IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2021-002013-V
(previously V/127/2021)

Between:

MS

Appellant

- v –

DBS

Respondent

Before: Upper Tribunal Judge Church, and Members Bainbridge and Cairns

Decided following a remote oral hearing by CVP held on 05 May 2022
At 10:30.

Representation:

Appellant: In person
Respondent: Ms Carine Patry QC of counsel (instructed by DBS legal)

DECISION

On appeal from the Disclosure and Barring Service (**"DBS"**)

DBS Reference: 00898655289
Final Decision Letter: 21 October 2020

The decision of the Upper Tribunal is to refuse the appeal. The decision of DBS made on 21 October 2020 to include the Appellant in the Children's Barred List was not made in mistake of law and was not based on any mistake of fact. The decision is confirmed.

REASONS FOR DECISION

What this appeal is about

1. This appeal is about MS, who at the relevant time was a musician and band manager at Bedford Town Band. It is accepted by MS that he developed a close and intense friendship with a fellow band member (to whom we will refer as "AB" to protect

her identity) which involved meeting up in person as well as exchanging over ten thousand short text, email and WhatsApp messages. The messages exchanged between MS and AB, while short, were very extensive. It was accepted by DBS that the messages were not overtly sexual in nature, but some of them were very intimate, covering topics such as AB's periods. There was a distinct intensity to the exchanges. At the relevant time AB was 15 years old and MS was 37 years old.

2. In September 2018 MS was referred to the Respondent, which carried out an investigation. The outcome of the process was that the Respondent decided not to place MS on either barred list. This was confirmed to MS in a letter dated 23 November 2018 (the "no barring action letter"), which stated:

> "… having considered the full circumstances we have decided that it is **not** appropriate to include you in the Children's Barred List or the Adults' Barred List.
>
> … We will keep any relevant information we hold on file in accordance with our Data Retention Policy and may take it into account if we receive further information in the future."

3. In September 2019 DBS carried out a "special exercise" to determine whether open cases could be better prioritised to expedite DBS's decision-making processes. This exercise resulted in the discovery that DBS had received a multi-agency submission on 21 January 2019. On 11 September 2019 MS was informed of this development, and on 21 May 20120 he was sent a "minded to bar" letter informing him that DBS thought it might be appropriate to include him on the children's barred list. He was invited to make written representations, which he duly did.

4. DBS re-examined the case for barring MS, examining the new evidence but also re-examining afresh the evidence that it had considered when it considered the initial referral a year earlier. That process led ultimately to a decision to place MS's name on the Children's Barred List (the "Barring Decision"), which was communicated to MS by a "final decision letter" dated 21 October 2020.

5. MS disagreed with the Barring Decision and applied to the Upper Tribunal for permission to appeal it. Permission was granted by Upper Tribunal Judge Church on 21 October 2020 on limited grounds.

6. While the threshold for a grant of permission to appeal to the Upper Tribunal is "arguability", the hurdle at the substantive stage is considerably higher: for an appeal against the Barring Decision to succeed we must be satisfied that the Barring Decision did involve the making of an error of law which was material, or that the decision was based on a material mistake of fact.

The oral hearing of the appeal

7. The oral hearing of this appeal was conducted remotely via CVP on 05 May 2022.

8. The Appellant gave live evidence and made arguments in support of his appeal. He was cross-examined by Ms Patry QC representing DBS.

9. No other witnesses were called to give evidence.

10. Ms Patry QC expanded on the arguments she had set out in her skeleton argument. We are grateful both to the Appellant and to Ms Patry for their clear and helpful submissions and for the respectful and measured way they conducted their respective cases.

The main issues in the appeal

11. The Appellant argued 7 grounds at the permission stage. Judge Church refused permission on 6 of these grounds, which we therefore don't need to address in this decision. However, he granted permission on the issues summarised below.

12. As a preliminary issue, having investigated the initial referral and having informed MS that he would not be included in either of the Barred Lists:

a. did DBS have the power to reopen the case for placing MS on the Children's Barred List based on substantially the same evidence?

b. was DBS entitled to exercise that power to reopen MS's case?

We decided that the answer to both limbs of the preliminary issue was "yes", and we explain why below.

13. Having satisfied ourselves about the preliminary issue, we went on to consider whether the Barring Decision was based on any material mistake on any point of law or in any finding of fact. In particular:

a. was the Barring Decision disproportionate given that, despite the volume of messages exchanged between MS and AB, AB said she didn't feel threatened or overwhelmed by them?

b. were the reasons given for the Barring Decision adequate?

c. was it irrational for DBS to conclude that the nature and extent of MS's contact with AB does not warrant his inclusion on the Children's Barred list, but his lack of insight into the impact that his actions might have on her, and the attendant risk that he may continue contact, does warrant it?

