DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

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

The decision by the Respondent under "customer reference" 00892354601, communicated to the Appellant by letter dated 25 June 2019, does not involve any material mistake of fact or law.

The Upper Tribunal further DIRECTS that, in accordance with the Anonymity Order below, 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 (SI 2008/2698)).

This decision and ruling are given under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 14, 21 and 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

ANONYMITY ORDER

1. Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 20081, we prohibit the disclosure or publication in particular of—

(a) the Appellant's name (referred to as "GF" in this decision);

(b) the name of the Appellant's granddaughter (referred to as "Child A" in this decision);

(c) the name of the Appellant's grandson (referred to as "Child B" in this decision);

(d) the name of the Appellant's daughter (referred to as "Mrs AB" in this decision;

(e) the name of the Appellant's son-in-law (referred to as "Mr AB" in this decision;

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

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

Attendances:

For the Appellant: Mr Oliver Renton of Counsel, instructed by direct access

For the Respondent: Ms Galina Ward of Counsel, instructed by the Disclosure and Barring Service

REASONS FOR DECISION

Introduction

1. This is the Appellant's appeal against the decision of the Disclosure and Barring Service (DBS) to place him on the Children's Barred List under the Safeguarding Vulnerable Persons Act 2006 ("the 2006 Act").

2. We held a virtual hearing of this appeal on 21 May 2020. The Appellant was represented by Mr Oliver Renton of Counsel. The Respondent (from now on, "the DBS") was represented by Ms Galina Ward, also of Counsel. We are indebted to them both for their careful submissions both before and at the hearing.

3. As well as the Appellant's oral evidence, we heard the advocates' oral submissions and considered all the documentation in the appeal hearing bundle (whether or not it was referred to in the hearing itself).

4. For the reasons that follow, the Upper Tribunal dismisses the Appellant's appeal. We conclude that there is no material error of law or mistake of fact in the DBS decision to include the Appellant on the Children's Barred List.

5. We deal first with a couple of procedural matters, being the decision to proceed by way of a virtual hearing and the DBS's provision of late evidence. By way of a roadmap, our decision as a whole is organised as follows:

The decision to proceed by way of a virtual hearing

6. This appeal was lodged with the Upper Tribunal in September 2019. In December 2019 the oral hearing of this appeal was fixed for 21 May 2020. Obviously, however, the Covid-19 pandemic intervened. On 29 April 2020 the Upper Tribunal issued case management directions, inviting either party to indicate whether they wished to apply for a postponement of the appeal hearing. In doing so the judge made the following observations:

> "7. The appeal has a hearing date scheduled for Thursday 21 May 2020. Paragraph 3 of the Chamber President's latest guidance states as follows:
>
> > 'The UTAAC is not holding face to face hearings at present. In respect of appeals and applications which are listed for hearing, the parties will be contacted by UTAAC staff in order to assist the judge to decide whether the matter is suitable for a telephone or video hearing (for example, by Skype). The judge must ensure that the case is heard and decided in a just and fair way. The judge will consider whether and how this can be done.'
>
> 8. It will come as no surprise to the parties if I say that I have concluded without needing to hear any observations from the parties that this appeal is not suitable for a telephone hearing.
>
> 9. The appeal may be suitable for a virtual hearing. The platform that UTAAC uses for such virtual hearings is Skype for Business. Several such hearings have already taken place in UTAAC jurisdictions. My provisional view is that Skype for Business is, in the circumstances, entirely satisfactory for cases involving legal submissions. Suitability may perhaps be open to question if there is to be extensive factual evidence including cross-examination. I would welcome the parties' observations. If this virtual hearing date is lost, for fairly obvious reasons I cannot at this stage predict or even hazard a guess as to when UTAAC will revert to traditional face-to-face oral hearings."

7. The DBS response was to adopt a position of studied, if unenthusiastic, neutrality. DBS noted that it was "anticipating extensive cross examination of witnesses should they attend to give oral evidence, as this is a case in which the correctness of a major factual finding made by the Respondent is in issue. Although the Respondent is not requesting a postponement of the forthcoming hearing, it does share the Tribunal's concerns regarding the suitability of video hearings in cases involving extensive factual evidence including cross examination."

8. The Appellant expressly stated that he was not seeking a postponement. His position, in essence, was that (as his counsel summed up) "whilst far from ideal, we would suggest that it would be preferable to proceed by way of video link than to necessitate potentially considerable delay". Counsel very fairly noted that MoJ and

HMCTS guidance about the prospect of conventional hearings "provides little by way of assurance as to when such a time may be and, as such, the length of adjournment that we would effectively be seeking. This is a matter that has weighed heavily on [GF], a burden that further delay would simply exacerbate."

9. There was, therefore, no application for a postponement or adjournment from either party. The Upper Tribunal nonetheless considered of its own volition whether we should proceed with the hearing in the present extraordinary circumstances. We took into account, as being most relevant to this type of proceedings, the guidance given in family proceedings cases by the Court of Appeal (see *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583 and *Re B (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 584) and the Family Division of the High Court (*A Local Authority v Mother & Ors* [2020] EWHC 1086 (Fam)).

10. In reaching our decision on whether to proceed, we recognised that both parties were legally represented by competent and experienced counsel, and that neither side was pressing for a postponement. We were satisfied from the documentation on file that the Appellant would be able to engage with and follow remote proceedings meaningfully. We also took into account that we would only be hearing from one or at most two witnesses of fact, both of whom had supplied a sworn witness statement in advance. We noted the case was listed for a whole day and considered this timetable would be manageable (but with more breaks than would normally be the case in a face-to-face hearing). We did not consider that a conventional oral hearing would be feasible at any time in the foreseeable future. Overall, we concluded it was fair and just to continue with this case remotely and not to postpone the hearing.

11. In the event, the virtual hearing proceeded for the most part uneventfully, using the Skype for Business platform. Everyone involved was logged in from a separate location (including the three panel members). The hearing was listed for a 10.30 start but did not properly get underway until 10.54, as a result of various initial technological teething problems (despite the best efforts of the Upper Tribunal's administrative and clerical team to ensure everything was in good order ahead of the hearing). The morning session then ran through to a convenient break at 13.15, with a 10-minute break at 12.20. The afternoon session resumed at 14.15 with a 5-minute adjournment at 15.00, with the hearing finishing at 15.45. On the rare occasion when the sound quality dropped in the course of the hearing, we ensured that everyone could be heard properly before re-starting the submissions or evidence that had been interrupted.

12. We formally record that:

(a) the form of remote hearing was A (audio). A face to face hearing was not held because it was not practicable in the light of Government guidance on urgent matters of public health. The case was also suitable for remote hearing. Further delay would not have been in the interests of justice;

(b) the documents that we were referred to were contained in the paper file numbered to 297 pages together with two unnumbered documents submitted late, as well as an electronic bundle of authorities, in respect of all of which both parties and their representatives also had copies;

(c) our decision is as set out above.

The Disclosure and Barring Service's late evidence

13. On 7 May 2020 the DBS filed its skeleton argument (now pp.268-279) along with several case law authorities. The DBS also included three items of new evidence: a copy of a police forensic report on GF's computers, a transcript of the ABE (Achieving Best Evidence) interview with the child concerned and a short case chronology from the relevant local authority Children's Service department. The production of the ABE interview transcript may well have been prompted by the observation in the Appellant's skeleton argument that "there has never been disclosure of the video recorded interview or any transcript thereof". On 13 May 2020 the DBS also filed copies of the Children's Service's Child and Family Assessment report and the department's case closure letter.

14. It is not entirely clear to us why these documents were produced so late in the day. Our understanding is that they had not been obtained in the course of the DBS investigation and were only sought in the lead-up to the appeal hearing. We return to that issue at the end of our decision. We considered whether it was fair for the evidence to be produced so late in the proceedings, although Mr Renton did not make any formal submissions on their admissibility. We decided that the overriding objective of dealing with cases fairly and justly meant this evidence should be considered. The documents were not lengthy and could be readily digested in the time available before the hearing. They were clearly relevant to the issues we had to determine. In assessing the weight to be attached to them, we took into account the fact that the Appellant was not realistically in a position to call any countervailing evidence.

The Disclosure and Barring Service's decision under appeal

15. The DBS sent the Appellant a final decision letter on 25 June 2019. In the passage headed "How we reached this decision", the DBS summarised its findings and conclusions in the following terms:

> "Having considered your representations, we have decided that it is appropriate to include you in the Children's Barred List. This is because you have been convicted for one count of 'Making Indecent Photograph or Pseudo-Photograph of Children, the context of which being that you were found in possession of an indecent image of a child, believed to be 16 years of age.
>
> The DBS have also found on the balance of probabilities that: you have searched for terms indicative of indecent images ('teens' and 'pre-teens') for your own gratification; and you sexually assaulted your four year old granddaughter by rubbing her vagina on multiple occasions."

16. Following further explanation, the DBS final decision letter concluded:

> "Therefore your name has been included in the Children's Barred List under paragraph 2 of Schedule 3 of the Safeguarding Vulnerable Groups Act 2006 (SVGA) on 25/06/2019."

17. For convenience in the course of this decision, we refer to the allegation of sexual assault, which the DBS found as proven on the balance of probabilities, as "the central allegation". We deal next with the legislative framework under the 2006 Act.

The legislative framework under the 2006 Act

18. The main provisions governing inclusion on the Children's Barred List are to be found in Schedule 3 to the 2006 Act. There are various 'routes' by which DBS may decide to put a person on the Children's Barred List. For present purposes only one such route is relevant, namely "Inclusion subject to consideration of representations" (paragraph 2 of Schedule 3).

19. Paragraph 2 provides that individuals convicted of certain offences must be included on the Children's Barred List, subject only to consideration of such representations as they may make. The DBS concluded that the present case falls within this category (so far as the Appellant's conviction for possession of an indecent image was concerned). The relevant provisions of paragraph 2 of Schedule 3 read as follows:

> "(1) This paragraph applies to a person if any of the criteria prescribed for the purposes of this paragraph is satisfied in relation to the person.
> (2) Sub-paragraph (4) applies if it appears to DBS that—
> (a) this paragraph applies to a person, and
> (b) the person is or has been, or might in future be, engaged in regulated activity relating to children.
> (3) [*repealed*]
> (4) DBS must give the person the opportunity to make representations as to why the person should not be included in the children's barred list.
> (5)-(6) [*omitted as not material*]…
> (7) Sub-paragraph (8) applies if the person makes representations before the end of any time prescribed for the purpose.
> (8) If DBS —
> (a) is satisfied that this paragraph applies to the person,
> (b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and
> (c) is satisfied that it is appropriate to include the person in the children's barred list,
> it must include the person in the list."

20. Thus, according to paragraph 2(8), where a person has been convicted of an offence specified for the purposes of paragraph 2(1), the DBS must, after considering any representations they wish to make, include them in the list if the test for regulated activity is satisfied and the DBS is satisfied that inclusion is appropriate. As the Divisional Court has recently observed, "it is clear that the function of DBS is a protective forward-looking function, intended to prevent the risk of harm to children by excluding persons from involvement in regulated activities. DBS is not performing a prosecutorial or adjudicatory role" (*R (on the application of SXM) v The Disclosure and Barring Service* [2020] EWHC 624 (Admin) at paragraph [38]).

21. A conviction for the offence under section 1(1)(a) of the Protection of Children Act 1978 is listed as one of the criteria that apply for the purposes of paragraph 2(1) (see further the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 (SI 2009/37), regulation 4(5) and Schedule 1, paragraph 2(f) and Part 2 of the Table). It is not in dispute that the Appellant has a conviction for being in possession of a single indecent image.

22. An activity is a "regulated activity relating to children" for the purposes of paragraph 2(2)(b) and 2(8)(b) of Schedule 3 if it falls within one of the sub-paragraphs in paragraph 1 of Schedule 4 to the 2006 Act. It is also not in dispute that the Appellant had previously been involved in "regulated activity relating to children".

23. We interpose that there is a further and separate route whereby the DBS may, subject again to seeking representations from the person concerned, bar an individual on the basis of their "Behaviour" (paragraph 3 of Schedule 2). This route is typically designed to cover cases of actual or potential harm to a child (so-called "relevant conduct", see paragraph 4 of Schedule 3) in the absence of a conviction. However, it should be noted in the present case that the DBS has not proceeded to bar the Appellant under paragraph 3 of Schedule 2 for his "behaviour". Rather, the DBS has made a finding of fact in respect of the central allegation which it has then deployed to justify its decision to bar under paragraph 2 of Schedule 2 in the light of the conviction for possession of an indecent image. But, as the Divisional Court has recently reminded us ((*R (on the application of SXM) v The Disclosure and Barring Service* [2020] EWHC 624 (Admin) at paragraph [61]):

> "it is important to bear in mind the differences between the functions of a prosecuting authority and those of the DBS. The DBS is not a prosecuting authority. It is not adjudicating on individual allegations by a victim. It is carrying out child protection functions concerning those taking part in regulated activities which might bring them into contact with children in future. Whilst it may take into account, amongst other things, conduct said to have been engaged in by those referred to it, the function of the DBS, unlike the criminal courts, is not to adjudicate on whether individuals have been guilty of particular misconduct in the past or to impose penalties."

24. There is a right of appeal to the Upper Tribunal against a DBS barring decision but only on the ground that the DBS has made a mistake either (a) "on any point of law" and/or (b) "in any finding of fact which it has made and on which the decision mentioned in that subsection was based" (see section 4(2) of the 2006 Act). However, "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" (see section 4(3)). According to section 4(5), we must confirm the DBS decision unless we find that the DBS "has made a mistake of law or fact". If we conclude that the DBS has so erred, then we can either direct the DBS to remove the individual from the list or remit the matter to the DBS for it to make a fresh decision (section 4(6)). Notwithstanding this statutory framework, the Upper Tribunal has the power to determine whether the DBS decision is proportionate and rational: see *R (Royal College of Nursing and others) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin) ("the *RCN* case") at para [104] and *Independent Safeguarding Authority v SB and RCN* [2012] EWCA Civ 977; [2013] WLR 308 (at paragraph [14]). Subject to section 4(3), we have an untrammelled jurisdiction to make findings of fact. As Wyn Williams J held in the *RCN* case:

> "102. During oral submissions there was some debate about the meaning to be attributed to the phrase "a mistake … in any finding of fact within section 4(2)(b) of the Act". I can 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."

