IN THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

NOTICE OF DETERMINATION OF

APPLICATION FOR PERMISSION TO APPEAL

This application to the Upper Tribunal for permission to appeal was made later than the time allowed by the Rules. I extend the time for making the application under rule 5(3)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and admit the application as it is in the interests of justice to do so.

I refuse permission to appeal.

Pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 there is to be no disclosure or publication of any matter likely to lead members of the public directly or indirectly to identify the Applicant or any other person who was a child at the time of the Applicant's conviction in November 2014 for any of the offences referred to in this decision. Any disclosure or publication in breach of this order is liable to be treated as a contempt of court and punished accordingly.

REASONS

Introduction

1. This is a decision refusing the Applicant [AB] permission to appeal the decision of the Disclosure and Barring Service [DBS] placing his name on the Children's Barred List. I have given a fuller decision than is customary since this application raised concerns about information sharing between the DBS and the Probation Service. I deal with these matters at the conclusion of this decision.

2. AB is not the Applicant's real name or initials. I have referred to him as AB and have removed as much of the identifying information about his case so as to give effect to the order I have made pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Background

3. The following is a summary pertinent to the issues in this application for permission to appeal.

4. At the time of the DBS's decision, AB was fifty-three year old married man with two teenage daughters aged about 16 and 13. Since 2007 he had worked as a driving instructor.

5. On 12 September 2014 AB applied to the DBS for an Enhanced Disclosure with Barred List check in order that he might work with those aged under 18 years as a driving instructor. Whilst processing that application the DBS received information from the police force in the area where AB lived that there was an impending prosecution of AB for the possession of indecent images of children. AB's home had been searched following information received from the National Crime Agency's Child Exploitation Online Protection Unit and computer equipment was seized. It contained indecent still and video images of children as well as images of extreme pornography, all of which were obtained by AB between 2005 and 20014.

6. On 20 November 2014 the DBS wrote to AB informing him that it was aware that he was on bail and facing prosecution for the possession of indecent images. It stated that it was considering whether to include his name on either the Children's or the Adults' Barred List. The letter informed AB that the DBS would be making further enquiries about the circumstances of the allegation and stated that it would be relying on other agencies to send it information about his case. AB wrote to the DBS on 26 November 2014 and admitted that he should not have had indecent images in his possession. He stated that this did not mean he was a sex offender.

7. On 28 November 2014 AB was convicted of (i) making indecent photographs or pseudo-photographs of children contrary to section 1(a) of the Protection of Children Act 1978 and (ii) the possession of extreme pornographic images involving sexual acts with living and dead animals contrary to section 63(1)(7)(d) of the Criminal Justice and Immigration Act 2008. He was sentenced at the Crown Court to (i) a sentence of imprisonment of 12 months which was wholly suspended for 24 months; (ii) a supervision requirement for 24 months; (iii) a programme requirement of 60 days for him to attend the Internet Sex Offender Treatment Programme; (iv) a victim surcharge of £100; and (v) a Sexual Offences Prevention Order lasting for 5 years. He was placed on the Sex Offenders Register for 10 years. AB was prosecuted on specimen charges as is usual in such cases though I note that he held over 400 indecent images of children. He had viewed and collected these images between 2005 and 2014. This was AB's first conviction.

8. The DBS received formal notification of AB's conviction from the police on 8 January 2015. On 26 January 2015 the DBS asked the South East and Eastern Probation Services for a copy of AB's pre-sentence report, his OASys report, and copies of any other documentation it held which Probation believed might be relevant to the DBS in determining whether AB was suitable to work with vulnerable groups. OASys is an acronym for the Offender Assessment System which is a computer based evaluation system used by the Probation Service to, amongst other matters, assess (a) an offender's likelihood of reconviction and (b) the risk of serious harm posed by the offender in order that any such risk might be appropriately managed.

