THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Upper Tribunal Case No. V/3024/2010

PARTIES

XY

and

The Independent Safeguarding Authority

APPEAL AGAINST A DECISION OF
THE INDEPENDENT SAFEGUARDING AUTHORITY

DECISION OF THE UPPER TRIBUNAL

JUDGE WIKELEY

MS MICHELE TYNAN (SPECIALIST MEMBER)

MR JOHN HUTCHINSON (SPECIALIST MEMBER)

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal by the appellant.

The decision of the Independent Safeguarding Authority taken on 26 May 2010 under file reference 79/01117 does not involve an error on a point of law or on any material finding of fact and is confirmed.

The Upper Tribunal further DIRECTS that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify any person who has been involved in the circumstances giving rise to this appeal.

This decision and direction are given under section 4(5) of the Safeguarding Vulnerable Groups Act 2006 and rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

REASONS FOR DECISION

Introduction

1. This is the first appeal to be heard by the Upper Tribunal under the Safeguarding Vulnerable Groups Act (SVGA) 2006 (also "the 2006 Act"). The Upper Tribunal's decision is to dismiss the appellant's appeal. In our judgment the decision of the Independent Safeguarding Authority (ISA), taken at the ISA Board Case Committee on 26 May 2010 under file reference 79/01117, and communicated by letter dated 19 July 2010, does not involve any error either on a point of law or a matter of material fact.

2. Although we have in this instance dismissed the appellant's appeal, we also make a number of observations on the way in which this matter has been handled by ISA. We are sure that the ISA senior management team will take these points on board as they review their procedures.

3. There is to be no publication of any matter likely to lead members of the public directly or indirectly to identify any person who has been involved in the circumstances giving rise to this appeal: rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 applies (SI 2008/2698). We take the view that neither the appellant, nor those involved in the allegations against him, should be identified by name, directly or indirectly, in this decision. We accordingly refer to the appellant as XY and to the witnesses also by initials, e.g. AB, CD, etc (which, again, are not their true initials). The parties alone have been provided with a key or legend which identifies all those concerned.

4. We held an oral hearing of the appeal in Manchester on 20 June 2011. The appellant was present, but did not give evidence, and was represented by Miss Assunta Del Priore of Counsel. ISA was represented by Mr Ben Jaffey, also of Counsel. We are indebted to them both for the clarity of their oral submissions (and to all the representatives involved for their detailed written submissions).

5. In this decision we deal with in turn: (i) the legal framework established by the SVGA 2006; (ii) ISA's structure and procedures in carrying out its functions under the

SVGA 2006; (iii) the referral, investigation and decision in this case; (iv) the grounds of appeal in this case.

The legal framework of the Safeguarding Vulnerable Groups Act 2006

6. Since the 1930s at least, government departments have maintained lists designed to ensure that, so far as possible, unsuitable people are not appointed to positions involving either contact with children or responsibility for them. The previous arrangements were summarised by Hedley J., giving the leading judgment in the Court of Appeals' decision in *D v Buckinghamshire CC* [2008] EWCA Civ 1372; [2009] 1 FLR 881 (at [4]-[7]). Those schemes included the POCA (Protection of Children Act) and POVA (Protection of Vulnerable Adults) lists, operating under the Care Standards Act 2000. The *Bichard Inquiry Report*, set up in the wake of the Soham murders, identified systemic failures in the previous vetting and barring systems (HC 653, June 2004). Recommendation 19 of the *Bichard Inquiry Report* called for a single, consistent national registration scheme for those working with children or vulnerable adults.

7. As Hedley J. further explained in *D v Buckinghamshire CC* (at [8]):

> "This multiplicity of lists and division of responsibilities was always likely to provide fertile soil for confusion and error as was pointed out in the Report in June 2004 of the Bichard Inquiry. As a result Parliament legislated again and there came on to the Statute book the Safeguarding Vulnerable Groups Act 2006 the purpose of which was to harmonise and unify the various statutory lists. The Act legislates for an Independent Barring Board which will in fact be known in practice as the Independent Safeguarding Authority. The intention is that this authority will take all the discretionary barring decisions presently taken by the relevant Secretaries of State and that the various lists (civil and criminal) will be replaced with two lists: one relating to children and one to vulnerable adults. It will also widen the scope of the activities covered."

8. The requirement that ISA maintains the two lists is contained in section 2(1) of the SVGA 2006. Section 2(2) provides that Part 1 of Schedule 3 of the Act will apply for the purpose of determining whether an individual is included in the children's barred list, while s.2(3) stipulates that Part 2 of that Schedule will apply for the purpose of determining whether an individual is included in the adults' barred list. The present appeal concerns a decision to place the appellant on the children's barred list only.

9. The serious consequences for an individual of being placed on either of the barred lists were explained by Wyn Williams J. in *R (on the application of Royal College of Nursing & Ors,) v Secretary of State for the Home Department & Anor* [2010] EWHC 2761 (Admin); [2011] 117 BMLR 10 ("the *Royal College of Nursing* case"):

> "4. The effect of being placed upon one of the lists is specified in section 3 of the Act. Section 3(2) provides that a person is barred from regulated activity relating to children if he is included in the children's barred list and subsection (3) provides that a person is barred from regulated activity relating to vulnerable adults if he is included in the adults' barred list. Regulated activity relating to children and vulnerable adults is defined in Parts 1 and Parts 2 respectively of Schedule 4 to the Act. In summary, regulated activity constitutes working with children or vulnerable adults either in employment or voluntarily. The prohibition on engaging in regulated activity is enforced by

> criminal sanctions. Section 7 of the Act provides that an individual commits an offence if he seeks to engage in regulated activity from which he is barred; offers to engage in regulated activity from which he is barred; or engages in regulated activity from which he is barred. The offences created by this section are triable both upon indictment and summarily. If the offence is tried upon indictment and the alleged offender is convicted he faces a maximum term of imprisonment of 5 years."

10. We also recognise that Baroness Hale of Richmond, holding in *R (On the application of Wright) v Secretary of State for Health & Anor* [2009] UKHL 3; [2009] AC 739 ("the *Wright* case") that the pre-SVGA 2006 schemes engaged both Articles 6 and 8 of the European Convention of Human Rights, ruled that "The right to remain in the employment one currently holds must be a civil right, as too must the right to engage in a wide variety of jobs in the care sector even if one does not currently have one" (at [19]). Furthermore, "the scope of the ban is very wide, bearing in mind that the worker is placed on both the POVA and the POCA lists. The ban is also likely to have an effect in practice going beyond its effect in law. Even though the lists are not made public, the fact is likely to get about and the stigma will be considerable" (at [36]).

11. In the *Wright* case the House of Lords held that the scheme under the Care Standards Act 2000 was incompatible with both Articles 6 and 8 of the Convention. As Baroness Hale held, "The process does not begin fairly, by offering the care worker an opportunity to answer the allegations made against her, before imposing upon her possibly irreparable damage to her employment or prospects of employment" (at [28]). The scheme under the SVGA 2006 is materially different, in that an individual is placed on the barred lists automatically only if he or she has been convicted of, or been cautioned for, a specified criminal offence. Thus, as noted above, Part 1 of Schedule 3 of the SVGA 2006 provides the criteria for deciding whether an individual should be included in the children's barred list. Those persons convicted of, or cautioned in respect of, various specified sexual or other offences are automatically included, with or without the opportunity to make representations (SVGA 2006, Schedule 3, paragraphs 1 and 2). These cases are known as "auto bars" or "auto bars with reps".

12. In the *Royal College of Nursing* case the claimants made four specific Convention challenges to the new scheme established by the 2006 Act (set out at [34]). A number of the individual claimants had accepted police cautions which had led to them being automatically included on the barred list, but subject to the right to make representations. Wyn Williams J. dismissed three of the Convention-based challenges, but made a declaration of incompatibility in respect of the first, namely the fact that, contrary to Articles 6 and 8, the scheme requires ISA to place individuals who have been convicted or cautioned for a wide range of offences on the barred lists without the right to make representations prior to listing (see at [67] and [78]). That particular issue does not arise in the present appeal, as the appellant has not been so convicted or cautioned, and has had the opportunity to make written representations before being included on the barred list.

13. This is because, as well as the so-called "auto bar" cases (whether with or without representations after listing), other individuals may be included on the barred lists on a discretionary basis, and always subject to the consideration of representations, because of their "behaviour" rather than because of any convictions or cautions. Paragraph 3(1)-(3) of Schedule 3 to the 2006 Act provide as follows (sub-paragraphs (4) and (5) are not material):

"**Behaviour**

3(1) This paragraph applies to a person if—

(a) it appears to ISA that the person has (at any time) engaged in relevant conduct, and

(b) ISA proposes to include him in the children's barred list.

(2) ISA must give the person the opportunity to make representations as to why he should not be included in the children's barred list.

(3) ISA must include the person in the children's barred list if—

(a) it is satisfied that the person has engaged in relevant conduct, and

(b) it appears to ISA that it is appropriate to include the person in the list."

14. Thus the principal factual issue that ISA had to decide in the present case was whether the appellant "has (at any time) engaged in relevant conduct" within paragraph 3(1)(a). That term is defined by paragraph 4 of Schedule 3:

"4(1) For the purposes of paragraph 3 relevant conduct is—

(a) conduct which endangers a child or is likely to endanger a child;

(b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;

(c) conduct involving sexual material relating to children (including possession of such material);

(d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to ISA that the conduct is inappropriate;

(e) conduct of a sexual nature involving a child, if it appears to ISA that the conduct is inappropriate.

(2) A person's conduct endangers a child if he—

(a) harms a child,

(b) causes a child to be harmed,

(c) puts a child at risk of harm,

(d) attempts to harm a child, or

(e) incites another to harm a child.

(3) 'Sexual material relating to children' means—

(a) indecent images of children, or

(b) material (in whatever form) which portrays children involved in sexual activity and which is produced for the purposes of giving sexual gratification.

(4) 'Image' means an image produced by any means, whether of a real or imaginary subject.

(5) A person does not engage in relevant conduct merely by committing an offence prescribed for the purposes of this sub-paragraph.

(6) For the purposes of sub-paragraph (1)(d) and (e), ISA must have regard to guidance issued by the Secretary of State as to conduct which is inappropriate."