25. The DBS finding as to the central allegation being established on the balance of probabilities was plainly material to the ultimate decision to bar under paragraph 2, even if the DBS did not decide formally to proceed to bar under paragraph 3 for that same reason.

The grounds of appeal to the Upper Tribunal and the DBS response

26. The Appellant's grounds of appeal against the DBS's barring decision are two-fold, namely:

(1) The DBS erred in placing reliance on the untested hearsay account of a 4-year-old child, without properly weighing such evidence as went to undermine that account;

(2) The decision to add the Appellant to the Children's Barred List was disproportionate to the risk of harm made out on the evidence.

27. Although Mr Renton primarily framed the former of these two grounds of appeal in terms of a submission that the DBS had erred in law, we are inclined to agree with Ms Ward that the first ground is at root, or at least encompasses, a ground of appeal to the effect that the DBS made a mistake of fact in finding that the central allegation was made out. Ms Ward, for her part, argued (in summary) that (i) the DBS did not make any such mistake of fact (either as to the central allegation or otherwise); (ii) the decision to include the Appellant in the Children's Barred List was plainly proportionate in the light of the facts as the DBS found them to be; and (iii) if any mistake of fact was found, the proper course was to remit the matter to the DBS for consideration in the light of the facts as found by the Upper Tribunal.

The people involved and the anonymous abbreviations used in this decision

28. For obvious reasons, we were concerned to protect the anonymity and privacy of the family (and especially the child) concerned in this appeal. For that reason, we do not even refer to the Appellant by his correct initials as, taken together with other information in this decision, there remains a risk, however slight, that the little girl who made the central allegation might be identifiable. We therefore use the following abbreviations in this decision:

GF	The Appellant
Child A	The Appellant's granddaughter (aged 4)
Child B	The Appellant's grandson and Child A's older brother (aged 6)
Mrs AB	The Appellant's daughter (and mother of Child A and Child B)
Mr AB	The Appellant's son-in-law (and father of Child A and Child B)

29. Child A has an affectionate nickname for the Appellant which may possibly make the family readily identifiable to those who know the individuals concerned. To use the exact nickname might therefore defeat the purpose of the rule 14 order. We have accordingly substituted an alternative nickname where her evidence is directly cited in this decision, that replacement nickname being "Grandpa Fussy".

30. Occasionally, when referring to other pieces of evidence, we have also redacted other information which might possibly lead an informed reader, familiar with the family, to identify them (e.g. the police authority and local authority Children's Service department involved, the identity and location of Mrs AB's place of work, etc.).

The Disclosure and Barring Service decision-making process

31. We summarise the DBS's rather protracted decision-making process in this case as it sheds light on the jurisdictional basis for the barring decision.

32. On 26 March 2018, the DBS sent the Appellant a 'minded to bar' letter, stating that it had been notified of his conviction earlier that year under the Protection of Children Act 1978 and inviting his representations as to why he thought it was not appropriate to include him on the Children's Barred List (pp.87-96). There was no

mention at this stage of the central allegation. The Appellant sent in his representations (pp.97-110), including testimonials and a submission drafted by Mr Renton, who had appeared for him in the magistrates' court proceedings, when GF had been sentenced on the basis of his guilty plea to possession of a single indecent image.

33. On 18 October 2018, the DBS again wrote to the Appellant inviting him to make representations as to why he should not be included on the list (pp.135-143). On this occasion the DBS stated it was considering whether to include him on both the Children's Barred List and/or the Adults' Barred List. The conviction was again noted, but the DBS also stated that it had made a further finding, on the balance of probabilities, which it considered appeared to amount to "relevant conduct". This was as follows:

> "During the forensic examination of your computer equipment, two laptops were examined. It is noted that on the older of the two laptops the following search terms were used 'teens', 'animal sex' and 'pre-teens'. It has been established that you were responsible for these search terms."

34. The DBS's second letter of 18 October 2018 included as an annex a redacted copy of the police Occurrence Enquiry Log Report and the police MG5 Report (summary report). The former included references to the central allegation but there was no reference to this matter in the DBS's covering letter. The latter report was almost wholly devoted to the investigation of the Appellant's computers. GF again made representations to the DBS (pp.144-151).

35. On 27 February 2019, the DBS wrote once more to the Appellant seeking his representations, this time solely with respect to his proposed inclusion on the Children's Barred List (pp.153-160). The DBS's third minded to bar letter again noted the conviction and the previously notified findings about computer search terms. On this occasion, however, the central allegation was also put, namely "You sexually assaulted your four year old granddaughter, Chid A, by rubbing her vagina on multiple occasions". The letter continued:

> "It therefore appears to us that you have engaged in relevant conduct in relation to children, specifically inappropriate conduct of a sexual nature involving a child. We are aware that [the] Police took no further action in relation to this case, however the DBS works to a different burden of proof. We have found the allegation proven using the balance of probabilities and not beyond reasonable doubt, which is that used in criminal case."

36. We simply note for the record that this latter passage is not well phrased. We do not understand it to be the case that "DBS works to a different *burden* of proof". Rather, the DBS works to a different *standard* of proof; the burden remains on the DBS to justify its findings and to make out its case, but to the civil and not the criminal standard of proof. Be that as it may, the Appellant made further representations (pp.162-165), enclosing a further testimonial from his daughter and son-in-law, Mr and Mrs AB. Following further consideration, the DBS issued its final decision letter summarised at paragraph 15 above, which did not repeat the error confusing the burden of proof with the standard of proof. We consider that this mistake – which, in fairness, was not adverted to by Mr Renton – was indicative of no more than sloppy drafting on the part of the DBS, and did not amount to a material error of law in the final decision.

37. Be that as it may, this decision-making chronology may explain why the DBS decided to proceed to bar solely by reference to paragraph 2 of Schedule 3 ("Inclusion subject to consideration of representations") rather than paragraph 3 of the same Schedule ("Behaviour"). It remains the inescapable fact that the DBS decision to find the central allegation was made out was an important constituent element in its decision that it was appropriate to bar GF. However, this is a convenient juncture to deal with the Appellant's (undisputed) conviction.

The conviction under section 1(1)(a) of the Protection of Children Act 1978

38. It will be recalled that the DBS's final decision letter was based on three findings of fact. The first of those findings of fact, relating to the conviction, is not itself in dispute. Early in 2018 the Appellant had pleaded guilty to a single count of making an indecent photograph or pseudo-photograph of a child contrary to section 1(1)(a) of the Protection of Children Act 1978. The conviction in the magistrates' court was notified to the DBS in the usual way, prompting the first minded to bar letter of 26 March 2018 (pp.87-96). The conviction related to a single image. In his sworn witness statement (§15, p.201), GF described the image in the following terms (which he reiterated in his oral evidence):

> "The purpose of my uploading the image of the two girls in the shower … was due to its artistic merit, rather than anything else, i.e. the mistiness of the shower giving the scene an intriguing ethereal hue. My intention was to try to replicate it by sketch at a later date."

39. Given the fact of the conviction itself is not disputed, our treatment of this issue can be relatively brief. However, we recognise that some further details must be provided as they amount to important contextual information for the DBS decision that it was appropriate to bar the Appellant.

40. The Appellant's case was that insofar as there is a spectrum of seriousness of offences under section 1 of the Protection of Children Act 1978, then his conviction was right at the lower end of that scale and so barring was disproportionate. As Mr Renton put it in the original application for permission to appeal (pp.9-10):

> "The Applicant has a single conviction, in which he entered a guilty plea to the possession of a single sexual image of a 16-year-old. The sentencing court accepted that no other images found within [GF]'s computer could properly be regarded as indecent images of underage people. The threshold contained within Schedule 3 of the Sexual Offences Act 2003 was not found to be met and, as a result, no sexual offender's registration requirement nor Sexual Harm Prevention Order was required."

41. Mr Renton provided further details in the representations he had made on behalf of the Appellant to the DBS in response to its original minded to bar letter (pp.102-106). He explained that both prosecuting counsel and the magistrates' court had accepted that there was only one image that could properly be said to depict a female under the age of 18, and her estimated age was 16. The image in question, as noted above, was of two naked females in a shower. To be precise, the Crown's expert Short Form Report expressed the opinion that one of the females was aged 17-19 years and the other 14-16 years, so it could not be ruled out that the second female was aged 16, rather than aged under 16. The Appellant was accordingly sentenced on that basis to a fine, a costs order and a victim surcharge. An order was also made for the forfeiture and destruction of the hard drive, but no further orders or requirements were imposed. Mr Renton therefore stressed that the Appellant had not been sentenced by the court as an individual with a sexual interest in children. The

mitigation advanced by Mr Renton included reference to GF's leisure interest as a keen amateur artist.

42. The most detailed account of what was found on the various laptops is in the Streamlined Forensic Digital Report ("the SFD Report"), which was put in evidence by the DBS to the Upper Tribunal but apparently was not before the original decision-maker. This confirmed that one inaccessible (i.e. inaccessible to a user with basic IT skills) Category C image was located on Toshiba laptop PP/1. We note the image was recorded as having been created between 21 December 2016 and 4 January 2017, and so shortly before the central allegation was made (SFD Report, p.2). No other indecent images were found on laptop PP/1 or the other laptops, smartphone etc that were seized. To that extent we accept Mr Renton's submission that this was a relatively unusual case, as it is not uncommon for the police to locate hundreds (if not thousands) of indecent images on some suspects' seized computer equipment. However, the SFD Report also revealed the use of search terms which gave rise to cause for concern. We return to this issue later. For now, we turn to consider the central allegation and the DBS's relevant finding of fact.

The evidence about the central allegation

Introduction

43. The appeal case file includes a variety of evidence relating to the alleged incidents and the central allegation. These include the police Occurrence Enquiry Log Report, the transcript of the ABE interview with Child A, documentary evidence from the Children's Service, sworn witness statements by both GF and Mrs AB, the Appellant's oral evidence and written representations, together with several testimonials. For the most part, this section of our decision simply sets out the evidence, although we make observations below on the weight to be attached to some of the more peripheral evidence. Our more detailed analysis of the weight to be attached to the key evidence – which we find to be the police Occurrence Enquiry Log Report, the ABE interview transcript and GF's evidence – follows in the next section of this decision.

44. We start with the police Occurrence Enquiry Log Report, if only because it seeks to provide a detailed chronology of the police investigation, so assisting in providing the context for the other evidence on file. Several typographical errors have been left as they appear in the original document, with one corrected [in square brackets] to assist clarity.

The police Occurrence Enquiry Log Report

45. We have both a heavily redacted version of this report (pp.31-46) and a more lightly redacted version (pp.237-253) on file. We refer to the latter version for convenience. The report starts on 1 March 2017 (a Wednesday) by noting that, following a referral, police and the Children's Service agreed to conduct a "S47 Joint investigation", i.e. a child protection investigation pursuant to section 47 of the Children Act 1989. The report closes in February 2018 with a brief note about follow-up actions after the magistrates' court proceedings.

46. The log entry for 1 March 2017 records two developments of note: a police officer's conversation with Mrs AB by phone and an informal interview with Child A conducted at the pre-school nursery premises.

47. The female police officer's phone conversation with Mrs AB was recorded as follows (p.237):

> "Officer spoke to Mrs AB on the phone who explained what had happened.

> Last Tuesday and Wednesday morning her father GF comes to the address to take the children to nursery and school. GF usually takes both children to school every Tuesday and Wednesday.
>
> Child A was getting ready and was wearing her new vets [vest] top. She did not have any bottoms on below. She said that she wanted to go downstairs as she wanted to show her grandad her new vest. Mrs AB said she couldn't without putting clothes on. Child A then said but he likes stroking me there. Mrs AB was taken aback by this. The next morning Mrs AB asked Child A about what she meant and Child A replied Granddad rubs it when I get ready for preschool. Child A didn't appear distressed.
>
> Mrs AB spoke to her son Child B about this and whether anything had happened to him and he said no and that he knew that kind of behaviour was wrong.
>
> Mrs AB spoke to Child A again. Mrs AB explained that Child A calls her vagina a front bottom and her bottom back bottom. Child A says that she gets ready herself. Granddad rubs her when she is taking her pj's off.
>
> Mrs AB spoke to her father GF about this as she was worried. He was in complete shock and said that he had never done that and felt sick. Mrs AB explained that she would be reporting it and he responded saying he would be supportive."

48. The police officer's informal interview (or perhaps it is better described as a conversation) with Child A on the same day was noted as follows (also present were a female social worker and the safeguarding lead at the child's pre-school; pp.237-238):

> "[We] met with Child A. She appeared shy. [The officer] introduced herself and asked her questions about her well done sticker, her friends, what toys she plays with.
>
> [The officer] then asked her about her home life being her routine in the morning before going to nursery. She explained what she calls her granddad as Grandpa Fussy.
>
> [The officer] asked her about Grandpa Fussy and disclosed, "GRANDPA FUSSY RUBS ME". [The officer] asked is that to help you. Child A responded, "GRANDPA FUSSY RUBS ME ALL THE TIME, HE DOESN'T STOP."
>
> [The officer] then ended the interview."

49. The following summary noted "There are currently no witnesses and Child A first disclosed this to her mother last week" (p.239). From other evidence we suspect this was an error for "the week before last", but we do not regard this misunderstanding as material.

