IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. V/1053/2020

THE UPPER TRIBUNAL ORDERS that:

(1) No one shall publish or reveal the name or address of the Applicant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of him or any member of his family in connection with these proceedings. The decision itself may be made public, but not the cover sheet, which is not part of the decision and identifies the Applicant by name.

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

On an application for permission to appeal from a decision by the Disclosure and Barring Service

Between:

Mr A.M.

Applicant

- v –

The Disclosure and Barring Service

1st Respondent

and

The Royal College of Nursing

2nd Respondent

and

The National Education Union

Intervener

Before: **Mrs Justice Farbey DBE, Chamber President**
Upper Tribunal Judge Nicholas Wikeley
Upper Tribunal Judge Mark Hemingway

Case no: V/1053/2020

Decision date: 10 June 2021
Decided following hearing on 13 May 2021

Representation:

Applicant:	Ms Kelly Cyples of counsel, instructed by Olliers
1st Respondent:	Mr Ben Jaffey QC and Ms Carine Patry of counsel, instructed by the DBS
2nd Respondent:	Ms Laura Bayley of counsel, instructed by the RCN
Intervener:	Ms Jayne Phillips, Solicitor, National Education Union (on paper)

DECISION

The Upper Tribunal has no jurisdiction to consider the Applicant's application for permission to appeal.

REASONS FOR DECISION

Introduction

1. The issue that arises in this application is a relatively narrow one: if the Disclosure and Barring Service refuses permission to undertake a review of a person's inclusion on the Adults' Barred List and/or the Children's Barred List, under paragraph 18 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 (the 2006 Act), does the affected person have a right of appeal to the Upper Tribunal against that decision refusing permission?

2. The Applicant is Mr M. The First Respondent is the Disclosure and Barring Service (the DBS). The Second Respondent is the Royal College of Nursing (the RCN). The Intervener is the National Education Union (the NEU). Mr M is not a member of either the RCN or the NEU. However, both organisations have members who may be affected by the outcome of the present proceedings in the same way as Mr M, so they have been joined as Second Respondent and permitted to participate as Intervener respectively. We are especially indebted to both organisations and their representatives for ensuring that the point at issue in these proceedings has been so fully argued.

3. We held a remote oral hearing by Cloud Video Platform (CVP) on 13 May 2021. We are satisfied that it was in the interests of justice to do so, not least as it enabled all those concerned to participate. Mr M was represented by Ms Kelly Cyples of counsel. The RCN was represented by Ms Laura Bayley of counsel, whose submissions were adopted by Ms Cyples. The NEU made representations to similar effect on paper, through their solicitor Ms Jayne

Phillips. The DBS was represented by Mr Ben Jaffey QC and Ms Carine Patry of counsel. We are grateful to them all for their helpful submissions. There were a number of observers at the remote hearing. All those present were reminded of the terms of the Rule 14 Order ensuring Mr M's anonymity and also the provisions of section 3 of the Sexual Offences (Amendment) Act 1992 (see further above).

4. The area of disagreement is well-defined. In short, the DBS argues there is no right of appeal to the Upper Tribunal against its decision to refuse permission to conduct a Schedule 3 paragraph 18 review. If that is correct, a person in Mr M's position (who was refused such permission) is limited to an application for judicial review of the DBS's decision in the Administrative Court. Mr M, the RCN and the NEU all argue that there is a statutory right of appeal to the Upper Tribunal in such circumstances.

5. Notwithstanding the involvement of the interested parties, we have not lost sight of the fact that this is at heart Mr M's application. Where relevant, we deal with the particular circumstances of his case. However, the jurisdictional issue identified in the previous paragraph affects a number of other current applicants in the Upper Tribunal, whose cases have been stayed pending the outcome of the present case. It also has the potential to affect many other individuals, including of course some members of both the RCN and the NEU. This was one reason amongst others for (unusually) convening a three-judge panel to determine this application for permission to appeal.

6. We start by setting out the legislative framework before considering the chronology of the present case involving Mr M and then turning to our analysis of the central jurisdictional issue.