We decided that that the Barring Decision didn't involve any such error, and we explain why below.

The statutory framework

14. 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 children's barred list and the adults' barred list (the "Barred Lists"). Its power and duty to do so arises under the Safeguarding Vulnerable Groups Act 2006 (the "2006 Act").

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

15. 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.

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

17. 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. "Regulated activity" is broadly defined and includes "any form of teaching, training or instruction of children, unless the teaching, training or instruction is merely incidental to teaching, training or instruction of persons who are not children".

18. MS has been included by the DBS on the children's barred list pursuant to Schedule 3, Part 1, paragraph [2] of the SVGA (which relates to children and is headed "Inclusion subject to consideration of representations"). That paragraph provides 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."

19. 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).

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

20. 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

21. The role of DBS is not to punish an individual for past conduct, but rather to protect all children (or, as the case may be, vulnerable adults) from potential future harm. In *R (on the application of SXM)* v *DBS* [2020] EWHC 624 (Admin), the Divisional Court observed that "the function of DBS is a protective forward-looking function, intended to prevent the risk of harm to children by excluding persons from involvement in regulated activities, DBS is not performing a prosecutorial or adjudicatory role" (at [38]).

22. 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"

23. 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."

24. However, what constitutes a mistake in the findings of fact made by DBS on which the decision was based, for the purposes of section 4(2)(b), was considered recently by a three judge panel of 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."

25. 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."

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

> "41. The mistake may be 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."

27. The issue of whether, and in what circumstances, DBS has the power to reopen the case of an individual whom it has previously decided not to place on a barred list has been considered in two recent Upper Tribunal decisions which post-dated the Barring Decision but which preceded the hearing of this appeal.

28. In S*V v DBS* [2022] UKUT 55 (AAC) the panel considered whether DBS has the power to reopen cases in which it has previously decided that "no barring action" is appropriate. It found that such a power was necessarily implied where new evidence was received, given its duty under paragraph 13 of Schedule 3 to the 2006 Act to consider any evidence it receives, "from whatever source or of whatever nature" and decides whether it is relevant to whether an individual should be included in the Barred

Lists. Indeed, the Upper Tribunal went further to find that, even in the absence of new evidence or a new referral, DBS has a general power to reopen closed cases due to the huge public importance attached to ensuring the integrity of the Barred Lists:

> "29.There is a very considerable public interest in DBS getting its decisions right, both in terms of including those who should be in the Barred Lists and, equally, in leaving out anyone who shouldn't be in the Barred Lists. The consequence of either type of error are potentially very grave indeed: on the one hand the risk of harm to a vulnerable adult or child may be realised if an individual who should be barred is permitted to continue engaging in regulated activity. On the other hand, if a person is included in the Barred Lists in error this will involve both a serious and wrongful infringement of that individual's human rights and the loss to society of someone who may play a valuable and much-needed role working or volunteering with children or vulnerable adults, or both.
>
> 30. Given the strength of this public interest, given that there is an implicit power to reopen "no barring action" decisions so that DBS may carry out its duty under paragraph 13 of Schedule 3 to the 2006 Act, and given that the 2006 Act contains no express or necessarily implied prohibition on DBS reopening "no barring action" cases, we are satisfied that DBS does have a general power to reopen such closed files for the purpose of maintaining the integrity of the Barred Lists, even if no new referral is made and no new evidence has been forthcoming."

29. In *R (Wood) v Secretary of State for Education* [2011] EWHC 3256 (Admin), a judicial review case which dealt with a predecessor barring scheme operated by the Secretary of State for Education, Singh J (now Singh LJ) reviewed the authorities on the doctrine of "legitimate expectation" and identified the proper test to be that set out in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213: the Court must ask itself whether there was a statement that was "clear, unambiguous and devoid of relevant qualification" ([39]), which Singh J said must be judged by "how, on a fair reading of the promise, it would have been reasonably understood by those to whom it was made." (*Wood* [46]). If a legitimate expectation is established, it is for the person who created it to justify departing from it (*Wood* [48] and [52]). This must involve establishing first that there was a legitimate aim in the public interest, and second that it is proportionate to go behind the legitimate expectation, and Singh J identified three factors that were relevant to the determination of proportionality in the case before him: the right to make representations to the panel revisiting the listing decision, the panel's access to specialist expertise, and the availability of a right of appeal against the reopened decision.

30. In *JT v DBS* [2022] UKUT 29 the Upper Tribunal considered *Wood* and found no reason why the three factors identified by Singh J would not apply equally to appeals before the Upper Tribunal against decisions of DBS. The Upper Tribunal drew a distinction between the decision to revisit a previous decision in favour of a person on the one hand, and the decision to include the person on a Barred List on the other. The former was a threshold issue. Once the threshold was crossed, the normal rules under the 2006 Act applied.