50. The following morning (2 March 2017) GF was arrested at his home address on suspicion of sexually touching his 4-year-old granddaughter. Police seized 5 items of electrical equipment:

> PP/1 – main laptop, set up on table in living room
> PP/2 – mobile phone

PP/3 – tablet
PP/4 – silver laptop on sofa in living room
TC/1 – Toshiba laptop found in case in main bedroom, described as "old laptop"

51. At about 5 pm the same day (2 March 2017) GF was interviewed under caution by two police officers in a fairly lengthy interview (1 hour 22 minutes; p.241). GF declined to be accompanied by a solicitor. We note there is no copy of the transcript of that interview in the case papers. The one-page summary in the Police Occurrence Enquiry Log Report is just that, a summary. That said, we did not understand Mr Renton to be challenging the account in any of its details (or suggesting there were any significant omissions). GF explained that he had an excellent relationship with his grandchildren, including Child A, and described in some detail the routine of helping them get ready for school and preschool. It included this passage about helping Child A get dressed:

> "Mrs AB usually has the children clothes ready. He would either dress Child A from the top first or start with the bottom. He would undress her from whatever she was wearing and then dress both of them with a top, vest, knickers, leggings, usually. Socks either before or after the leggings. This would be either the children's bedrooms or in the living room. Up until 2017, GF he had to do all of Child A's dressing by taking off her clothes and putting on new clothes. This year Child A is able to do it herself including knickers.
>
> GF explained that he would sometimes bring the clothes downstairs so they could get dressed. Child A now dresses herself although she may still need help. GF could not remember the last time he dressed her this year."

52. Later on, GF described helping Child A with toileting, although "the last time was before the Christmas holidays and can't recall doing it this year. She [Child A] is now more competent … GF denied apart from the times above [assisting with toileting] when he would have touched her private parts. He denied that it was in a sexual way. He did say that she was sat on his knee. He said it was never sexually gratifying. He said it was a horrible thought." Following the interview, GF was bailed subject to conditions including not contacting (directly or indirectly) Mrs AB or Child A.

53. On 18 March 2017, and so just over a fortnight later, police conducted an ABE interview with Child A. The summary in the Police Occurrence Enquiry Log Report was very short. The material part reads as follows (p.243):

> "[One of the officers] spoke to Child A about truth and lies at which she was confused about it and then stated, 'MY BROTHER SAYS I TELL LIES BUT I DON'T". Then this was explained to her about truth and lies.
>
> Child A explained that Grandpa Fussy was touching my front bottom all the time when getting dressed. Child A indicated that Grandpa Fussy used his hands and fingers on her front bottom. She answered I don't know to a lot of the questions. She stated that when she takes her trousers off he always rubs me all the time. She did not understand or did not know how to answer about all the time. She stated that it did not feel very good when Grandpa did it. Child A explained that this happened in Child B's bedroom when Child B was there. She was very specific that it happened after breakfast before they went to pre school."

54. We return to the ABE interview below, now that the transcript is available.

55. On 31 March 2017 GF had a second but much shorter interview under caution (17 minutes), this time with his solicitor present. After a further explanation about helping with Child A's toileting, the summary reads as follows:

> "[The officer] informed GF that that Child A had now given an account in which she said it happened in the bedroom. GF said that she would mostly need help dressing herself but Child B was further down the line but he still needs chivvying up. He tends to dress himself now he is 6. Latterly, and very recently, Child A dressed herself on one occasion. More or less but not fully. It depends what she's wearing.
>
> This year weren't actually much help this year with Christmas, New Year and not being used for school so not too many times this year. GF explained that he does not rub her.
>
> [The officer] challenged about the front bottom all the time and he questioned rubbing as it was not all the time. He stated no I dress her and help her with her tights so she doesn't get what I call chaffing. He makes sure she is comfortable.
> [The officer] challenged about the fingers and he said he did not use his full hand because his hands are too big and she little and wouldn't rub.
> [The officer] challenged about the act about whether it was innocent and he said it could be mostly because of her sitting on his knee, holding her cuddles like that. It's not like that all the time though as he was trying to get them to school."

56. On 21 April 2017 GF had a third interview under caution, again with his solicitor present, lasting just under an hour (pp.245-246). He was arrested on suspicion of possession of an indecent photograph of a child, and (at least according to the summary) most of the interview had this new charge as its focus. This postscript to the main topic of the interview was recorded:

> "He wished to clarify that when he had dressed Child A it was not just in the bedroom but also in the living room and in Child B's bedroom. Most of the time Child A and Child B had been together when he dressed Child A."

57. By July 2017 the case had been sent to the Crown Prosecution Service (CPS) for consideration (p.248). A log entry for 21 August 2017 (p.249) then recorded that "OIC [officer in the case] has spoken to the prosecutor who explained they are not going to take any further action in regards to the case with Child A. Still awaiting the other statement and then will look at the other case." A further log entry for 2 October 2017 (also p.249) recorded the CPS lawyer as confirming that "he will charge the indecent images side of the case. He will send an email with the charges. CPS suggested that he may be cautionable for this offence although this would be down to a Police decision." On the same day it was decided to charge GF with the indecent image offence.

58. Three days later, on 5 October 2017, the log records as follows (p.250):

> "As per below, the CPS decision is not to progress with the sexual assault offence against Child A due to the parents not wanting to go to court.
>
> Child A's mother, Mrs AB, is fully aware of the circumstances of the allegations involved and of the CPS decision. Throughout the investigation, although Mrs AB has taken the risks to her child seriously, she has also displayed a desire for the investigation to be over with in order that she and her family can return to a

> normal life, how things were. GF is however shortly due to be reported for the offence of making an indecent photograph of a child.
> Mrs AB is not aware of this matter."

59. This entry is followed by a careful consideration of the safeguarding implications of Mrs AB being unaware of the pending prosecution of GF for possession of the indecent image.

60. The investigation summary on 7 December 2017, as well as noting the absence of forensic evidence or CCTV, included the following observation by the OIC (p.251):

> "Officer referred the case to RASSO [Rape and Serious Sexual Offences unit] and due to the victim's parents not wanting her to attend court the decision was to charge for the indecent images."

61. The Detective Sergeant's somewhat summary supervision review (p.252) recorded that the investigation had been carried out to a satisfactory standard and had resulted in the following CPS charging decisions:

> "Sexual assault – No charge – there is not a realistic prospect of conviction – Parents unwilling for their daughter to attend court to give evidence
>
> Indecent images – Charge, Making indecent photograph/ pseudo-photograph of a child."

62. The final relevant entry (other than ones relating to the magistrates' court proceedings) is a note to the effect that "Outcome changed from Charge to HOCR [Home Office Counting Rules] 16 Victim declines / withdraws support – CPS have reviewed this case and would have charged with the parents support" (p.253).

The ABE interview transcript and Child A's evidence

63. We now have a transcript of the ABE interview with Child A. This transcript was not before the DBS when it made its barring decision but was produced in the run-up to the Upper Tribunal hearing, as described at the outset of this decision. According to the record of the interview, it lasted 36 minutes (but with at least 7 minutes of introductions and explanations and a break of 7 minutes towards the end). After some further preliminaries, the following exchange took place (a doll used in the ABE interview appears in this passage; its name is referred to here as *****):

10:00	Officer:	you don't know why you are hear to talk about, alright so let me ask you, you told mum something about grandad, what as that, tell me everything what you said to mum about grandad
10:14	Child A:	umm he was touching my front bottom he was rubbing it and umm he was rubbing it all the time when I was getting dressed for school
10:26	Officer:	And was getting I didn't hear the last
10:30	Child A:	when I was getting umm when I was getting dress for pre school
10:35	Officer:	arh dressed from pre school go on tell me more

10:40	Child A:	I don't how I don't know
10:43	Officer:	Ok so you said that eh that grandad was rubbing you when you were getting ready for preschool
10:53	Child A:	Yeah
10:54	Officer:	And he was doing that all the time
10:57	Child A:	Yeah
10:57	Officer:	OK so tell me more about the rubbing tell me everything about the rubbing
11:02:	Child A:	I don't know
11:04:	Officer:	You don't know ok and you said that he was rubbing which part of your body
11:09	Child A:	(Child A uses her right hand to indicate her front private area) this bit here
11:12	Officer:	Ok how do you call that
11:14	Child A:	umm front bottom
11.16	Officer:	front bottom alright so just let me see hear on ***** (officer picks up a toy)
11:23	Child A:	(Child A points on the doll where the front bottom is) front bottom
11:23	Officer:	if you had to point and how would you call this part (officer turns ***** and points at the bottom area)
11:28	Child A:	(Child A points to the area) back bottom
11:31	Officer:	back bottom ok so would you be able to show me how grandad rubbed your front bottom
11:40	Child A:	(Child A then touches her front bottom)
11:40	Officer:	No, no here with *****
11:42	Child A:	(Child A then touches the front bottom area of the doll with her right hand with all fingers and then only using two fingers makes the motion of moving up and down on ***** front bottom) Yeah

64. A little further on the exchange continued as follows:

13:08 Officer: Ok with his hands right thank you so he did it with his hands and

umm so and you said that umm he did it all the time

13:25 Child A: Yeah

13:27 Officer: What do you mean by all the time

13:29 Child A: I don't know

13:32 Officer: Ok did he do it once more than once or you don't know

13:37 Child A: I don't know

13:39 Officer: Ok alright and umm Child A so tell me when grandad tell me everything that you were doing just before grandad was rubbing you

13:56 Child A: umm when I took my took my trousers off he always rubs me

14:01 Officer: sorry I couldn't hear that

14:03 Child A: umm when I take my trousers off he always rubs me

14:08 Officer: when you take your trousers off he always rubs you

14:10 Child A: yeah

14:11 Officer: ok and umm when you say always

14:17 Child A: yeah

14:17 Officer: how many times has it happened

14:20 Child A: all the time

14:21 Officer: all the time all the time so tell me what you do just yeah nice yeah

14:33 Child A: a fan

14:34 Officer: a fan a fan made of pens ummm so tell me what yeah tell me more about tell me more about when you said about the trousers you said that when you take your trousers so tell me what you were doing just before you take your trousers

14:57 Child A: umm when I take my knickers off he even rubs me more

15:05 Officer: ok who takes your knickers off

15:08 Child A: just me

15:09 Officer: ok

15:09 Child A: and I take my trousers off too

15:11 Officer: ok why did you do that why did you take your knickers tell me the reason for taking your knickers

15:16 Child A: because because mummy mummy I always take my trousers off and only mummy and daddy don't

15:22 Officer: ok let me move a little bit this (moves table out of the way) so and umm and you take your trousers off and then tell me everything about grandad

15:39 Child A: umm I don't know

15:42 Officer: alright and why is grandad there when you take your trousers off

15:47 Child A: I don't know

15:49 Officer: alright how when was the last time you saw grandad

15:56 Child A: its all the time then mummy and daddy took me to preschool but mummy and daddy don't rub my bottom though and Child B

16:06 Officer: sorry mummy and daddy

16:08 Child A: mummy and daddy don't rub my bottom and Child B doesn't

16:12 Officer: they don't

16:13 Child A: no

16:14 Officer: whose the only one who does that

16:16 Child A: just granddad

16:17 Officer: just granddad and how do you feel when grandad does that

16:23 Child A: umm not very good

16:26 Officer: not very good tell me more

16:28 Child A: I don't know (she drops something on the floor) sorry

65. Five minutes further on in the interview, the following exchange takes place:

21:25 Officer: arh right ok so let me see when granddad rubs you where does it happen

21:37 Child A: I don't know

21:39 Officer: Is it in your house

21.43 Child A: yep

21:43	Officer:	ok where in your house
21:47	Child A:	In [Child B]'s bedroom
21:49	Officer:	In [Child B]'s bedroom and what did you do in [Child B's] bedroom
21:53	Child A:	umm umm inaudible get dressed on the side of [Child B's] bed
22:04	Officer:	OK so when granddad you are in [Child B's] bedroom so where is where does the rubbing happen in which bedroom where in the house
22:13	Child A:	umm I don't know
22:19	Officer:	alright whose there when it happens when the rubbing happens is there anybody else there
22:24	Child A:	no only granddad and [Child B] and me
22:31	Officer:	ah [Child B] is there as well
22:32	Child A:	Yeah
22:33	Officer:	Ok has [Child B] seen granddad rubbing you
22:38	Child A:	(Child A shakes head and then moves head up and down in yes movement)
22:40	Officer:	sorry I couldn't understand that
22:41	Child A:	yes
22:42	Officer:	Arh alright so [Child B] is also there
22:46	Child A:	Yeah
22:48	Officer:	And you said your granddad always rubs you
22:53	Child A:	(Child A nods)
22:53	Officer:	Is all every time granddad rubs you is [Child B] there
22:59	Child A:	Yeah
23:05	Officer:	Ok ok and tell me about what you were wearing when granddad rubs you
23:11	Child A:	Pre school

23:15 Officer: Sorry

23:15 Child A: t-shirts pre school t-shirt

23:19 Officer: pre school t-short tell me more

23:21 Child A: umm pre school jumper that's all

23:26 Officer: And that when you said it happens does it happen the rubbing before pre school after pre school or you don't know

23:36 Child A: before pre school

23:38 Officer: before ok and does it happen before pre school happens before

breakfast after breakfast or you don't know

23:48 Child A: after breakfast

23:49 Officer: after breakfast ok so when granddad rubs you is it before breakfast after breakfast or you don't know

24:00 Child A: after breakfast

24:02 Officer: arh so it is after breakfast and before pre school

24:06 Child A: (Child A nods)

24:07 Officer: ok I understand now and umm you said to mummy that granddad rubs you what made you tell your mummy

24:24 Child A: Don't know

24:26 Officer: Why do you say to mummy that granddad rubs me

24:30 Child A: I'd because mummy don't want me to there

24:34 Officer: I see ok because mummy isn't there alright ok well lets go and see mummy

Documentary evidence from the Children's Service

66. We have relatively little evidence from the local authority Children's Service. To start with, there is a single page chronology of key events which reads (in its entirety) as follows:

Event date	**Event details**	**What is the impact on the child/young person (Outcome)**
22-Feb-2017	[Child A] has disclosed to her mother verbally and by pointing that maternal grandfather strokes her vaginal area.	Strategy discussion
01-Mar-2017	Strategy discussion held	Joint S47
07-Mar-2017	Record of Outcomes (S47) – Concerns are substantiated, but the child/young person is NOT judged to be at	Continue with C&F assessment

	continuing risk of significant harm	
18-Apr-2017	Management Oversight - CF completed	Case Closure - Authorised.
19-Apr-2017	Closing letters sent to parents with copy of c&f assessment and letter to 1 professional.	

