IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. V/2641/2016

Appellant: Mr AB

Respondent: Disclosure and Barring Service

DECISION OF THE UPPER TRIBUNAL

UPPER TRIBUNAL JUDGE PEREZ
MS MARGARET DIAMOND
MR BRIAN CAIRNS

This decision has been anonymised with the parties' agreement.

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

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

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

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

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

DECISION

Anonymity order

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

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

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

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

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

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

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

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

Upper Tribunal final decision

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

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

Background

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

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

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

Interim decision

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

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

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

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

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

Further evidence

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

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

Second oral hearing

Legislation

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

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

[2] Submission 31/5/19.

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

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

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

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

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

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

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

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

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

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

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

Submissions on whether to remit or to direct removal

Submissions for the DBS

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

16. In *MR*, the Upper Tribunal said—

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

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

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

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

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

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

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

20. We invited Ms Patry's submission on the following point. Section 4(3) of the 2006 Act provides that "the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact". That is however expressed in that subsection to be "For the purposes of subsection (2)", whereas we are considering how to exercise the power in subsection (6). Is it significant that there is no similar provision in, or expressly for the purposes of, subsection (6)?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appellant's submissions

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

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

Discussion

Preliminary point: decision document versus decision letter

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

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

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

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

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

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

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

Introduction

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

40. It seems to be common ground that there is no express provision to that effect. The provision in section 4(3) that "the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact" is there expressed to be "For the purposes of subsection (2)". Subsection (2) provides for an appeal to be made on the grounds that the DBS has made a mistake on any finding of fact on which the decision was based or any point of law. Once we have decided whether there was a mistake of law or fact, we move out of subsections (2) and (3) and into subsection (6). There is nothing express in section 4(6), or anywhere in section 4 or elsewhere in the 2006 Act, prohibiting us from considering appropriateness when deciding how to exercise our section 4(6) powers. The question is however whether that prohibition should be implied.

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

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

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

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

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

> "(2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake—
>
> (a) on any point of law;
>
> (b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.
>
> (3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.
>
> […]
>
> (6) If the Upper Tribunal finds that DBS has made such a mistake it must—
>
> (a) direct DBS to remove the person from the list, or
>
> (b) remit the matter to DBS for a new decision.".

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

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

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

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

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

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

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

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

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

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

(2) *ISA v SB v RCN*

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

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

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

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

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

(3) Upper Tribunal decision in *MR*

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

54. In *MR*, the Upper Tribunal said—

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

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

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

(4) Upper Tribunal decision in *CM*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion: section 4(6) of the 2006 Act

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

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

Putting the appellant back on the list

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

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

Why we are directing removal

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

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

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

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

(1) Setting the bar too high

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

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

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

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

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

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

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

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

[…]

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

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

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

[…]

Opinion

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

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

Risk Assessment

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

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

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

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

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

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

(a) Dr Earnshaw's expertise and process

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

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

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

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

(b) Content of Dr Earnshaw's opinion

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

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

(i) Self-interest

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

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

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

(ii) Impotence

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

95. Dr Earnshaw said—

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

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

(iii) Declining sexual preoccupation

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

(iv) Marriage as a restraining factor

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

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

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

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

(v) Pornography use and fantasy life

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

(vi) Generally

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

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

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

(3) DBS considerations

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

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

Behaviour which led to inclusion in the list

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

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

Insight

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

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

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

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

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

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

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

Full consideration on remittal

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

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

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

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

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

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

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

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

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

(4) Closure

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

Conclusion

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

Rachel Perez
Judge of the Upper Tribunal
11 March 2020

Annex to Upper Tribunal decision

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

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

Legal framework

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

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

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

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

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