15. The Secretary of State's (detailed) guidance contemplated by paragraph 4(6) is available from ISA's website: *Guidance on inappropriate conduct involving sexually explicit images and conduct of a sexual nature under Schedule 3 of the Safeguarding Vulnerable Groups Act 2006 (SVGA)* (we call this the *Secretary of State's Guidance*).

16. Appeal rights against decisions made by ISA are governed by s.4 of the SVGA 2006 (as amended), which provides as follows:

> **"Appeals**
>
> 4(1) An individual who is included in a barred list may appeal to the Upper Tribunal against—
>
> (a) a decision under paragraph 2 or 8 of Schedule 3 not to remove him from the list;
>
> (b) a decision under paragraph 3, 5, 9 or 11 of that Schedule to include him in the list;
>
> (c) a decision under paragraph 17 or 18 of that Schedule not to remove him from the list.
>
> (2) An appeal under subsection (1) may be made only on the grounds that ISA has made a mistake—
>
> (a) on any point of law;
>
> (b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.
>
> (3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.
>
> (4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.
>
> (5) Unless the Upper Tribunal finds that ISA has made a mistake of law or fact, it must confirm the decision of ISA.
>
> (6) If the Upper Tribunal finds that ISA has made such a mistake it must—
>
> (a) direct ISA to remove the person from the list, or
>
> (b) remit the matter to ISA for a new decision.
>
> (7) If the Upper Tribunal remits a matter to ISA under subsection (6)(b)—
>
> (a) the Tribunal may set out any findings of fact which it has made (on which ISA must base its new decision); and
>
> (b) the person must be removed from the list until ISA makes its new decision, unless the Upper Tribunal directs otherwise."

17. The appellant in the present case has exercised the right of appeal to the Upper Tribunal under section 4(1)(b) of the 2006 Act. That right of appeal "may be made only on the grounds that ISA has made a mistake" either "on any point of law" or "in any finding of fact which it has made and on which the decision mentioned in that subsection was based" (section 4(2)). As to the latter, we note that, in the *Royal College of Nursing* case, Wyn Williams J. could "see no reason why the sub-section should be interpreted restrictively. In my judgment the Upper Tribunal has jurisdiction to investigate any arguable alleged wrong finding of fact provided the finding is material to the ultimate decision" (at [102]).

18. We also recognise that there has been some debate as to the effect and limits of section 4(3), which provides that for the purposes of section 4(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". In the *Royal College of Nursing* case, Wyn Williams J. concluded as follows:

> "104…. [ISA] is in the best position to make a reasoned judgment as to when it is appropriate to include an individual's name on a barred list or remove an individual from the barred list. In the absence of an error of law or fact it is difficult to envisage a situation in which an appeal against the judgment of [ISA] would have any realistic prospect of success. Second, if [ISA] reached a

> decision that it was appropriate for an individual to be included in a barred list or appropriate to refuse to remove an individual from a barred list yet that conclusion was unreasonable or irrational that would constitute an error of law. I do not read section 4(3) of the Act as precluding a challenge to the ultimate decision on grounds that a decision to include an individual upon a barred list or to refuse to remove him from a list was unreasonable or irrational or, as Mr. Grodzinski [for the Home Secretary] submits, disproportionate. In my judgment all that section 4(3) precludes is an appeal against the ultimate decision when that decision is not flawed by any error of law or fact."

19. In the present case, we take the view that what may be the potential complications surrounding section 4(3) do not arise. If ISA was right to conclude that the appellant had indeed "engaged in relevant conduct", then the decision on whether or not it was appropriate for him to be included in the barred children's list only realistically admitted of one answer. The reasons for this will become apparent later.

ISA's structure and procedures in carrying out its functions

20. ISA is a body corporate established by statute (section 1(1) of the 2006 Act; it was originally known as the "Independent Barring Board", or "IBB", but was renamed as ISA by section 81(1) of the Policing and Crime Act 2009). ISA's chairman and members are appointed by the Secretary of State and "must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults" (Schedule 1, paragraph 1). ISA also has a chief executive and other staff (Schedule 1, paragraph 4). Paragraph 6 allows ISA to delegate its functions as follows:

> "(1) ISA may to such extent as it may determine delegate any of its functions to—
>
> (a) one of its members;
>
> (b) a member of its staff;
>
> (c) a committee consisting of some of its members, members of its staff or both members and members of staff.
>
> (2) A committee mentioned in sub-paragraph (1)(c) which consists of both members and members of staff must be chaired by a member."

21. The 2006 Act is remarkably silent on the details of the decision-making processes to be operated by ISA (although Part 3 of Schedule 3 includes some general provisions relating to procedure and representations; see also the Safeguarding Vulnerable Groups Act 2006 (Barring Procedure) Regulations 2008 (SI 2008/474)). However, ISA's Board has published, for the use of its case workers, its own *Guidance Notes for the Barring Decision Making Process* (currently Version 3.4, August 2010; we call this document *ISA's Guidance Notes*), which the ISA website describes as "a living document subject to constant review and updating". ISA's decision making process is also helpfully summarised schematically in the *Barring Decision Process* flow chart, again available on its website. We simply note at this stage that *ISA's Guidance Notes*, whilst they are helpful, have no statutory force (see *R (On the application of G) v The Governors of X School* [2011] UKSC 30 at [23] *per* Lord Dyson), unlike the *Secretary of State's Guidance*.

22. In addition, in the *Royal College of Nursing* case, Ms Anne Hunter, ISA's Director of Operations, made a witness statement (dated 4 October 2010), explaining ISA's decision making processes. Mr Jaffey helpfully arranged for a copy of Ms

Hunter's witness statement to be available at our oral hearing. In that statement Ms Hunter also described the decision making process adopted by ISA when a person is referred for consideration not by virtue of a conviction or caution (the primary issue in that case) but by virtue of their conduct or a perceived future risk of harm. In his judgment, which we gratefully adopt, Wyn Williams J. cited directly from that explanation in the witness statement as follows (at [21]):

> "17. At the point that the ISA proposes to include a person on a barred list or lists (also known as 'minded to bar'), the ISA is required to seek representations from the person…. However, the legislation does not set out a process by which the ISA must reach the conclusion that it is minded to bar a person. Accordingly, the ISA's decision making process in respect of discretionary decisions has been developed to ensure all ISA barring decisions are fair, rigorous, consistent, transparent and legitimate. The guidance on the decision making process that is provided to ISA case workers is freely available from the ISA's website and is attached to this statement….
>
> 18. The decision-making process has five stages. At each stage a decision is required for the case to progress to the next stage. If criteria for the case to progress to the next stage are not met, the case is closed and no further action taken. The first stage is an initial assessment, whereby the ISA determines whether information that has been provided to the ISA is relevant and the allegations are something the ISA should consider. This should ensure that cases which are simply malicious gossip or are not serious enough to warrant further consideration are closed at a very early stage. The second stage is information gathering. The ISA considers all the facts it has on a case and may seek additional material from a range of other sources to ensure it has all known relevant information on the person. The ISA considers all relevant information that may be provided or requested from employers, the police, personnel providers, and regulatory bodies…..local authorities or the referred person. The information gathered may include relevant cautions, convictions or information from disciplinary proceedings. The ISA will also consider information that it may already have from previous consideration of that person. This could provide evidence of cumulative behaviour indicating a safeguarding risk. When all relevant information is gathered and assessed the ISA determines on the balance of probability whether there has been conduct that has harmed or may harm a child or vulnerable adult. If so, the case progresses to stage three, the Structured Judgment Process ('SJP').
>
> 19. The SJP is a risk assessment tool developed and agreed by the ISA board to determine whether, based on all relevant information, there is a future risk of harm to children or vulnerable adults. If, following the SJP, a risk of harm to children or vulnerable adults is determined, the ISA would propose to include the person on a barred list or lists ('minded to bar'). If, on the basis of the information available to the ISA, it is not considered appropriate to bar a person then the case is closed.
>
> 20. As stated above where the ISA proposes that a person be included on a barred list or lists, Schedule 3 of the SVGA obliges the ISA to seek representations from that person. The process for seeking representations is as described above in relation to automatic inclusion. The referred person's employment is not restricted at this point in the process.

21. If no representations are received, then the person is barred by the ISA. If representations are received then the case is re-assessed and the final decision is made. If barred, the person is notified in writing including their right to seek an appeal."

23. Mr Jaffey also told us that difficult cases, such as the present one, although initially handled by an ISA case worker, will go to the Board (or in practice a sub-committee of the Board) for a final decision, not least given the gravity of the consequences for the individual concerned in the event that adverse findings of fact are made. Such a referral was also in accordance with *ISA's Guidance Notes*, which advise as follows (emphasis added):

"5.7 Acquittals

- Where a jury has found someone not guilty of having done something, case workers must remember that this means that the court could not determine that something happened "beyond a reasonable doubt" (the criminal standard of proof). The test applied by the ISA in relation to barring considerations is 'on the balance of probabilities' (the civil standard of proof). There could however be any number of reasons why a person charged with an offence was acquitted: perhaps the victim decided not to testify and the Crown Prosecution Service (CPS) (Public Prosecution Service [PPS] in Northern Ireland) had to withdraw the case; perhaps the acquittal was based on a technicality; perhaps the witnesses, on cross-examination were comprehensively discredited and the judge came to unequivocal conclusions regarding an individual's innocence. *Where there has been an acquittal, the ISA must still consider the case for itself on the basis of the balance of probabilities but any decision to treat an acquittal differently (to that of the court) would only be taken in very limited circumstances and always only after the case had been reviewed internally and at a senior level. Cases of this nature should be referred to the Board."*

The referral, the investigation and the decision in the appellant's case

24. Some of the events with which this case is concerned go back more than 30 years. However, ISA's involvement began on 29 October 2008, when it received a referral from a police force ("the Northlands Police"). The letter started in these terms: "Northlands Police have grave concerns about the potential risks of harm of sexual abuse posed by the above-mentioned person to children, in particular young boys". The letter stated that the appellant "has been employed as a music teacher at various schools in the UK, has been involved in voluntary work and musical tuition with different churches and coached boys' choirs. He continues to seek employment, both paid and voluntary, in positions which would involve regular contact with children." The letter summarised police investigations in different forces in 1997 and 2002 relating to alleged incidents of abuse between 1985-1989 (when the complainant was CD) and 1977-1981 (when the complainant was AB) respectively.