31. The decision of the Court of Appeal in *Khakh v Independent Safeguarding* Authority [2012] EWCA Civ 1341, a case which concerned a decision of the

predecessor to DBS, addressed the standard to which the reasons given for barring decisions are to be held. In his judgment Elias LJ said of the obligation to give reasons:

> "23. …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."

The oral evidence

32. We had the benefit of hearing live evidence from MS at the hearing.

33. In his evidence MS emphasized the impact that the whole barring process had had both on him and on AB. He said that he had "pulled away from" any activities or friendships that might risk his coming to the attention of the DBS again, as the whole barring process had been highly emotional, draining and stressful both for him and for AB.

34. He said that, while looking back he could see that "it could be interpreted that there were safeguarding issues", he looked at it very differently: in his view he was supporting his 15 year old friend who had a difficult home life. He said that his focus on providing this support might have blinded him to how his close relationship with AB might have looked to others. While he did at one point accept that, "looking back now", his relationship with AB was inappropriate, he quickly returned to denial of any inappropriateness and characterising the situation as one in which he was acting honourably, standing by his friend at her time of need despite the adverse consequences which this would visit on him.

35. Under questioning by Ms Patry QC he conceded that his relationship with AB was "close", that he had been the first to say "I love you" in the messages they exchanged, that he had discussed intimate details with AB, including asking her about her periods, that he had continued their close friendship after she had disclosed having romantic feelings for him, and that he continued to maintain contact with AB despite her mother, people involved in the band, and the police all expressing concerns about the relationship. He said that contact stopped only when AB's mother threatened to take legal action.

36. In response to questions about his failure to take on board advice from others about his relationship with AB, MS said that he struggled to take the opinions of those he saw as clearly prejudiced against him into account.

37. When asked directly whether he thought that AB had suffered harm as a result if the relationship between them he said:

> "Not the relationship per se. She has been harmed by being put through this process. Yes, technically, in the sense that the process was caused by this relationship, but there was no direct harm. She didn't feel threatened or stressed. It was only because of the consequences of it."

38. He did not agree with the proposition put to him by Ms Patry QC that for an adult to continue a close friendship with a teenager who had intense romantic feelings for them could cause emotional harm. He said he "can't see that it is not a part of life that people go through, whether with an adult or a child". He said it was "part of growing up to learn where boundaries are in relationships. Part of what you have to deal with whether older or younger." He didn't appear to acknowledge any distinction between a relationship between two adults or two children on the one hand and a relationship between an adult and a child on the other hand. He drew an equivalence between AB's situation and a teenager having a crush on a celebrity, saying that this could "cause a degree of emotion, but can't be avoided."

39. Tribunal Member Cairns invited MS to consider how he would feel if he learned that a football coach or teacher of his 15 year old nephew were exchanging messages with his nephew with a similar volume and intensity to the messages MS had exchanged with AB. MS said that he would have "very mixed" feelings about it. He said he would view the situation as "not appropriate" and it would make him "uneasy".

40. In response to questions put by Tribunal Member Bainbridge, MS revealed that he had resumed message contact (but not in-person contact) with AB "around her 16th birthday" because he considered that she would then be "legally allowed to determine who she has contact with". He clarified that he had sought no advice in relation to this and had not specifically investigated the situation, and that it was based solely on his own understanding. He said that he had resumed contact because he "couldn't let her self-destruct as she had nearly done while going through this process", saying that she had "been getting very suicidal" and required support which wasn't being provided by her parents. He said that he had encouraged her to seek help with her suicidal thoughts, but he couldn't recall telling her parents about them other than perhaps encouraging her father to "speak to her about how she is feeling". He explained that the "main issue" was that AB felt responsible for the situation that MS was in, with the involvement of the police and DBS. He said he "can't get her to understand that she is not to be blamed".

41. MS said that he exhibited a lot of autistic traits, and that this had been a big realisation for him, albeit that he did not claim to have any diagnosis or to have sought any kind of neurological or mental health assessment. He said that he interpreted the world in a different way from others, and that this has caused him to go back and look again at how his relationship with AB might have looked to others.

42. Whatever lessons MS may have learned from his experience of the barring process, he remained adamant that he would continue to "support" AB. He said:

> "I don't abandon my friends. I know it's put me in a position like this. I can't change how we've got to this situation., but I can't stop supporting her. It's just the way I'm built."

43. MS said that he hoped that he could resume face-to-face contact with AB in due course and that they could revert to doing things like going to the cinema and shopping, as well as perhaps having sleepovers as they had previously discussed. He denied having any hopes of a romantic relationship.