9. On 25 February 2015 the DBS wrote to AB telling him that it was aware of his conviction. As AB had been engaged in regulated activity with children as a driving instructor and might be so engaged in future, the fact of his conviction for the possession of indecent images meant that his name would either be automatically

included or considered for inclusion in either the Children's or Adults' Barred Lists. In fact the DBS had come to the conclusion that it was not appropriate for AB to be included in the Adults' Barred List as he had not previously worked with vulnerable adults and was unlikely to do so in future. The letter told AB about that decision and invited him to make written representations as to why he should not be included in the Children's Barred List. An accompanying factsheet explained that written representations could include but were not restricted to copies of pre-sentence reports. OASys reports, the judge's sentencing remarks, other Probation Service reports, Social Services assessments, relevant reports from medical experts, details of a person's career and professional references or testimonials. The factsheet stated that "*If you decide to provide a report from a third party, it is your responsibility to send it to us; we cannot arrange to get it for you*" [page 40].

10. On 7 March 2015 AB sent the DBS written representations which included a copy of his 2014 bail conditions, an incomplete copy of the Sexual Offences Prevention Order, and a testimonial from the Army after AB's 20 plus years of military service. On 12 March 2015 the DBS wrote to AB confirming receipt of his representations and stating that "*it would help us to consider your case if you could also give us copies of any professional reports or assessments that have been carried out (e.g. Pre-sentence report, OASys report, Social Services report and from Lucy Faithfull) or a transcript of the judge's sentencing remarks. We would also welcome any other documents or information you have that supports your case not to be included in the Children's Barred List*" [page 49].

11. On 18 March 2015 the DBS wrote to the local police force requesting additional information. Though the offence of making an indecent photograph or pseudo-photograph of children was included in the list of offences triggering automatic inclusion of AB's name on the Children's Barred List, the DBS explained in its letter that AB had the right to make representations about why he should not be included on the List and had done so. The DBS stated that it held limited information about AB's case and believed that the police might hold information relevant to its decision making. It asked for information about a number of matters including the estimated ages/gender of the victims of the images, the number of indecent images possessed by AB, and whether AB had provided any explanation for these offences. The police were told that information provided would be disclosed to AB but could be redacted before disclosure to the DBS. The DBS was willing to discuss redaction with the police if that would be of assistance to them. On 20 March 2015 the police responded to the DBS's letter providing a great deal of relevant information.

12. On the same date the DBS also wrote a letter to the local office of the Community Rehabilitation Company [CRC] involved with AB. CRCs are responsible for the management of low to medium risk offenders and the supervision of short-sentence prisoners (those sentenced to less than 12 months in prison) after release. They form part of the National Offender Management Service [NOMS]. It asked for AB's pre-sentence report and for any other information which might be relevant to the DBS. A warning was given that information would be disclosed to AB if the DBS relied on it when reaching its decision but the DBS was willing to discuss any concerns about that with the CRC. As far as I am aware, no response to that letter was received by the DBS.

13. On 8 April 2015 South East and Eastern Probation responded to the DBS's email of 26 January 2015 refusing to provide copies of AB's pre-sentence report or

AB's OASys report. It did however provide a copy of a case summary from the Probation Offender Management System. That information was stated to have been provided solely for the purpose of the DBS's investigation and was not to be revealed to any third party or used for any other purpose. No explanation was provided about why disclosure of the reports requested by the DBS was not forthcoming. The two page case summary provided little information that was not already known to the DBS.

14. On 19 April 2015 AB replied to the DBS's letter of 12 March 2015. He stated that he was "*astonished that you were making your decision on my case without any information about myself*" [page 62]. He had taken legal advice and had been told not to send any further information to the DBS. He said he had been told that he could work legally with anyone over the age of 16 and said "*I would also draw your attention to the Data protection laws and the European convention on human rights in my respect to privacy*" [page 62].

15. On 29 April 2015 the DBS provided the information sent by the police together with a copy of AB's Police National Computer data print and the two page Probation case summary to AB and asked for his comments. AB was once more invited to submit any relevant reports. He did not respond to that letter.