67. This document was not (it seems) before the DBS when it made its final barring decision. Neither counsel referred us to it at the hearing. Given it is a formal document prepared by professionals for child protection purposes, we accept it as an accurate record of the dates in question.

68. We have also seen the Child & Family Assessment report completed on 11 April 2017. Again, this was not before the DBS when it made its final barring decision. Again, neither counsel directed our attention to any passages in this report, but we consider it to be a helpful document in at least three respects.

69. First, it is consistent with the account in the police Occurrence Enquiry Log Report about the timeline for the early stages of the joint investigation. In the section of the report headed "Child/young person's views/wishes/feelings as observed, where pre-verbal or non-verbal", the following entry was made:

> "[Mrs AB] initially disclosed to social services that her daughter [Child A] had said that her Maternal Grandfather [GF] likes to stroke her and [Child A] then pointed towards her vaginal area.
>
> I have completed an initial visit with [Child A] on 24th February 2017. During this home visit, when (mother) asked [Child A] in front of the social worker whether anyone touched her 'front bottom' ([Child A] addresses her vaginal area as front bottom), [Child A] spontaneously replied that '[Grandpa Fussy] touch there and rubs'. She then pointed to her vaginal area.
>
> Following this home visit, a follow up strategy discussion has been held and progressed to joint section 47 enquiry. DC from […] Police station and myself attended the pre-school and spoke to [Child A] who said that '[Grandpa Fussy] rubs me, [Grandpa Fussy] rubs me all the time.'
>
> On 9/03/17 I have seen [Child A] at SARC [Sexual Assault Referral Centre] in […] and she was noted as very happy and socially well-engaging child."

70. We just interject here that Mrs AB's referral to the Children's Service, according to the chronology provided (see paragraph 66 above), was made on (Wednesday) 22 February 2017.

71. Secondly, and notwithstanding some bureaucratic 'social-work-ese' language, the Child & Family Assessment report paints a picture of Child A as an articulate, bright, independent and well-adjusted 4-year-old girl. The following extracts are typical:

> "As per the information from the pre-school, [Child A] is very articulate, polite and well behaved child. … There are no concerns about [Child A]'s behaviour at pre-school and she has not changed since disclosing inappropriate touching from her maternal grandfather … [Child A] has shown appropriateness in her feelings and actions while engaging with her mother and brother on my visit. … I have noticed that she is very attached to her mother and is able to follow her rules. … I have noticed her social interaction was good and was a very confident

> child. … Her self-care skills were age appropriate and was noted as very independent for her age. [Child A] said that she is able to dress without assistance. … [Child A] seen as happy and healthy in appearance. Parents and pre-school informed of no behavioural changes in [Child A]. [Child A and Child B] have age appropriate self care skills and are able to express their views freely with their parents.

72. Thirdly, the Child & Family Assessment report describes Mr and Mrs AB as loving, caring and competent parents and very alive to safeguarding issues. By 7 March 2017 (so at the end of the first week of the joint investigation) the Children's Service chronology (see above) reports that "Concerns are substantiated, but the child/young person is NOT judged to be at continuing risk of significant harm". This doubtless accounts for why as early as 19 April 2017 – and so again at a relatively early stage in the criminal investigation – the social worker wrote to Mr and Mrs AB with a copy of the Child & Family Assessment report, which was described in the covering letter as not having "identified a need for ongoing support from Children's Service at this time and therefore the case will be closed to our department."

73. Given the primary focus of the Child & Family Assessment report was on Child A, there is unsurprisingly relatively little said in it about GF himself. As noted above, Child A's disclosure of the central allegation is reported but there is little further in the Child & Family Assessment report which might go to help assess its credibility or otherwise. In fairness, however, it should be noted that Mr AB was reported as having said to the social worker "that there was no reason for him or his wife to be concerned about the children's maternal grandfather other than this referral reason".

The Appellant's evidence

74. We have three sources of evidence from the Appellant. First, we have his sworn witness statement (pp.199-205). Second, we have his oral evidence at the virtual hearing of this appeal. Third, we have his various written representations at the different stages of the DBS investigation. He has consistently denied the central allegation concerning Child A. We review his evidence below only insofar as it relates to that allegation. For the moment we put to one side his evidence relating to the conviction and the alleged computer search terms.

<u>The Appellant's witness statement</u>

75. GF's witness statement picks up the issue of the central allegation at §27:

> "27. My initial reaction, upon being informed of [Child A's] comment, was total shock and disbelief. I could not understand what would have made her say such a thing. At first, I couldn't fully take it in.
>
> 28. When [Mrs AB] told me what had been said, I was absolutely devastated.
>
> 29. She asked me whether I had ever "touched" [Child A], and I replied of course, but only when dressing her for school or for toilet purposes."
>
> …
>
> 33. I kept searching my mind and still do, wondering why [Child A] would have formed that impression, wondering whether it was the way I held her as I rocked her. There was no sexual connotation to it whatsoever, or perhaps the way I wiped her bottom after she had been to the toilet. I was certain that there must have been some mistake or misunderstanding."

76. The witness statement then deals with the daily routine on those two days of the week when GF went to Mr and Mrs AB's home to help by 'doing the school run' (at §27-§49). This included an account of helping Child A with toileting (§39-§41) and dressing the children:

> "42. When I dressed her, I would take off her pyjamas and put her in her day clothes, although, as she got better able to do some things herself, I would allow hr to learn under supervision.
>
> 43. In order to ensure they were both not late for school and that we left on time, I would often end up assisting [Child B] and dress [Child A].
>
> 44. When [Child A] was old enough to start attempting to dress herself, I checked to make sure that everything was ok – tights, pants, socks etc. and that there was no potential chaffing from her tights and/or knickers and that she was / would be comfortable."

77. After describing examples of other occasions when he had provided Mr and Mrs AB with childcare for his grandchildren, GF made some concluding comments:

> "56. Even now I have no understanding as to what would have led my granddaughter [Child A] to make such a pronouncement. I do not know whether it was because I dressed her and attended to her toiletry needs differently from her parents, or because those tasks formed a larger impression on her mind due to the fact that I generally only saw her twice a week for a relatively short period of time. I do know, however, that I always looked after both my grandchildren to the very best of my ability, in a caring and responsible manner, which never involved any sexual feelings or any other kind of impropriety.
>
> 57. I believe there is a continued attempt to link the one image of two females, which were considered to be in the age group of 16-18 and various historical referenced searches found on an old computer even though I was not sentenced by the Court as someone with a sexual interest in children.
>
> 58. I did not sexually assault my granddaughter [Child A] in any way whatsoever.
>
> 59. The accusation that on the 'balance of probabilities' I sexually assaulted my granddaughter is devastating to me and is something I cannot accept."

<u>The Appellant's oral evidence</u>

78. GF's oral evidence in chief at the hearing was consistent with the account he had provided in his witness statement and his earlier written representations. He provided more detail on his career before retirement and his leisure interests. He explained how he had started helping Mr and Mrs AB with childcare before school and pre-school, initially for one morning a week and latterly for two. He said there was inevitably physical contact between himself and Child A when helping her get dressed. When asked directly by Mr Renton whether, in the process of helping Child A get dressed, he would ever have cause to touch Child A's genital area, GF said:

> "When I was trying to help her get dressed, it was like a dog's breakfast sometimes ... and things would just not be in the right place. I was always careful not to have any clothing which was going to cause any particular kind of discomfort so around particularly, as you know, you can get your underpants caught or knickers caught, so I always made sure she was comfortable round that area because of things like rubbing, chaffing, so yes I would, yes."

79. Children being children there would be "generalised protests and trying to get away" in the process of getting dressed. He then told Mr Renton (OR) that the distraction of watching TV was sometimes a problem:

> GF: "… and in fact the very, very last time I was actually doing it I actually said that we are not having any more television."
>
> OR: "I see. And that was the very last occasion before what?"
>
> GF: "Before the allegation".

80. The Appellant then described how in mid-February 2017 Mrs AB had asked to see him in person. He had assumed it was something to do with his (separated) wife, who was seriously ill at the time. Mrs AB "asked me if I touched [Child A] … I remember saying, I can't remember whether she said 'touch', but I said 'Of course I do, when I'm wiping her bottom and that sort of thing' and then she said like what had been… to be honest I can't remember the precise words as it was like a thunderbolt. A shock. That I touched her, liked rubbed her. Yes, I was devastated like why on earth would she say something like that." He went on to describe how he understood Mr and Mrs AB would be taking advice and that he was supportive of any steps they thought appropriate. He then described his arrest by the police and finding the whole criminal process as "bewildering". He confirmed that he had never seen the video of Child A's ABE interview and that he had only seen the transcript recently. Mr Renton asked him for his reflections on what was being said by Child A in response to the questions on the transcript:

> "My response? Well, it's very difficult to really get a handle on it… because as far as I was concerned the original was a throwaway line. There's nothing in there which to me that has got a kind of a substance. There are inconsistencies, to be honest. It's not like in detail… I mean I've read it….But there are inconsistencies things are said like… well, I don't know what the question was like but this always happened after breakfast. But yes, OK, after breakfast but there were so many other times when I was you know with [Child A] before then or babysitting and things like this. It was always after breakfast so like what was that all about? In other words, if I was inclined to do anything, I'd think, well hang on a minute, I've been alone with [Child A] but yet this thing like it was always after breakfast in the bedroom. But the bedroom was just one place. Most of the time we were altogether in the living room. This really doesn't add up. From a personal point of view, if I can be blunt."

81. In cross-examination by Ms Ward, GF was questioned about the statement in his witness statement at §29. He confirmed that it was clear what Mrs AB meant by her reference to "touching", and he knew what the inference was, although he could not recall her precise words. This was why his witness statement said, "I replied of course, but only when dressing her for school or for toilet purposes". Ms Ward suggested "a more natural answer would have been 'Of course I haven't' and then perhaps think later well maybe I did accidentally when doing those things". GF's reply was a very flat "Why? That was my response. Perhaps other people would say 'Oh no I didn't'…. I don't know, our relationship is good enough and that was the fact". Ms Ward later put it to GF that there was no reason for Child A to have made the allegation up. The Appellant's response was:

> "I've searched my mind for why she said it. She's never said it ever since. It's never raised, it's never been raised at all. And of course, who's to raise it? I'm

> not going to raise the subject, why she did it. It's very much, it almost sounds like a silly little comment and then it kind of took on a life of its own."

82, When Ms Ward put it to GF that DBS had found as a fact that he had had the opportunity and had rubbed Child A's vagina, he replied "Well, that's not correct, that's not correct. I did not do that. I was in all other situations when it would have been far more easy for me to have done things when I was alone with her in … when I was caring for her all day. There was no time any way for rubbing, whatever rubbing is, you know, it was too busy trying to get two children, and try and help [Mrs AB], and do dishes, and tidy up and that sort of thing. There was no time. It …you know, it defeats me."

83. In questions from the panel, Mrs Prewett asked GF again about his statement to the effect that he had stopped the children watching TV in the mornings on the last day that he had been caring for them before school. GF said there was no particular reason for mentioning that – he had just been describing the difficulties of getting them ready for school and was not "trying to make a point". He apologised if any different impression had been given.

The Appellant's written representations

84. Given that there were three DBS minded to bar letters, the Appellant has made written representations to DBS at various stages. The first minded to bar letter made no reference to the central allegation and neither did GF's representations. The second minded to bar letter likewise made no reference to that allegation, although an enclosure (the heavily redacted police Occurrence Enquiry Log Report) did so; see pp.113-128. GF's further written representations to DBS understandably focussed on the offence and the computer search terms allegation (pp.144-147). There is one veiled reference to the central allegation on the second page ("I can see that it looks particularly bad in the police reports and, when presented together, with suggested linkages to events, it appears very alarming. I was alarmed and shocked" (p.145)). On the third page the following comments are made:

> "I was happy to co-operate with the police in the first interview in the investigation process without any legal representation. I did not consider I would need to since it was furthest from my mind that I had done anything wrong or untoward.
>
> Throughout the whole investigation and subsequent events [child A]'s interests were first and foremost by all parties and my full cooperation was given.
>
> Whatever misunderstanding there had been there was no case to answer. (Please see supporting letter from my daughter)."

85. As already noted, DBS only drew attention to the central allegation by making the provisional finding reported in its third minded to bar letter (pp.153-160). GF's written representations on this allegation are at pp.162-164. Those representations are consistent with the Appellant's witness statement – that he was shocked and sickened by the alleged conduct, that he undertook his childcare responsibilities carefully and responsibly, that there was inevitably some physical contact involved in such care (e.g. with toileting and dressing). He described the police documents disclosed as "condensed and presented for determining a prosecution. They are not as balanced as I would have expected". He noted that "as early as August 2017 the CPS confirmed that the prosecutor was not going to take any further action with regard to the investigation involving [Child A]" (p.163). In summary, GF reiterated that

"Never have I acted inappropriately with any child let alone with my own grand-daughter" (p.164).