25. The 1997 inquiry had led to the appellant being committed for trail at the Crown Court on two charges of indecent assault and one of attempted buggery on a boy aged under 16. However, the letter stated that the prosecution was later dropped "due to the mental health of the complainant". The 2002 inquiry did not result in any prosecution "as there was a lack of corroborating evidence due to the

historical nature of the alleged abuse". Northlands Police's letter also referred to images retrieved from the appellant's computer during the 2002 investigation "showing young males appearing to be under the age of 16 in sexual poses". No charges had been brought on that matter, "owing to the difficulties improving that the males were under 16 years of age".

26. On 21 July 2009 an ISA case worker carried out the first (initial assessment), second (information gathering) and third (SJP) stages of the decision making process. She concluded that "relevant conduct" had occurred, namely that the allegations of sexual abuse from 1977-1981 (the 2002 inquiry) and 1985-1989 (the 1997 investigation) were proven, but that the computer images did not amount to relevant conduct. The case worker formed the view that it would not be appropriate for the appellant to continue to work with children and completed a "minded to bar assessment".

27. On 19 October 2009 ISA accordingly wrote to the appellant a "minded to bar" letter, including the following statement:

> "On the basis of the information we have received we have found, on the balance of probabilities, that:
> - Between the years of 1977 and 1981 … you groomed and sexually abused a boy under 16 years of age.
> - Between the years of 1985 and 1989 … you groomed and sexually abused a boy under 16 years of age.
> - As a result of investigation undertaken by Northlands Constabulary in 2002 multiple indecent images of young and teenage boys were found on your computer. Some of these images had been printed out and were found in your property,"

The letter then invited the appellant to make representations in accordance with the statutory scheme.

28. On 8 January 2010 the appellant's solicitors sent ISA an extremely detailed 6-page letter with representations on his behalf. By way of general opening observations, they pointed out that during the appellant's professional career:

> "… he has given instruction and motivation certainly to hundreds and probably to over one thousand individuals and he has always treated each of them with great respect and behaved in a totally professional manner. You have considered allegations by two individuals whose testimony, if it were now possible to cross examine them (and of course this is not possible), would in our submission be regarded as highly unreliable by any reasonable tribunal. Indeed the likelihood is that anyone such as [the appellant] who has dealt with so many young people over a period of more than 35 years would come across at least one person who would be prepared to dishonestly allege impropriety for no other reason than mental instability or malice. We suggest that two complaints of impropriety in over 35 years are not persuasive and indeed we would go further and suggest that absence of further complaints, particularly in the light of the lengthy police investigations of [the appellant's] conduct add credence to his assertion of good character."

29. The solicitors' letter then devoted a total of five pages to analysing and seeking to refute the specific allegations made, as well as including a copy of the

appellant's CV and 14 references and testimonials from colleagues, friends, former pupils and pupils' parents.

30. The ISA case worker then undertook the fourth and fifth stages of the decision-making process on 10 February 2010. She considered the representations but did not accept their overall thrust and reached a "final review of appropriateness to bar", concluding that the appellant "does continue to pose a risk of harm to children and therefore should be barred from working with them by being placed on the Children's Barred List". However, in accordance with *ISA's Guidance Notes* she also referred the case to a Case Committee of the ISA Board for a final decision. The Case Committee, which met on 26 May 2010, comprised three Board members, all senior professionals with long experience in protecting children and vulnerable adults from sexual abuse. The Case Committee considered the summary presented by the case worker, reviewed both the evidence provided and the appellant's representations and made various findings. The Case Committee's decision was to recommend that the appellant be included on the children's barred list.

31. On 19 July 2010 ISA wrote to the appellant notifying him of the decision to include him on the children's barred list. The formal basis for the decision was said to be paragraph 3, read in conjunction with paragraph 4(1)(a) and (e), of Schedule 3 to the SVGA 2006 (see [14] above). The reasoning underlying that decision was expressed in the following terms in that letter (emphasis added):

> "We remain of the view that you have engaged in relevant conduct on the basis of our findings set out in our letter of 19 October 2009, in that you engaged in conduct which endangered a child and inappropriate conduct of a sexual nature involving a child.
>
> **This is because we do not find that the evidence provided by you in your representations is sufficient to disprove the allegations made against you.** In particular:
>
> - There is no evidence of collusion or collaboration between the two victims in this case and nothing to suggest that they knew each other or had access to the details of the other's allegations.
> - The allegations made by both parties, especially in the method of sexual grooming, are of a similar pattern such as to rule out coincidence.
> - Information provided relating to AB making threatening phone calls to you was considered but did not undermine the credibility of the allegation of abuse.
> - Information provided that AB made allegations of abuse against you for monetary gain was considered but has been disregarded as no statement from EF has been forthcoming.
> - Despite information provided that you could not recall having previously seen the indecent images of young males shown to you during your police interview, it is considered more likely than not that you were in possession of these images.
>
> We furthermore remain of the view that it is appropriate to include you on the Children's Barred List in light of the relevant conduct. This is because the evidence indicates that you have a sustained sexual interest in teenage males and there is a significant risk that similar behaviour may be repeated in the future."

32. On 6 October 2010 the appellant applied to the Upper Tribunal for permission to appeal against ISA's decision. The grounds of appeal, as settled by Dr Stephen Hardy of Counsel, were essentially two-fold – that ISA had misapplied the statutory test under the SVGA 2006 and that its decision was perverse, given the nature of the appellant's detailed representations. There was then an unfortunate administrative delay in putting the matter to a judge.

33. On 15 March 2011, the application having been referred to the Judge on 7 March 2011, permission to appeal was granted. In doing so the Judge remarked that the drafting of ISA's letter of 19 July 2010 suggested that the case worker may have misapplied the burden of proof (notably the statement in bold above at [31] above). The parties' respective written submissions on the appeal were elaborated upon by Miss Del Priore and Mr Jaffey at the oral hearing.

The appellant's grounds of appeal

34. The appellant's full grounds of appeal, as drafted by Dr Hardy and as developed at the hearing by Miss Del Priore, were essentially four-fold, namely: (1) ISA had misapplied the burden of proof; (2) ISA had misapplied the proper statutory test under paragraph 3 of Schedule 3 to the 2006 Act; (3) ISA had erred in law by failing to offer the appellant an oral hearing, a failure which could not be cured by the right of appeal to the Upper Tribunal; and (4) ISA's decision was perverse.

(1) The burden of proof

The parties' submissions

35. Miss Del Priore understandably pointed to ISA's letter of 19 July 2010, which stated its view that the appellant had engaged in "relevant conduct" on the basis of its provisional findings "because we do not find that the evidence provided by you in your representations is sufficient to disprove the allegations made against you." She described this as "a very worrying sentence" to be included in such a letter, which indicated that ISA had taken the view that it was for the appellant to disprove the factual allegations. On that basis, Miss Del Priore submitted, ISA had erred in law by misapplying the burden of proof. The available documentation demonstrated a fundamentally flawed process, she argued, in which ISA had systematically reached conclusions with a closed mind, before the appellant had been given the opportunity to comment, and in which the complainants' allegations had been irrationally accorded more credibility than the appellant's own account.

36. Mr Jaffey frankly conceded that the sentence in ISA's letter of 19 July 2010 on which Miss Del Priore relied was, in his words, "to a lawyer's eyes, appallingly drafted". If that sentence reflected the reality of ISA's decision-making process, and ISA had indeed expected the appellant to disprove the allegations, then he accepted that the appeal had to be allowed. However, Mr Jaffey's submission was that the offending sentence was an example of poor drafting, but signified nothing else. The decision letter was not the decision of the Board, but a précis prepared by ISA staff. He argued that the Case Committee had properly recognised that it was for ISA to establish the allegations, and not for the appellant to disprove them, and that this much was evident from the minutes of the meeting on 26 May 2010. These minutes made it plain, he contended, that ISA had correctly applied the burden and standard of proof (e.g. "The case committee members all agreed that on the balance of probabilities the two separate allegations of sexual abuse are true and constitute Relevant Conduct").

The Upper Tribunal's analysis

37. We agree with Mr Jaffey's analysis on the first ground of appeal for the following reasons.

38. First, despite the absence of a detailed statutory decision-making regime, the overall structure of the scheme under the 2006 Act is reasonably clear. In effect ISA is required first to "form a view", having received a referral (e.g. from the police or an employer). At the initial stages a provisional view must be taken as to whether "it appears to ISA that the person has (at any time) engaged in relevant conduct" and whether or not "ISA proposes to include him in the children's barred list" (Schedule 3, paragraph 3(1)). It is only after these initial stages (the first three steps in the process described in the extract from the judgment in the *Royal College of Nursing* case above at [22]) that the individual is then asked to comment (Schedule 3, paragraph 3(2)).

39. Secondly, taken as a whole, the "paper trail" for the decision in this case does not support the argument that ISA either approached the matter with a closed mind or misapplied the burden of proof. The ISA case worker initially took the view that there was evidence to support both of the allegations of sexual abuse but that the possession of computer images did not represent a third category of relevant conduct, as the precise circumstances were not proven. After having considered the representations made on the appellant's behalf, the ISA case worker later took the view that the allegations of sexual abuse in 1989-1991 had been made out, but not those relating to the earlier period, but that the possession of indecent images did amount to relevant conduct. The Case Committee, however, took a different view, in effect reinstating the case worker's original provisional view. Thus the Case Committee concluded that both allegations of sexual abuse were made out, and amounted to relevant conduct, but that the possession allegation "doesn't constitute relevant conduct but does support a sexual interest in teenage boys". This shifting of position by the ISA case worker and subsequent reconsideration by the Case Committee does not suggest a rush to judgment with a closed mind. On the contrary, it shows how those concerned were seeking to weigh up the evidence and only making a specific finding if satisfied that it was justified in the circumstances.

40. Third, we echo the criticisms made by both counsel of the terms of ISA's letter of 19 July 2010. However, the appellant's right of appeal lies against "a decision under paragraph 3 … of that Schedule to include him in the list" (section 4(1)(b) of the 2006 Act). The decision in question was the decision ultimately taken on 26 May 2010 by the ISA Board's Case Committee. For the reasons set out above, that decision itself was not flawed by any misapplication of the burden of proof. In short, we must focus on the substance, not the form, and the appeal is against the decision as a whole and not the decision letter, let alone one paragraph in that letter, taken in isolation. We are confident that ISA will be taking steps to ensure that such a letter is never again sent out, and return to that matter later.