The DBS's Decision

16. On 2 July 2015 the DBS issued its final decision letter to AB. It stated that it was appropriate to include AB on the Children's Barred List. Even though AB felt he was not a danger to anyone, there was no evidence that he had acknowledged the harm caused by accessing indecent images of children. Though AB said he had had treatment via a course run by the Lucy Faithfull Foundation, he had provided no details about this at all. His offending behaviour had occurred over a significant period of time and the amount of time which had passed since it had been discovered was felt to be insufficient to demonstrate that AB now had effective self-management skills to prevent a repeat of his offending behaviour. The Sexual Offences Prevention Order was only effective for five years and once it had expired there would be no restriction on AB gaining employment with children of any age.

17. The nature and level of the images found in AB's possession and the time over which he accessed those images warranted a bar on his ability to work with children in order to sustain public confidence in the effective operation of statutory safeguarding arrangements. Inclusion on the Children's Barred List was a proportionate safeguarding measure given the risk of harm presented by the nature of AB's offences, the significant period over which his offending occurred and the lack of any credible evidence that AB had addressed the issues which prompted his offending behaviour.

18. AB received the DBS's decision on 4 July 2015 as it was sent to him via signed-for special delivery.

Proceedings Before the Upper Tribunal

19. An appeal to the Upper Tribunal lies on "any point of law arising from a decision" [section 11(1) of the Tribunals, Courts and Enforcement Act 2007]. The

Upper Tribunal has discretion to give permission to appeal if there is a realistic prospect of success or if there is some other good reason to do so. A person included in a Barred List may appeal to the Upper Tribunal by virtue of section 4 of the Safeguarding Vulnerable Groups Act 2006 on the ground that the DBS's decision reveals either an error of law or an error of fact on which the decision was based, that is, a material error.

20. The appropriateness of a barring decision is not a matter for the Upper Tribunal on appeal. Unless the DBS has made either an error of law or material fact, the Upper Tribunal may not interfere with the decision [see R v (Royal College of Nursing and Others) v Secretary of State for the Home Department [2010] EWHC 2761 (Admin)]. Further if it is argued that a decision to include a person on a barred list is disproportionate to the relevant conduct or risk of harm relied on by the DBS, the Upper Tribunal must afford appropriate weight to the judgement of the DBS as a body enabled by statute to decide appropriateness [see SA v SB & Royal College of Nursing [2012] EWCA Civ 977].

21. On 2 November 2015 AB applied to the Upper Tribunal for permission to appeal the DBS's decision dated 2 July 2015. The time limit for so doing is three months from the date that a person receives written notification of the DBS's decision [rule 21(3)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008]. AB's application was late and he provided no explanation on his application form explaining why that was. In response to directions I made on 11 December 2015, AB explained that he had not opened the letter until the end of July 2015 because of a family holiday and had then assumed that he had three months from that time to consider any appeal to the Upper Tribunal. He apologised for any confusion and for submitting his application out of time.

22. Initially this case was listed for an oral hearing on 22 February 2016. The DBS made a written submission and, in accordance with my earlier directions made on 11 December 2015, elected not to attend that hearing. AB relied on the contents of his pre-sentence report and upon the sentencing remarks of the trial judge as part of his case that the DBS made a materially flawed decision. I directed that he produce those documents to me prior to the hearing on the basis that the contents would be shared with the DBS as the Respondent to the proceedings.

23. However my review of the DBS paperwork in advance of the hearing raised a number of concerns in my mind about the co-operation of the Probation Service with the DBS. I posed the following questions of the DBS:

[a] Is an enquiry of the type made to the Ministry of Justice [the Probation Service] in this case usual in a case where the subject has been convicted of relevant criminal offences

[b] Did the DBS establish precisely why, in this case, the relevant Probation Region had refused to provide the information sought? My reading of the letter does not reveal a reason. Sections 29 and 35 of the Data Protection Act are invoked with respect to the very limited information which was in fact disclosed.

[c] Did the DBS contemplate any further action to obtain this information from the relevant Probation Region? If not, why not, and, if so, what application might it have made to obtain this information and what would have been the statutory basis for such an application?

[d] Was the response by the relevant Probation Region in this case typical when a request for the type of information sought is made? If the letter dated 8 April 2015 represents a typical or standard response for the Probation Service, for how long has this been the case? Is the response different depending on the Probation Region concerned?

