person's name in the list. The role of the Upper Tribunal on an appeal is to consider if the DBS has made a mistake on any point of law or in any finding of fact. It cannot consider the appropriateness of listing (see section 4(3) of the Act). That is, unless the decision of the DBS is legally or factually flawed, the assessment of the risk presented by the person concerned, and the appropriateness of including him in a list barring him from regulated activity with children or vulnerable adults, is a matter for the DBS.

44. The role of the Upper Tribunal was considered in relation to the Independent Safeguarding Authority or ISA (the predecessor to the DBS) in *Khakh v Independent*

Safeguarding Authority (now the Disclosure and Barring Service) [2012] EWCA Civ 1341. At paragraph 18, Elias LJ, with whom the other members of the Court agreed, said:

> "18….. The jurisdiction of the UT when considering an appeal from a decision not to remove the appellant from a barred list is limited to cases where the ISA has made a mistake on any point of law, or in any finding of fact on which its decision was based: section 4(2) . A point of law, as Mr Grodzinski QC, counsel for the ISA, properly concedes, includes a challenge on *Wednesbury* grounds and a human rights challenge. But it will not otherwise entitle an applicant to challenge the balancing exercise conducted by the ISA when determining whether or not it is appropriate to keep someone on the list. In my view that is plain from traditional principles of administrative law but in any event it is put beyond doubt by section 4(3) which states in terms that the decision whether or not it is appropriate to retain someone on a barred list is not a question of law or fact. It follows that an allegation of unreasonableness has to be a *Wednesbury* rationality challenge i.e. that the decision is perverse. "

45. Elias LJ also dealt with the obligation to give reasons at paragraph 23 of his judgment where he said:

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

The proper interpretation of the decision letter

46. The starting point therefore is to consider the decision letter, read fairly and as a whole, to determine what it concluded and what reasons it gave for those conclusions. I have set out the decision letter at paragraph 22 above. It is not always well expressed or well structured. Read fairly, and as a whole, however, it is reasonably clear what the DBS was seeking to say. The decision was based on the original case material, the material provided by the respondent and the report of Dr Earnshaw. The decision was that the DBS remained of the view "that it is not appropriate for [the respondent's] name to be remove from the Children's Barred List" (paragraph 2 of the decision).

47. The reasons are set out at paragraph 3 and 4 of the decision. The respondent had sexually touched four girls, he held a position of trust in relation to these four girls,

and the motivation for the touching was a sexual interest in teenage girls. The respondent had concealed the behaviour for 15 years, and while now accepting that the incidents had occurred, he had demonstrated little insight or understanding that the behaviour was harmful and that the girls only complied with the behaviour because they felt they had to.

48. Paragraph 5 of the decision deals with the respondent's statement that the injuries suffered in the road traffic accident in 2002 meant that there would be no risk in future. The paragraph records, in effect, that the DBS did not accept that. One of the incidents (it called it abuse) occurred in 2002 after the accident. The respondent had also confirmed that he still had sexual thoughts and was capable of orgasm through masturbation. Further, the impotence would not exclude sexual touching of girls which was what characterised the behaviour in question.

49. At paragraphs 6 to 8, the decision dealt with Dr Earnshaw's assessment. It noted that she considered that the respondent would be unlikely to repeat the behaviour because of self-interest and a decline in sexual pre-occupation through age and impotence. Paragraphs 9 to 10 set out why the DBS did not agree that the risk was such that it was no longer appropriate to retain him on the children's barred list. That included the fact that his sexual touching of EF in 2002 weakened his assertion that the road traffic accident was a turning point in his life causing him to modify his behaviour, the fact that the behaviour had only recently been admitted, and the fact that the absence of any abusive relationships since 2004 was due to the restrictions placed on him engaging in regulated activities with children. The DBS accepted that while the risk of "further abusive behaviour may be decreasing, the DBS cannot be sufficiently satisfied" that he would not be capable of acting in a similar manner again if the restrictions on participating in regulated activity with children were removed.