(2) The proper statutory test under paragraph 3 of Schedule 3 to the 2006 Act

The parties' submissions

41. Miss Del Priore's core submission was that the documentation demonstrated that ISA had misapplied the statutory test for what constituted "relevant conduct" under paragraph 3 of Schedule 3 to the 2006 Act. ISA's findings of fact, she contended, could not be sustained, given the detailed representations made on behalf of the appellant and in the light of the evidence which he had supplied relating to the original police investigations. In summary, Miss Del Priore argued that ISA had failed to consider and weigh all the relevant evidence, had erroneously found

credible accounts by complainants who had been shown to be manifestly unreliable, had failed to avert to the risk of cross-contamination of the complainants' accounts and had failed to make appropriate enquiries and find facts accordingly about that cross-contamination.

42. Mr Jaffey's response was robust. In his submission, the central question was whether or not ISA had acted rationally in concluding, on the balance of probabilities, that the appellant had engaged in "relevant conduct" with children. He referred to the appellant's admitted behaviour, which he argued gave rise to serious concern in itself, as well as what he described as doubts over the appellant's own credibility. Mr Jaffey further submitted that on all the evidence, taken as a whole, ISA was perfectly entitled to reach the conclusion that the principal allegations of sexual abuse had been made out and that there had been no cross-contamination in the two complainants' accounts. He reminded us that ISA does not pretend to offer certainty, but its statutory function is to protect children from unacceptable risks. The appellant, he submitted, posed just such a risk within the terms of the 2006 Act.

The Upper Tribunal's analysis

The nature of the proceedings before ISA

43. As noted above, the 2006 Act creates a new jurisdiction, albeit one that has been built on the previous POCA and POVA regimes. There is a technical point here as to the precise juridical nature of such proceedings. One argument is that ISA is an independent public body that accepts referrals from e.g. employers and other bodies which "think" that an individual has engaged in "relevant conduct", or poses a risk of harm, and which then makes factual findings in the context of an overall assessment as to future risk. In that context, formal legal notions such as the "burden of proof" may not be apposite (see, as regards the deliberations of the Parole Board, e.g. *R (Brooks) v Parole Board* [2004] EWCA Civ 80 at [28]; see also the discussion in the POCA case of *ID v Secretary of State* [2011] UKFTT 202 (HESC) at [63]-[67]).

44. We can leave such matters for another occasion. Mr Jaffey, on behalf of ISA, rightly accepted that so far as the factual findings upon which ISA bases its assessment of risk and its conclusions on appropriateness, the starting point must be that factual allegations require proof, and that it would be wholly wrong to place the onus on XY or indeed any other individual to disprove the allegations. We also accept that this process is subject to the civil standard of proof. As Baroness Hale observed in *Re B (Children)* [2008] UKHL 35 (at [70] and [72], this means:

> "… the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies … As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability."

45. Further, as Lord Hoffmann held in the same case (at [15]):

> "...There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most

> parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children. It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely."

46. Thus, as the Care Standards Tribunal observed in *AJ (2) v Secretary of State* [2009] UKFTT 277 (HESC) (at [20]), whilst the consequences of an adverse finding are undoubtedly serious for the alleged abuser, it is settled law that the proper standard of proof is the civil standard of the balance of probabilities.

The absence of any criminal conviction or caution

47. We reiterate that the appellant has not been convicted or cautioned in relation to any relevant offence involving children (if he had, of course, this would have been an "auto-bar" case and it is also possibly unlikely that permission to appeal would have been granted by the Upper Tribunal). However, these are civil proceedings and the absence of any such criminal record is not determinative of the outcome (although, of course, it is one reason why the burden of proof is on ISA). According to the *Secretary of State's Guidance* (at p.13), concerning paragraph 4(1)(e) of Schedule 3 to the 2006 Act ("Conduct of a sexual nature involving children"):

> "The Secretary of State considers that … where there is evidence to suggest that inappropriate behaviour may have taken place but that this evidence has not resulted in any criminal prosecution or conviction, the Board may consider this evidence to see whether, on the balance of probabilities, the activity took place and if so, this conduct should be considered inappropriate and therefore 'relevant conduct'… the Board must bear in mind that no criminal offence has been proved to the criminal standard of proof when it takes the ultimate barring decision."

48. We agree with Mr Jaffey that "relevant conduct" is defined differently to the conduct required for proof of the commission of any particular criminal offence, and so conduct that is not criminal may still be "relevant conduct". Obviously a criminal trial is rightly subject to strict rules of evidence and the prosecution must prove its case beyond reasonable doubt, i.e. to a very high standard. However, proceedings before ISA are civil in nature, the strict rules of evidence do not apply and a lower standard of proof operates. Thus a criminal prosecution may not succeed, for any number of reasons, but there may still be sufficient evidence to conclude on the balance of probabilities that the alleged abuser has engaged in "relevant conduct" with children and should be prevented from working with children. In that context we also note that, whereas the definitions of sexual offences under the criminal law typically vary according to the age of the victim, for the purposes of the 2006 Act a child is simply any person under the age of 18 (see section 60(1)).

49. We also note that the *Secretary of State's Guidance*, when referring to "conduct of a sexual nature involving a child" within paragraph 4(1)(e) of Schedule 3 to the 2006 Act, advises as follows:

> "Clearly the focus is on sexual conduct. This is not confined to sexual activity, that is, intentional touching of a sexual nature, but should include a wider range of conduct which has a sexual purpose, for example, grooming or solicitation. Parliament's choice of the words 'conduct of a sexual nature' rather than 'sexual activity' or 'intentional touching of a sexual nature' (see the

> Sexual Offences Act 2003) is significant and points to the wider interpretation."

The evidence before the Upper Tribunal and the scope of the appeal

50. Before analysing ISA's findings in this case, we must explain the nature of evidence before us. We had a considerable body of documentary evidence that had been before ISA, almost filling one lever arch file. This mostly comprised the detailed witness statements of both complainants, along with the appellant's lengthy interviews under caution in the course of both investigations. We also had sight of the testimonials and representations provided to ISA by the appellant. Obviously we also had before us the ISA Barring Decision Making Process (or BDMP) document for the appellant's case, starting with the case worker's initial assessment and concluding with the Case Committee minutes, a document which ran, in total, to over 40 pages of printed text. We read all the evidence on file. The only material documentary evidence we had before us, which had not been before the Case Committee, was a subsequent and indeed much more recent exchange of correspondence between ISA and Northlands Police, which we return to later. As the appellant chose not to give evidence at the hearing before the Upper Tribunal, we did not have the benefit of hearing his oral testimony, or hearing it being challenged. Nor did we hear any other witnesses as to the facts.

51. As a result, this first oral hearing before the Upper Tribunal may have been a rather atypical case. The Upper Tribunal's expert members have considerable judicial experience in hearing and evaluating evidence and making findings of fact in their former role as members of what used to be the Care Standards Tribunal (CST), hearing appeals at first instance under the pre-SVGA 2006 regimes. On this occasion, however, those skills were confined to analysing the documentary evidence in the light of counsel's careful submissions.

52. We reminded ourselves that the appellant's right of appeal is confined by section 4(2) of the 2006 Act to (a) "any point of law" in ISA's decision or (b) to "any finding of fact which it has made and on which the decision mentioned in that subsection was based". As to the former, we noted that an error of law can include making a perverse or irrational finding of fact on a material matter, failing to take into account and/or resolve conflicts of fact on material matters, giving weight to immaterial matters and making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant was not responsible for the mistake and unfairness resulted from that mistake (*R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, at [9] and [10]).

53. However, we did not regard ourselves as limited by the constraints set by the Court of Appeal's decision in *R(Iran)*, as those comments were made in the context of a second appeal limited to points of law only, whereas we are exercising a new hybrid form of appellate jurisdiction. As a matter of principle, it seemed to us that, notwithstanding his decision not to give evidence in person, if the appellant could point to any finding of fact on which ISA's decision was based as being plainly wrong, then that might form the basis for a successful appeal, even if it might not fall within the rather narrow *R(Iran)* criteria. Our only qualification to that principle is that it seems to us that it must still have been an error as regards some material fact, i.e. that could have affected the outcome. That approach is supported by the Administrative Court's decision in the *Royal College of Nursing* case (see [17] above).

The similar fact evidence and the question of cross-contamination

54. We turn now to our consideration of the evidence. We start with what seem to us to be respectively the strongest part of the case made by Mr Jaffey in support of ISA's decision and, in response, the strongest part of the challenge mounted by Miss Del Priore to that case. This relates to the alleged similar fact evidence and the question of cross-contamination.

55. Mr Jaffey's submission was that there were striking similarities between the accounts of AB and CD, to the extent that the two accounts were mutually supporting. AB alleged that, whilst he was a pupil at a residential school, he had been abused by XY, a teacher, between 1977 and 1981. AB gave a detailed statement to police, describing a long process of grooming, commencing with affectionate and complimentary comments and moving on to social calls, including XY allowing AB to use his bath, the provision of alcohol and eventually inappropriate touching and mutual masturbation. CD was taught piano by XY at a later period. CD described a similar pattern of grooming involving flattery, social calls and inappropriate touching, including an incident in which XY kissed CD in front of a witness, followed by mutual oral sex and on one occasion by a non-consensual attempt by XY to perform anal sex on CD.

56. The two accounts, Mr Jaffey submitted, were so strikingly similar, both in their overall pattern and their specific details, that ISA was justified in reaching the conclusion that both allegations were made out on the balance of probabilities. The overall pattern in both cases, he argued, involved progressive steps of classic grooming behaviour from flattery to inappropriate touching to sexual activity. The details included both complainants commenting on XY's bad breath and also the fact that XY kept a specific lubricant by his bed (AB: "he would always have a tube of 'KY' jelly by his double bed either on the bedside drawers or in the first drawer. It was blue and metal tube. He would use 'KY' jelly when he wanked me off"; CD: "I remember having entered the bedroom, XY produced a tube of KY cream, from the bedside cabinet drawer. He told me what it was for – 'To lubricate yourself'."