Arguments:

44. MS represented himself at the hearing. Quite understandably, he didn't make technical legal arguments, and some of his arguments strayed some way from the

grounds on which permission had been granted. He didn't make any arguments on the ground of appeal which turned on whether DBS had jurisdiction to reconsider his case, and he did not seek to distinguish his case from *JT v DBS* or *SV v DBS*.

45. MS was very critical of DBS's decision-making process. His main criticisms were that:

a. the barring process was too focused on how things had been at the time of the first investigation, with no assessment of how things have changed since then;

b. AB was not included in the process and was not listened to. Neither her evidence nor her views were sought. He found it "strange and counter-intuitive" for DBS to conclude that AB suffered emotional harm when she has told him that she didn't;

c. DBS has prejudged matters and MS's representations were overlooked or treated dismissively;

d. MS has not, save at the hearing, been asked how he feels, or how he would act in future;

e. the Barring Decision did not recognize that MS had had no training in safeguarding, and little understanding of this area;

f. it was unfair that his right to appeal to the Upper Tribunal was so circumscribed, and not a full merits appeal, which meant that the focus was too narrow.

46. Ms Patry QC represented DBS. She addressed each of the grounds of appeal on which permission had been granted.

47. In terms of the jurisdiction ground, she argued that *JT v DBS* and *SV v DBS* establish that DBS has the power to reopen closed cases (those where a "no barring action" decision has been made and communicated to the individual), and that the letter sent to MS in this case did not establish any legitimate expectation that his case wouldn't be reopened in the future (unlike in *Wood*). She submitted that, even if the letter did establish a legitimate expectation, for the same reasons as those given in *Wood*, there was a strong public interest in reopening the case and to do so was proportionate to the detriment that it would cause MS and others, and it was relevant that MS had a right of appeal.

48. In terms of the proportionality ground, Ms Patry QC maintained that it was unnecessary for DBS to establish that AB was overwhelmed by the extent and nature of her contact with MS for it to conclude that it was appropriate and proportionate for him to be placed on the Children's Barred List. Rather, given its protective remit, it was sufficient for it to be satisfied that, given the sheer volume of messages, the potential to cause harm if the conduct were repeated, and MS's lack of insight, created a risk of harm such that the Barring Decision was proportionate.

49. In terms of the ground relating to adequacy of reasons, it was submitted that, if the proper standard (being that set out by the Court of Appeal in *Khakh*) is applied, DBS's reasons (not only in its final decision letter but also in the Barring Process Decision document) comfortably satisfy it, explaining in some detail the balancing exercise that it carried out and allowing MS to understand why his representations were to no avail.

50. In terms of the ground which related to whether DBS gave adequate reasons for changing its assessment of the appropriateness of barring MS, given the consistency between the original evidence it considered and the new evidence discovered, Ms Patry QC said that the ability to see the entirety of the messages allowed DBS to form a much clearer assessment of the risks, and that it was in any event incumbent on DBS to re-examine all the evidence, not only the new evidence, and make the right decision.

51. Finally, with respect to the irrationality ground, Ms Patry QC stressed that the bar for irrationality was a very high one. She argued that, given that DBS's duty was to assess risk, appropriateness and proportionality, it was entitled to arrive at the Barring Decision based on MS's lack of insight and the risk of repetition (whether with AB or any other person) rather than on the impact that his past behaviour had had. She said it didn't matter whether MS's lack of insight could be explained in terms of "autistic traits" or a lack of training, because DBS's focus had to be not on culpability but on risk of future harm to children.

52. Ms Patry QC cautioned the panel that several of the issues engaged in the appeal risked straying into the territory of "appropriateness", which is beyond the jurisdiction of the Upper Tribunal.

Discussion

Preliminary issue 1: does DBS have the power to reopen closed cases?

53. Judge Church's grant of permission was made when the Upper Tribunal had not yet considered whether, and if so in what circumstances, DBS had the power to reconsider or reopen the case of an individual whom it had previously decided not to bar. However, by the time of the oral hearing of this appeal the Upper Tribunal had considered these issues in two substantive appeals: *JT v DBS* [2022] UKUT 29 (AAC) and *SV v DBS* [2022] UKUT 55 (AAC), which decided that the Respondent does have the power to reopen closed cases.

54. For the same reasons as are set out in *SV v DBS* at paragraphs [19] to [30], which are summarised briefly in paragraph [26] above, we are satisfied that DBS has a general power to reopen closed cases for the purpose of maintaining the integrity of the barred lists.

Preliminary issue 2: did the "no barring action" letter establish a legitimate expectation that MS's case would not be reopened?