Analysis

50. The reason why the DBS considered that the respondent's sexual interest is, in the circumstances, indicative of a risk to young females is clear from the decision letter: that is, the decision is firmly based on the respondent's own sexual interest in teenage girls, the fact that he was in a position of trust in relation to four identified girls, and he engaged in inappropriate conduct with them for sexual gratification. There were factors indicating that the risk of future behaviour was reduced but there were others, particularly the lack of insight into why his behaviour was wrong and the harm it caused to the girls, which led the DBS to conclude that it could not be satisfied that the risk had been reduced sufficiently to remove the restrictions on the respondent engaging in regulated activities with children.

51. That decision is not based on any implied premise about the risk posed by the appellant as compared with the risk posed by other heterosexual men. It is not based on any comparative assessment of factors that might indicate a reduction in risk (such as self-restraint) and other factors. Consequently, there can be no error in failing to give reasons for these implied assumptions. The Upper Tribunal has failed to understand the decision letter properly. Its decision appears to reflect its own assumptions not those of the DBS. As such the Upper Tribunal itself erred in law.

52. In relation to the third error asserted by the Upper Tribunal, the DBS was not required in the circumstances of this case to investigate the precise circumstances in which the

2002 incidents occurred. The fact is that the respondent continued to engage in sexual touching after the road traffic accident. The DBS were entitled to conclude that that negated any suggestion that the respondent's impotence following the road traffic accident eliminated the risk. He could, and did, engage in the same type of sexual conduct after the accident as before. Similarly the DBS were entitled to have regard to the fact that the sexual touching occurred after the road traffic accident and with a female member of the choir (albeit now 19). That person was one of the four females with whom he had previously engaged in sexual touching when she was 16 and 17. The DBS were entitled to consider that those facts did weaken his assertion that the accident was a turning point in his life which caused him to modify his behaviour. Given the way in which the DBS used the information provided by the respondent, it was not obliged to conduct further inquiries to determine whether the view put forward by the respondent that the gap in time, and the allegation that EF was the instigator made the conduct different from what had occurred before.

53. For those reasons alone, the interim decision of the Upper Tribunal must be set aside as the DBS had not made any of the three errors that the Upper Tribunal said it had. The Upper Tribunal itself erred in law in its interpretation of the decision and in finding that errors of law had occurred when there were no such errors.

54. More fundamentally, I am satisfied that, reading the decision as a whole, the Upper Tribunal did err in its approach to this appeal. It did not confine itself to deciding whether the DBS had erred in law or fact and whether the DBS had failed to provide adequate reasons for its conclusions. It simply disagreed with the reasons given because it considered that the circumstances did not, in its view, justify the decision that it was appropriate to maintain the respondent's name in the children's barred list. It based that view on its own assessment of the respondent and his evidence, and its reading of the specialist assessment of Dr Earnshaw and, it appears, its own assumptions about the sexual interests of heterosexual men in general.

The findings of fact made by the Upper Tribunal

55. The Upper Tribunal also made findings of fact and made comments on other matters. Section 4(7) of the Act provides that where the Upper Tribunal remits a matter to the DBS it "may set out any findings of fact which it has made (on which DBS must base its new decision)". It is neither necessary nor feasible to set out precisely the limits on that power. The following should, however, be borne in mind. First, the Upper Tribunal may set out findings of fact. It will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter. By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to a marriage being a "strong" marriage or a "mutually-supportive one" may be more of a value judgment rather than a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third "finding" would certainly not involve a finding of fact. Secondly, an Upper Tribunal will need to consider carefully whether it is appropriate for it to set out particular facts on which the DBS must base its decision when remitting a matter to the DBS for a new decision. For example, Upper Tribunal would have to have sufficient evidence to find a fact. Further, given that the primary responsibility for assessing the appropriateness of including a person in the children's barred list (or the adults' barred list) is for the

DBS, the Upper Tribunal will have to consider whether, in context, it is appropriate for it to find facts on which the DBS must base its new decision.