Mrs AB's evidence

86. The Appellant had put in evidence a sworn witness statement from his daughter, Mrs AB, i.e. Child A's mother (dated 23 December 2019). However, he did not call Mrs AB as a witness at the hearing and so we did not have the opportunity to pursue any further lines of enquiry with her. On a careful reading, Mrs AB's witness statement appears to be designed with two purposes in mind.

87. First, Mrs AB in effect provides a character reference for the Appellant, building on her earlier unsworn testimonials. So, to take just several examples: "My dad has been completely honest with myself and my husband" (§3), "My dad is an extremely supportive and caring man" (§7), "he is a principled man" (§8), "we did not believe that my dad had sexually assaulted her" (§23), "in this case, I can't see how my dad could be a risk" (§58) and "I maintain utmost trust in my dad, and can confirm that he still looks after my children unsupervised. They love spending time with him, and ask for him all the time" (§59).

88. Second, Mrs AB provides a narrative account of the investigation process, understandably from her perspective. Although this is a lengthy witness statement (running to 59 paragraphs, for the most part single sentence paragraphs, over 7 pages), the initial disclosure of the central allegation is dealt with very shortly:

> "17. When [Child A] first told me that my dad (her grandad) had rubbed her vaginal area, I thought I'd misheard her. I was completely shocked as she had only just turned 4 at the time and it came completely out of the blue.
>
> 18. She stated it calmly and didn't sound phased [*sic*] by it or upset in any way.
>
> 19. I told my mum straight away, and she couldn't believe it either and thought that [Child A] must have misinterpreted something.
>
> 20. We both thought she had made a mistake and was confused with perhaps her bottom being wiped in a different way.
>
> 21. It's difficult to talk to a child about things like that and I didn't want to escalate it in her mind.
>
> 22. She was a happy child and clearly loved to be with my dad as did my son and she didn't seem perturbed or afraid about anything."

89. This passage in Mrs AB's witness statement is remarkable in two respects. First, it devotes more space to providing potentially exculpatory explanations (by way of some misunderstanding or misinterpretation on the part of Child A) than to the bare facts of the allegation itself. Second, and more worryingly, it makes no reference to two further contemporaneous repetitions of the allegation as reported by the police officer who spoke to Mrs AB on the phone on 1 March 2017 ("The next morning Mrs AB asked Child A about what she meant and Child A replied Granddad rubs it when I get ready for preschool. Child A didn't appear distressed. … Mrs AB spoke to her son Child B about this … Mrs AB spoke to Child A again. Mrs AB explained that Child A calls her vagina a front bottom and her bottom back bottom. Child A says that she gets ready herself. Granddad rubs her when she is taking her pj's off" – see paragraph 47 above)."

90. We fully recognise that the police Occurrence Enquiry Log Report is not a sworn statement. However, for reasons explained elsewhere, we consider it for the most part to be a reliable and broadly accurate record of e.g. conversations that took place. We recognise that Mrs AB's witness statement is a sworn statement, but it has not been tested under cross-examination. She has not been called as a witness and we were not given any explanation as to why that was the case. We note that the witness statement was sworn over 2½ years after the key events and recognise that memories can fade. We had, for example, another concern about Mrs AB's recollection of events. After explaining the nature of their telephone contact with the NSPCC and MASH (Multi-Agency Safeguarding Hub) – an account which Ms Ward did not contest and which we fully accept – Mrs AB then seeks to explain what happened next:

> "33. We certainly didn't think that the Police would be involved.
>
> 34. We did not discuss the matter with [Child A] again, as we were unsure how best to approach the subject.
>
> 35. We were later told that a Social Worker would be coming out to us, which we were fully receptive to.
>
> 36. The Social Worker visited the family home once, and she came with us when [Child A] had a physical examination which was awful. She then closed her case.
>
> 37. I was therefore shocked when I received a phone call from the Police whilst I was working in … to say that they had spoken to [Child A] at pre-school earlier that day.
>
> 38. I was upset and angry that I had not been informed and I felt betrayed, especially after being told that the pre-school keyworker had already been informed and had been present when [Child A] was spoken to by the police."

91. We fully understand Mrs AB being very upset, as any parent would be, about Child A being spoken to at pre-school by the police and social worker without her prior knowledge (§38). However, the sequence of events described in the witness statement is not consistent with what we know from other sources. The social worker's home visit referred to at §36 took place on 24 February 2017, two days after the initial referral (see paragraph 69 above). We are satisfied the physical examination referred to in the same paragraph took place at the SARC on 9 March 2017 (see paragraph 69 above). We consider it completely implausible that the local authority Children's Service had "closed the case" before that examination. Rather, on 7 March 2017 the Children's Service had reached the provisional view that "Concerns are substantiated, but the child/young person is NOT judged to be at continuing risk of significant harm", and the Child and Family Assessment was to continue. We do not know at what stage that provisional view was communicated to Mr and Mrs AB (if it was), but the chronology shows that the case was not closed until April 2017. Mrs AB's witness statement at §36-§37 necessarily implies that the sequence of events was as follows:

> social worker home visit → physical examination → Children's Service case closure → police visit pre-school with social worker.

92. However, given the other evidence in this appeal referred to above, we are satisfied the correct sequence of events was in fact:

social worker home visit (24 February) → police visit pre-school with social worker (1 March) → physical examination (9 March) → Children's Service case closure (18 April).

93. We do not for one moment suggest that Mrs AB was actively seeking to mislead us. However, Mrs AB's apparent surprise at the police involvement in the case is also not easy to reconcile with GF's own witness statement, where he states (at §34) "A few days after seeing [Mrs AB], she phoned me to say that she had reported the allegation and had been advised by the organisation that the Police might want to interview me."

94. In sum, these inconsistencies in Mrs AB's evidence, especially in the absence of the opportunity to ask further questions, meant that we were unable to place great weight on her account of the narrative.

95. We have also re-read Mrs AB's testimonial letters (e.g. at pp.24, 57, 64 and 150), one of which is co-written with Mr AB, but do not consider that they materially add anything to her witness statement.

Other evidence

96. There are several other disparate evidential issues we should mention at this stage.

97. First, we have not overlooked the supportive letters from GF's son (who lives abroad) and GF's longstanding friend, but other than generalised testimonials to the Appellant's good character they add little of material relevance. GF's son is clearly aware of the criminal prosecution for possession of an indecent image (p.26) but it is entirely unclear as to whether he is aware of the central allegation involving Child A. Likewise, the testimonial from GF's friend is framed in terms of the criminal conviction and not the central allegation. We recognise, of course, that both letters of support were written in May 2018, at which time the DBS was proceeding solely on the basis of the conviction (paragraph 32 above). The fact remains that we have no evidence either way that either of these testimonial writers is aware of the central allegation. There is no indication that they were asked to provide further testimonials in the wake of the second and third minded to bar letters from the DBS in October 2018 and February 2019. In that overall context their supportive letters can carry no real weight in connection with the central allegation.

98. Second, we have not overlooked the fact that there has been no retraction of the central allegation by Child A (as the DBS puts it, p.181) or indeed any further repetition of it since the time in question (as the Appellant puts it). In short, we do not consider this helps us either way. Child A's family have long wanted to see the matter closed and have understandably not revisited the matter. Child A meanwhile has grown up and, doubtless taking her cue from the adults round her, has seen no need to repeat the allegation. The absence of any retraction does not materially advance the DBS case in the same way that the absence of any repetition since the ABE interview does not undermine it.

99. Third, our view is we should be wary of reading too much into the decision not to press charges in relation to the central allegation. Mr Renton is, of course, entirely correct in saying that a CPS decision to bring a prosecution depends on an affirmative answer to two questions, namely is there a realistic prospect of conviction and is it in the public interest to proceed with a prosecution. Mr Renton also pointed to the Log Report entry for 21 August 2017, which simply stated that the prosecutor

"explained they are not going to take any further action in regards to the case with Child A" (p.249). We agree there is no mention there of the unwillingness of Mr and Mrs AB to allow Child A to be involved in criminal proceedings as being the basis for the decision not to prosecute (although we do note the CPS decision followed a further statement by Mrs AB (which we have not seen) sent to the CPS three days earlier). It is also true that the explanation (relied on by the DBS) that the CPS would have charged with the parents' support only appears later in the Log Report (e.g. for 5 October 2017, p.250, and 7 December 2017, pp.251 and 253). We do not think that Mrs AB's witness statement sheds any real light on this issue, as she is plainly referring to the prosecution for the possession of the indecent image. The relevant evidence being so limited, we simply cannot say whether the CPS decided not to charge e.g. (i) because there was insufficient evidence to support a realistic prospect of conviction; or (ii) because Mr and Mrs AB declined to support a prosecution based on the central allegation (or indeed because of a combination of the two). What we can say, without any hesitation, is that the police took the view they had sufficient evidence to justify a referral to the CPS for a decision on charging.

Weighing the evidence and finding the facts

Introduction

100. Our role in a safeguarding appeal such as this necessarily involves weighing the evidence and finding the facts. So far as the central allegation is concerned, the primary evidence which DBS relies upon in support of its finding of fact is the police Occurrence Enquiry Log Report and Child A's ABE interview transcript. In disputing the central allegation, and in arguing that the DBS is mistaken in its finding of fact, the Appellant primarily relies upon his own evidence and the evidence of Mrs AB. This is not to discount the evidence of others – e.g. Child B – but simply to highlight the main sources of evidence which we need to weigh in determining our findings of fact. However, we start by addressing the broader legal submissions made on behalf of GF by Mr Renton.

The Appellant's legal submissions

101. Before turning to our evaluation of the evidence, we must address Mr Renton's legal submissions based on the approach taken by the appellate courts to the admission of hearsay evidence within jurisdictions concerned with conducting risk assessments of clinical professionals, e.g. fitness to practise panels (FTPPs). Mr Renton referred us to a trio of such authorities, namely *Nursing and Midwifery Council v Ogbonna* [2010] EWCA Civ 1216, *R (Bonhoeffer) v General Medical Council* [2011] EWHC 1585 (Admin) and *Thorneycroft v Nursing and Midwifery Council* [2014] EWHC 1565 (Admin).

102. In *Ogbonna*, the Nursing and Midwifery Council (NMC)'s conduct and competence committee had struck off the registrant midwife for alleged professional failings. One of the charges was dependent upon the evidence of the registrant's team leader, a Ms Pilgrim, whose evidence had been adduced in written form in spite of objection on the part of the registrant. The High Court (Nicola Davies J) quashed the decision to strike the registrant off on the basis that it had been unfair to admit Ms Pilgrim's statement as a hearsay account. The Court of Appeal subsequently dismissed NMC's appeal, Rimer LJ (with whom Pill and Black LJJ agreed) holding that it was obvious that, in the circumstances, fairness to the registrant demanded that, in principle, the witness statement ought to be admitted only if the registrant had an opportunity of cross-examining the witness upon it. The NMC could and should have sought to make arrangements to enable such cross examination to take place, such arrangements held to reasonably include flying the witness to the United Kingdom from the Caribbean.

103. We do not read *Ogbonna* as seeking to lay down any broader proposition of law in reaching this conclusion. Under the NMC's procedural rules the admissibility of Ms Pilgrim's statement was dependent on "fairness" (as per rule 31), which the Court of Appeal recognised was necessarily fact-sensitive (at paragraph [26]). The Court of Appeal furthermore expressly recognised that Nicola Davies J's "reasoning was focused on the particular facts of the case and did not purport to lay down any more general principle than the need for a proper consideration to be given to the criterion of fairness when the question of the admission of a hearsay statement under rule 31 arises" (at paragraph [25]). The "particular facts of the case" which bore on that issue included the fact that there was known to be bad feeling between Ms Pilgrim and the registrant and that the NMC, somewhat surprisingly, apparently made no provision for a video-link to be used for a witness to give evidence. Our interpretation of *Ogbonna* is supported by the High Court's analysis of *Ogbonna* in *Bonhoeffer*:

> "78. It is apparent from the decision of the Court of Appeal in *Ogbonna* that it did not approve or lay down a general rule that fairness requires that a nurse facing disciplinary proceedings is entitled in every case to test the evidence of her accuser(s) by way of cross-examination unless good and cogent reasons can be given for the non-attendance of the witness. Insofar as the Court of Appeal laid down any general rule, it was that the resolution of what is required by the fairness requirement in Rule 31(1) will necessarily be fact-sensitive."

104. In *Bonhoeffer* itself, by some distance both the best known and the most comprehensive judgment of the three authorities relied upon, the registrant was an eminent consultant paediatric cardiologist accused of serious sexual misconduct whilst working overseas in Kenya. Much of the evidence against the registrant flowed from a single witness, whose identity was disguised but who had indicated a willingness to travel to the UK in order to give evidence in person. The GMC decided not to call him in person as a witness, contending that doing so would place him at risk of harm from homophobic elements in Kenya, and also from those who were loyal to the registrant and may wish to exact revenge. A strong Administrative Court (Laws LJ and Stadlen J) quashed the GMC's decision to allow the witness's evidence to be read, holding that the decision was irrational and a breach of the registrant's right to a fair hearing. However, this was a decision based on the application of well-established principles to "the peculiar facts of this case", as Stadlen J explained at the outset of the High Court's discussion of those principles:

> "39. The question before this Court is whether the decision by the FTPP to admit Witness A's hearsay evidence was irrational. In my judgment the answer to that question is not dictated by any absolute rule whether of common law or under Article 6. Various formulations of such a putative rule were canvassed in argument. There is, in my judgment, no absolute rule whether under Article 6 or in common law entitling a person facing disciplinary proceedings to cross-examine witnesses on whose evidence the allegations against him are based. Nor does such an entitlement arise automatically by reason of the fact that the evidence of the witness in question is the sole or decisive basis of the evidence against him. Nor, so far as Rule 34 is concerned, does it follow automatically from a conclusion that hearsay evidence would be inadmissible under the gateways of section 114 and/or 116 of the 2003 Act that it would be unfair for the FTPP to admit it under the Rule.
>
> 40. However, in my judgment the Claimant's challenge to the decision of the FTPP in this case is not dependent on the assertion of the existence of any such absolute rules. Rather, it is dependent on the application to the particular and very unusual facts of this case of the general obligation of fairness imposed on

> the FTPP having regard to general common law principles, the Claimant's Article 6 rights and the terms of Rule 34.
>
> 41. In my judgment the application of those principles to the peculiar facts of this case required the FTPP to conclude that it would be unfair to admit Witness A's hearsay evidence."