55. The "no barring action" letter sent to MS included the following statements:

> "… having considered the full circumstances we have decided that it is **not** appropriate to include you in the Children's Barred List or the Adults' Barred List.
>
> …
>
> We will keep any relevant information we hold on file in accordance with our Data Retention Policy and may take it into account if we receive any further information in the future…"

56. We do not consider that the "no barring action" letter, when read as a whole, can be said to represent a statement that is "clear, unambiguous and devoid of relevant qualification" such as to establish a legitimate expectation on the part of MS that his case would not be reopened in the future.

57. The wording in MS's letter is remarkably similar to that in the letter received by Mr Wood, which Singh J found to create a legitimate expectation that Mr Wood's case would not be reopened. However, even if the "no barring action" letter did create for MS a legitimate expectation that his case would not be reopened unless further information was received, in this case DBS did receive further information in the form of the second referral, which included significant new evidence including the full transcripts of the messages which had previously not been available to DBS. The present case is therefore distinguishable from *Wood.*

58. In any event, the same factors apply in this case to those relied upon by Singh J in *Wood* and the Upper Tribunal in *JT v DBS* and *SV DBS* as making it proportionate to go behind a legitimate expectation that a case would not be reopened, namely the opportunity to make representations prior to the decision on barring being made, the specialist expertise of the decision maker, and the availability of an appeal right to an independent judicial body. Given the pressing public interest in ensuring that the Barred Lists are accurate, both in terms of including those who represent an unacceptable risk of harm to children or vulnerable adults should they be permitted to engage in regulated activity and in terms of excluding those who do not pose such a risk we consider that, to the extent that any legitimate expectation arose, DBS was entitled to go behind it.

Was the Barring Decision disproportionate given that, despite the volume of messages exchanged between MS and AB, AB said she didn't feel threatened or overwhelmed by them?

59. While the Upper Tribunal is expressly prohibited from considering questions of "appropriateness" of including a person on a barred list (see section 4(3) of the 2006 Act and *B v ISA* [2013] 1 WLR 308, a case that concerned a predecessor scheme)) it may determine questions of proportionality and rationality. When doing so it must accord "appropriate" weight to the decision of the authority. The Court of Appeal confirmed in *B v ISA* that the principle set out at [16] of *Belfast City Council v Miss Behavin' Limited* [2007] UKHL 19 continues to apply:

> "If the [local authority] exercises that power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights."

60. The principle of "proportionality", in the context of an appeal against a barring decision, is the principle that the impact of DBS's response (i.e. the decision to bar) should be proportionate to the risk posed by the individual in the future. DBS's remit extends neither to punishment nor to deterrence: it is solely concerned with the protection of children or, as the case may be, vulnerable adults from exposure to unacceptable risk from the activities of referred individuals should they be permitted to engage in regulated activity (see *R (on the application of SXM) v DBS* (2020) EWHC 524 at [38]).

61. The assessment of future risk is necessarily based on an assessment of the individual's past conduct because it must be evidence-based. However, the decision whether to bar turns not on a calibration of the degree of harm caused by the past actions, but rather on an expert assessment of the degree to which the facts found about the referred person's previous conduct, when considered in the context of other relevant factors such as the degree of insight developed into that conduct, indicates that there would be an unacceptable degree of risk of harm in the future (whether to

the individual or individuals affected by the past conduct or to any other children or vulnerable adults) should they be permitted to engage in regulated activity. Assessment of proportionality inevitably involves consideration not only of the likelihood of such conduct occurring but also the harm that such conduct could be expected to have were it to occur.

62. DBS's reasoning on proportionality is set out in its "Barring Decision Process" document. The passage of DBS's reasoning specifically on the issue of proportionality is very brief:

> "It is acknowledged that a bar would impact on [MS]'s ability to engage in any hobbies and volunteering activities which would fit the definition of regulated activity. It would not prevent him from playing in a band regardless of the age of the participants. It may also impact on his ability to find work. [MS]'s rights under Article 8 of the European Convention on Human Rights have been considered, barring [MS] on the Children's List is also a proportionate response."

63. On its own this may appear to be an inadequate assessment of proportionality. However, it cannot be read in isolation, because the issue of proportionality is so intertwined with the issues of appropriateness, the assessment of the degree of likelihood of the conduct which has given rise to the concerns being repeated, and the foreseeable harm that may arise should it be repeated. On these topics DBS has given detailed reasons. Its reasons are balanced, acknowledging factors in MS's favour (which DBS refers to as "Counter Indicators") as well as identifying factors of concern (referred to by DBS as "Indicators").

64. MS's case is largely based on his understanding that, because he has not been found to have had a malevolent intent in his contact with AB, because he has not been found to have had any sexual contact with her, and because he says he was motivated by a genuine belief that he was providing much-needed emotional support, it couldn't be proportionate to place him on the children's barred list. This is a misunderstanding.