56. In the present case, the Upper Tribunal did set out facts on which, if the matter were remitted to the DBS, it should base its decision, together with references to "other matters". I have no doubt that it would be unsafe for any Upper Tribunal to have regard to, or rely upon, those findings of fact or the references to the other matters as to do so would lead it into error. The "finding of facts" flow from a flawed understanding of the decision letter and the reasons for the DBS's decision. Further, and separately, they result from a failure on the part of the Upper Tribunal to appreciate its proper role on an appeal. The "findings" result from the fact that the Upper Tribunal was, on analysis, improperly considering whether on the evidence it was appropriate to include the respondent within the children's barred list which was as matter for the DBS to assess not the Upper Tribunal.

57. Furthermore, there would, in any event, be flaws in the approach the Upper Tribunal took in deciding to set out the four facts on which it said the DBS must base its decision if the matter was remitted. The first fact the Upper tribunal found was that the respondent did not currently (i.e. at the time of the interim decision in March 2019) rely on sexual impotence as mitigating risk. Although this could be described, in the abstract, as a finding of fact (as at a particular date, the respondent was not asserting a particular factor as relevant to risk), it is difficult to regard this as the sort of finding envisaged by section 4(7) of the Act. It is more a statement of the respondent's case at a particular time. If the matter was remitted to the DBS he could make representations as to what his case is since the respondent's circumstances and case may change. It is difficult therefore to see that it was appropriate to find this as a fact on which the DBS must base any new decision.

58. The second finding is part fact (that the respondent did not say certain words to Dr Earnshaw) and in part an interpretation of what the words meant if they were used (they should not be seen as a justification of the behaviour) or in any event what the respondent says about the use of those words now. The second factor is not a finding of fact at all. The third factor may be a correct finding on the respondent's evidence but will need to be evaluated in the context of the facts as a whole and assessed in regards to consistency and the like. As for the first (that certain words were not said to Dr Earnshaw), the Upper Tribunal does not address the statement in the report that Dr Earnshaw made contemporaneous notes of the interviews which she retained and where speech appears in quotation marks in the report (as the disputed words do) they were taken directly from the notes.

59. The third fact is an expression of view that the fact that the respondent did not seek out the girls to apologise for what he had done was not a 'concealment' of his behaviour. That may or may not be a correct view of the situation. But it is difficult to see that it is a finding of fact within the meaning of section 4(7) of the Act. In relation to the state of the respondent's marriage, the Upper Tribunal found that that was a fact which would discourage him from repeating his behaviour. That is a judgment, or expression of view about a fact, not a finding of fact.

60. Consequently, I find that the decision of the Upper Tribunal to set out those four findings of fact pursuant to section 4(7) of the Act was flawed and would uphold ground 2 of the appeal for that additional reason. In any event, for the reasons given

above, it would be unsafe to rely upon the facts as they resulted from a flawed understanding of the decision and a wrong approach by the Upper Tribunal to its jurisdiction to determine appeals.

61. It would also be unsafe for another tribunal to have regard to anything said by the Upper Tribunal in connection with the respondent's 10 grounds of appeal. The Upper Tribunal did not consider, as it should have done, those grounds of appeal and determine whether they were established. The decision refers to certain grounds and indicates that they did or might indicate errors of law on the part of the DBS, for example, ground 1(b) and the reference to past conduct, ground 2 and the assessment of self-restraint, grounds 6 and 8 and the consideration of the 2002 incidents and ground 7, the long-standing interest in teenage girls on which the respondent had previously acted. However, those indications are all based on the flawed reading of the decision letter and the indications themselves are consequently flawed. The fact is that the 10 grounds of appeal have not yet properly been considered by an Upper Tribunal.

62. For all those reasons, I would allow the appeal against the decision of the interim decision of 29 June 2019 and set it aside.