57. Both accounts were vigorously denied by XY. Mr Jaffey conceded that the alleged similar fact evidence was not, of itself, decisive. He submitted that ISA and, on appeal, the Upper Tribunal, was required to consider matters in the round, as shown by *Secretary of State for Children, Schools and Families v J* [2009] EWHC 524 (Admin), a case involving multiple allegations of sexual abuse. That decision was taken under the pre-SVGA 2006 regime, but the principles set out there are agreed to be of general application. Pitchford J. observed that, in assessing the probative value of the evidence, "the Secretary of State was entitled to ask the tribunal what was the likelihood of three separate teenagers making similar but untrue allegations of sexual misconduct on separate and unconnected occasions" (at [36]). Furthermore:

> "37. … In assessing the probative force of the evidence, the tribunal of fact will need to consider at least three things. Firstly, the risk of collaboration or contamination between the witnesses. If there was such a risk, then the probative force of the observation that they make similar complaints may be lost. Secondly, the degree of similarity between the allegations and the period of time over which those allegations were made. The more similar the allegations made by individuals who had not collaborated, the more improbable it is that those allegations are untrue. Thirdly, any factors which may affect the credibility and reliability of the complainant. It may be that a witness is so unreliable that nothing said by that witness should be treated as probative of anything."

We deal with each of those three issues identified by Pitchford J. in turn.

(i) the risk of collaboration or contamination between the witnesses

58. AB's allegations related to the period between 1977 and 1981 when he was a pupil at a residential school in the North of England and XY was in his mid- to late-20s. AB made the first disclosure to police in London in 2002, following an apparent suicide attempt, when he was aged 37. CD's allegations related to a later period, 1989-1991, when he and XY (by then aged in his mid-30s) were both living in Wales, but were made at an earlier date (1997), when the complainant was aged 22. CD died in 2000, possibly (although this is unclear) by suicide. On the face of it, therefore, there was a considerable distance between the two complainants in terms of geography, the period and context of the alleged abuse and their respective ages.

59. ISA's Case Committee dealt with this issue as follows:

> "There is no evidence of collusion or collaboration between the two alleged victims in this case, AB and CD, and nothing to suggest that AB and CD knew each other. CD committed suicide at least 18 months before the second allegations were made by AB. The depth of the media coverage of the events is unknown, detailed internet searches have been carried out by the caseworker and no details were found regarding the allegations of abuse made by CD. The allegations made by both parties especially regarding the method of sexual grooming are of a similar pattern such as to rule out coincidence, and there is no obvious way that the information from one could have been passed to the other. Whilst one set of allegations appear stronger, in evidence from the other, taken together they are each proven in balance of probabilities.
>
> There is no evidence of collaboration between the two alleged victims in information from the Police."

60. Miss Del Priore seized, in particular, on this final statement. She rightly pointed out that the Case Committee minutes made no reference to the further statement at the very end of AB's detailed statement to the police, in which he stated:

> "I haven't reported this to police until now because I couldn't face up to it because it meant I had to face up to a lot of things myself. Upon finding that XY had been arrested for an allegation that had been made by a minor, it helped me reach the decision to contact the police myself."

61. Furthermore, Miss Del Priore noted that the case worker had noted at the second stage of the process that:

> "It is stated in representations that AB became aware of these allegations and then made allegations himself in order to gain compensation. This is considered and evaluated in full later in the evidence regarding the allegations made by AB however at this point is it sufficient to say that there is no evidence to support this mitigation".

62. Miss Del Priore submitted that the very fact that AB knew that XY had been arrested raised the clear risk of cross-contamination, which ISA should have explored fully. In particular, how had AB acquired that knowledge and what was the extent and scope of that knowledge?

63. At first, we thought there was some force in Miss Del Priore's submissions on this point. We certainly think that it would have been desirable for the ISA Case Committee to make express reference to, and address in its reasoning, the fact that AB knew that XY had been arrested previously for child abuse. It would also have been preferable for ISA to have made further enquiries at an earlier stage. We note that shortly before the Upper Tribunal hearing, in April 2011, ISA approached Northlands Police for further information on this matter, but were advised by them simply that "it appears therefore that he [AB] was aware of a previous allegation, but we hold no additional information regarding the allegation or how [AB] came to be aware of it."

64. Does this represent a fatal flaw in ISA's process of fact-finding and reasoning? We think not. There is a fine distinction, but still a distinction, between knowledge that an individual has previously been arrested on child abuse charges and collusion or cross-contamination between two complainants. ISA's Case Committee was entitled to conclude on the evidence before it, on the balance of probabilities, that there was no evidence of collusion or collaboration. We also agree that it is highly unlikely that there was cross-contamination. We read the internet account of CD's inquest, published in a local newspaper in 2002. This named CD, and referred to the collapse of the criminal prosecution against his alleged abuser, but there was no hint of XY's identity or the details of the allegations. Overall, the weight of the evidence before ISA pointed to the fact that the two complainants did not know each other and it was difficult to see how AB could have acquired any information about the nature and especially the detail of CD's allegations, given the circumstances set out by the Case Committee in its reasoning. Indeed, in our view that conclusion is given added force by the very last sentence of AB's witness statement, which provides further support for the view that the risk of cross-contamination was remote: "Until three years ago [1999] I had lived in [the Middle East] for ten years and this had also prevented me from reporting the incident to police sooner."

65. We accordingly conclude that ISA was entitled to find that the two complainants did not know each other, had not conspired with each other or in any other way collaborated to bring separate allegations against XY in relation to incidents separated by some considerable distance and time.

(ii) the degree of similarity between the allegations and the period of time involved

66. We agree with, and will not repeat here, Mr Jaffey's analysis of the striking similarity between the two sets of allegations, both in terms of the overall pattern of sexual grooming and the details included in each account. ISA was right to conclude that the probative force of the two accounts was mutually reinforcing. We do not think that this can be explained away on the basis of coincidence, collaboration, collusion or cross-contamination for the reasons set out above.

(iii) any factors which may affect the credibility and reliability of the complainant

67. There were, undoubtedly, issues around the credibility and reliability of both complainants. CD was the first complainant to make a disclosure of alleged abuse, although the events were more recent. As a result XY was committed to the Crown Court for trial. However, the Crown Prosecution Service (CPS) later decided to offer no evidence because CD's mental health problems had not been disclosed to the defence, with the result that XY was found not guilty on all three counts. XY's written representations argued that CD's mental health problems fundamentally and fatally

undermined his evidence. The ISA case worker acknowledged that CD had been sectioned under the Mental Health Act 1983 in May 1997, but noted that his police statements were made between June and September 1997, by which time he had been released and was receiving treatment as an outpatient. The issue of CD's mental health and his credibility was plainly a live issue on the basis of the documentation before ISA. The Case Committee's conclusion was to note that "it was recognised that childhood trauma, including sexual abuse, can contribute to future mental health problems".

68. Miss Del Priore submitted that ISA's analysis of CD's mental health problems was cursory; she pointed out that CD's father had told police that his son's illness had peaked in May and June of 1997, and that his perception of reality was seriously distorted (he had referred to life being controlled by aliens and that his mother and brother were not real people). His GP had described CD at the time of admission as "an acutely disturbed psychotic patient, who needed urgent psychiatric assessment and treatment". Miss Del Priore argued that ISA should have instructed a psychiatrist who could review the clinical history and provide an expert opinion on CD's state of health and its implications.

69. We do not think that Miss Del Priore's suggestion about commissioning a report is realistic. CD died about 10 years ago and so any psychiatric report would be confined to a review of the paper evidence, albeit from an expert witness. The reality is that CD's mental health was one part of a much larger jigsaw of evidence. We can certainly understand how the failure to disclose that aspect of the case led to the collapse of the criminal trial. However, in this jurisdiction the rules of evidence are not as strict and the standard of proof is different. In our view it was open to ISA to conclude, on the balance of probabilities, that the allegations were true and were not simply the product of mental disorder. We also find no support for the suggestion in XY's written representations that "the idea he had sexually abused CD appears to have been put in his head by his father and we can confirm that there is corroboration for this view in the papers." To the contrary, we have read the witness statement by CD's father, a solicitor, and its account of the unfolding of the conversation following CD's discharge from hospital has the ring of truth as the start of a classic unfolding of a disclosure of a history of past abuse.

70. There were also issues around AB's credibility. Miss Del Priore argued that ISA had irrationally treated AB as a credible witness and conversely XY as an unreliable witness. She contended that there were inconsistencies in the dates provided by AB and pointed out that the absence of any corroborative evidence was a reason for the police investigation not leading to any criminal charges. We repeat the points above about the differences between criminal and civil proceedings such as these; we also find it hardly surprising that there may be some inconsistencies in the dates provided by AB given that he was referring to events that occurred some 20-25 years earlier. Yet as the ISA case worker noted in her analysis:

> "There is much evidence given by AB which adds credibility to his allegations. AB is able to describe the type of television XY had, the chairs in his flat, the beverages XY preferred, the records which XY listened to and the type and colour of car driven by XY. AB also describes restaurants and bars he visited with XY. AB also describes a small silver ring which XY wore on his little finger. These facts were confirmed by XY in a police interview..."

71. However, the earlier written representations on behalf of XY also made other, and much more serious, allegations as to why AB's credibility was flawed, factors to which Miss Del Priore made relatively little reference to in the course of the hearing

before us. We must examine those claims in some detail as they go both to the reliability of AB's evidence and conversely to XY's credibility.

72. In the written representations, XY's solicitors stated as follows:

> "XY adds that AB has subsequently admitted to a fellow ex-pupil that, following serious difficulties with alcoholism, drug dependency and personal problems, he heard of the allegations that had been made against XY in 1997 and saw this as an opportunity of gaining some financial advantage. The ex-pupil to whom AB made this admission is called EF. EF telephoned XY, quite unexpectedly, just over a year ago and described to XY how he met up with AB and found AB in a very bad state due to alcohol and drug abuse. AB specifically admitted to EF that he had made his allegations against XY with the possibility of compensation in mind.
>
> XY received a further call from EF on 5th January 2010. XY noted: 'he told me that AB said that I had shown him nothing but support, friendship, both pastoral and at time financial, but that he had to blame somebody for the mess he had made of his life. He specifically stated that no sexual approach had ever been made by me.' If it would be helpful to the ISA's deliberations we would be happy, if you so request, to obtain a formal signed statement from EF."