The legislative framework

7. Section 2 of the 2006 Act provides as follows:

> **Barred lists**
>
> **2.—** (1) DBS must maintain–
>
> (a) the children's barred list;
>
> (b) the adults' barred list.
>
> (2) Part 1 of Schedule 3 applies for the purpose of determining whether an individual is included in the children's barred list.
>
> (3) Part 2 of that Schedule applies for the purpose of determining whether an individual is included in the adults' barred list.
>
> (4) Part 3 of that Schedule contains supplementary provision.
>
> (5) In respect of an individual who is included in a barred list, DBS must keep other information of such description as is prescribed.

8. The relevant provisions in section 3 of the 2006 Act then stipulate as follows (and see also section 5):

Barred persons

3.— (1) A reference to a person being barred from regulated activity must be construed in accordance with this section.

(2) A person is barred from regulated activity relating to children if he is–

(a) included in the children's barred list;

(b) included in a list maintained under the law of Scotland or Northern Ireland which the Secretary of State specifies by order as corresponding to the children's barred list.

9. Section 4 then deals with rights of appeal:

Appeals

4.— (1) An individual who is included in a barred list may appeal to the Upper Tribunal against–

(a) …

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

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

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

(a) on any point of law;

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

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

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

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

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

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

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

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

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

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

10. For present purposes the scope of section 4(1)(c) is critical, namely that "an individual who is included in a barred list may appeal to the Upper Tribunal against … (c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list". The DBS contends that a refusal of permission to carry out a paragraph 18 review is not in terms *a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list*. The other parties argue that it is.

11. The circumstances in which a person may now be placed on the Children's Barred List are set out in Part 1 of Schedule 3 to the 2006 Act and need not be detailed here. Transitional arrangements were put in place for those on the existing pre-2006 Act barred lists to be moved over to the DBS Children's Barred List (see Schedule 8, paragraph 2 and article 2 of the Safeguarding Vulnerable Groups Act 2006 (Transitional Provisions) Order 2008 (SI 2008/473)). As we shall see later, Mr M himself fell into this latter category.

12. Part 3 of Schedule 3 to the 2006 Act then sets out various supplemental procedural matters. There are two provisions which deal with the criteria for a review of a person's inclusion on one or other (or both) of the barred lists.

13. The first is paragraph 18, which as recently amended (but not in a way that is material to the present case) reads as follows:

> **18.—** (1) A person who is included in a barred list may apply to DBS for a review of his inclusion.
>
> (2) An application for a review may be made only with the permission of DBS .
>
> (3) A person may apply for permission only if–
>
> > (a) the application is made after the end of the minimum barred period, and
> >
> > (b) in the prescribed period ending with the time when he applies for permission, he has made no other such application.
>
> (4) DBS must not grant permission unless it thinks–
>
> > (a) that the person's circumstances have changed since he was included in the list or since he last applied for permission (as the case may be), and
> >
> > (b) that the change is such that permission should be granted.
>
> (5) On a review of a person's inclusion, if DBS is satisfied that it is no longer appropriate for him to be included in the list it must remove him from it; otherwise it must dismiss the application.
>
> (6) The minimum barred period is the prescribed period beginning with such of the following as may be prescribed–
>
> > (a) the date on which the person was first included in the list;
> >
> > (b) the date on which any criterion prescribed for the purposes of paragraph 1, 2, 7 or 8 is first satisfied;

> (c) where the person is included in the list on the grounds that he has been convicted of an offence in respect of which a custodial sentence (within the meaning of section 76 of the Powers of Criminal Courts (Sentencing) Act 2000 (c. 6) or section 222 of the Sentencing Code was imposed, the date of his release;
>
> (d) the date on which the person made any representations as to why he should not be included in the list.

14. The minimum barred period which must expire before an application for review may be made under paragraph 18 depends on the age of the barred person. In most circumstances a person aged 25 or over will have to wait 10 years before they can seek a review under paragraph 18 (see the Safeguarding Vulnerable Groups Act 2006 (Barring Procedure) Regulations 2008 (SI 2008/474), regulation 11(6)).

