THE UPPER TRIBUNAL ORDERS that:
The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. No matter relating to the complainant (referred to as the Victim) shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of a sexual offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

IN THE UPPER TRIBUNAL **Appeal No. UA-2019-002079-V**
ADMINISTRATIVE APPEALS CHAMBER **(previously V/2417/2019)**

Between:

MG

Appellant

- v –

DBS

Respondent

Before: Upper Tribunal Judge Church, and Members Michele Tynan and Elizabeth Bainbridge

Decided following an oral hearing on 31 January 2022

Representation:
Appellant: Mr Howarth of counsel (instructed by Ms Sandhal of Messrs Duncan Lewis)
Respondent: Mr Weiss of counsel (instructed by Ms Finlay of DBS)

DECISION

On appeal from the Disclosure and Barring Service (**"DBS"**)
DBS Reference: 00894023585
Final Decision Letter: 26 July 2019

The decision of the Upper Tribunal is to refuse the appeal. The decision of DBS made on 26 July 2019 was not made in error of law and is confirmed.

REASONS FOR DECISION

What this appeal is about

1. This appeal is about MG, a 51-year-old man who in 2018 was working in a senior role as a Service Manager for Hestia, a charity which, among other things, provides complex needs accommodation for people who have become homeless.

2. On 04 May 2018 MG was referred to DBS. On 26 July 2019 DBS decided to place MG's name on both the Adults' Barred List and the Children's Barred List (together, the **"Barred Lists"**; the **"Barring Decision"**).

3. MG appeals the Barring Decision because he wishes to be removed from the Barred Lists so that he can get back to working directly in the health and social care sector at management level.

Factual background

4. On 06 March 2018, MG and some colleagues and service users attended the funeral and wake of a Hestia service user. The death was to be the subject of an internal investigation which was to be led by MG.

5. After the wake MG and another colleague took a 25-year-old junior female social worker colleague over whom MG exercised some managerial responsibility (to whom we will refer as the **"Victim"** in order to protect her identity) by taxi to a Hestia property comprising flats and communal spaces that served as a medium support mental health unit. Later that night MG sexually assaulted the Victim by kissing and sexually touching her in circumstances in which she was unable either to consent or to indicate lack of consent, due to being incapacitated by alcohol.

6. Although the Victim had no recollection of events of the night of 06 March 2018, a service user reported concerns about what they had witnessed that night and the incident was investigated. Following the employer's investigation MG was dismissed from his job with Hestia for gross misconduct on 09 April 2018. The matter was also investigated by the police and MG was charged with one count of sexual assault contrary to Section 3 of the Sexual Offences Act 2003 (the **"Index Offence"**).

7. MG initially denied the Index Offence, and indeed the employer's allegations of gross misconduct, which he attempted unsuccessfully to appeal. However, when confronted with CCTV footage of the incident he pleaded guilty to the charge. MG was convicted of the Index Offence on 24 October 2018 at Isleworth Crown Court and sentenced to 18 months imprisonment (suspended for 24 months), 60 days of rehabilitation activity, 200 hours of unpaid work, and a £140 victim surcharge. He was placed on the sex offenders' register for 10 years.

8. It is accepted that MG has engaged well with the requirements of his sentence and he continues to do so.

9. MG is now studying for a BSc (Hons) degree in International Business Management and has set up a consultancy business providing services to start-up businesses in the health and social care sector, including advice on recruitment, training, health and safety, policies and procedures and compliance.

The oral hearing of the appeal

10. The oral hearing of this appeal was conducted remotely via CVP on 31 January 2022.

11. There was a late application for MG to give evidence at the hearing and for the admission of two character references into evidence. DBS did not oppose the application and we were satisfied that there was no material prejudice to DBS if it were to be admitted. We decided that the interests of justice favoured the granting of the application.

12. MG gave live evidence. Mr Howarth and Mr Weiss expanded on the arguments they had set out in their skeleton arguments. We are grateful to both of them for their clear and helpful submissions and for the measured way they conducted their clients' respective cases.

