IN THE UPPER TRIBUNAL **V/1687/2015**
ADMINISTRATIVE APPEALS CHAMBER

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

I refuse permission to appeal.

REASONS

1. This application for permission to appeal relates to a decision of the Respondent (DBS) to include the Appellant on the children's barred list. After I gave initial directions for DBS to provide documentation, DBS notified the Upper Tribunal that it had identified errors of law and fact in the decision and, in the light of that and the provision by the Appellant of further information, DBS wished to review the case under Paragraph 18A of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006. I stayed the proceedings pending that review.

2. On 4 April 2016 DBS notified the Appellant that it had decided to remove her name from the children's list. The Appellant nonetheless wished to continue with her appeal. She said that her name should never have been included on the list. She was also concerned about the explanation by DBS that they will retain relevant information held by them, which may be taken into account if they receive further information, and retention of the information will be reviewed in ten years. Consequently this appeal had become academic unless the Upper Tribunal had power to direct that the Appellant be removed from the list retrospectively. I directed an oral hearing of the application for permission to appeal, to address that issue.

3. The oral hearing took place before me on 15 September 2016. The Appellant appeared in person and DBS was represented by Ms Galina Ward (counsel). Ms Ward had sent to the Upper Tribunal written submissions and extracts from relevant legislation. Unfortunately these did not reach the Appellant prior to the hearing. I therefore directed that the Appellant could send further written submissions within 28 days of the date of the hearing, and the Appellant did so.

4. Having considered all the submissions of both parties, both written and oral, I am satisfied that it is not arguable that the Upper Tribunal can direct removal from the list retrospectively. I now explain why I have reached that conclusion.

5. I start by observing that the Appellant's submissions are predicated on her understanding that the Respondent admitted that the original inclusion of the Appellant's name in the list was made in error. In so doing, she relies on the Respondent's letter of 16 July 2015 to the Upper Tribunal (page 67) in which it said that it wished to review the decision under paragraph 18A because "errors of law and fact have been identified". She may be reading too much

into this. DBS has not said what errors were identified. It is possible that the errors identified were in failing to include the Appellant in the adults list rather than including her in the children's list. That could explain why DBS subsequently told her (page 31) that it remained of the view that her name should be included in the children's list and additionally was considering including her name in the adults' list. DBS's decision on completion of the review (page 60) was that it was *no longer* appropriate to retain her name in the children's list. There is no concession by the Respondent that the original decision was mistaken. That would be a matter for the Upper Tribunal to determine *if* permission to appeal is given.

6. The Upper Tribunal's powers on appeal against the decision by DBS to include her in a List are found in section 4(5)-(7) of the 2006 Act. Where the Upper Tribunal is satisfied that DBS made a mistake of law or fact, it must direct DBS to remove the person from the list or remit the matter to DBS for a new decision: section 4(6). The statutory language does not indicate that removal could be retrospective. It is not arguable that it could be interpreted to include retrospective removal, as I now explain.

7. It is helpful to start with the powers of DBS on review. The power of removal in paragraph 18A arises both where DBS is satisfied of matters that call into question the original decision (ie there was missing information at the time of inclusion or there was an error by DBS), and where it is satisfied that circumstances have changed so that the continued inclusion on the list is no longer appropriate. It could not have been intended that change of circumstances could lead to retrospective removal and, as the power is the same regardless of the basis on which DBS decides the person should not be included in the list, it is clear that the power to remove is not retrospective.

8. That being so, I am also satisfied that there is no power in the Upper Tribunal to direct that removal from a list is retrospective. There is no indication in the Act that the Upper Tribunal is able to direct DBS to do something that the Act does not otherwise empower DBS to do. The Act does not give the Upper Tribunal power to quash the original decision, which is what retrospective removal would amount to. It is not arguable that under section 4(6)(a) the Upper Tribunal is empowered to direct DBS to do something that it would otherwise lack power to do. In addition, for the same reasons as I have given in respect of paragraph 18A – that is, because the Upper Tribunal's powers are the same whether or not DBS's decision was wrong from the outset - the power to direct removal under section 4(6)(a) cannot mean retrospective removal.

9. There is also a powerful pragmatic reason for this. Inclusion in a list is a matter of historic fact. History cannot be rewritten by DBS on review. While a person is on a list, it is a criminal offence for the person to engage in regulated activity from which they are barred, or for an employer to engage them in such activity. That state of affairs cannot be altered retrospectively. If it could, it would mean that the success of a prosecution would depend on whether their trial takes place before or after a review by DBS.

10. The Appellant submits that, if she is correct that her name should not have been included in the list originally or at any time during the 14 month period before DBS removed it, then article 8 of the European Convention on Human Rights requires that her name is removed retrospectively. There is no realistic prospect of the Appellant establishing that failure to remove her name with retrospective effect violates her rights under Article 8. Her name has been removed from the list. In response to an enquiry from a prospective employer as to whether the Appellant is on a list, the only answer DBS could give is that she is not. When DBS is asked to carry out a criminal record or enhanced criminal record check, it collates relevant information disclosed by the police, which could include information that led to the decision to include the Appellant in the list but would not include the fact that her name was in a list. Moreover, there is a separate procedure for reviewing information included on a CRB certificate and judicial review is available if the Appellant considers that a certificate is wrong in law including that it breaches her Convention rights.

11. The Appellant has not identified any ongoing disadvantage to her of her name not being removed retrospectively. The issue about retention of information is a separate matter over which the Upper Tribunal has no jurisdiction. The Appellant has a separate remedy by way of a claim for damages under the Human Rights Act if she considers that DBS included her name on the list unlawfully and that has caused her loss. It is not for me to comment on the merits of any such claim.

12. For the sake of completeness, I address briefly other submissions made by the Appellant which I consider to have no merit. The cases on which she relies - R (Royal College of Nursing) v SSHD [2010] EWHC 2761 (Admin) and Independent Safeguarding Authority v SB and Royal College of Nursing [2012] EWCA Civ 977 – say nothing relevant to the question of retrospective removal. If there was anything in her submission that DBS's decision was a nullity with the effect that she was never included, which there is not (for reasons which I do not need to explore here), it would be a matter for judicial review and not appeal to the Upper Tribunal. Her reliance on Anisminic v Foreign Compensation Commission [1969] 2 AC 147 is misconceived. The Upper Tribunal exercises a statutory jurisdiction and is subject both to judicial review and appeal, in appropriate cases. Finally the Appellant submits that, if retrospective removal is not possible, she seeks remittal of the matter to DBS with a direction that it must require the records to include a note to the effect that during the period February 2015 to July 2016 her name appeared in the list due to the Respondent's error. The short answer to that is that there is no power under the Act for this Tribunal nor DBS to do so.

13. In conclusion, the appeal in this case has become academic because DBS has removed the Appellant's name from the children's barred list. She has achieved the limit of what is possible under the Act. There is no wider point of principle involved or other good reason to consider the appeal, and I refuse permission to appeal.

Signed on the original
on 21 October 2016

Kate Markus QC
Judge of the Upper Tribunal