15. The second review power is contained in paragraph 18A of Schedule 3 to the 2006 Act (as inserted by section 71 of the Protection of Freedoms Act 2012):

> **18A.—** (1) Sub-paragraph (2) applies if a person's inclusion in a barred list is not subject to—
>
> (a) a review under paragraph 18, or
>
> (b) an application under that paragraph,
>
> which has not yet been determined.
>
> (2) DBS may, at any time, review the person's inclusion in the list.
>
> (3) On any such review, DBS may remove the person from the list if, and only if, it is satisfied that, in the light of—
>
> (a) information which it did not have at the time of the person's inclusion in the list,
>
> (b) any change of circumstances relating to the person concerned, or
>
> (c) any error by DBS,
>
> it is not appropriate for the person to be included in the list.

16. We analyse the scope of paragraphs 18 and 18A in more detail in our discussion below.

The chronology of Mr M's case

17. The current application can only properly be understood in the context of the chronology of Mr M's status as a listed person on the DBS barred lists.

18. In 2007 Mr M was convicted at the Crown Court on two counts of causing or inciting a child to engage in sexual activity. He had met his victims, two girls aged 14 and 12, when he was aged about 21 and working as a lifeguard at a swimming pool. He exchanged texts of a sexual nature with both victims and sent the older victim an indecent image. By way of sentencing, he was given a 3 year supervision order and was made subject to an indefinite Sexual Offences Prevention Order (SOPO), under the Sexual Offences Act 2003, section 104.

19. In 2008, and as a result of that conviction, Mr M was put on what was then known as List 99 (one of the precursors to the DBS barred lists, operated under the Education Act 2002, section 142 and previously the Education Reform Act 1988, section 218). In accordance with the terms of the then barring scheme, he was given no opportunity to make any representations about his inclusion on List 99. He was later "migrated" to the Adults' and Children's Barred Lists operated by the DBS under the transitional arrangements summarised above.

20. In 2011 the Crown Court varied the SOPO to a 5 year term, meaning it ended in July 2012. However, in 2016 Mr M was convicted by the magistrates' court of seeking to engage in a regulated activity (working as children's games coach) when banned. It appears he argued he had misunderstood what was meant by an unspent conviction; in any event, the magistrates gave him a conditional discharge.

21. Turning to the immediate origins of the present proceedings, on 4 January 2019 Mr M applied to the DBS (via his solicitor) for a review of his inclusion on both the barred lists. The application was made under Schedule 3 paragraph 18 of the 2006 Act on the basis that the minimum barred period had passed (10 years in Mr M's case) and that there had been a relevant change in his circumstances, which his solicitor argued was evidenced by the supporting documentation. This included (i) three testimonials; (ii) an e-mail from Mr M's probation officer in 2011 about the application to remove the SOPO restrictions; (iii) a series of detailed Progress in Treatment Reports from the NPS Sex Offender Groupwork Programme (2008). His solicitor also provided further written representations as to why it was argued there had been a change of circumstances such that it was no longer appropriate for Mr M to be barred.

22. On 2 December 2019 the DBS wrote to Mr M informing him that "we have carefully considered the information before us, including the information you provided in support of your request for review, but we do not consider that the criteria for granting permission for a review have been met". The decision letter then reviewed in some detail over 7 pages the documentation that had been supplied. It reiterated that "the DBS have considered the totality of the information presented and consider that there is no evidence of a change of circumstances which demonstrates that a review of your inclusion should be granted. **Therefore, you remain included in the Children's Barred List**" (original emphasis).

23. The letter continued, under the heading "Your right to a review", by stating that the earliest date from which Mr M could seek a further Schedule 3 paragraph 18 review was from 4 January 2029, i.e. ten years hence. However, it added that under Schedule 3 paragraph 18A he could apply for a review before that date "subject to you satisfying certain conditions". Finally, the letter concluded – under the somewhat misleading heading 'Your right to appeal' – with the statement that "No appeal right lies against the DBS decision not to grant permission under Paragraph 18."