13. At the end of the hearing, in light of the heavy reliance that was placed by Mr Howarth on the statement in the Probation Service's Pre-Sentence Report that the author had "no reason to assess that [MG] poses a risk of serious harm to children", Judge Church directed the parties to make submissions as to:

a. whether the definition of "children" for the purposes of the probation service's pre-sentence reports was the same as that used in the Safeguarding Vulnerable Groups Act 2006 (**"2006 Act"**) (i.e. people who have not attained their 18th birthday) or whether it used a different definition; and

b. whether DBS was bound in any way by the views of a probation officer expressed in a probation report as to the risk of harm posed by the individual who was the subject of the report.

14. Submissions were duly provided.

The issues in this appeal

15. MG accepts that his commission of the Index Offence amounts to relevant conduct, and he accepts that he has been and / or might in future (if not included on the Barred Lists) be engaged in regulated activity relating to children and / or vulnerable adults. He does not, however, accept that it is appropriate that he should be included in either Barred List.

16. The crux of this appeal is whether the Barring Decision was based on any material mistake on any point of law or any finding of fact.

17. MG argued 6 grounds at the permission stage. Judge Church refused permission on his grounds 1 and 3, which we therefore don't need to address in this decision. He granted permission on a reasons challenge (referred to as ground 2), and a rationality challenge (comprising grounds 4, 5 and 6 (summarised below)) on the basis that he was persuaded that they cleared the hurdle of "arguability".

18. In this appeal we must therefore decide two main issues:

(1) whether DBS failed adequately to explain how it weighed the "pertinent factors" highlighted in the Appellant's appeal ground 2 (set out in paragraph [42] below) against the countervailing factors it identified in the Final Decision Letter (**"Ground 2"**); and

(2) whether the Respondent's decision that it was "appropriate" to include the Appellant on the Children's Barred List pursuant to paragraph 2 of Schedule 3 to the 2006 Act was "irrational" because:

a. its reasons, i.e. that

> "traits exhibited could also be transferable to Regulated Activity with Children as many females approaching or just over the age of consent appear physically similar to adult females and that should the Appellant be presented with an opportunity to obtain sexual gratification from such a female he could do so, particularly if she was unable to object and perhaps not recall the incident"

are not evidence-based and amount merely to speculation (**"Ground 4"**); or

b. the Respondent failed to follow its own structured judgment process because no information was entered in the section titled "Pre-dispositional Factors – Harm-related intrinsic drives and interests" relating to sexual preference for children, and there is no evidence that the Appellant would be likely to present any risk of harm towards children or young people approaching the age of consent (**"Ground 5"**); or

c. the Respondent failed to conduct the required assessment of risk when addressing the issue of whether it was "appropriate" to include the Appellant on the Children's Barred List with reference to risk and any other pertinent factors, and the evidence of the Pre-Sentence Report (which should be given weight as the risk assessment tools of the National Probation Service are credible and reliable) indicates that there is no reason to believe that the Appellant poses a risk of serious harm to children (**"Ground 6"**).

19. We decided that the Respondent's reasons for the Barring Decision were adequate and that the Barring Decision was not irrational and not based on any mistake on a point of law.

20. We therefore decided to uphold the decision. We explain why below.

The statutory framework

21. DBS was established by the Protection of Freedoms Act 2012, taking on the functions of the Criminal Records Bureau and the Independent Safeguarding Authority. One of its main functions is the maintenance of the Barred Lists. Its power and duty to do so arises under the 2006 Act.

DBS's duty to maintain the Barred Lists, and the criteria for inclusion

22. Section 2(1)(a) of the 2006 Act places a duty on DBS to maintain the Barred Lists. Schedule 3 to the 2006 Act applies for the purposes of DBS determining whether an individual is included in either or both Barred Lists.

23. By section 59 of the 2006 Act "child" means a person who has not attained the age of 18.

24. By section 60 of the 2006 Act, a vulnerable adult means any adult to whom an activity which is a regulated activity relating to vulnerable adults by virtue of any paragraph of paragraph 7(1) of Schedule 4 is provided.

25. Under Section 3(2)(a) of the 2006 Act a person is barred from "regulated activity" relating to children if they are included in the children's barred list. Under Section 3(3)(a) a person is barred from "regulated activity" relating to vulnerable adults if they are included in the adults' barred list.