[e] Is there any Guidance known to the DBS governing the disclosure of relevant information from Probation Regions to the DBS? If so, a copy should be produced.

24. On 10 February 2016 I adjourned the listed hearing so that the DBS could provide a full response to my questions and directed a later hearing be fixed at which the DBS should attend. The DBS helpfully responded on 24 February 2016.

25. AB sent his pre-sentence report and the judge's sentencing remarks but this material had been redacted by AB who said that "*some parts have been hidden as they are of a private and personal matter and do not have any bearing on the appeal raised*". Paragraph 1 of my case management order dated 10 February 2016 contained no provision for the redaction of this material by the AB. This material should have been provided in unredacted form.

26. The pre-sentence report redacted the offence details and the first paragraph of the section headed "Offence Analysis". The transcript of the sentencing remarks was also edited to remove, as far as I could ascertain, detailed reference to the nature of the offences for which the AB was sentenced.

27. In my directions order dated 9 March 2016 I stated that, if AB considered that I should give a direction pursuant to rule 14(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure of the redacted material to the DBS, he must make an application to that effect explaining why that was necessary. AB was to provide me with the unredacted material so that I could decide whether the DBS should see it. My decision would be guided by rule 14(2) which allowed me to prohibit disclosure of the redacted information if I were satisfied that disclosure would be likely to cause AB or some other person serious harm and if it was proportionate to give such a direction. If a rule 14(2) application were not made, I warned AB that if he refused to provide this material in an unredacted form, I would exclude it pursuant to rule 15(2)(b)(ii) because the pre-sentence report and the sentencing remarks were not provided in accordance with my direction of 10 February 2016. AB subsequently provided the material in unredacted form by letter dated 1 April 2016 apologising for his actions which he attributed to shame and embarrassment about his offences.

28. I held a hearing in London on 8 June 2016 at which the DBS was represented by Alison Robson. AB was not present at the hearing because he had to attend training that day in connection with a new job. He stated in an email dated 6 June 2016 that he was content for the hearing to proceed in his absence.

29. I am very grateful to Ms Robson for her assistance during the hearing. I asked the DBS for additional information pertinent to the disclosure provided by the Probation Service. This was provided following the hearing and AB has had an opportunity to comment on it.

30. I have read all of the Upper Tribunal bundle.

Admitting the Application

31. I have decided to admit this application as it is in the interests of justice to do so.

32. This application was received almost a month later than it should have been. The DBS submitted at the hearing that I should not admit it on that account. The delay was substantial and, though AB's explanation is not especially persuasive, I bear in mind that he was representing himself in these proceedings. The chances of this appeal succeeding if I admit this appeal are slight but the degree of prejudice to the DBS if I admit the application are equally negligible. This application raised matters of real concern about the co-operation of statutory agencies with the DBS which warranted further exploration by the Upper Tribunal. Bearing in mind the overriding objective and the matters set out in rules 2(2) to 2(4) inclusive of the Tribunal Procedure (Upper Tribunal) Rules 2008, I find that it is in the interests of justice to admit this application.

Grounds of Appeal

33. I have derived the following grounds of appeal from both the application form and the contents of AB's correspondence with the DBS.

34. First, AB said that the DBS decision was procedurally unfair in that the DBS had failed to uphold the law and examine the evidence in this case. Its decision was not independent.

35. I reject that submission. The DBS is bound by the provisions of the Safeguarding Vulnerable Groups Act 2006 [the Act] and my perusal of all the documentation considered by it during the decision making process has not identified any departure from the applicable law. The DBS use a document entitled the Barring Decision Making Process [BDMP] when considering whether a person should be included on a Barred List. That document contains a number of headings which list the matters required by section 4 of the Act, for example, whether a person is or has been engaged in regulated activity with children or may do so in future. The use of the BDMP provides a clear and legally founded structure to the DBS's decision making and it was used in AB's case.