THE THIRD ISSUE – THE POWERS OF THE UPPER TRIBUNAL ON AN APPEAL

63. The third issue raised by this appeal concerns the powers of the Upper Tribunal when it has found an error of law or fact and then comes to exercise its powers under section 4(6) of the Act to remit the matter to the DBS or to direct that the person's name be removed from the relevant list. The critical question is whether the Upper Tribunal should only direct removal of the person's name if, in the light of the errors of law or fact that it has found, no other decision could lawfully be made by the DBS if the matter were remitted to it or whether the Upper Tribunal is entitled to decide for itself whether retention of a person name in the list is no longer appropriate and so may direct removal. That is a question of general importance for tribunals dealing with such appeals.

Submissions

64. Mr Jaffey submitted that the Upper Tribunal is not entitled, when deciding whether to remit or direct removal of a person's name, to decide for itself whether it is appropriate that the person be included in the children's barred list (or the adults' barred list if relevant). The purpose of the scheme was to leave such questions to the DBS. Hence, section 4(3) of the Act provides that the Upper Tribunal is not to consider the appropriateness of inclusion of a person within a list when deciding whether the DBS has erred in law or fact. Parliament cannot have intended the Upper Tribunal to determine questions of appropriateness when dealing with remedies as that would undermine the statutory scheme and the clearly delineated roles of the DBS and the Upper Tribunal. Further, section 4(6) of the Act would not permit the Upper Tribunal to decide that it is appropriate for the person's name to remain on a list, notwithstanding that the DBS has made an error of law or fact. It would have to remit the matter to the DBS for the DBS to decide that question. That was an indicator that section 4(6) of the Act was not intended to enable the Upper Tribunal to deal with questions of appropriateness. That, Mr Jaffey submitted, was particularly obvious in the present case as the errors identified were procedural, that is a failure to give

reasons or to carry out investigations. Those could be remedied by the DBS if the matter were remitted. It cannot have been intended that where the error of law was procedural, section 4(6) of the Act nevertheless transferred jurisdiction over the question of appropriateness from the DBS to the Upper Tribunal. The Upper Tribunal had previously understood that a direction to remove a person's name rather than remittal to the DBS was only appropriate where no other decision could lawfully be made: see *MR*. The decision in *CM* was consistent with that as the Upper Tribunal there had found that the decision to include CM's name in the relevant list was irrational and a disproportionate interference with his right to private life and so inconsistent with Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

65. The respondent relied upon the detailed reasons given by the Upper Tribunal as to why it could determine whether inclusion of a person's name was no longer appropriate and so could direct removal of the name. In particular, he submitted that section 4(3) of the Act excluded consideration of appropriateness "for the purpose of subsection (2)", that is for the purposes of determining whether the DBS had made an error of law or fact. There was no specific restriction on the ability of the Upper Tribunal to consider appropriateness once it had found an error of law and was considering the appropriate remedy under section 4(6) of the Act.

Discussion

66. This issue turns on the proper interpretation of section 4(6) of the Act. That depends on a consideration of the words used, having regard to the context as a whole, and the underlying purpose of the statutory scheme.

67. The context, and the nature of the statutory scheme, is that it creates a system for the protection of children and vulnerable adults. It provides for an independent body, the DBS, to determine whether specified criteria are met and, in the case of paragraph 3 of Schedule 3 to the Act, that it is appropriate to include a person's name in the children's barred list or the adults' barred list. There is a safeguard for individuals in that they may appeal to the Upper Tribunal on the basis that the DBS has made an error of law or fact. The Upper Tribunal cannot consider the appropriateness of the decision to include or retain the person's name in a barred list when deciding if the DBS had made such an error. If the DBS has not made an error of law or fact, the Upper Tribunal must confirm the decision of the DBS (section 4(5) of the Act). Only if the DBS has made an error of law or fact, can the Upper Tribunal determine whether to remit or direct removal of the person's name from the list (section 4(6) of the Act).

68. The scheme as a whole appears, therefore, to contemplate that the DBS is the body charged with decisions on the appropriateness of inclusion of a person within a barred list. The power in section 4(6) of the Act needs to be read in that context. The context would not readily indicate that the Upper Tribunal is intended to be free to decide for itself questions concerning the appropriateness of inclusion of a person in a barred list. It is unlikely, therefore, that section 4(6) of the Act was intended to give the Upper Tribunal the power to direct removal because it, the Upper Tribunal, thinks inclusion on the list is no longer appropriate. It is more consistent with the statutory scheme that the power is to be exercised when the only decision that the DBS could lawfully make would be to remove the person from the barred list.