65. First of all, MS misunderstands the import of AB's saying that she was not overwhelmed by the messages. Such a statement does not necessarily establish that she was not overwhelmed or threatened, or that she did not otherwise suffer harm as a result of their relationship. DBS's analysis of the transcript of messages between MS and AB gave rise to a concern that MS had engaged in grooming. It is in the nature of "grooming" behaviour that the person to whom it is directed is often unaware that they are being groomed, and unaware of any harm suffered. Alternatively, the subject of grooming may believe that they have suffered harm but believe that the harm is the result not of the actions of the person who has groomed them but rather of the intervention made to bring the grooming to an end. DBS was entitled to conclude from the evidence before it that MS had engaged in grooming, albeit that it did not find that this was with a view to sexual exploitation, irrespective of whether AB considered herself to have been groomed.

66. In his oral evidence MS spoke of AB blaming herself for the situation that MS now finds himself in. He said that he "can't get her to understand she is not to be blamed", and he said that her feelings of responsibility had led to her experiencing persistent suicidal thoughts. MS could accept that this amounted to harm, but he considered that it was not his relationship with AB that had caused the harm, but rather the interruption in their contact that was to blame. DBS was entitled to take a different view. Its position

that AB was harmed, and that the harm stemmed from the intense relationship between MS and AB, was a perfectly rational one.

67. DBS formed the view that there was a considerable risk that MS might engage in harmful behaviour in the future. Its conclusion on this was based on evidence. As it explained under the heading "Appropriateness and Proportionality Assessment" in its Barring Process Decision document:

> "[MS] was told by a number of sources to stop contacting [AB]. He failed to adhere to this advice stating that he had done nothing wrong. This again raises definite concerns in that [MS] believed that there was no harm in his actions and was oblivious to wider safeguarding protocols. It is acknowledged that [MS] appeared to be a family friend and that he included [AB's] sister in trips to the cinema but his focus appeared to be entirely on [AB] and whilst a sexual motivation cannot be demonstrated he behaved in an irresponsible manner by persisting with such a high level of messaging. [MS] was unable to or unwilling to see that he may have harmed [AB] emotionally and did not modify his behaviour in any manner even when under investigation. [MS] appears to have put his own feelings and needs for emotional warmth ahead of any consideration of [AB's] well being (sic). As a 37 year old adult he should have been aware of the implications of engaging in such an intense friendship with a then 15 year old child."

68. MS's own evidence at the hearing did nothing to cast doubt on the correctness of DBS's approach to its decision making or the conclusions it reached in this regard. MS said that he wouldn't allow himself to "get anywhere near" this kind of situation again, and he complained that no-one had asked him about how he would behave in the future but had simply focused on the past.

69. However, his evidence was stark: even having been through the process of being investigated by the police and having been barred by DBS, he has re-established message contact with AB. He did so without seeking advice as to whether such a resumption might be inappropriate, or potentially harmful. He displayed recklessness by simply assuming that, now that AB has reached her 16th birthday, she should be entitled to make her own decisions as to whom she communicates with. This was despite AB having told him about her feelings of responsibility and her suicidal thoughts. Despite his saying that he wouldn't get "anywhere near" such a situation again, he has done precisely that.

70. The likelihood of future repetition of the behaviour of concern is apparent from MS's own words at the hearing:

> "I don't abandon my friends. I know it's put me in a position like this. I can't change how we've got to this situation., but I can't stop supporting her. It's just the way I'm built."

71. Given its findings in relation to the way MS responded to advice from others, and to the experience of having been investigated, it was entitled to conclude that there was a significant risk of his repeating similar potentially harmful behaviour in the future, whether in relation to AB or to another child.

72. For the reasons set out above, we are satisfied that there was no error of law in DBS's proportionality assessment.

Were the reasons given for the Barring Decision adequate?

73. Two of the grounds of appeal in respect of which permission was granted related to the adequacy of DBS's reasons for the Barring Decision.

74. The first related to the adequacy of its reasons in relation to the proportionality of the Barring Decision. The reasons which relate specifically to proportionality are undeniably brief. However, for the reasons set out in paragraphs [62] and [63] above we are satisfied that, when read in the context of the extensive and considered reasons given for DBS's assessment of the risk of future harm and appropriateness, which include a balancing of Indicators and Counter Indicators, they clear the hurdle established by *Khakh v ISA* and approved by the Court of Appeal recently in *DBS v AB* (at [44]) comfortably.

75. The second reasons ground was that DBS may have failed adequately to explain why it changed its assessment when it reopened the case in 2020, even though the new material which it had received appeared to be entirely consistent with the evidence before it when it made its earlier assessment in 2018 that it was neither appropriate nor proportionate to include MS's name in the Children's Barred List.