36. The DBS plainly had regard to the evidence in its possession on which it invited comment from AB prior to reaching a final conclusion. Its reasoning is set out in paragraphs 16 and 17 above and its conclusions cannot be described as either unreasonable, irrational or unlawful.

37. Second, AB argued that the DBS was wrong to conclude that he presented a risk to children when the pre-sentence report classified him as low risk. He said that his risk was taken into account by the trial judge who ruled that he could continue to work as long as he had no contact with those under the age of 16 years.

38. The DBS submitted that AB's inclusion in the Children's Barred List was not duplicative of the restrictions placed on AB by the terms of the Sexual Offences Prevention Order. Thus AB's Sexual Offences Prevention Order made no reference to employment (paid or otherwise) with children. The DBS has a statutory duty to protect vulnerable groups from harm or risk of harm notwithstanding the existence of other parallel legal schemes. In Khakh v DBS [2013] EWCA Civ 1341 it was held

that one body cannot be prevented from exercising its statutory powers and duties if another body may do so in due course [see paragraph 36]. Entirely consistent with that case law, the sentencing judge told AB that, in consequence of his conviction, he may be barred from working with children and vulnerable adults [page 163].

39. I accept the submissions made by the DBS. The concerns about AB held by the DBS can only be addressed by the placing his name on the Children's Barred List in circumstances where the Sexual Offences Prevention Order is of limited duration and makes no reference to employment (paid or otherwise) with children. Inclusion on the Children's Barred List prevents AB from engaging in a wide range of activities in different contexts where he might come into contact with children. The DBS had sufficient evidence to make the findings it did and it was wholly appropriate for it to exercise its statutory safeguarding function in AB's case.

40. AB submitted that he was classified as low risk to children by the Probation Service and this judgment should have been sufficient for the DBS. On the information available to it in July 2015, the DBS was satisfied that AB represented a risk of serious harm to children and explained its decision carefully in the letter dated 2 July 2015.

41. The DBS has now had access to the full pre-sentence report and the judge's sentencing remarks. At the hearing before me, it submitted that a review of this material had not altered its decision in any way. Though AB pleaded guilty at the first opportunity, there were aggravating features such as the length of time over which the images had been accessed and the age of the children in the images, some of them being only about 8 years old. Though he recognised he had a problem and had apparently attended a course run by the Lucy Faithfull Foundation, the sentencing judge was unpersuaded that he was looking at these images out of curiosity and considered him to have done so for sexual gratification.

42. I am satisfied that risk as assessed by the Probation Service cannot bind the DBS from coming to its own conclusions about whether AB should be placed on the Children's Barred List. It had sufficient evidence to make the decision it did and nothing that has come to light since that decision was made casts doubt on the appropriateness of that decision either as a matter of law or fact.

43. Third, AB submitted that he had attended counselling provided by the Lucy Faithfull Foundation and I infer from this that he argues this factor lessens the risk he presents to children and should have been taken into account by the DBS.

44. It is clear that the DBS did consider AB's attendance at the Lucy Faithfull Foundation for counselling/treatment [see its letter dated 2 July 2015]. However, despite requests to provide information about this, AB did not do so. The information provided in his application to the Upper Tribunal does not confirm his attendance or explain the precise nature of the course/treatment he attended. I note the transcript of the criminal proceedings prior to sentencing makes reference to a number of documents emanating from AB's attendance on a Lucy Faithfull Foundation course but he has chosen not to provide this information to the DBS. Even if the DBS were to accept AB had attended such a course, what is stated in the decision letter about that matter remains correct, namely that the DBS has no information from Lucy Faithfull Foundation relating to AB's engagement in the course or the level of risk AB was deemed to present on completion of it. In the light of all the above, I conclude that AB's submission lacks any substance as a ground of appeal.

45. Fourth, AB submitted that the DBS have failed to take into account that his offending was "*an internet crime*" [page 5] and that he has not actually had direct contact with the child victims depicted in the images.