105. In *Thorneycroft*, as in *Ogbonna*, the Administrative Court again quashed a determination by the NMC conduct and competence committee. In this case key evidence had been admitted from two witnesses, a support worker and a nurse, both of whom refused to attend the hearing (as indeed did the registrant). Mr Renton drew our attention to the specific factors which Andrew Thomas QC, sitting as a Judge of the High Court, held should have been taken into account in that case by the panel (at paragraph [56] of the judgment). The Deputy Judge undoubtedly found that the findings made by the panel on the basis of the absent witnesses' hearsay evidence was unsustainable, but it is equally clear that conclusion was reached on the basis of a catalogue of errors in the original hearing (see paragraphs [57]-[62]). The guidance at paragraph [56] must be read in that context. For our purposes, we found the Deputy Judge's summary of the relevant legal principles at paragraph [45], following his consideration of the case law (including *Ogbonna* and *Bonhoeffer*) to be of rather more assistance:

> "45. For the purposes of this appeal, the relevant principles which emerge from the authorities are these:
>
> 1.1. The admission of the statement of an absent witness should not be regarded as a routine matter. The FTP rules require the Panel to consider the issue of fairness before admitting the evidence.
>
> 1.2. The fact that the absence of the witness can be reflected in the weight to be attached to their evidence is a factor to weigh in the balance, but it will not always be a sufficient answer to the objection to admissibility.
>
> 1.3. The existence or otherwise of a good and cogent reason for the non-attendance of the witness is an important factor. However, the absence of a good reason does not automatically result in the exclusion of the evidence.
>
> 1.4. Where such evidence is the sole or decisive evidence in relation to the charges, the decision whether or not to admit it requires the Panel to make a careful assessment, weighing up the competing factors. To do so, the Panel must consider the issues in the case, the other evidence which is to be called and the potential consequences of admitting the evidence. The Panel must be satisfied either that the evidence is demonstrably reliable, or alternatively that there will be some means of testing its reliability.
>
> In my judgment, unless the Panel is given the necessary information to put the application in its proper context, it will be impossible to perform this balancing exercise."

106. Mr Renton's submission was that despite "the extent of the theoretical potential for risk, in each case the appellate court insisted upon proper evidential safeguards against unjust reliance on untested hearsay evidence" (skeleton argument at §23). However, as we have noted, the outcomes in the three authorities discussed above were all fact-sensitive. In addition, the whole tenor of Mr Renton's submissions was that the Upper Tribunal should adopt the same default position as in the courts,

namely that evidence is oral at a final hearing, subject to the witness's sworn statement having been served by the party calling him or her, and that the witness should almost invariably be available in court in person for cross-examination. However, on a proper analysis, and having considered the relevant legislative provisions governing the reception of evidence, we shall see that Mr Renton's submissions can only go the question of weight rather than admissibility.

The legislative provisions governing the reception of evidence in safeguarding cases

107. Questions of the admissibility of evidence may arise either at the level of the DBS investigation or (given the scope of the right of appeal) on appeal before the Upper Tribunal.

108. So far as the DBS is concerned, paragraph 13 of Schedule 3 to the 2006 Act is framed in very wide terms (consistent with its statutory purpose: see *R (on the application of SXM) v The Disclosure and Barring Service* [2020] EWHC 624 (Admin)):

> "(1) DBS must ensure that in respect of any information it receives in relation to an individual from whatever source or of whatever nature it considers whether the information is relevant to its consideration as to whether the individual should be included in each barred list.
> (2) Sub-paragraph (1) does not, without more, require DBS to give an individual the opportunity to make representations as to why he should not be included in a barred list."

109. Accordingly, the test is not some abstract one of admissibility, but rather relevance (or otherwise) to the question of whether an individual should be barred. So, as Ms Ward submitted, "the DBS was not only entitled, therefore, but required to take the evidence [of Child A] into account, subject only to the question of relevance" (skeleton argument at §30, original emphasis).

110. So far as the Upper Tribunal is concerned, rule 15(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) provides in very general terms as follows:

> "(2) The Upper Tribunal may—
> (a) admit evidence whether or not—
> (i) the evidence would be admissible in a civil trial in the United Kingdom; or
> (ii) the evidence was available to a previous decision maker; or
> (b) exclude evidence that would otherwise be admissible where—
> (i) the evidence was not provided within the time allowed by a direction or a practice direction;
> (ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or
> (iii) it would otherwise be unfair to admit the evidence."

111. This very broad power, which is very different to the powers of the criminal and civil courts, is subject only to the requirement to give effect to the overriding objective of dealing with cases fairly and justly (rule 2). While bearing that principle in mind, we use as a helpful starting point some general principles as laid down by the courts in cases of alleged sexual abuse and then turn to consider the weight which we should attach to the various individual sources of evidence in this appeal.

Some general principles in cases of alleged sexual abuse

112. The burden of proof is on the DBS to make out its case for barring the Appellant. The standard of proof is the ordinary civil standard, i.e. the balance of probabilities. Lord Hoffmann put it this way in *Re B (Children)* [2008] UKHL 35; [2009] 1 AC 11 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."

113. The point was reiterated by Baroness Hale of Richmond (at [70]) in the same House of Lords' judgment:

> "… the standard of proof in finding the facts necessary [in child protection proceedings] is 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."

114. In this context, there is no room for a finding by a court or tribunal that something *might* have happened: a finding of fact means necessarily that either it did happen or it did not happen. It also follows from the burden of proof that there is no obligation on GF to establish the truth of any alternative case put forward (e.g. that Child A was mistaken). Any failure by the Appellant to establish such an alternative case on the balance of probabilities does not of itself prove the DBS's case; see, by analogy with child protection proceedings, *Re X (No. 3)* [2015] EWHC 3651 (Fam). Finally, and crucially, findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence and not on mere suspicion, surmise, speculation or assertion: see e.g. *Re A (A Child) (Fact Finding Hearing: Speculation)* [2011] 1 FLR 1817 at [26]. Bearing those overarching principles in mind, we turn to consider the key evidence before us.

The police Occurrence Enquiry Log Report: our evaluation

115. On the face of it, the police Occurrence Enquiry Log Report provided a comprehensive account of the police investigation. Mr Renton submitted that we should attach only limited weight to the Log Report. It was, he pointed out, not accompanied by a declaration of truth. It was, he also argued, little more than a collection of notes compiled on an ongoing basis by busy professionals, and was plainly less than watertight – he observed that a mysterious Child F appeared in the Log Report, having disclosed to his teacher that his father had hit him with a belt the previous night (p.238). We deal with that latter point first; it is clear this was a reference to another child protection enquiry that had somehow mistakenly found its way into this Log Report. However, one such error, possibly inserted on a "cut and paste" basis, does not undermine the credibility of the Log Report as a whole. Given the range of different types of evidence from disparate sources which are necessarily considered in a safeguarding investigation, we also do not attach any significant weight to the absence of a declaration of truth by the officer or officers responsible for the Log Report.

116. Indeed, we consider that the police's Occurrence Enquiry Log Report is for the most part (the reference to Child F excluded) an accurate and reliable account of the police investigation and what took place. We are well aware of the dangers of over-reliance on police officers' contemporaneous notes. However, there are at least four factors which lead us to conclude that this Log Report is an accurate and reliable account.

117. The first is that there is a very full account of the initial telephone contact between the investigating officer and Mrs AB (see paragraph 47 above). We have no reason to believe that any of that report was concocted. It is matter of fact in its level of detail. We were, of course, unable to put this account to Mrs AB, as she was not tendered as a witness.

118. Secondly, there are detailed summaries of the three interviews under caution with GF. It is perfectly correct that we have not seen transcripts of any of those interviews, but neither GF nor his counsel have at any stage challenged any of the details in those reports.

119. Thirdly, despite the compressed nature of the Log Report, there is sufficient to persuade us that the investigating officer was a competent police officer acting with integrity who followed the appropriate professional steps at each stage in the enquiry. So, for example, she conducted a very brief initial conversation with Child A at the pre-school but then ended the interview as soon as Child A repeated the allegation (in accordance with ABE interviews best practice). Similarly, the officer's careful record of the safeguarding considerations for the police, prompted by Mrs AB's ignorance (at that stage) of the fact that GF was facing prosecution for possession of an indecent image, is indicative of her high professional standards (see paragraphs 58-59 above).

120. Finally, although this is not a major factor, the chronology in the Log Report can be successfully triangulated with other documentary evidence before us (e.g. from the Children's Service) to confirm the sequence of events and the personnel involved.

The ABE interview transcript: our evaluation

121. The Youth Justice and Criminal Evidence Act 1999 made special provision for evidence from children and vulnerable witnesses, which is elaborated upon by *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* (Ministry of Justice, March 2011) (the "ABE Guidance") (and see also a guide for those collecting evidence from children and vulnerable witnesses *Vulnerable and Intimidated Witnesses A Police Service Guide*, Ministry of Justice, March 2011). The ABE Guidance is not just relevant to criminal proceedings; it has been treated as equally appropriate to interviewing children for children's proceedings (both private law cases and public law child protection proceedings). The procedures recommended in the ABE Guidance have also been commended by the Supreme Court (see e.g. *Re W (Children) (Abuse: Oral Evidence)* [2010] UKSC 12; [2010] 1 FLR 1485) and repeatedly by Family Division and Court of Appeal judges.

122. Thus, it is well established in the family courts that video-recorded interviews can be used to provide evidence in chief in e.g. child protection proceedings, if the interview has been properly conducted or at least sufficiently properly conducted (*Wolverhampton City Council v JA & Ors* [2017] EWFC 62 *per* Keehan J at [264]). Keehan J also provided the following helpful pointers to be borne in mind when

considering children's allegations, whether made in an ABE interview or on another occasion (at [17]):

> "a) no case of alleged sexual abuse where there is an absence of any probative medical or other direct physical evidence to support a finding can be regarded as straightforward: *Re J (A Child)* [2014] EWCA Civ 875;
>
> b) the greatest care needs to be taken if the risk of obtaining unreliable evidence from a child is to be minimised. Children are often poor historians and many are suggestible: *Re B (Allegation of Sexual Abuse: Child's Evidence)* [2006] 2 FLR 1071 at paragraphs 34 to 35, 37, 40 and 42 to 43;
>
> c) the 2011 revision of Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures;
>
> d) the court must acknowledge and carefully analyse material where there are numerous and substantial deviations from good or acceptable practice in ABE interviews or other procedures adopted for interviewing children and must consider whether or not flaws in the ABE process are so fundamental as to render the resulting interviews wholly unreliable: *Re E (A Child) (Family Proceedings Evidence)* [2016] EWCA Civ 473 at paragraph 35;
>
> e) a court considering the hearsay evidence of a child must consider what the child has said, the circumstances in which it was said and the circumstances in which any alleged abuse might have occurred: *R v B County Council ex parte P* [1991] 1 FLR 470 at page 478;
>
> f) the extremely helpful summary of the principles to be applied and approach to be taken in cases of alleged sexual abuse set out by MacDonald J in *AS v TH (Fake Allegations of Abuse)* [2016] EWHC 532 (Fam)."

123. The final pointer enumerated by Keehan J is a reference to the extended passage at [22]-[52] of MacDonald J's judgment in *AS v TH (Fake Allegations of Abuse)*, which we have also taken into account.

124. Mr Renton characterised the ABE interview with Child A as unreliable hearsay, which the Appellant had not had a proper opportunity to test by way of cross-examination. Mr Renton made three particular observations in connection with the reliability of the account given by Child A. Before we address these, we note that Mr Renton did not make any explicit submission to the effect that the ABE interview with Child A was actually in breach of the ABE Guidance in any material particular. We also observe that there was realistically never any prospect that Child A would be giving live evidence in these proceedings. There was every indication that Mr and Mrs AB would not accede to such an invitation. Furthermore, and given the availability of the ABE evidence, any decision to call Child A as a witness would surely be contrary to the Senior President's *Practice Direction (First-tier and Upper Tribunals: Child Vulnerable Adult and Sensitive Witnesses)*.

125. First, Mr Renton suggested the central allegation "seems to be blurted out at the outset" of the ABE interview. In that connection he wondered aloud whether there had been any 'priming' of Child A, which he was quick to qualify by saying that he did not seek to imply intentional priming. On one level, of course, it is impossible to rule out 'priming' or 'coaching'. However, we have already explained that we are satisfied as to the integrity and professionalism of the officer involved (see above). The transcript shows that there was an appropriate period of some 10 minutes at the start

of the ABE interview explaining the parameters and establishing rapport. Thereafter, the specific allegation made at 10:14 was made in response to an appropriately open question (at 10:00), albeit one that set the framework after the initial very open question at 09:46 only generated a "I don't know" response (see paragraph 63 above).

126. Second, he characterised much of the rest of the interview as involving Child A responding by saying "I don't know", and not understanding or elaborating upon what was meant by "all the time". It is certainly the case that there are many "I don't know" answers. However, this must be seen in the context of the explanation given to Child A at the outset about the ground rules for the ABE interview, namely that she must not make something up if she did not know the answer (see at 02:10). Nor do we find Child A's use of "all the time" in the least surprising. This usage is entirely consistent with a bright 4-year-old's use of language. Whereas any adult might say 'routinely', 'frequently', 'often' or 'more than once', a child of this age is not going to understand the concept of how many times a particular event occurs if it seems to her as something that is in itself commonplace and unremarkable.