69. There are further indications in the statutory provisions that section 4 of the Act is not intended to enable the Upper Tribunal to consider and reach a decision on appropriateness. First, the only options given to the Upper Tribunal are to direct removal or remit. There is no provision for the Upper Tribunal to determine that it is appropriate for the person's name to be included in a barred list notwithstanding the nature of any error of law or fact made by the DBS. In those circumstances, the Upper Tribunal has to remit the matter (and the DBS could come to a different decision on appropriateness than that which the Upper Tribunal might have reached). That is an indication that the power conferred by section 4(6) of the Act was not intended to include consideration of questions of appropriateness. Secondly, the power in section 4(7) of the Act indicates that the Upper Tribunal is concerned with identifying the facts upon which the DBS is to base its "new decision" on whether inclusion in a barred list is appropriate. That indicates, again, that the ultimate assessment of appropriateness is for the DBS not the Upper Tribunal. It is the DBS that will take a new decision. The Upper Tribunal's role is limited to identifying facts relevant to that decision, not taking the decision itself. Indeed, if the Upper Tribunal were free to take the decision on appropriateness, it would not need to set out the facts on which the DBS should proceed. It could simply take the decision itself.

70. Finally, there is section 4(3) of the Act. The Upper Tribunal described that as an express prohibition on considering appropriateness which was applicable only to section 4(2) of the Act. By contrast there was no express prohibition placed on consideration of appropriateness at the stage when the Upper Tribunal was considering disposal of an appeal under section 4(6) of the Act and no basis for implying such a prohibition. The Upper Tribunal considered that if Parliament had intended to prohibit it from considering appropriateness at both stages, that is considering if there was an error and in deciding on the appropriate disposal of an appeal, it could easily have said so.

71. I do not consider that the Upper Tribunal has correctly characterised the nature of the provision in section 4(3) of the Act and the language of express or implied prohibition is potentially misleading. Section 4(2) of the Act sets out the grounds of appeal against one of the specified decisions such as a decision to include a person's name on a list or not to remove it following a review. The grounds of review are that the DBS has made an error of law or fact. The decision may include a decision on whether it is appropriate to include a person's name in a list. That is, for example, one of the criteria for deciding to include a person under paragraph 3(3) of Schedule 3 to the Act. It is the decision that the DBS will take on a review under paragraph 18(5) of the schedule. Parliament made specific provision in section 4(3) to ensure that a decision on appropriateness was not treated as an error of law or fact. That reflects the fact that Parliament must have intended the assessment of appropriateness to be a matter for the DBS.

72. Section 4(6) of the Act performs a different role. It sets out the powers of the Upper Tribunal when it has found an error of law or fact. The Upper Tribunal then has a power to direct removal or remission of the matter back to the DBS. The question is when would it be appropriate to direct removal rather than remitting the matter back to the DBS. The fact that the Upper Tribunal is not intended to consider questions of appropriateness when deciding if there has been an error is, in my judgment, a strong pointer to the fact that the Upper Tribunal should not be deciding that question when

deciding on the appropriate disposal under section 4(6) of the Act. Unless it is clear that the only decision that the DBS could lawfully come to is removal, the matter should be remitted to the DBS to consider. If, therefore, there is a question of whether it is appropriate to include a person's name on a barred list, the appropriate action under section 4(6) of the Act would be to remit the matter to the DBS so that it could decide the issue of appropriateness. That is consistent with the statutory scheme which provides for the DBS to determine the appropriateness of inclusion on a barred list but ensures that the Upper Tribunal can check that there has been no error of law or fact in the decision making process.

