IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. V/2641/2016

Appellant: Mr AB

Respondent: Disclosure and Barring Service

DECISION OF THE UPPER TRIBUNAL

UPPER TRIBUNAL JUDGE PEREZ
MS MARGARET DIAMOND
MR BRIAN CAIRNS

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

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

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

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

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

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

INTERIM DECISION

Anonymity order

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

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

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

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

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

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

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

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

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

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

Upper Tribunal decision

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

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

Background

Inclusion in lists

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

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

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

Review of inclusion in lists

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

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

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

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

Specialist risk assessment

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

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

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

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

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

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

Removal from Adults' Barred List

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

DBS review decision under appeal

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

Upper Tribunal appeal

Introduction

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

Grounds of appeal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Upper Tribunal's consideration of grounds of appeal

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

(a) Supporting letters

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

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

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

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

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

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

(b) Past conduct

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

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

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

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

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

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

Ground (2): Specialist risk assessment unreasonably disregarded

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

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

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

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

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

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

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

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

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

32. The Decision said—

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

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

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

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

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

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

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

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

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

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

Errors of law

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

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

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

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

38. We so find for the following reasons.

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

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

40. The Decision said—

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

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

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

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

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

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

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[…]

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

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

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

[…]

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

57. The Decision said (our emphasis)—

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Submissions

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

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

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

Discussion

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

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

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

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

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

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

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

Dr Earnshaw's report said—

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

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

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

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

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

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

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

Insight

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

What the DBS must do if we remit

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

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

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

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

Findings of fact

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

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

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

(1) Whether appellant relies on impotence as mitigating factor

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

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

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

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

87. The Decision said—

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

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

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

89. The appellant told us—

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

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

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

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

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

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

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

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

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

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

(3) Past concealment of behaviour

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

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

(4) Appellant's marriage as a restraining factor

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

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

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

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

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

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

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

Other matters

Effect of impotence

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

Who the appellant told of his behaviour and when

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

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

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

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

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

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

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

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

Grooming

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

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

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

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

113. Dr Earnshaw said in her report—

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

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

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

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

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

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

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

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

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

Disposal

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

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

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

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

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

CASE MANAGEMENT DIRECTIONS

124. We direct as follows—

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

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

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

Rachel Perez
Judge of the Upper Tribunal
29 June 2018

Annex A to Upper Tribunal decision

Legislation

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

"**4 Appeals**

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

(a) [repealed].

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

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

(2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake—

(a) on any point of law;

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

(3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.

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

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

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

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

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

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

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

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

Annex A continued

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

"*Review*

18

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[End of Annex A]

Annex B to Upper Tribunal decision

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

Written evidence

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

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

This statement is factually incorrect.

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

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

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

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

Oral evidence

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

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

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

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

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

Judge: "What brought it to an end?"

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

Cross-examination

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

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

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

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

Ms Ward: "But was it linked?"

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

Judge: "What do you mean?"

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

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

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

[End of Annex B]

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

"**Intellectualization**

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

Description

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

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

Example

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

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

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

Discussion

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

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

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

So what?

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

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

See also

Denial, Dissociation, Rationalization, Repression"

[End of Annex C]