127. Third, Mr Renton submitted that there was simply no way of knowing whether Child A had not simply made some "interpretative error", and so could simply have been referring to rubbing in a way that was uncomfortable, e.g. when adjusting clothing in the process of appropriately helping her get dressed. We discount the possibility of any such "interpretative error". For example, Child A volunteered the following responses in response to appropriate open, non-leading questions from her interviewer:

"15:49	Officer:	alright how when was the last time you saw grandad
15:56	Child A:	its all the time then mummy and daddy took me to preschool but mummy and daddy don't rub my bottom though and Child B
16:06	Officer:	sorry mummy and daddy
16:08	Child A:	mummy and daddy don't rub my bottom and Child B doesn't
16:12	Officer:	they don't
16:13	Child A:	no
16:14	Officer:	whose the only one who does that
16:16	Child A:	just granddad"

128. We recognise that we have not seen the video itself of the ABE interview, and have only read the transcript. As such, we have not been able to identify any of the nuances which body language might reveal. However, even in the absence of the video as a check, we are satisfied on the balance of probabilities that the transcript is an accurate record. It has clearly been professionally produced, shows no signs of embellishment (fillers such as 'ah', 'er' and 'um' have all been dutifully recorded) and records where sight lines have obscured what actions were being made. Furthermore, taken as a whole, there are none of the warning signs that might lead us to conclude that we should attach little weight to this ABE interview. Child A was not subjected to inappropriate questioning; the interview did not last for an excessive

length of time; the conduct of the interview took account of Child A's age and competence; Child A was not asked leading questions; the interview was conducted in a way that was both consistent with Child A's welfare and in sum did not, in our assessment, lead to any real possibility that Child A would be led into making false allegations.

129. We acknowledge the ABE evidence is hearsay. But we are satisfied it is reliable hearsay of Child A's evidence.

The Appellant's evidence: our evaluation

130. Mr Renton's contrary submission, of course, was simple – the only evidence in support of the DBS finding of fact was unreliable and untested (and untestable) hearsay that should be accorded little or no weight. In contrast, there was evidence in support of GF's denials that he had in any abused Child A both from Mrs AB and Child B. We deal with their evidence below. Moreover, of course, there was the Appellant's own evidence, both oral and in his sworn witness statement (and his written representations). Mr Renton reminded us this was direct evidence, not hearsay, and so should be accorded due weight. Moreover, Mr Renton submitted, the Appellant had given his evidence in a straightforward manner.

131. We recognise that the Appellant's evidence in support of his denial of the central allegation has been consistent throughout. However, consistency is only one factor by which we assess the credibility of a witness. We must also take into account the manner and tone used in giving evidence. We had ample opportunity to do this in the course of the all-day virtual hearing. From the very outset, when GF gave us a lengthy account of his professional career, he appeared to have a self-centred personality, which was reflected in his tendency to talk across counsel – both his counsel and DBS's – when answering questions. This self-centredness and tendency to self-justification sometimes led him into diversions onto topics which were clearly important to him but were not entirely relevant to the point in hand. Although he stressed how important his family was to him, we found there was little real sympathy for Child A and the circumstances that led her to make the central allegation.

132. Indeed, in giving his oral evidence, GF was dismissive about the central allegation, telling us that "it almost sounds like a silly little comment and then it kind of took on a life of its own" (paragraph 81 above) Commenting on the disclosure near the start of the ABE interview, he again was dismissive: "as far as I was concerned the original was a throwaway line" – even though it had, on our findings, been made on more than one occasion and to more than one adult interviewer. There were three further incidents in the oral evidence which led us to question the weight we could properly attach to GF's account.

133. The first was when he told us about the problems he encountered getting the children ready for school on time when the TV was on (see paragraph 79 above):

> GF: "… and in fact the very, very last time I was actually doing it I actually said that we are not having any more television."
>
> OR: "I see. And that was the very last occasion before what?"
>
> GF: "Before the allegation".

134. Whilst answering a question from the panel, GF then sought to apologise for giving the impression that there was any sort of grudge involved on Child A's part. We have to say that we thought his response disingenuous. We recognise Mr

Renton's point that difficulties with the TV and children had been mentioned in the Log Report, and so this was not a new point. However, we note the matter was put rather differently there – according to the Log Report summary, "at the beginning of 2017 [GF] told the children there would be no more TV as they were being difficult in getting dressed when watching the TV which [was] why he said no more" (entry for 2 March 2017, p.241). We took the view that the shift in the timing for the TV 'ban' from "at the beginning of 2017" to the "very last occasion" before the allegation was made represented a further example of an overt tendency towards self-justification.

135. The second and more telling example occurred under cross-examination from Ms Ward. GF had made it plain in his evidence that Mrs AB had made it perfectly clear what she had meant by asking whether he "had ever 'touched' [Child A]". The inference, therefore, was not in doubt. In both his witness statement and oral evidence GF replied to the effect that he had touched Child A, but only for the purpose of helping her dress or at the toilet. We agree with Ms Ward that a more natural response, and to be expected from someone who had nothing at all to hide, and especially where the inference was clear, would be to deny outright any 'touching' and then possibly as an after-thought to mention help with dressing and toileting.

136. The third illustration concerned GF's evidence about the laptops (considered in more detail further below). GF's witness statement and representations were to the effect that the troubling search terms relied upon by the DBS had only been found on the old laptop TC/1, which had not been in use for some 10 years, and there was nothing untoward of that nature (the image excepted) on the newer laptop PP/1. The police forensic report demonstrated that assurance was simply incorrect.

137. It follows from all the above that we were not able to attach the weight to the Appellant's evidence that Mr Renton invited us to do. In particular, we were to find it wanting when we considered the evidence on the other side of the scales.

Mrs AB's evidence: our evaluation

138. We are satisfied that Mrs AB believes that no abuse took place. Mr Renton submits that we should accord proper weight to that evidence from Child A's mother. However, we have explained above our concerns about certain aspects of Mrs AB's evidence, principally in her sworn witness statement, which we were unable to explore with her in oral evidence. We do not need to repeat those reservations here, but we note in particular the stark contrast between the very specific reports of the disclosures (plural) made by Child A, as detailed in the initial phone conversation with the police officer, with the very cursory account in Mrs AB's witness statement.

139. We have other reservations about Mrs AB's evidence. It is notable that Mrs AB says of the manner of Child A's disclosure that "she stated it calmly and didn't seem [fazed] or upset in any way". However, we must bear in mind Child A was just four, not fourteen. Why should Child A be upset when she is happy in her grandfather's company and what he is doing with her is routine, commonplace or something that seems to a child to be happening "all the time"? Furthermore, in her witness statement and representations Mrs AB does not appear to deal anywhere with her father's conviction and how this might influence her thinking in regard to safeguarding her own children. For example, she indicates her doubts about Child A's disclosure and reports the children continue to enjoy unsupervised contact with GF. This raises at least two other questions. First, Mrs AB does not appear to have considered any potential risk, especially to Child A, arising from the behaviours that led to GF's conviction or how this could possibly lend weight to the substance of her daughter's central allegation by way of reciprocal confirmation. Second, GF himself told us he

had no unsupervised access to his grandchildren (e.g. babysitting) since the central allegation was made, which very much goes against what Mrs AB told us in her witness statement.

140. In the light of all those considerations, we are not able to place any significant weight on Mrs AB's account. We recognise, of course, that Mrs AB was placed in an enormously difficult if not impossible position, torn by competing loyalties to her child and her father. We are inclined to agree with Ms Ward's assessment that there was a tendency in Mrs AB's written evidence (both in her witness statement and the testimonials) towards being unwilling to entertain the possibility that abuse of Child A had taken place. She had understandably expressed frustration and wanted matters sorted out, so the family could return to the way things had been before, but without really engaging with the central allegation and its implications.

Child B's evidence: our evaluation

141. Mr Renton also submitted that Child B provided exculpatory evidence, as he said that nothing untoward happened between GF and Child A. We have not dealt with Child B's evidence earlier for the simple reason that we do not consider it takes us very much further at all either way. Child B is Child A's elder brother. At the time in question, when Child A was just 4, he was 6 years old. There is nothing of note in the Children's Service documentary evidence about Child B. He does, however, make a brief substantive appearance in the police Occurrence Enquiry Log Report. Mrs AB reported that at the time of Child A's initial statement she had asked Child B "whether anything had happened to him and he said no and that he knew that kind of behaviour was wrong" (paragraph 47 above). The (very brief) summary account of the ABE interview on 18 March 2017 with Child A starts (see paragraph 53 above) by stating "[One of the officers] spoke to Child A about truth and lies at which she was confused about it and then stated, 'MY BROTHER SAYS I TELL LIES BUT I DON'T". Then this was explained to her about truth and lies." There was also a police interview with Child B on the same day, although the Log Report reveals very little about this:

> "Based on the above OIC decided to speak with Child B about what he knew. OIC and [another officer] asked Child B some questions which were written down. Child B stated that he doesn't know anything and that Child A would sometimes get ready in his room other times they would be separate or he would get ready in Child A's room".

142. We suspect the brevity of this account reflects a recognition on the part of the police that Child B had nothing to say that might in any way either assist or indeed derail any prospective prosecution. However, we consider it is a long way from being the exculpatory evidence that Mr Renton suggested it was. Rather, we take the view it is neutral evidence and does not appreciably tip the scales in GF's favour, not least given the cogent and consistent details in Child A's own account. Indeed, the main points we take from the evidence about Child B is that their relationship involved typical sibling rivalry but at the same time demonstrated that Child A understood the difference between truth and lies and, perhaps more importantly, understood that telling lies was a bad character trait.

143. Mr Renton also relied in part on Child A's apparent uncertainty in response to one line of questioning in the ABE interview. The sequence in question was as follows:

22:19 Officer: alright whose there when it happens when the rubbing happens

		is there anybody else there
22:24	Child A:	no only granddad and [Child B] and me
22:31	Officer:	ah [Child B] is there as well
22:32	Child A:	Yeah
22:33	Officer:	Ok has [Child B] seen granddad rubbing you
22:38	Child A:	(Child A shakes head and then moves head up and down in yes movement)

144. We do not consider Child A was showing any confusion in her response at 22:38. She was simply more certain that Child B was present. This line of questioning could easily be interpreted by a 4-year-old as a two-part question – (i) did Child B see what was happening?; and (ii) was Child B there in the house? – the answer is a clear yes to the latter.

Our findings of fact taking into account our evaluation of all the evidence

145. We approach this in two stages. First, what did Child A say to whom and when? Second, did what Child A say had happened actually take place? In both respects we make our findings on the balance of probabilities.

146. First, and given our findings on the reliability of the various items of evidence as analysed above, we are satisfied on the balance of probabilities that Child A made the following statements (we provide some other incidents to help with the time-line; the bold numbered references in square brackets are to paragraphs in this decision):

w/c 13 February 2017	(1) "Child A was getting ready and was wearing her new [vest]. She did not have any bottoms on below. She said that she wanted to go downstairs as she wanted to show her grandad her new vest. Mrs AB said she couldn't without putting clothes on. Child A then said but he likes stroking me there. Mrs AB was taken aback by this." **[47]**
w/c 13 February 2017	(2) "The next morning Mrs AB asked Child A about what she meant and Child A replied Granddad rubs it when I get ready for preschool. Child A didn't appear distressed." **[47]**
w/c 13 February 2017	(3) Having spoken to Child B, "Mrs AB spoke to Child A again. Mrs AB explained that Child A calls her vagina a front bottom and her bottom back bottom. Child A says that she gets ready herself. Granddad rubs her when she is taking her pj's off." **[47]**
	[Sunday 19 February 2017 Mrs AB puts the central allegation to GF] **[47] and [80]**

[Weds 22 February 2017	Mrs AB makes referral to the Children's Service] **[66]**
Friday 24 February 2017	(4) Social worker visits family home. When Mrs AB "asked [Child A] in front of the social worker whether anyone touched her 'front bottom' ([Child A] addresses her vaginal area as front bottom), [Child A] spontaneously replied that '[Grandpa Fussy] touch there and rubs'. She then pointed to her vaginal area." **[69]**
Weds 1 March 2017	(5) "[The officer] asked her about Grandpa Fussy and disclosed, "GRANDPA FUSSY RUBS ME". [The officer] asked is that to help you. Child A responded, "GRANDPA FUSSY RUBS ME ALL THE TIME, HE DOESN'T STOP."" **[48]**
Sat 18 March 2017	(6) ABE interview with further statements about the central allegation. **[63]-[65] and [121]-[129]**

147. Second, we are satisfied on the balance of probabilities that the statements that Child A made were true. We have reached that conclusion for a number of reasons.

148. The core of Child A's account has been consistent throughout. Assuming that statements (2) and (3) were made on the same day, the central allegation has been repeated on at least 5 different dates over a period of about 6 weeks starting with the first allegation. There is more detail in the account given in the ABE interview but none of that narrative is inconsistent with Child A's earlier statements. Child A's reported demeanour both as she initially spontaneously disclosed and thereafter consistently repeated the central allegation to her mother, at pre-school and in the ABE interview, remains calm and unfazed. This is compelling evidence as to its veracity, as is her use of the term "all the time", for the reason we gave above (see paragraph 126). We recognise Mr Renton's point that the mere fact an allegation is repeated does not make it true; as he put it, "repetition does not ensure reliability". However, we find on the balance of probabilities that this is a reliable account.