26. MG has been included by the DBS on the Barred Lists pursuant to Schedule 3, Part 1, paragraph 2 of the SVGA (which relates to children and is headed "Inclusion subject to consideration of representations") and Schedule 3, Part 2, paragraph 8 (the equivalent provision relating to vulnerable adults, which is headed "Inclusion subject to consideration of representations"). Those paragraphs provide as follows:

> (1) This paragraph applies to a person if any of the criteria prescribed for the purposes of this paragraph is satisfied in relation to the person.
>
> (2) Sub-paragraph (4) applies if it appears to DBS that—
>
> (a) this paragraph applies to a person, and
>
> (b) the person is or has been, or might in future be, engaged in regulated activity relating to children.
>
> …
>
> (4) DBS must give the person the opportunity to make representations as to why the person should not be included in the children's barred list.
>
> …
>
> (7) Sub-paragraph (8) applies if the person makes representations before the end of any time prescribed for the purpose.
>
> (8) If DBS —
>
> (a) is satisfied that this paragraph applies to the person,
>
> (b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and
>
> (c) is satisfied that it is appropriate to include the person in the children's barred list, it must include the person in the list.

27. By section 5(1) of the 2006 Act, a reference to regulated activity relating to children must be construed in accordance with Part 1 of Schedule 4. Regulated activity relating to children includes any form of care or supervision of children (paragraph 2(1)(b) of Schedule 4), and any form of advice or guidance provided wholly or mainly for children (paragraph 2(1)(c) of Schedule 4) carried out frequently by the same person (paragraph 1(1)(b) of Schedule 4).

28. The DBS have also included MG on the Adults' Barred List pursuant to paragraph 8, Schedule 3 of SVGA. That section provides that:

> (1) This paragraph applies to a person if any of the criteria prescribed for the purposes of this paragraph is satisfied in relation to the person.
>
> (2) Sub-paragraph (4) applies if it appears to DBS that—
>
> (a) this paragraph applies to a person, and

(b) the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults.

…

(4) DBS must give the person the opportunity to make representations as to why the person should not be included in the adults' barred list.

…

(7) Sub-paragraph (8) applies if the person makes representations before the end of any time prescribed for the purpose.

(8) If DBS —

(a) is satisfied that this paragraph applies to the person,

(b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and

(c) is satisfied that it is appropriate to include the person in the adults' barred list,

it must include the person in the list."

29. By section 5(2) of the 2006 Act, a reference to regulated activity relating to vulnerable adults must be construed in accordance with Part 2 of Schedule 4. By section 60 of the 2006 Act, a vulnerable adult means any adult to whom an activity which is a regulated activity relating to vulnerable adults by virtue of any paragraph of paragraph 7(1) of Schedule 4 is provided.

30. An offence contrary to section 3 of the Sexual Offences Act 2003 is a prescribed offence for the purposes of paragraphs 2 and 8 of Schedule 3 to the 2006 Act, by virtue of regulations 4 and 6 of the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009/37.

Appeals of decisions to include, or not to remove, persons in the Barred Lists

31. Section 4 of the 2006 Act provides for a right of appeal to the Upper Tribunal in limited circumstances:

"4. Appeals

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

…..

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

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

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

(a) on any point of law;

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

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

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

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

The authorities

32. In *DBS v AB* [2021] EWCA Civ 1575 the Court of Appeal (LJ Lewis) considered the respective roles of the DBS and the Upper Tribunal. At paragraph [43] he said:

> "unless the decision of the DBS is legally or factually flawed, the assessment of the risk presented by the person concerned, and the appropriateness of including him in a list barring him from regulated activity with children or vulnerable adults, is a matter for the DBS"