46. The downloading of indecent images of children from the internet results in harm to children by perpetuating the market and distribution networks for such images. Children are at risk of being forced to participate in the activities resulting in those images and also at risk of psychological harm when they realise either at the time or later that images of themselves are being used as a means of sexual gratification. Some of the activities may themselves be capable of causing a child serious physical and sexual harm – in this context, I note from the transcript of the criminal proceedings that some of the images involved penetrative activity with pre-pubescent children [page 153]. Parliament has recognised the serious nature of the harm caused to children by such offending and that someone convicted of such an offence presents, absent other evidence, a serious risk to children. It has thus legislated to include the offence for which AB was convicted in a list of offences which trigger automatic inclusion on the Children's Barred List in the absence of mitigating representations.

47. There is thus nothing of substance in AB's argument.

48. Fifth, AB argued that, as he was not included on the Adults' Barred List, the DBS must have accepted some of his representations that he posed no risk to the vulnerable or to children. I infer that he suggests that, as a result, the decision by the DBS with respect to the Children's Barred List is irrational and/or unreasonable.

49. I do not accept this submission. The DBS came to the rational conclusion that, by reason of the nature of AB's offending, it would not be appropriate to include him on the Adults' Barred List. There was no evidence that he possessed indecent images of vulnerable adults or that he believed harmful behaviour towards vulnerable adults was acceptable. The risk that he thus posed to vulnerable adults was not sufficiently evidenced to warrant inclusion on the Adults' Barred List. That conclusion has little bearing on the issue of whether to include AB's name on the Children's Barred List – that required a separate evaluation of AB's offending and of all the information known to the DBS. DBS's conclusion with respect to the Children's Barred List was both reasoned and rational.

50. Finally, AB argued that his inclusion on the Children's Barred List was a disproportionate interference with his Article 8 right to family and private life under the European Convention on Human Rights.

51. Whilst the DBS accepted that its decision may constitute a prima facie interference with AB's Article 8 rights by preventing him from engaging in regulated activity with those under the age of 18, it submitted that any interference was both lawful and proportionate having regard to (a) the serious nature of the offending as shown by the number of images downloaded and the seriousness of those images; (b) the duration of the offending – a period of over 9 years; (c) AB's lack of insight into his harmful behaviour; and (d) the nature and scope of the restrictions in place with respect to AB imposed by the criminal court.

52. Whilst I must give due weight to the judgment of the balancing exercise conducted by the DBS, I can interfere with its decision if I objectively conclude that the outcome of the DBS assessment was necessarily disproportionate. In this case I

have come to the firm conclusion that the DBS assessment was wholly proportionate. I do so for the reasons advanced by the DBS set out in the above paragraph. The nature of AB's offending was more than just the viewing of indecent images of children out of curiosity as evidenced by the number of images in his possession (including over 400 video images of children) and by his creation of a file structure for the different images and videos he had downloaded. I agree with the sentencing judge that he looked at these images for sexual gratification rather than curiosity. I note that the pre-sentence report identified a degree of minimisation in AB's assertion that he acquired the child abuse images in his possession inadvertently. This was entrenched behaviour and there is presently no convincing evidence to suggest that AB now has the techniques of effective self-management to prevent a repeat of his offending behaviour.

53. Thus, for all the reasons, set out above, I dismiss AB's application for permission to appeal.

Disclosure Issues

54. In this case AB did not provide information to the DBS despite its repeated requests that he do so. He stated that he had received legal advice not to do so. I am satisfied that the DBS decision was not influenced by that lack of co-operation per se.

55. AB's initial redaction of his pre-sentence report and of the judge's sentencing remarks may be attributable to a lack of understanding about the conduct of this appeal. However it also betrays a continuing lack of insight into the nature of his offending behaviour.

56. What has concerned me is that, on request by the DBS for relevant information, the Probation Service failed to provide anything other than a short case summary. The contents were already known to the DBS and so did not advance the DBS's understanding of the circumstances of AB's offending and any future risk he might pose. The Probation Service gave no explanation for its failure to provide the information sought by the DBS. Further, the CRC in the area where AB lived and which was likely to be responsible for his management in the community did not even respond to the request for information made by the DBS on 30 March 2015.