149. We reach that conclusion in turn for a variety of reasons. We are satisfied that Child A was a bright, articulate and well-adjusted 4-year-old with good linguistic skills. This was certainly not one of those children with learning difficulties where extra special caution is needed in interpreting their responses. If anything, we find that she was advanced for her years (as shown, for example, in the ABE interview by the clarity of her explanation of the bedroom arrangements at home). She came from a stable and loving family background. There is no evidence whatsoever either that she was suggestible or indeed that anyone had any motive for coaching her into making a false allegation. She was too young to appreciate the significance and seriousness of the allegation being made. In the final analysis, we can see no reason at all why Child A should have made the allegation unless it was true. She was matter of fact and consistent in her account that GF rubbed her "front bottom"; there was no real scope for confusion or ambiguity as to what she was saying. She made the first allegation entirely spontaneously and was not subject to leading questioning by anyone at any stage of the investigation. She also illustrated the action complained of by hand movements, both in the initial meeting with the social worker and in the ABE interview. Without any prompting, she expressly stated in her ABE interview that she did not like it and moreover that other close family members did not rub her in the

same way. In her ABE interview, and again without prompting, she was clear that the incidents happened after breakfast and in Child B's bedroom. Although Child B saw nothing amiss, there will have been times when Child B was not present or simply unaware of what was happening. There was no suggestion any such rubbing happened in the bathroom, where at least there was the potential for confusion as to whether assistance with toileting was being misinterpreted. There was no challenge to the ABE interview in terms of its compliance with the ABE Guidance – a purist might consider the interview may have gone on a little longer than strictly necessary, and a few questions had not been posed quite as clearly as they might be, but for much the greater part of the interview best practice had been followed.

150. All in all, while acknowledging both that Child A's evidence has not been open to cross-examination and there is no forensic evidence (or CCTV) to support the central allegation, we find on the balance of probabilities that Child A was telling the truth. So, what evidence do we have to evaluate the truth of Child A's central allegation against GF? In summary, in our assessment it is fourfold:

> (i) what Child A said (and demonstrated) in her ABE interview;
>
> (ii) the consistency of that account with what Child A is recorded as saying to Mrs AB on more than one occasion and also to the police officer and social worker outside the context of the ABE interview;
>
> (iii) the less than straightforward nature of some of GF's evidence to this Tribunal;
>
> (iv) the absence of any plausible explanation for some form of misunderstanding on Child A's part, given the cogency and specificity of her evidence.

151. On the basis of the totality of this evidence, we are satisfied that Child A has given a truthful account of her being sexually abused by GF over a relatively prolonged period of time. We cannot make a finding over how long that period was and how frequently abuse took place. However, that does not detract from our clear finding that GF did so.

152. Given our conclusion that the DBS did not make any error of fact or law in its finding of sexual abuse, barring was plainly inevitable.

153. For completeness, we must also deal with the issue of the search terms found on GF's laptop(s).

The laptop search terms

154. In its second minded to bar letter, the DBS stated that it had found on the balance of probabilities as follows (p.136):

> "During the forensic examination of your computer equipment, two laptops were examined. It is noted that on the older of the two laptops the following search terms were used 'teens', 'animal sex' and 'pre-teens'. It has been established that you were responsible for these search terms".

155. The reference to "the older of the two laptops" was plainly a reference to police exhibit TC/1. This finding was repeated in the third minded to bar letter (p.153).

156. However, in the final decision letter, the findings of fact were put in a rather different way, namely that "The DBS have also found, on the balance of probabilities

that: you have searched for terms indicative of indecent images ('teens' and 'pre-teens') for your own gratification" (p.166). This finding differs in four important respects from that set out in the second minded to bar letter. First, the finding is not in terms confined to a particular laptop (although it might be inferred the DBS was only referring to TC/1, and certainly no details were given by the DBS of search terms found on any other laptop). Second, the finding in relation to the search term 'animal sex' had been omitted. Third, however, the finding involves an explicit association between the search terms deployed and "indecent images". Fourth, and finally, as Ms Ward observed when commencing her cross-examination of GF, the final conclusion actually comprised two conceptually distinct findings of fact. The first was that certain search terms were used by GF and the second was that those searches were for the purpose of his own sexual gratification.

157. We start by considering the evidence that was before the DBS when it made its initial finding (in the second minded to bar letter). At this stage, the only relevant evidence available to the DBS to support its findings was to be found in the police Occurrence Enquiry Log Report and in the police MG5 Report. The latter was in effect a summary of the former.

158. The police Occurrence Enquiry Log Report details the laptops etc seized by the police as a result of their search on 2 March 2017 (p.240; see paragraph 50 above). On 18 April 2017 the Digital Forensics team sent the investigating officer an e-mail stating that "Indecent images of children (IIOC) were identified on exhibit PP/1 and indicative images were identified on TC/1 … the illegal files are saved on the device memory" (p.245). No details of any specific search terms were provided in the e-mail itself. However, the e-mail stated that the reports and exhibits would be returned to the police Central Property Store on the same day. The SFD Report (which is dated 7 April 2017) was clearly in front of the investigating officer when she conducted the third interview with the Appellant on 29 April 2017. The Occurrence Enquiry Log Report account of that interview shows that he was asked for his explanation for the searches for (i) 'teens', (ii) 'pre-teens' and (iii) 'animal sex' (p.246). As to (i), he explained he was looking for young female models for his art work; as to (ii), he had no recollection; and as to (iii), he conceded "it might have been him" but he had not downloaded anything wrong or illegal. Search terms (i) and (ii) were explicitly tied by the police to what was described as "the broken laptop" (exhibit TC/1), and it is implicit that search term (iii) was likewise associated with the same laptop. There was no further substantive reference to any search terms in the Log Report. The police MG5 report was in essentially the same terms as the Log Report in terms of rehearsing the questions and answers about the three search terms above (pp.232-233).

159. So far as the two search terms that were included in the final DBS findings of fact were concerned, the (undoubtedly compressed) account in the police MG5 report of the interview under caution for each search term read as follows:

> "Regarding his 'teens' internet search history found on the broken laptop, Exhibit TC/1, he said that he had been searching for young female models for his art work. He said that he wouldn't be able to get live models to draw. He would have been aroused and this was a natural reaction. The 'teenage' websites he has viewed tend to show girls over 16 in these kinds of things. Teenagers start at 13 but these sites invariably show girls over 16. It is not indicative and you can be in your 20s; most of the time they are much older. It's not a true reflection. Invariably they are older. Under 16 doesn't give him any arousal. Looking at these sites and search engine was for the future, a bucket list of drawing.

> Regarding the searches for 'pre-teens' he did not recall this nor does he have an interest in this. He has no memories of this and no sexual interest in this. He didn't recollect … He did not account for the searches made for 'pre-teens'."

160. The Appellant's written representations in response to the second DBS minded to bar letter, and understandably enough given the way that the DBS framed its findings, focussed on the old laptop (TC/1). GF stressed that this laptop had not been used, possibly for "in the region of 8/10 years" (p.144). He stated that while he could not recall specifics, "I accept that certain searches must have been made on the old computer. They are referenced in the police report and I, therefore, take responsibility for them." He explained he had an enquiring mind, but "I have never searched a subject, which I thought was illegal to do so or in which I had an unhealthy sexual interest … I stress that the references to 'teen', 'animal sex' and 'pre-teens' does not reflect me or any interest in any sexual or perverse behaviour" (pp.144-145). He added:

> "I have not made and the police investigation shows that no searches of this nature had been made on any of the 'in usage' computers from 2010. Indeed, my tablet (referenced as PP/3) and my mobile phone (reference PP/2) were returned to me during the period of the police investigation".

161. The second of those sentences is true. The first (which was repeated in the sworn witness statement at §4, p.200), as we shall see later, is not.

162. The Appellant's sworn witness statement (pp.199ff) was in similar terms to the account given in the interview under caution and in the earlier written representations. He emphasised that he thought the relevant laptop had last been used in around 2010; that any historical search references provided a distorted impression; that his searches were all in connection with various art projects; and that any associated arousal would have been temporary and only referable to females in their 20s or older. He reiterated that any searches for 'teens' would have been from an artistic perspective (§22, p.201) and that any references to 'pre-teens' would have been inadvertent (§10, p.200 and §25, p.202). He added that he had had computer virus problems which had necessitated the laptop in question being repaired (§11, p.200), as indeed was also mentioned in the interview under caution (p.245).

163. As already noted, about a fortnight before the hearing the DBS disclosed a copy of the SFD Report. Curiously, this document itself does not refer to the search term 'teens' as such in connection with laptop TC/1. It does, however, refer to a number of exhibits (or annexes) which are not included with the main report, and we accept the search term 'teens' may have been mentioned therein. Be that as it may, under the heading "***Internet searches conducted with names indicative of IIoC terms include***" the report provides a sample of some search terms detected on TC/1, being as follows:

- PRETEEN MODELS
- GLAMOUR PRETEEN
- PRETEEN GLAMOUR

164. The report referred to several internet sites that had been visited with similar sounding titles. It also stated that "a number of entries showing a user seeking extreme material involving animals … has been produced as exhibit **TC/1-Extreme-**

Browsing". This is one of the further exhibits to the SFD Report which we have been spared.

165. In answer to a question at the hearing from Mr Renton, GF stated that the three bullet-listed terms above did not sound as the sort of search terms he would have used. He could not see any reason for using them. He also denied getting any gratification from sexualised pictures of children. Under cross-examination by Ms Ward, GF conceded that he had "probably" used the search term 'teens' but did not accept that he had used the term 'pre-teens'.

166. Taking into account all we have read and heard, we find as a fact that GF used the search term 'teens'. He has not denied doing so but has rather sought to provide a justification for doing so in terms of his leisure pursuit as an amateur artist.

167. We also find that GF used the search term 'pre-teens'. We stress that these are actual search terms found on laptop TC/1 (see the bullet points above), not pornographic websites that a casual user might get re-directed to by a website link or a rogue pop-up window. This finding is supported by the comment on the SFD Report (in relation to TC/1) that "although no Indecent Images of Children were found upon this exhibit, a great number of images showing an interest in young girls and child modelling sites have been found" (p.284). Indeed, the report writer's summary in relation to this laptop reads as follows (p.281):

> "Evidence of an interest in images and movies of child modelling and images indicative of an interest in Indecent Images of Children present on this exhibit. Images and movies have been categorised as indicative of indecent images as although they show scantily clad children did not meet the current thresholds for charge in CPS guidance of what constitutes an Indecent Image of a Child (in my experience)."

168. We regard the suggestion that such searches for 'pre-teen' may have been generated by malware and the implication that something might have been done to the laptop when being repaired as simply fanciful. In this context we note that the SFD Report on laptop PP/1 – which it has never been suggested was in third party hands and was in current not historic use – reveals the use of similar search terms, including "Young thai preteen models", "Ptteentumblr" and "iloveteentumblr" (p.283). Again, the forensic analysis of this other and newer laptop demonstrated an interest in child modelling websites (p.283).

169. We do not need to make any findings in relation to the search term 'animal sex', given it is not relied upon by the DBS in its final decision.

170. We do, however, have to make a finding on the second limb of the DBS final finding of fact, namely that the search terms were used for sexual gratification. We find on the balance of probabilities that they were. We do not consider that a leisure interest in artistic representations is consistent with the nature of the search terms and websites visited, given the labels that are typically attached to them. We also note that GF originally accepted responsibility for all the search terms (see paragraph 160 above) but has subsequently sought to distance himself from those which might be considered especially inappropriate. We were not persuaded by his denial that he had ever searched for 'pre-teen'; rather, we consider that denial as motivated by a desire to cover up an underlying intent to seek sexual gratification in such images.

171. We recognise that the Appellant was only provided with a copy of the SFD Report relatively late in the day and so has not had the opportunity to commission his

own expert report. However, he has been legally represented and made no application for an adjournment for that purpose. Moreover, the SFD Report is not the sole reason why we have upheld the DBS findings of fact as regard search terms – it is merely further evidence which supports the conclusion reached.

172. It follows that our conclusion is that there is no mistake of fact (or indeed any error of law) in the DBS finding of fact about search terms used by the Appellant.

Conclusion

173. As we find no material error of fact or law on the part of the DBS in its final decision letter, we therefore dismiss this appeal.

Postscript

174. We hesitate to add to what is already a lengthy decision, but we feel we must say something briefly about the DBS investigation in this case. There are two aspects that concern us (putting to one side for the present the terminological confusion between the burden and standard of proof: see paragraph 36 above).

175. The first is the drawn-out nature of the investigation process in this case. The Appellant was sent three minded to bar letters. While it is clearly important that any individual at risk of barring is given a proper opportunity to make representations, it is difficult to see why the provisional findings set out in the second and third DBS letters were not dealt with at the same time. There is nothing to suggest that any further evidence came to light in the period of over four months between the two letters.

176. The second is the limited nature of the evidence relied upon by the DBS in making its decision. As it happens, our conclusion on this curious form of merits review appeal (subject to section 4(3) of the 2006 Act) and with the benefit of further evidence is that the DBS came to the correct decision on the limited material it had. In terms of material held by the police, the DBS only had the police Occurrence Enquiry Log Report and the police MG5 summary report. However, those documents made it plain that there was a wealth of further evidence in police hands that was potentially relevant to this investigation. This included evidence we have now seen (e.g. the ABE interview transcript) and evidence we have not seen (e.g. the ABE interview video and the statements made to the police by both the Appellant and Mrs AB). It may be that this investigation was viewed as being in the nature of an 'open and shut' case, given the conviction for possession of an indecent image, and nobody took a step back to review the case for its seriousness more strategically, but this is speculation on our part.

177. We trust, therefore, that the DBS will learn some lessons from this appeal.

Approved for issue
on 18 June 2020

Nicholas Wikeley
Judge of the Upper Tribunal

Sallie Prewett
Member of the Upper Tribunal

Michele Tynan
Member of the Upper Tribunal