33. Further, the comments of Elias LJ in *Khakh* were cited with approval by Lewis LJ at paragraph [44]:

> "44. The role of the Upper Tribunal was considered in relation to the Independent Safeguarding Authority or ISA (the predecessor to the DBS) in *Khakh v Independent Safeguarding Authority (now the Disclosure and Barring Service)* [2012] EWCA Civ1341. At paragraph 18, Elias LJ, with whom the other members of the Court agreed, said:
>
> > "18..... The jurisdiction of the UT when considering an appeal from a decision not to remove the appellant from a barred list is limited to cases where the ISA has made a mistake on any point of law, or in any finding of fact on which its decision was based: section 4(2). A point of law, as Mr Grodzinski QC, counsel for the ISA, properly concedes, includes a challenge on Wednesbury grounds and a human rights challenge. But it will not otherwise entitle an applicant to challenge the balancing exercise conducted by the ISA when determining whether or not it is appropriate to keep someone on the list. In my view that is plain from traditional principles of administrative law but in any event it is put beyond doubt by section 4(3) which states in terms that the decision whether or not it is appropriate to retain someone on a barred list is not a question of law or fact. It follows that an allegation of unreasonableness has to be a Wednesbury rationality challenge i.e. that the decision is perverse."

34. However, what constitutes for the purposes of section 4(2)(b) a mistake in the findings of fact made by the DBS and on which the decision was based was considered recently by the Upper Tribunal in *PF v DBS* [2020] UKUT 256 (AAC). At paragraph [39] the panel stated:

> "There is no limit to the form that a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or an omission. It may relate to anything that may properly be the subject of a finding of fact. This includes matters such as who did what, when, where and how. It includes

> inactions as well as actions. It also includes states of mind like intentions, motives and beliefs."

35. In *AB v DBS*, in the context of discussing the Upper Tribunal's power to make findings of fact under section 4(7) of the 2006 Act, Lewis LJ noted (at [55]) the

> "need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter. By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to marriage being a "strong" marriage or a "mutually supportive one" may be more of a value judgment rather than a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third "finding" would certainly not involve a finding of fact."

36. It was noted in *PF v DBS* that:

> "41. The mistake maybe in a primary fact or in an inference... A primary fact is one found from direct evidence. An inference is a fact found by a process of rational reasoning from the primary facts likely to accompany those facts.
>
> 42. One way, but not the only way, to show a mistake is to call further evidence to show that a different finding should have been made. The mistake does not have to have been one on the evidence before the DBS. It is sufficient if the mistake only appears in the light of further evidence or consideration."

The oral evidence

37. We had the benefit of hearing live evidence from MG at the hearing. We were not impressed by his evidence, which we felt undermined some of the "pertinent factors" which Mr Howarth invoked in his aid. Under cross-examination MG sought to justify his actions against the Victim by describing her text messages as "flirtatious", and when this was challenged by Mr Weiss by reference to the messages in the appeal bundle, he accepted that those messages were not flirtatious but said that he nonetheless perceived "an element of flirtatious behaviour". This tended towards victim-blaming. He minimised the Index Offence, saying that he "made a mistake" and that he had "touched a lot of lines", but he initially denied that he had acted in the way DBS alleged. He repeatedly denied touching the Victim's vagina, despite the Pre-Sentence Report, which he sought to rely on, making reference to his having accepted that "at the time of the offence the victim was 'almost unconscious' and did not have the capacity to consent to him touching her breasts or vagina". Under cross-examination he eventually conceded that he touched her "around the vaginal area, not the vagina". When he reflected on the incident, he focused on the effect it had had on himself, and not on the Victim: "How did I find myself packing up, going home and finding myself in this situation?" None of this evidence cast doubt on DBS's assessment that MG lacked insight into his offending and represented a continuing risk of offending against vulnerable women, whether under or over 18. Rather, it lent further support to that assessment.

The character evidence

38. We considered that the character evidence which was adduced by MG did not help us in our task of establishing whether DBS had made any mistake of law or fact. These references spoke to how MG was at doing aspects of his job, and as such were of little relevance. Further, we note that there was nothing in the statements in support of MG's appeal that indicated that the provider of the references were aware of why MG was seeking character references, which limited their usefulness even further.

Discussion

The reasons challenge: Did DBS give an adequate explanation of its weighing of the "pertinent factors" for and against inclusion in the Barred Lists? (Ground 2)

39. MG's perfected grounds asserted that DBS had failed to address the "pertinent factors" which he had argued provided mitigation for his offending. As Judge Church said in his limited grant of permission, this argument was unsustainable, because DBS plainly considered those factors, but it found them to be outweighed by the seriousness of the Index Offence and other negative factors. The issue on which permission was given was limited to whether DBS explained this weighing exercise adequately.