73. XY's solicitors went on to state that AB had subsequently "made a series of threatening telephone calls to XY which were reported by XY to the police. AB then received a warning from the Metropolitan Police and the intimidation thereafter ceased." ISA does not appear to have made any enquiries about the allegations of intimidation before the Case Committee met. However, it belatedly did so in April 2011, when Northlands Police confirmed that in March 2003 XY had reported abusive and threatening phone calls from AB and that AB had indeed been arrested on suspicion of harassment and had accepted a police caution for the offence.

74. XY's account of being harassed by AB has therefore been confirmed by a credible source. The Case Committee, of course, did not know this. They recognised that it had been claimed that AB had made threatening telephone calls "but did not believe that it undermined the credibility of the allegations of abuse". It seems to us that that was a question of judgment. Confirmation of such intimidation does not necessarily make AB an unreliable witness. It simply raises a further question. AB may indeed have threatened XY because he had made up false allegations with a view to claiming compensation and was furthering that same plan. Or AB may have threatened XY because the allegations were true and he was bitter and frustrated that XY was not facing any criminal proceedings. As Mr Jaffey suggests, it is inherently more likely that AB was angry at being subjected to serious sexual abuse than that he not only made up untrue allegations but then also feigned angry telephone calls to XY. In that context, as Mr Jaffey drily observed, "EF's evidence sounds crucial".

75. ISA had received XY's written representations on 11 January 2010. On 19 January 2010 the case worker wrote to XY's solicitors asking for a copy of a formal signed statement from EF and extending the period for representations to be made until 1 February 2010. On 21 January 2010 XY's solicitors replied, stating that they would try to obtain such a statement but thought it unlikely to would be available by the extended deadline. On 1 February 2010 XY's solicitors wrote again to ISA in the following terms:

> "In my letter of 21st January I said that we would try to obtain a formal signed statement from EF before 1st February. Unfortunately, we have been unable to do so. Should the statement become available before the end of this week I will post it immediately to you and hopefully it could then form part of your deliberations but I do not wish to delay your consideration of the matter and if you have not heard from me again by the end of the week I would invite you to proceed on the basis of the information you already have."

76. No such statement by EF was ever provided. ISA's Case Committee concluded as follows:

> "There is detail in the case file that suggests that AB made the allegations of abuse against XY for monetary gain; a statement to support this has not been forthcoming therefore the case committee agreed to disregard this information."

77. In our view it might have been better if the Case Committee had stated that they "attached little weight" to the allegation, rather than that they disregarded the information. As Miss Del Priore argued, EF's statement was hearsay and should have been given some weight, rather than wholly disregarded. However, in our judgment the fact that no statement from EF has ever been produced not only reinforces AB's account, but casts serious doubt on XY's credibility. We do not accept Miss Del Priore's submission that it is impermissible to draw such an inference from this episode.

78. As Mr Jaffey pointed out, ISA has no way of knowing whether EF even exists. If he does exist, and in the absence of any explanation for the absence of statement being proffered, the only sensible conclusion is that EF's evidence would not be helpful to XY. If EF could assist XY but is unwilling to make a statement, then it is an obvious case for an application for a witness summons before the Upper Tribunal (see rule 16 of the Tribunal Procedure (Upper Tribunal) Rules 2008). In Mr Jaffey's words, "a credible statement from EF might well be the end of the matter", and ISA is right to be concerned that a serious allegation (bordering on blackmail) is made against AB but not substantiated by XY. We also consider it likely that the potential crucial significance of EF's evidence, and the express indication from XY's solicitors that such a statement would be provided, led ISA to overlook the desirability of making further enquiries about (i) how AB had come to hear of the fact that a previous allegation had been made against XY; and (ii) whether AB had indeed made threatening calls to XY.

Other evidential matters

79. Mr Jaffey also referred us to facts that had been admitted by the appellant in the course of police investigations which, ISA submitted, were pertinent to the findings that XY had engaged in "relevant conduct". For example, CD alleged that XY had kissed him, had loaned him pornographic magazines and videos and had also bought him a pair of blue silk boxer shorts (for his 15th or 16th birthday – a gift which Mr Jaffey understandably characterised as "a purchase laden with sexual meaning"). Both complainants had described how they were given wine by XY. Those facts were all agreed by XY in police interviews. We do not feel it necessary to refer further to such matters. In our view, whether or not such admitted acts amounted to "relevant conduct" in themselves, there is no doubt that they support the conclusion that the appellant has had a fundamental difficulty in appreciating the proper boundaries in relationships with young people who are, to some extent at least, in his charge.

80. There are other matters which do not assist the appellant's case – for example, his written representations included an express denial of the allegation that pornographic gay material and videos were available to view at his home, his solicitors adding that XY "was arrested at his home which presumably would have been searched for pornographic material and none was found." We have read the witness statement by the detective constable, who in fact carried out just such a search in 1997, which itemises the items seized. Some were entirely innocuous (e.g. copies of *Gay Times* and of the video *My Beautiful Laundrette*). Others, including items loaned to DE, were agreed by XY himself in a police interview to be explicit and pornographic in nature.

81. ISA's investigation also referred to the indecent images which were found on XY's computer in 2002. There was some discussion of these at the hearing before us. Given our findings above, we do not think it is either necessary or useful to analyse this material in any detail. Mr Jaffey sought to persuade us that we should draw inferences from XY's persistent refusal to say anything other than "No comment" when he was being questioned by police about these images. Whilst we acknowledge that in such civil proceedings it may be appropriate to draw inferences from silence, when an individual has been given the opportunity to advance an explanation and only provides one later, we also recognise that XY was doubtless acting on the advice of his solicitor who was present at the interview. We also accept, of course, that no criminal charges were brought on this matter, but note that this was because of the difficulty of establishing the precise ages of the young people depicted. We merely observe that (a) at the time in question (before section 45(1) of the Sexual Offences Act 2003 came into force) the relevant offence involved possession of indecent images of under 16 year olds, but (b) for the purposes of the 2006 Act, a child is any person under the age of 18, so the failure to secure a criminal conviction cannot be in any way determinative.

82. The suggestion that ISA disregarded the testimonials provided by XY does not withstand scrutiny. It is clear that they were considered, but it was noted that only two of the 14 people had known XY prior to 1990. Some of the statements were accorded a strong weighting, others less weight, for various reasons. In our judgment such an approach was entirely proper.

Overall conclusion

83. In the light of all the factors above, we are satisfied that ISA neither erred in law nor made any material mistakes of fact in concluding that XY had engaged in relevant conduct. ISA was entitled to find that XY has a long-standing sexual interest in teenage boys and has demonstrated a pattern of behaviour by which he grooms his victims using flattery, alcohol, familiarisation with physical contact and open discussion about sexual matters to reduce his victim's resistance. There were aspects of its consideration of the case that might have been improved, but we are more than satisfied that its conclusions as to the facts of both principal allegations by the complainants AB and CD were justified on the evidence. Indeed, although the material was not before ISA at the time it made its decision, and we do not rely on it in making our decision, there is further information in Northlands Police's reply of April 2011 indicating that XY is or has been associated with two other males against whom serious allegations of sexual abuse have been made by boys under the age of 16.

84. As Mr Jaffey argued, once those findings of fact were made about the two main allegations, there was then a separate issue as to the finding of appropriateness to bar, bearing in mind those findings of fact. We simply note again that there was some discussion of the respective remit and expertise of ISA and that

of the Upper Tribunal, bearing in mind the enigmatic language of section 4(3) of the 2006 Act. We did not find it necessary to explore those matters in any detail. If the findings of fact were made out – and XY's central case was that the core allegations were false, not that they had some foundation but had been exaggerated and that the events had all happened a long time ago under different circumstances – then there was no serious argument that ISA could reach any other decision other than that XY was unsuitable to work with children.

(3) The failure to offer the appellant an oral hearing

The parties' submissions

85. The third ground of appeal on behalf of the appellant was that ISA had erred in law by failing to offer him an oral hearing before reaching its decision. Miss Del Priore's submission was that the appellant's rights under the European Convention of Human Rights were engaged at the point where the decision was taken to place him on the Children's Barred List. She further contended that the failure to offer him an oral hearing at that stage was an error of law that could not be cured by the possibility of an appeal (with permission only) to the Upper Tribunal. At the oral hearing Miss Del Priore placed considerable reliance on the Court of Appeal's decision in *R (on the application of G) v X School & Ors* [2010] EWCA Civ 1; [2010] 1 WLR 2218 (the decision of the Supreme Court, reversing the Court of Appeal's decision in that case, having not appeared at that time).

86. Miss Del Priore also relied on the *Royal College of Nursing* case, especially the passage in the judgment of Wyn Williams J. in which his Lordship suggested that "a failure or refusal to conduct an oral hearing in circumstances which would allow of an argument that the failure or refusal was unreasonable or irrational would itself raise the prospect of an appeal to the Upper Tribunal on a point of law" (at [103]). We also note that earlier in that judgment Wyn Williams J., reviewing the evidence of ISA's Director of Operations in that case, remarked as follows:

> "16. According to Ms Hunter the Interested Party has never held an oral hearing prior to reaching a decision about whether a person should be removed from the list. She points out, however, that there is no statutory prohibition upon conducting an oral hearing. She says:-
>
> > 'Should the ISA receive a request to make oral representations from a person under consideration and the ISA considers that it is necessary to receive oral representations to protect that person's Convention rights, or in the interests of fairness and equality, the ISA would make arrangements to hear those representations.'"

87. Mr Jaffey submitted that the *Royal College of Nursing* case did not assist the appellant; on that basis the real issue was whether or not it was unreasonable or irrational of ISA not to hold a hearing. Yet the appellant had submitted detailed written representations, had not asked ISA for a hearing and moreover it was unclear what purpose any such hearing before ISA would serve. Furthermore, ISA had no power to compel any witnesses to attend while the appellant had every right, once permission had been granted, to apply for an oral hearing before the Upper Tribunal. The decision to proceed without a hearing was a judgment call and was not thereby unfair (by analogy with the case law on the operation of the Parole Board: see e.g. *R (on the application of Brooks) v The Parole Board* [2004] EWCA Civ 80 (at [89]-[90]).

The Supreme Court's judgment in R (G) v The Governors of X School

88. The Supreme Court delivered its judgment in *R (On the application of G) v The Governors of X School* [2011] UKSC 30 in the week following the Upper Tribunal's hearing of the present appeal. The parties then made further written representations in the light of the Supreme Court's judgment which we took into account in reaching our decision.