73. For those reasons, I would interpret section 4(6) of the Act as permitting the Upper Tribunal to direct removal of the name of a person from a barred list where that is the only decision that the DBS could lawfully reach in the light of the law and the facts as found by the Upper Tribunal. It is not difficult to think of examples where that might be appropriate. The DBS may have considered that a person had been found to have engaged in sexually inappropriate conduct on one occasion with a child. If, on the facts, it transpired that the conduct had not in fact occurred (or the respondent had wrongly been identified as the person responsible) and the person had not been guilty of the conduct, there would be no basis for including that person in a barred list and the Upper Tribunal could direct removal. By contrast, if the person were thought to have committed sexually inappropriate conduct with two children, but the Upper Tribunal decided on the facts that the person was responsible for one but not the second act of inappropriate conduct, the question of whether it would be appropriate to include the person on the children's barred list because of that one act would raise a question of appropriateness. The matter should then be remitted for the DBS to take a new decision based on the facts as found. The interpretation that I consider to be correct is therefore both workable and reflects the essential elements of the statutory scheme.

74. For completeness, I note that that interpretation is consistent with the understanding of the role of the DBS set out in the decision of Maurice Kay LJ, with whom the other members of the Court of Appeal agreed, in *SB*. He observed at paragraph 23 that the ISA, the predecessor to the DBS:

> "is particularly equipped to make safeguarding decisions of this kind, whereas the [Upper Tribunal] is designed not to consider the appropriateness of listing but more to adjudicate upon "mistakes" on points of law or findings of fact".

75. That interpretation of section 4(6) of the Act is also consistent with the decision of the Upper Tribunal in *MR*. As it said in paragraph 8 of its decision in that case, the Upper Tribunal should direct removal only if it is satisfied that that is the only decision the DBS could lawfully make if the case were remitted to it. (It is not necessary to consider the other possibility canvassed by the Upper Tribunal in that case, namely that the DBS agreed that the correct decision was removal of the person's name from the list). The Upper Tribunal in the present case erred in considering that the observations in paragraph 8 were inconsistent with later comments in paragraph 18 of the decision in *MR*. That later paragraph was dealing with a different issue, namely whether the DBS in that case could give an indication in advance of the Upper Tribunal hearing as to what it would consider appropriate on a particular hypothesis. When the DBS was unable to do so, the Upper Tribunal in *MR* acted in accordance

with the view expressed in paragraph 8 of its judgment and remitted the matter to the DBS for determination. We are not bound by the Upper Tribunal decision but I am reassured that the interpretation I consider correct is consistent with the decision in *MR*. That is particularly so as we were told that it is a reported decision and such decisions are reported only when they "command the broad assent of the majority of salaried Upper Tribunal judges" of the Administrative Appeals Chamber: see *Fileccia v Secretary of State for Work and Pensions* [2017] EWCA Civ 1907, [2018] 1 WLR 4129 at paragraph 34. I also consider that the interpretation of section 4(6) that I consider correct is consistent with the direction to remove given by the Upper Tribunal in *CM* (although I express no view on whether it is appropriate to consider matters such as a desire to bring matters to a conclusion for the person whose name has been included on the list).

76. The decision of the Upper Tribunal of 11 March 2020, and its direction that the DBS remove the respondent's name from the children's barred list must therefore be set aside. The Upper Tribunal reached that decision, and made that direction, on the basis that it was for it to determine whether it was no longer appropriate for the respondent's name on the children's barred list. That was to use the power conferred upon the Upper Tribunal by section 4(6) of the Act on a legally flawed basis. In those circumstances it is not necessary to consider the detailed reasoning of the Upper Tribunal as to why it considered it appropriate to make the direction it did on its view of the facts, and seriousness, of the case. That was not a task that it was appropriate for the Upper Tribunal to carry out. Suffice to say that I would find significant parts of the fact finding exercise the Upper Tribunal conducted to be dubious.