40. In *Khakh*, which concerned DBS's predecessor, Elias LJ considered the requirement of the Independent Safeguarding Authority to give reasons for its decisions. At [23] he said:

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

41. The Appellant maintains that DBS's reasons fall short of the standard outlined by the Court of Appeal in *Khakh* because it failed to explain its decision making process, thereby denying MG the opportunity properly to scrutinise the rationale for its decision, and in particular it failed to show how all factors were balanced and weighed against each other and why certain factors were preferred over others.

42. The "pertinent factors" invoked by MG in his perfected grounds of appeal were:

a. that it was an isolated offence and the Appellant has shown no propensity to commit sexual offences of any type;

b. that the Appellant was of previous good character;

c. that the Appellant pleaded guilty;

d. that the Appellant regrets the offence;

e. that the Appellant expressed genuine remorse for his offence (per the Pre-Sentence Report); and

f. that the Appellant has complied fully with his sentence, attended all sessions of probation and engaged well.

43. These matters were all expressly addressed in the Final Decision Letter:

    a. Factors a. and b. were expressly acknowledged and DBS explained why it considered that they were outweighed by other negative factors:

        > "you had worked in Regulated Activity since 2002 and there is no evidence of any issues, your positive reference is accepted but you were in a senior position at the organisation you worked at with the victim, you could have accessed information to get your victim home safely, you chose not to do this and exploited your position and her vulnerability instead"

    b. Factor c. was also noted, but again DBS explained to MG why it considered the guilty plea was outweighed by other negative factors:

        > "You refused to fully acknowledge your offending throughout your employer's investigations even when arrested by Police you maintained your behaviour was not sexual, it was only when CCTV footage was presented to you and your Solicitor by Police that you admitted your behaviour and pleaded guilty to the charge".

    c. Factors d. and e. were expressly addressed by DBS, but it explained its decision-making in this regard in these terms:

        > "Although your remorse may now be genuine, you showed none at the time of your offence. Your victim had no idea what had happened to her and it is likely she still would not have, had a Service User not reported concerns. Any remorse felt or expressed by you now is not sufficient to detract from the concern raised by your callous behaviour, your victim describes the effect on her and her family as being profound, it is thought the harm for them will be lasting."

    d. Factor f. was also noted by DBS, but it explained why it nonetheless felt that there was still a risk of harm:

        > "You are reportedly engaging well with Probation Services but are currently regarded as a medium risk of harm and of reoffending. In light of the information above, you exploiting a vulnerability of an adult for sexual gratification can not [sic] be ruled out and a bar on the Vulnerable Adult's list is considered an appropriate measure".

44. We are satisfied that DBS has complied with its common law duty to provide adequate reasons to the standard outlined in *Khakh*, which is a relatively low one. While it could perhaps have explained the weighing exercise in more detail the explanation it gave was sufficient for MG to understand why his representations were "to no avail". The reasons challenge is not made out.

The rationality challenge: Was the Respondent's decision that it was "appropriate" to include the Appellant on the Children's Barred List pursuant to paragraph 2 of Schedule 3 to the 2006 Act "irrational"? (Grounds 4, 5 and 6)

45. The definition of "child" for the purposes of the 2006 Act must be borne in mind when considering issues related to the decision to include MG in the Children's List: the definition is a person who has not yet attained the age of 18.

46. DBS's reasons for including MG in the Children's Barred List were explained in the Final Decision Letter as follows:

> "Your offending suggests a belief that you were entitled to sexual contact with your victim, you exploited your position and her vulnerability in a callous way and it is felt these traits are transferable in to Regulated Activity with Vulnerable Adults. It is also felt these behaviours could transfer in to Regulated Activity with Children, many females approaching or just over the age of consent appear physically similar to adult females. It is thought that should you be presented with an opportunity to obtain sexual gratification from such a female you could do so, particularly if she was unable to object and perhaps would not recall an incident. There is no evidence that would indicate you are any less likely to repeat your behaviour against this group and as such you are considered an unacceptable risk of future harm. In light of this a bar on the Children's list is considered appropriate."