76. The new evidence that was available to DBS when it reopened MS's case in 2020 included the full transcripts of the text and WhatsApp messages that passed between MS and AB, printouts of some of the email traffic, as well as notes from the police investigation. While this was consistent with the evidence it had considered when it first considered including MS on the Children's Barred List in 2018, there was a qualitative difference in that evidence. Because DBS was able to see the messages themselves, rather than the police summary and analysis of them, it was better able to apply its own analysis to the evidence. It was able to see from the messages how the relationship developed, and how MS escalated the relationship by, for example, telling AB that he loved her and introducing intimate topics such as AB's periods from which DBS reasonably inferred that MS was unable to adhere to appropriate boundaries in his relationship with AB given their respective statuses as adult and child.

77. While DBS could perhaps have been clearer as to why it changed its mind on the appropriateness and proportionality of barring MS, to the extent that this amounts to a defect in its reasons, it is not a material one. DBS explained with adequate clarity, by reference to the evidence, why it made the Barring Decision, and why MS's representations were to no avail. That is what was important and that is adequate to clear the bar set in *Khakh v ISA*.

78. DBS had the power to reopen the case, and when it discovered further evidence had been received it was placed under a statutory duty to investigate it and to determine, based on all the evidence available to it, whether it was then appropriate and proportionate for MS to be placed on either or both barred lists. It was not required to do this by reference to the earlier "no barring action" decision (except in the context of assessing whether it was proportionate to reopen the case to the extent that there was a legitimate expectation that the matter would not be reopened, as discussed at paragraph [58] above).

79. This is not a case in which any uncertainty as to why DBS reached a different conclusion from the "no barring action" decision is liable to obscure any misunderstanding or misapplication of the law, because whether it considered that the previous decision was made in error or whether it considered the earlier decision correct on the evidence then available, but it was persuaded by the new evidence that

a different outcome was indicated, it would have been equally entitled to arrive at the Barring Decision.

80. For the reasons set out above we are satisfied that the reasons given for the Barring Decision are adequate.

Was it irrational for DBS to conclude that the nature and extent of MS's contact with AB does not warrant his inclusion on the Children's Barred list, but his lack of insight into the impact that his actions might have on her, and the attendant risk that he may continue contact, does warrant it?

81. We understand why MS finds it perplexing and counterintuitive that DBS can conclude, on the one hand, that the nature and extent of his contact with AB doesn't warrant his inclusion on the Children's Barred List, but on the other hand his lack of insight does. However, it makes sense when one grasps the fundamental principle that decisions on barring are properly based on an evidence-based assessment of the future likelihood of conduct which is liable to cause harm to those whom the 2006 Act was enacted to protect, taking into account both the likelihood of the conduct being repeated and the severity of the harm that might eventuate if it were. It is intended to be protective and preventative, not punitive. That is why DBS was entitled to approach the Barring Decision as it did, and to place such weight on its assessment of MS's degree of insight into the potential for his conduct to cause harm.

82. MS's evidence on AB's disclosure of persistent suicidal thoughts caused DBS to change its position on whether MS's past conduct had been sufficient to warrant his inclusion in the Children's Barred List, with Ms Patry QC arguing at the hearing that an inclusion on this basis was warranted after all. This is something that we don't need to express a view on because we are satisfied that DBS's previous position was not irrational.

83. MS's written submissions and his oral evidence at the hearing demonstrated a stark lack of insight into how problematic and potentially harmful his actions have been (no matter how well-intentioned they may be). Given this lack of insight DBS was entitled to conclude that the likelihood of similar conduct being repeated is high. This is especially the case given MS's dismissive attitude to the input of third parties who have expressed concerns about their relationship.

84. The panel found MS to be absolutely convinced that he had acted only in AB's best interests. He considered it a matter of honour that he had refused to "abandon" AB despite the input of third parties including her mother, social services, the police and DBS clearly advising that it was inappropriate. He said explicitly that he "can't stop supporting her" because "it's just the way I'm built". This inability to understand or to respect boundaries is concerning. It was apparent from his evidence at the hearing that he had recklessly resumed contact with AB without seeking any advice on the appropriateness of this. This demonstrates that DBS was correct in its assessment that there was an unacceptable risk that MS would repeat the conduct of concern: the conduct has already been repeated. MS's assertion that he would support his friends and wouldn't "abandon" them in difficult circumstances was made not only in relation to AB but was stated as a code applicable to MS's behaviour towards any friend. This is supportive of DBS's reasoning as to why it was both appropriate and proportionate that he should be placed on the children's barred list based on a concern to protect not only AB but other children with whom MS may develop intense friendships with.