77. There is a second reason why, on the facts of this case, the direction of the Upper Tribunal must be set aside. It can only exercise the power under section 4(6) of the Act if the Upper Tribunal finds that the DBS has made a mistake of law or fact. I have already indicated that the Upper Tribunal was wrong to find that the DBS had made the three errors of law identified in its interim decision and the decision had to be set aside. There is, at present, no finding that the DBS has made a mistake of law or fact and the basis upon which the Upper Tribunal may make the decisions referred to in section 4(6)(a) and (b) has not yet arisen.

DISPOSAL OF THE APPEAL

78. This is an appeal on a point of law under section 13 of the Courts, Tribunal and Enforcement Act 2007 ("the 2007 Act"). I am satisfied that the Upper Tribunal erred in law in respect of both its interim decision of 29 June 2018 and its decision of 11 March 2020. I would set aside both decisions, and the direction that the respondent's name be removed from the children's barred list. The respondent has not yet had his 10 grounds of appeal properly and lawfully considered by the Upper Tribunal. I would remit the case to a differently constituted Upper Tribunal pursuant to section 14(2)(b) and (3) of the 2007 Act.

79. I am conscious that this means that the Upper Tribunal will be focussing on alleged errors in a decision taken in May 2016. That is in part because of the time taken by the Upper Tribunal in dealing with the appeal. It took nine months from the first hearing to give its decision. It then took the Upper Tribunal a further year to arrange a second hearing and a further nine months following that hearing before it gave its final decision. The period of time taken is regrettable. Furthermore, due to the errors

made by the Upper Tribunal, and its failure to carry its task of considering the respondent's grounds of appeal, that process must begin again. There is, however, no other realistic choice. In fairness, and as a matter of law, the respondent is entitled to have his appeal considered properly by the Upper Tribunal. The difficulty is that the passage of time since the decision (now almost five and a half years) may mean (we cannot tell) that circumstances have changed.

80. The possibility was canvassed of the respondent making an application for a review under paragraph 18A of Schedule 3 to the Act. Mr Jaffey for the DBS indicated that if the respondent made an application under that paragraph, the DBS would decide as soon as possible whether to conduct a review. He did not consider that such an application would be barred under paragraph 18A(1) by reason of the outstanding appeal to the Upper Tribunal in respect of the May 2016 decision. He could not commit the DBS to deciding that it would conduct a review. Nor could he commit the DBS to agree to arrange, and fund, an up to date specialist risk assessment of the respondent. Nor is it possible to be certain that the DBS would not regard the fact that it considered its May 2016 to be lawful (and there had as yet been no successful appeal against it) as an indicator that no review was needed. Those are matters for the DBS. Ultimately it is for the respondent to decide whether to continue with his appeal, and whether to make an application under paragraph 18A as well as, or possibly instead of, pursuing his appeal. It is for the DBS ultimately to deal with any request made for a review under paragraph 18A and whether or not to arrange and fund a specialist risk assessment as part of any such review. This court can only exercise the powers conferred by section 14 of the 2007 Act.

CONCLUSION

81. The Upper Tribunal erred in its interim decision in finding that the DBS had failed to give adequate reasons for certain implied assumptions said to underlie its decision of 21 May 2016. On a fair and proper reading of the decision letter, the DBS had not made any such assumptions and it did not, therefore, err in law by failing to give reasons for such assumptions. The Upper Tribunal erred in finding that the DBS acted unlawfully by not investigating the circumstances, or making findings of fact relating two incidents involving EF in 2002. The Upper Tribunal erred in exercising its powers under section 4(7) of the Act to find certain facts in its interim decision. Further, the Upper Tribunal erred in its interpretation of section 4(6) of the Act. The Upper Tribunal may not consider the appropriateness of a decision to include a person's name in a barred list in deciding whether to direct the removal of a person's name from a barred list or remit the matter to the DBS. The Upper Tribunal ought only to direct removal where, as a result of its findings of law or fact, the only decision that the DBS could lawfully come to would be to remove the person's name from the barred list. I would set aside the interim decision of 29 June 2018 and the decision of 11 March 2020 and remit the matter to a differently constituted Upper Tribunal.

Lord Justice Moylan

82. I agree.

Lady Justice Macur

83. I also agree.