Ground 4 – reasons for finding that offending transferable to Regulated Activity with Children not evidence-based

47. Mr Howarth argued on behalf of MG that DBS's reasoning was fatally flawed because it relied on findings based on speculation rather than evidence. He rejected the suggestion that, because DBS found that MG's offending demonstrated a sense of entitlement to sexual contact and a callous willingness to exploit his position and the Victim's vulnerability, his risk of further offending "could transfer" to regulated activity with children on the basis that "many females approaching or just over the age of consent appear physically similar to adult females". His Ground 4 argument was, in essence, that the assertion that there were physical similarities between those approaching the age of consent (but still "children" for the purposes of the 2006 Act) and young adult females was unscientific and unevidenced.

48. Mr Weiss, for DBS, argued that this question of similarity of appearance was a matter that engaged the special expertise of DBS and that the Upper Tribunal should not meddle in it.

49. We disagreed with both counsel on this issue, considering DBS's statement in its Final Decision Letter to be simply a statement of common sense.

50. We were puzzled by the argument that this was a matter on which the DBS decision maker had an expert opinion that engaged its specialist expertise. This situation is very different from age assessment in an asylum context, where experts in age assessment conduct examinations and provide expert reports as to the age of the applicant. After all, this process involves more than just assessing the appearance of the person in question. Further, in this case there is no suggestion that the decision maker at DBS has actually met the Victim or even seen any image of her to assess the extent to which she looks "young".

51. How old someone looks is a subjective matter, and it is far from a science. A person who is pre-pubescent is likely to look noticeably different in age from someone who has passed puberty, even if they were born on the same day. However, as noted

above, "child" for the purposes of the 2006 Act is defined not by reference to puberty but rather to whether the age of 18 has been attained, so it will encompass many who have passed puberty some years ago and are likely to appear fully developed.

52. It seems to us to be uncontroversial that people who are close in age (and who have passed puberty) can often look similar in age. To take things to their logical conclusion, it is undeniable that a person will (absent the acquisition of an injury) look very similar on their 18th birthday to the way they looked on the day before their 18th birthday. When the appearance of multiple people who have all passed puberty is compared, attempts to distinguish their respective ages are likely to be reasonably unreliable if their ages are within a handful of years of each other.

53. While we disagree with DBS's argument in submissions that this is a matter that engages its special expertise in risk assessment which the Upper Tribunal should be cautious to interfere with (per *AB v DBS*), we do not accept that its reasoning in the Final Decision Letter is flawed in terms of the transferability of the risk to children. DBS did not have to establish that MG was sexually attracted to pre-pubescent or pubescent children. It only had to demonstrate that, just as he was tempted to sexually assault the 25-year-old Victim, he might similarly be tempted to sexually assault a young female who happened to be under the age of 18 but whom he didn't know to be under 18.

54. In this case MG is 50 years old and his victim was 25 years old. MG said he didn't know the Victim's age, but he was aware that she was a qualified social worker and understood her to be "in the running" for a management role. We accept that MG had no reason to think that the Victim might have been under 18, and we also accept that he was in possession of some contextual information that made it unlikely that she was under 18, but that doesn't mean that the risk associated with his offending behaviour is not transferable to regulated activity with children. In its assessment of risk DBS was entitled to take into account that the Victim was only 7 years older than someone who would meet the definition of "child" under the 2006 Act, and that he wasn't put off by the large gap in age between him and his victim (who was younger than MG's own daughters). It was clearly also entitled to base its decision not on a particular sexual attraction to female children but instead on his willingness to exploit vulnerabilities, which was demonstrated starkly by the circumstances of the Index Offence: the Victim was not only substantially younger than MG and in a much more junior role at Hestia, she was also incapacitated, had just attended the funeral of a service user, and she was expecting that her care for that service user was to be investigated by none other than MG.

55. It was argued on behalf of MG that DBS has effectively sought to reverse the burden of proof when it says in justification of its decision "there is no evidence that would indicate that you are any less likely to repeat your behaviour against this group and as such you are considered an unacceptable risk of future harm". We do not accept this. DBS has found that there is a risk that MG will repeat his behaviour and it has explained why it doesn't consider that being under the age of 18 would prevent someone from being at risk of harm from him.