89. As noted above, the Supreme Court allowed the school's appeal against the Court of Appeal's decision in that case, which arose from a school's decision to suspend a sessional music assistant ("G") from his post on the basis of allegations that he had formed an inappropriate relationship with a 15 year old boy doing work experience at the school. The school had informed G that he was entitled to be represented at the subsequent disciplinary hearing by a trade union representative or a work colleague. G, who was not a member of a trade union, sought to be represented by his solicitors, a request that the school refused. G attended the disciplinary hearing but refused to answer questions on the basis that he believed the proceedings to be unfair. The disciplinary panel concluded that G had formed an inappropriate relationship which constituted gross misconduct warranting his summary dismissal. The school reported the matter to the Secretary of State, and a decision by ISA was pending. G argued that the school's refusal to allow him legal representation at the disciplinary hearing violated his rights under Article 6(1) of the Convention.

90. The principal question raised by the appeal concerned the connection required between the school's disciplinary hearing and the proceedings before ISA in order for Article 6(1) of the Convention to apply to both sets of proceedings (Lord Dyson, with whom Lord Walker agreed, giving the leading judgment, at [35]). It was accepted that the civil right in question under Article 6(1) was G's right to practise his profession as a teaching assistant and to work with children more generally. It was also agreed that this civil right would be directly determined by a decision of ISA to include him on the children's barred list, and accordingly Article 6(1) applied to the proceedings before ISA itself. However, if the right to remain in his current post had been the sole issue, it was not suggested that Article 6(1) would have required that he have the opportunity of legal representation in the disciplinary hearing (Lord Hope at [89]). G's Convention arguments were accordingly based on the effect of the interaction between the employer's disciplinary proceedings and the prospective ISA proceedings.

91. The Supreme Court unanimously held that the Court of Appeal had been correct in ruling that an individual may enjoy Article 6 procedural rights if the decision in the disciplinary proceedings will have a substantial influence or effect on ISA's determination of his civil right to follow his profession (Lord Dyson at [69], Lord Hope at [90] and Lord Kerr at [103]). However, in terms of the application of that principle to the particular circumstances of the case, the majority of the Supreme Court (Lord Kerr dissenting) held that the school's disciplinary proceedings did not engage Article 6(1) of the Convention, as they did not directly determine or exert a substantial influence over ISA's proceedings (Lord Dyson at [84], Lord Hope at [91] and Lord Brown at [97]).

92. Although the particular focus of the appeal was the potential application of Article 6(1) to the disciplinary proceedings, the members of the Supreme Court necessarily devoted considerable attention to ISA's decision making processes. For example, Lord Dyson set out ISA's five stage procedure in some detail (at [22]-[31]). There were repeated references in the majority judgments to the fact that ISA was required to exercise its own judgment, independently of the view taken by the school.

For example, according to Lord Dyson, "ISA is required to make its own findings of fact and bring its own independent judgment to bear as to their seriousness and significance before deciding whether it is appropriate to place the person on the barred list" (at [79]; see also Lord Hope at [92] and Lord Brown at [97]). This feature was plainly instrumental in informing the majority view that the school's disciplinary proceedings did not directly determine or exert a substantial influence over ISA's proceedings.

93. In the course of the judgments, the Supreme Court also considered the potential for oral hearings before ISA. Lord Dyson observed as follows:

> "80. …. First, the ISA does not operate a procedure for oral hearings with cross-examination. There is nothing in either the statute or the guidance notes to prevent the ISA from operating such a procedure, but there is nothing which sanctions it either. I do not find it necessary to decide whether the ISA could operate such a procedure. There must be very few cases where the lack of an oral hearing (with examination and cross-examination of witnesses) would make it unduly difficult for the ISA to make findings of fact applying its own judgment to the material. It is only in very few cases that a decision-making body is faced with a conflict of evidence which it resolves *solely or even primarily* on the basis of the demeanour shown by the witnesses. There is usually something else. It may be that the account given by one person is self-contradictory or inconsistent with the account that he or she gave on a different occasion; or doubt may be cast on its accuracy by a document; or one account is supported by the evidence of other apparently credible and reliable witnesses, whereas the other stands on its own; or one account is incredible or at least improbable. In any event, as Lord Bingham said in *The Business of Judging* (2000) at p 9, 'the current tendency is (I think) on the whole to distrust the demeanour of a witness as a reliable pointer to his honesty'. At pp 9-13, he developed this view and supported it with references to a number of statements by judges and advocates."

Lord Dyson added that the absence of an oral hearing did not prevent ISA from making its own findings of fact (at [82]).

94. Lord Kerr, in the minority, and referring to Lord Dyson's discussion at [80], cited immediately above, noted that "whether ISA has power to hold an oral hearing remains imponderable" (at [109]).

The Upper Tribunal's analysis

95. There is no doubt that, as a matter of principle, Article 6(1) applies to proceedings before ISA in that those proceedings involve the determination of the appellant's civil rights and obligations (see the *Royal College of Nursing* case at [47] and *R (On the application of G) v The Governors of X School* at [33], [101] and [111]). As such, Article 6(1) provides that the appellant "is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". However, does that necessarily mean that the appellant is or may be entitled to an oral hearing <u>before ISA itself</u>?

96. The decision of the Supreme Court does not directly answer that question, not least as that was not the precise issue before the Court. There are some parallels on the facts between *R (On the application of G) v The Governors of X School* and the present case, not least in that both cases concerned an actual or potential discretionary bar on the basis of "relevant conduct". But, as Miss Del Priore points out, there are also fundamental differences on the facts – not least that in *R*

(On the application of G) ISA had made no determination (at least as yet) and that G, unlike XY, had at least had the opportunity of an oral hearing, albeit in his employer's disciplinary proceedings. Miss Del Priore's central submission was that Article 6(1) was engaged at the point when XY's civil right to practise his profession was directly determined, namely at ISA's decision making stage, at which point irreversible damage was done to his reputation and professional standing. The inevitable consequence, she argued, was that in the circumstances of this case ISA should have afforded XY an oral hearing to give effect to his Article 6(1) right to a fair trial, and *R (On the application of G)* provided no authority for any contrary proposition.

97. Certainly Lord Hope expressly acknowledged that "As the ISA has not yet considered the claimant's case, we do not have before us a concrete set of facts on which to judge whether or not its procedures are fair" (at [92]). Likewise, Lord Brown commented (at [101]) that:

> "...If, of course, a challenge comes in due course to be made to the operation or legality of the scheme in such a case – a challenge necessarily directed against the ISA (in so far as it is said that the scheme is not, but could be, operated lawfully) and/or the Secretary of State (in so far as it is said, as in *Wright,* that the scheme is inherently incompatible with article 6) – the court will have to decide it... That challenge, however, I repeat, is not presently before us."

98. To that extent we accept that we are not bound by the Supreme Court's decision to decide the point before us one way or the other. In our judgment, however, as a general rule a person whom ISA is 'minded to bar' on a discretionary basis has no right to an oral hearing before ISA prior to the decision being made, for the reasons that follow.

99. First, although the point was strictly *obiter*, we have a very strong steer from the majority of the Supreme Court in *R (On the application of G) v The Governors of X School* that an oral hearing will only rarely be necessary in proceedings before ISA. The Supreme Court's judgments were framed more in terms of whether ISA *could* hold an oral hearing, not whether it *should* hold such a hearing in any given case. The majority of the Supreme Court saw no reason to doubt that "taken as a whole, the procedures that the 2006 Act sets out are compatible with article 6(1)" (Lord Hope at [93]; see also Lord Brown at [101].

100. Secondly, in the *Royal College of Nursing* case itself, Wyn Williams J. expressly held that "that the absence of a right to an oral hearing before the Interested Party [ISA] and the absence of a full merits based appeal to the Upper Tribunal does not infringe Article 6 EHCR" (at [103]). His Lordship continued:

> "…To repeat, an oral hearing before the Interested Party is permissible under the statutory scheme and there is no reason to suppose that in an appropriate case the Interested Party would not hold such a hearing as Ms Hunter asserts would be the case. I do not accept that this possibility is illusory as suggested on behalf of the Claimants. Indeed, a failure or refusal to conduct an oral hearing in circumstances which would allow of an argument that the failure or refusal was unreasonable or irrational would itself raise the prospect of an appeal to the Upper Tribunal on a point of law. Further, any other error of law and relevant errors of fact made by the Interested Party can be put right on an appeal which, itself, may be conducted by way of oral hearing in an appropriate case."

101. Thirdly, and following on from that point, even if there ought to have been an oral hearing before ISA, then any failing to hold such a hearing may be cured by the appeal to the Upper Tribunal, where the facts can be reconsidered in full and the Appellant can call whatever evidence he wishes and make submissions on the facts as he sees fit (sometimes called the 'curative' or 'full jurisdiction' principle). In the present case, as already noted, the appellant has declined to offer evidence before the Upper Tribunal himself or to call any witnesses as to the facts. As Wyn Williams J. noted in the *Royal College of Nursing* case at [92]:

> "This scheme affords to the affected person a right to make representations. The scheme does not preclude the Interested Party convening an oral hearing if it thinks it appropriate. Section 4 of the 2006 Act confers a right of appeal. Although permission to appeal is required, the scheme envisages that an appeal may be brought when, at least arguably, the Interested Party has made a mistake on any point of law or in any finding of fact upon which its decision is based. In the event that the appeal succeeds the Upper Tribunal may either direct the Interested Party to remove the person's name from the barred list or remit the matter to the Interested Party for a new decision. If it takes the latter course it may set out findings of fact upon which the Interested Party must base its new decision. In my judgment, these measures, taken together, afford a considerable degree of procedural protection."

We accept, however, that there may be some difficult issues relating to the potential application of the curative or full jurisdiction principle, which were not fully addressed in the submissions to us (see further *R (On the application of G)* at [84]-[85 (Lord Dyson), [101] (Lord Brown) and [119] (Lord Kerr)).

102. Finally, although we were not referred by counsel to the jurisprudence of the Strasbourg court, that case law lends support to the approach taken by the domestic courts. The right to appearance at an oral hearing in person is not universal, and so it may be important to distinguish presence (in person) from participation (by way of representations), given that written procedures may offer certain advantages, not least in terms of speed and efficiency (see e.g. *Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 405).