85. For the reasons set out above we are satisfied that the Barring Decision was not irrational.

MS's remaining criticisms

While not strictly necessary, given that permission wasn't given to pursue them, we nonetheless address below (in short order) the further arguments and criticisms made by MS at the hearing.

86. His first criticism was that the barring process was too focused on how things had been at the time of the first investigation, rather than how matters had developed since. The criticism proceeds from an assumption that MS has developed insight and changed his behaviour in the light of advice given during the process, but MS's evidence at the hearing demonstrated that any insight gained to date remains quite superficial. While he expressed regret about the whole barring process and its impact on both AB and himself, he considered that the responsibility for this impact lay with DBS rather than with him. He was able to speak of AB having suicidal thoughts and blaming herself for the predicament that MS found himself in, but he was unable to see this as harm arising from an inappropriate relationship. He had also resumed contact with AB around the time of her 16th birthday and didn't acknowledge any potential risk of AB suffering further harm as a result.

87. The second criticism was about AB's views not being duly considered in the barring process. We are satisfied that there was no error in DBS's approach in this regard because DBS was investigating concerns that AB had been subjected to grooming by MS. As explained in paragraphs [61] et seq. above, victims of grooming are rarely aware that they are being, or have been, groomed. Assurances given by AB that she has not been groomed by MS can therefore be expected to command very little weight. Similarly, assurances by AB that she has not been harmed by MS's conduct can be expected to carry little weight because a teenage child who has been groomed may very well not understand the harm that they have experienced, or that they have been harmed at all. MS himself gave stark evidence at the hearing that persuaded the panel that AB had experienced significant harm.

88. MS's third criticism was that DBS had prejudged matters and not given proper consideration to his representations. We are not persuaded that this criticism is well-founded because DBS explained in some detail in its Barring Decision Process document what it made of his representations. As well as listing "Indicators" supportive of a decision to bar, it acknowledged several "Counter-Indicators" which tended to militate against barring, some of which arose from things that MS had said in his representations. However, there was very little dispute as to the facts relating to MS's conduct. The difference between MS and DBS was mainly a difference of understanding of the effect that his conduct had on AB, or might have on AB or another child in future if repeated. DBS explained its reasons for finding that it was appropriate and proportionate to place MS's name on the Children's Barred List.

89. MS's fourth criticism was that he had not, save at the hearing, been asked how he feels or how he would act in future. This is puzzling, given that MS was given the opportunity to make representations and he did so at some length. DBS was entitled to form its own view based on the evidence as to the likelihood of MS repeating the behaviour of concern, rather than relying on MS's own assertions. It was entitled to make the decision it did based on the evidence available to it, and MS's evidence at the hearing did nothing to place doubt on the Barring Decision. Indeed, MS revealed

that he had already resumed contact with AB and he told the panel that he "can't stop supporting her".

90. MS's fifth criticism related to DBS's failure to acknowledge or give weight to his lack of formal safeguarding training, and his lack of understanding of this area having never worked in a role such as a teacher or social worker. This criticism stems again from an understandable confusion as to the nature of DBS's role in managing the barred lists: whether or not someone is included on the barred lists is based on DBS's assessment of risk of harm, not on culpability. While any training that a person has had in safeguarding issues may be relevant to DBS's assessment of appropriateness, someone who has had no training will still be liable to be placed on a barred list if their conduct gives rise to an unacceptable risk of harm. A lack of understanding is no "defence" to this, but rather a continued lack of understanding would tend to indicate a higher risk of repetition. Conversely, if someone has engaged in conduct which has been of concern but has subsequently gained insight into the risks associated with that conduct, possibly as a result of receiving training, that would tend to indicate a lower risk of repetition. Similarly, MS's unevidenced assertion that he has "autistic traits" and that this might explain why he didn't view his behaviour as problematic, does not assist him because DBS's task is to make evidence-based decisions on appropriateness and proportionality based on its expert assessment of risk. A lack of understanding about potential for harm is a relevant factor in such an assessment. The root cause of any lack of understanding is relevant only to the extent that it has a bearing on the likelihood of improvement in that understanding and reduction of risk.

91. MS's final criticism was that it was unfair that his right of appeal to the Upper Tribunal was so circumscribed, and that fairness demands that he should have a full merits appeal against the Barring Decision. The limitations to the jurisdiction of the Upper Tribunal to deal with appeals against safeguarding decisions are provided for by statute, as that statute has been interpreted in binding judicial decisions. We must apply the law as it is, not as MS thinks it should be. As such we can interfere with the Barring Decision only if we are satisfied that it involved the making of a material mistake of law or was based on a material mistake of fact. For the reasons we have given above we are not satisfied that the Barring Decision involves any such error.

Conclusion

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

93. 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
Brian Cairns
Members

Authorised for issue on 6 July 2022