56. It was argued in the Appellant's skeleton that DBS had erred in law in failing to apply the correct standard of proof when reaching its findings of fact, saying that the proper standard of proof was not whether a person *could* do something harmful but rather whether they are *likely* to cause harm to children on the balance of probabilities.

57. This submission confuses two aspects of DBS's decision making: its findings of fact on the one hand, and its assessment of risk and appropriateness on the other. When making findings of fact it had to apply the standard of the balance of probabilities, but when assessing risk and appropriateness it did not have to be satisfied that it was more likely than not that MG would in fact harm children in the context of regulated activity. Rather, it had a more complex exercise to perform: identifying potential risk and then assessing both the likelihood of the risk being realised and the severity of the consequences should it be realised in order to come to a decision on the appropriateness of placing MG on the Barred Lists taking into account all the circumstances. Given that the risk it contemplated was a repetition of the kind of extremely exploitative behaviour involved in the Index Offence the consequences of the risk being realised is very grave indeed.

58. It must be remembered that DBS exercises a protective function and it is a forward-looking one. It has no crystal ball and can only make its barring decisions based on evidence of past conduct. In the circumstances, DBS was entitled to find from the evidence of MG's offending that his willingness to exploit the vulnerabilities of the Victim indicates an unacceptable risk of harm to vulnerable adults. It was also entitled to infer from these primary facts that MG also posed an unacceptable risk of harm to females under the age of 18. There was nothing irrational in its reasoning in this regard.

59. For these reasons we do not find Ground 4 to be made out.

Ground 5 – failure to follow its own structured judgment process

60. While Mr Howarth argued that DBS's decision on "appropriateness" was irrational because it did not comply with its own Structured Judgment Process, Mr Weiss argued that this demonstrated a misunderstanding of the document, and he maintained that the document had been completed accurately and fully.

61. The Structured Judgment Process section of the Barring Decision Process form is divided into sections dealing with "Predispositional factors – Harm-related intrinsic drives and interests", "Cognitive Factors – Harm-supportive thinking, attitude and beliefs", "Emotional Factors – Relationships" and "Behavioural Factors – Self management and lifestyle". Each of these sections in turn has sub-categories relating to different aspects of these factors, with space for the caseworker to:

a. make comments on the applicability of each factor to the case in hand;

b. to indicate the evidential basis for the comment;

c. to indicate whether each matter is an indicator (militating towards inclusion) or a counter indicator (militating against inclusion);

d. to categorise the level of concern; and

e. to explain the rationale for the level of concern.

62. The form contains three sub-factors which are directly concerned with children: "sexual preference for children", "child abuse supportive beliefs" and "emotional congruence with children". In these sections of the form completed in relation to MG the caseworker has left each field blank other than the "level of concern" field which has been marked "NO INFORMATION".

63. While, on the face of it, this would seem to indicate that MG does not pose a risk to children, one must understand DBS's processes for completing the form. These are explained in the SJP Guidance document at pages 322-328 of the appeal bundle. That document explains that this section of the form is intended to capture "predispositional factors in relation to sexual interest in children", but children for these purposes are not defined in the way they are in the 2006 Act but rather as

> "pubescent or pre-pubescent girls (aged approximately 0-12 years) or boys (aged approximately 0-14 years)".

64. This section focuses on whether the individual concerned is, in common parlance, a "paedophile", but it is not necessary for an individual to be found to have paedophile proclivities, urges or beliefs for it to conclude that it is appropriate for that individual to be included in the Children's Barred List. As discussed above in relation to Ground 4, it is sufficient that DBS has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children (a matter that was not in dispute), and the individual poses an unacceptable risk of harm to children (in its 2006 Act sense), taking into account all relevant factors.

65. One might well ask why DBS's own Structured Judgment Process tool doesn't use the definition used in the statute that defines its duties to maintain the Barred Lists. The approach to the form seems designed to confuse and is likely to give rise to a risk that reasons for including an individual in the Children's Barred List who poses a risk to children in the 12-18 age bracket, but not younger children, might not be properly evidenced or indeed thought through (which is presumably the whole purpose of its having a "structured judgment process"). However, that is a matter for DBS: our role is only to decide whether the Barring Decision was based on any material mistake on any point of law or in any finding of fact.