103. Our conclusion, therefore, is that as a matter of law there is no automatic right to an oral hearing before ISA before it reaches its final decision in a discretionary bar case. As we note above, that conclusion is consistent with the judgment of Wyn Williams J. in the *Royal College of Nursing* case. We also bear in mind that the Upper Tribunal, unlike the Administrative Court, has no power to grant a declaration of incompatibility under section 4 of the Human Rights Act 1998 (see especially section 4(5)).

104. However, Miss Del Priore did not put the appellant's case in quite these stark terms. Rather, her submission was that *on the particular facts of this case* ISA should have afforded XY an oral hearing (see [96] above). There is, of course, a liberty to apply for such a hearing. In this context we have to say we were not overly impressed by Mr Jaffey's contention that the appellant could have asked ISA for an oral hearing. Whilst it is true that the appellant was legally represented, there was no suggestion at all in the lengthy "minded to bar" letter from ISA that an oral hearing at that stage was a possible option. We therefore asked Mr Jaffey how many such hearings, if any, had been held by ISA since the inception of the scheme. On instructions, he was able to advise us that ISA had considered some 600 discretionary barring cases, in which it had received a total of just 10 requests for an

oral hearing, but none had actually been held (in some cases, of course, ISA will have decided on receipt of written representations that barring was not appropriate). Given the format and contents of ISA's standard correspondence, we were not unduly surprised by the low level of such requests.

105. It also seems to us that there is a subtle difference of emphasis in the respective judgments of Wyn Williams J. in the *Royal College of Nursing* case and of the Supreme Court in *R (On the application of G) v The Governors of X School* (and, rather puzzlingly, not least given the making of a declaration of incompatibility, there is no discussion in the Supreme Court's judgments of the former decision). Wyn Williams J., whilst holding that there was no absolute right to an oral hearing before ISA, plainly contemplated that there would be cases where such a hearing would in fact be appropriate. For ourselves, however, given the figures cited above, we are not quite so sanguine as Wyn Williams J., who saw "no reason to suppose that in an appropriate case [ISA] would not hold such a hearing". So in this respect we share the scepticism of Lord Kerr who, dissenting in *R (On the application of G) v The Governors of X School*, noted that ISA had not held any hearings to date "and it may safely be assumed that it will not convene such a hearing in the present case" (at [109]). However, the Supreme Court's majority judgment will understandably be taken by ISA as supporting what certainly appears to be its current *de facto* practice (if not its official policy) of not holding hearings.

106. So, even if there is no *general* right to an oral hearing before ISA makes a decision in a discretionary bar case, did ISA err in law by failing to offer the appellant such an opportunity *in the circumstances of this case*? Despite Miss Del Priore's powerful arguments – and we remain very mindful of the effect of such a barring decision on the appellant's livelihood – we agree with Mr Jaffey that the real issue was whether or not it was unreasonable or irrational of ISA not to hold a hearing. We have indicated that we do not accept all of Mr Jaffey's submissions on this point. However, we cannot say it was unreasonable or irrational of ISA not to hold a hearing. We bear in mind in particular that ISA had a considerable body of documentary evidence in terms of the appellant's extensive interviews under caution and the various (and in some instances very full) witness statements. It also had the very detailed representations made by the appellant's solicitors, along with the testimonials submitted on his behalf. The events in question were also some time ago. In all those circumstances we find no error of law in ISA's decision to proceed in the way that it did.

107. However, with respect, and notwithstanding both the powerful points made by the majority of the Supreme Court, and our own conclusions on the relevant law, we would encourage ISA to consider the circumstances in which it would be appropriate to hold an oral hearing. There may well be circumstances in which the common law duty of procedural fairness may point to the need for an oral hearing (see further, but admittedly in a very different context, the recent analysis by Wyn Williams J. in *R (on the application of Flinders) v Director of High Security* [2011] EWHC 1630 (Admin) (at [60]-[64]). We were not overly impressed by Mr Jaffey's point that ISA has no power to summon witnesses – this assumes, wrongly in our view, that an oral hearing must necessarily follow the adversarial court-based model (see further the observations of Cranston J. in *R (H) v Secretary of State for Justice* [2008] EWHC 2590 (Admin) (cited in *Flinders*)). There are several examples of areas in which administrative and non-judicial decision makers usually determine cases on the papers but may decide to hold some form of interview or oral hearing, even if it is the exception rather than the rule (e.g. the Social Fund Inspectors in relation to social fund reviews).

108. Furthermore, the current appellant is an intelligent man with a professional background with experienced solicitors acting for him, who submitted detailed written representations to ISA. That will not always be the case. We bear in mind that some individuals under consideration for barring will be unable to communicate clearly by way of written representations and will be able neither to access nor to afford competent legal representation. It is true, of course, that there is the possibility of an oral hearing on appeal before the Upper Tribunal. However, it is the unrepresented and vulnerable appellant who is more likely to be at a disadvantage in the appellate process, not least as he or she has to persuade the Upper Tribunal that it is appropriate to grant permission to appeal in the first place. There may well be other situations in which an oral hearing before ISA itself may be desirable, notwithstanding the right of appeal to the Upper Tribunal.

(4) The perversity argument

The parties' submissions

109. Miss Del Priore's fourth and final submission was that ISA's decision was perverse. The principles by which perversity is to be judged in law were set out by Mummery LJ in *Yeboah v Crofton* [2002] EWCA Civ 794 (at [92]-[95]). In summary, a claim that a decision is perverse should only succeed where an overwhelming case is made out that the tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Miss Del Priore did not shy away from making that challenge, which she submitted was buttressed by what she argued were the tribunal's errors of law in relation to the burden of proof, the findings of "relevant conduct" and the failure to hold an oral hearing.

110. Mr Jaffey, however, submitted that ISA was entirely justified in making the findings of fact which it did, and that even on the admitted facts the appellant's relationships demonstrated inappropriate behaviour which was likely to cause harm to children. In sum, in response to this last ground of appeal, Mr Jaffey relied upon his submissions in relation to the three earlier points.

The Upper Tribunal's analysis

111. As Miss Del Priore rightly acknowledged, the perversity challenge sets a high threshold to be met. According to Sir John Donaldson MR, sitting in the Court of Appeal, the test was whether the decision was so "wildly wrong" as to merit being set aside (*Murrell v Secretary of State for Social Services*, reported as Appendix to Social Security Commissioner's decision R(I) 3/84). More recently, in *Miftari v Secretary of State for the Home Department* [2005] EWCA Civ 481 Keene LJ (at [36], agreeing with Maurice Kay LJ), observed that "Perversity has long been equated with *Wednesbury* unreasonableness, with the consequence that there is an error of law if a decision is one to which no reasonable decision-maker, properly instructing himself on the law, could have come on the evidence before him."

112. In our view the perversity challenge in this case really adds nothing to the other grounds of appeal analysed above. If, for example, we had been satisfied that ISA had committed an error of law or made an incorrect finding on a material fact in reaching its conclusions as to "relevant conduct", then the likelihood is that a perversity challenge might have stood some prospect of success. However, given that we have rejected the other grounds of appeal, the perversity challenge inevitably falls away.

Conclusion

113. We are not satisfied that any of the four grounds of appeal are made out, for the reasons set out above. It follows that we conclude that ISA's decision does not involve any material error, either by way of law or finding of fact, and so we dismiss the appellant's appeal.

Recommendations

114. The Upper Tribunal has no formal power under the Tribunals, Courts and Enforcement Act 2007 or the SVGA 2006 to make any recommendations when disposing of an appeal. The series of recommendations that follow are therefore precisely that, a set of suggestions which have no statutory force. However, given that this is the first occasion on which one of ISA's decisions has been challenged on appeal at a hearing before the Upper Tribunal, we considered it might be helpful to include the following reflections and recommendations by way of a rider to our formal decision dismissing the appeal. We are confident that the ISA Board and senior management team will consider these suggestions in the spirit in which they are intended and will take whatever steps they consider appropriate.

115. First, ISA must take urgent steps to ensure that no letter is ever sent again in the same terms as the letter of 19 July 2010 which implies that the onus is on the recipient to disprove allegations made against him or her. This may require further training for all ISA case workers, or even a requirement that all such "minded to bar" letters are first vetted by an in-house lawyer. We are sure that the ISA Board will consider carefully what quality assurance processes are needed to ensure that there is no repetition of this unfortunate incident.

116. Second, we recommend that ISA considers and ideally sets out in a publicly available document the circumstances in which it would be appropriate to hold an oral hearing. As we explain at [107] and [108] above, even if there is no general right to an oral hearing in a discretionary bar case before ISA reaches a decision, there may well be circumstances in which the common law duty of procedural fairness may still point to the need for an oral hearing.

117. Third, we think that further thought needs to be given to the lay-out of the Barring Decision Making Process document, given that it is not simply an in-house aide-mémoire but a record which will often have to be disclosed both to the individual in question and to the Upper Tribunal. For example, we found the use of different fonts in long columns when analysing evidence and representations unhelpful. It would be easier to understand the document if ISA's provisional findings on the evidence were listed in the left-hand column with the alleged abuser's representations on each point in a middle column and ISA's conclusions in a third right-hand column. The document would be easier to read if prepared in landscape rather than portrait format. It would also assist if all entries were given paragraph numbers for easy reference in tribunal hearings (rather than counsel having to refer in cumbersome terms to e.g. "the second italicised paragraph, starting after the indented normal font paragraph on the right-hand side of page 123").

118. Fourth, and finally, ISA case workers may need to operate clear protocols for checking whether further information is needed on particular aspects of the case e.g. after representations have been received in a discretionary bar case and before the matter is further considered. As noted above at [78], we suspect that the express indication from XY's solicitors that a statement would be provided by EF led ISA to overlook the desirability of making further enquiries about (i) how AB had come to

hear of the fact that a previous allegation had been made by CD against XY; and (ii) whether AB had indeed made threatening calls to XY. In the present case, however, we are satisfied that the failure to make such inquiries did not undermine the conclusions reached by ISA's Case Committee.

Signed on the original
on 19 July 2011

Nicholas Wikeley
Judge of the Upper Tribunal

Michele Tynan
Member of the Upper Tribunal

John Hutchinson
Member of the Upper Tribunal