57. In response to the questions posed in my directions order dated 10 February 2016, the DBS gave me the following information.

58. Where a person has been convicted of a relevant criminal offence, the DBS write to him/her indicating an intention to bar and inviting representations as to why the individual should not be included in one or both Barred Lists. If a person does not make representations, they are automatically included in the relevant lists without further information gathering provided that there is sufficient information to proceed and the relevant statutory tests are met, these being the test for regulated activity and that for relevant conduct. If however a person submits representations, this may trigger further information gathering which may include a request to the National Offender Management Service [NOMS] for a copy of any pre-sentence report and/or OASys report. NOMS is responsible for the running of prison and probation services in England and Wales. There may be some cases where it is felt appropriate to request information from Probation Services notwithstanding the fact

that a person has not made reference to such information in the body of his/her representations.

59. In this case the DBS did not contemplate further action to obtain information from the Probation Service when that Service failed to produce the information the DBs had asked for. This was because the facts of AB's case and the information in the possession of the DBS enabled it to make an adequate appraisal of risk in relation to AB. The relevant statutory tests were met and it was deemed appropriate for his name to be included in the Children's Barred List.

60. The DBS told me that "*it is not uncommon for Probation Services to withhold disclosure of material held and there is no legislative power compelling the provision of information to the DBS by Probation Services nor is there a formal Memorandum of Understanding in place (though any Memorandum would not provide a legal basis for disclosure)*" [page 102]. Some Probation Regions disclose full information to the DBS whereas others only disclose partial information. Others simply disclose nothing at all.

61. DBS provided me with a document from NOMS entitled "Safeguarding of Children and Vulnerable Adults: Changes to Disqualification Order Regime and Access to Information on Barred Status of Offenders" dated 31 January 2014. That document largely concerns itself with access by Probation Services to information about an offender's barred status from DBS and has little to say about any information sharing when DBS makes a request for the same from the Probation Service. There are two paragraphs relevant to this issue which I reproduce in full as follows:

"*2.11 The DBS does not have an investigatory function but, as part of its decision-making process, it can seek relevant information from other organisations, agencies and bodies. This can include, for example, police reports, court documents, competent body findings, adult social care or children's services reports, and employer disciplinary hearing records. It may, therefore, approach a probation provider for disclosure of relevant information on an offender, for example from sources such as pre-sentence reports and OASys. Any requests should be considered on a case-by-case basis and in compliance with information sharing policies and data protection principles. In doing this, it is important to bear in mind that the DBS is carrying out a statutory function with the purpose of preventing crime (harm to children and vulnerable adults). It may be necessary to extract from or redact records to ensure that only information that is relevant and proportionate to the function of the DBS and to safeguarding and prevention of crime purposes is disclosed.*

2.12 When considering the appropriate level of disclosure, the probation provider also needs to bear in mind that the DBS is obliged to share with the person concerned all the information it has used to make its barring decision. If information cannot be passed to the person being considered for barring, for example in the interests of the prevention and detection of crime, the DBS cannot legally consider this information in the barring decision-making process. It is required to secure only as much relevant information as is necessary and reasonably sufficient to make a fair and defensible barring decision. The test applied by the DBS in relation to barring considerations is the civil standard of proof, "on the balance of probabilities"."

62. This document concludes by stating the intention to establish information sharing agreements with the DBS to provide terms and conditions for the use and processing of the personal data involved in the information sharing process. It suggests that "*guidance on the type of sharing agreements and the parties who should enter into them with the DBS will be issued shortly*" [paragraph 2.16].

63. The DBS told me that there were difficulties with putting in place an Information Sharing Agreement/Memorandum of Understanding with NOMS. Over 80% of offenders are managed by Community Rehabilitation Companies acting on behalf of NOMS but a protocol for information sharing has yet to be established between NOMS and these Companies. Until that is implemented, NOMS cannot put an Information Sharing Agreement in place with DBS.