66. The Barring Decision Process document and the Final Decision Letter must be read together, and as a whole. When they are read this way it is apparent that, despite a lack of information or evidence pointing to any particular sexual interest in prepubescent or pubescent children, child abuse supportive beliefs or emotional congruence with children, the "DEFINITE CONCERNS" recorded in respect of the factors "Entitlement to sex", "Exploitative attitudes" and "Callousness / lack of empathy" are sufficient to justify DBS's conclusion that it was appropriate to include him in the Children's Barred List, when those concerns are paired with the finding that MG was not deterred from committing a serious sexual assault on the Victim by the fact that she was decades younger than him, as well as her multiple other vulnerabilities.

67. For these reasons we are not persuaded that DBS failed to follow its own structured judgment process, rendering its decision on the appropriateness of including him in the Children's Barred List irrational. Ground 5 is not made out.

Ground 6 – Pre-Sentence Report

68. Mr Howarth placed great emphasis on the Pre-Sentence Report produced by the Probation Service (at page 247-252), which assessed MG as posing "a medium risk of serious harm to females, in particular his co-workers" and a "low risk of serious harm" to "members of the general public, known adults, staff or himself". The report also states that the author has "no reason to assess that [MG] poses a risk of serious harm to children". Mr Howarth argued that this independent and expert assessment of risk was compelling evidence that his inclusion on the Barred Lists was inappropriate. He

said that the Pre-Sentence Report should be given weight as the risk assessment tools of the Probation Service are "credible and reliable".

69. The Pre-Sentence Report was not before DBS when it made the Barring Decision. MG had been given until 13 July 2019 to provide it but he had not done so nor asked for any extension of time to provide it, and the Probation Service had provided a more recent report, which DBS did take into account in its decision making. Given these facts DBS was entitled to make its decision without waiting for the Pre-Sentence Report.

70. Further, as a matter of principle, DBS is not bound by the findings of reports from other agencies, including the Probation Service, as Judge Knowles QC (now Gwynneth Knowles J) said in *AB v DBS* [2016] UKUT 386 at [42]:

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

Indeed, DBS has a statutory duty to determine the issue of "appropriateness" in respect of those referred to it. It cannot abdicate that function to any other body.

71. In any event, we consider that there are several reasons why the Pre-Sentence Report would have been far less useful to DBS's task of assessing "appropriateness" than Mr Howarth suggests.

72. First, the purpose of the Pre-Sentence Report was to assist the judge in the Crown Court to sentence MG for the Index Offence, while DBS's task is to carry out its statutory function of maintaining the Barred Lists in accordance with the 2006 Act.

73. Second, the Probation Service's categorisation of risk is by reference to "serious harm", and the Probation Service's risk assessment tool (known as "OASys") defines "serious harm" as:

> "an event which is life threatening and/or traumatic and from which recovery, whether physical or psychological, can be expected to be "difficult or impossible"."

This is not the standard which DBS must apply when assessing appropriateness. Even if a person does pose a "low" risk of "serious harm" that does not necessarily mean that it is not appropriate to include them on a barred list.

74. Third, the statement in the Pre-Sentence Report that the author has "no reason to assess that [MG] poses a risk of serious harm to children" is doubly unhelpful in that, not only is it by reference to the inapplicable standard of "serious harm", it is unclear what definition of "children" the author is using. It appears from the response DBS received to their query of the Probation Service that it could be either those under 16 or those under 18, depending on an individual offender's licence conditions. As such, this assessment cannot be used as a proxy for "appropriateness".

75. For these reasons we are not persuaded by Ground 6.

Conclusion

76. For the reasons we have explained above we dismiss this appeal.

77. DBS's Barring Decision was not based on any mistake of law or fact. The Barring Decision is therefore confirmed.

Thomas Church
Judge of the Upper Tribunal

Elizabeth Bainbridge
Michele Tynan
Members

Authorised for issue on 21 March 2022