64. After the hearing on 8 June 2016, I was told by the DBS that it was currently reviewing all of its formal Memoranda of Understanding with keepers of registers – such as the Care Council and the Health Care Professions Council - and with supervisory authorities such as the National College for Teaching and Leadership and the Care Quality Commission. I was also told that it was working with NOMS to develop a formal Memorandum of Understanding to facilitate information sharing. I am grateful for that information.

65. The DBS is a non-departmental government body that carries out the statutory functions previously undertaken by the Criminal Records Bureau and the Independent Safeguarding Authority. These are (a) processing requests for criminal records checks as defined in Part V of the Police Act 1997; (b) deciding whether it is appropriate for a person to be placed in or removed from a Barred List; and (c) maintaining the Barred Lists. It is beyond dispute that its functions render it a vital part of the wider safeguarding landscape for both children and vulnerable adults.

66. I regard the failure by Probation – whether the Region or the local Community Rehabilitation Company – either to respond at all or to explain its refusal to provide relevant information to the DBS as undermining the effectiveness of safeguarding for the most vulnerable in society. Probation Services and CRCs are under a statutory obligation pursuant to section 11(2)(a) of the Children Act 2004 to discharge their functions having regard to the need to safeguard and promote the welfare of children. I note that the section 11 duty is conferred on CRCs by virtue of contractual arrangements entered into with the Secretary of State for Justice. That statutory obligation is also stated clearly in chapter 2 of Working Together to Safeguard Children 2015 [paragraph 31].

67. The lack of co-operation evident in this case suggests a failure by the Probation Service and by CRCs to have regard to that duty. It is also troubling to be told that what occurred in this case is relatively commonplace for the Probation Service. Why that is, I do not know.

68. The lack of a statutory foundation for information sharing with the DBS by the Probation Service may be part of the answer. The absence of formal information sharing protocols may also contribute to the confusion apparent in the mixed responses of different Probation Service Areas. The latter is a matter which requires addressing as a matter of some urgency given that it is over two years since NOMS stated that guidance on information sharing would be issued "*shortly*" [see paragraph 62 above].

69. I have not heard argument about the relationship between the duties imposed on the Probation Service by the Children Act 2004 and those imposed by the Data Protection Act 1998. If appropriate, that issue may warrant further exploration in a future case of this type.

70. Given my concerns, I considered whether I should invite representations on this issue from NOMS via the Ministry of Justice. I decided not to do so as this would merely prolong this litigation and stretch unacceptably the inquisitorial function of the Upper Tribunal. I have however decided that I should invite the Chief Executive of the DBS to send a copy of this ruling to the Chief Executive of NOMS who has the responsibility for the Probation Service as a whole (including responsibility for services delivered by CRC).

71. This decision will also be placed on the website of the Upper Tribunal (Administrative Appeals Chamber).

Rule 14(1)(b) Order

72. AB has two teenage daughters with whom, I understand, he continues to live. As a matter of first principle a decision by the Upper Tribunal is a public document. Were AB to be identified from that document, his family would also be easily identified. Whilst I have received no direct evidence about this, it is clear that, by reason of their age, his daughters are vulnerable to any adverse publicity which may arise in consequence of this decision and its publication.

73. At the hearing I invited the DBS whether it wished to object to a ruling preventing identification of AB and any person who was a child at the time of his conviction in November 2014. I indicated that my Reasons would be redacted so as to remove any identifying information. DBS indicated that it had no objection to that course. AB was subsequently asked to express a view and was content that I make the order proposed. He said that his daughters had a life to live without the shadow of his wrong doing following them around.

74. I am satisfied that I should make an order pursuant to rule 14(1)(b). It is clear to me that, if I were not to do so, there is a risk that disclosure of any identifying information in my Reasons would be likely to place AB's daughters at risk of serious emotional or other harm by reason of their father's exposure as a sex offender with an interest in indecent images of pre-pubescent children and extreme pornography.

Conclusion

75. For the reasons I have explained, I refuse permission to appeal. No arguable error of law or fact has been identified in the approach of DBS and I have not been able to detect one in my scrutiny of all the material available to me.

Gwynneth Knowles QC

Judge of the Upper Tribunal

25 August 2016

[Signed on original on the date stated]