24. In a separate decision, but notified at the same time, Mr M's name was removed from the Adults' Barred List (as it was considered he had never been

involved in a relevant regulated activity for that purpose). That decision is not in issue.

25. On 5 March 2020 Mr M lodged an application with the Upper Tribunal on Form UT10 for permission to appeal against a DBS decision. He ticked the box indicating that he wished to appeal against a DBS decision "not to remove my name from the Safeguarding Vulnerable Groups Children's barred list". His solicitor included as the grounds of appeal a copy of the representations that had been sent to the DBS in connection with the original application for a Schedule 3 paragraph 18 review.

The parties' submissions in outline

26. We heard oral submissions from Ms Bayley for the RCN (whose arguments, as noted above, were adopted by Ms Cyples for Mr M) and Mr Jaffey QC for the DBS respectively, both of whom elaborated on their helpful skeleton arguments. At this stage we simply provide the barest summary of their submissions to provide the necessary context.

27. Ms Bayley put the case (in effect for Mr M and for this Tribunal having jurisdiction to consider his application) in two ways. First, she submitted that the decision letter received by Mr M was necessarily a decision made under paragraph 18 and had the effect of not removing him from the Children's Barred List. As such, and as a matter of principle, it should carry the right of appeal provided for under section 4(1)(c) of the 2006 Act. Second, and in the particular circumstances of this case, the decision letter was in fact the outcome of a DBS review of Mr M's continued inclusion on the Children's Barred List. Given the DBS's careful consideration and analysis of the issues raised, Ms Bayley submitted the decision letter, although "dressed up"' as a refusal of permission to review, was in fact a refusal to remove Mr M from the barred list following a review.

28. Ms Bayley further submitted that the DBS was a creature of statute, and so could only act in accordance with statute. In that regard, she argued that if the intention was to remove a right of appeal, then Parliament would have to use express words to do so. She further pointed out that the effects of a decision to bar an individual, which was potentially life-long, should not be under-estimated, not least in terms of restricted employment opportunities. She added that a right to challenge the DBS's decision to refuse permission to conduct a review by way of an application for judicial review was effectively illusory for most of those people likely to be affected. In any event, the very fact that the statutory right of appeal under section 4 was subject to permission being granted by the Upper Tribunal was sufficient to winnow out any unmeritorious applications.

29. Mr Jaffey QC's core submission was that the legislation (and in particular paragraph 18 of Schedule 3 to the 2006 Act) drew a distinction between (i) the substantive decision following a review as to whether an individual should be removed from a barred list; and (ii) the logically prior 'gateway' or procedural decision as to whether to give permission to carry out such a review in the first place. The former decision gave rise to a right of appeal to the Upper Tribunal (subject to permission being granted by the Tribunal) whilst the latter was

susceptible to challenge only in the Administrative Court on an application for judicial review. Mr Jaffey QC's submission was that Parliament's intention to make such a distinction was demonstrated by a proper textual analysis of the relevant provisions of the 2006 Act. Mr Jaffey QC further contended that such an arrangement was consistent with an individual's rights under Article 6 of the European Convention on Human Rights ("Article 6"). Mr M's case, he submitted, was in effect a worked example of that distinction being drawn in practice.

Previous Upper Tribunal consideration of the jurisdictional issue

30. There is no prior binding authority on the point we have to determine. However, Upper Tribunal Judge Ward made the following observations *obiter* in *BB v Disclosure and Barring Service (extension of time)* [2019] UKUT 366 (AAC) at paragraph 19:

> "… A refusal to review is not within the category of decision appealable under s.4, although a decision under para 18A not to remove a person's name is appealable. While it is no longer necessary to decide the point (in that the applicant has been given an extension of time anyway) and I do not do so, I would not be inclined to accept that every time the DBS, who have a discretion whether or not to carry out a review under para 18A, explain why they do not accept the grounds on which it is argued that they should carry out such a review, they would be taking a new appealable decision. A review is typically a much fuller process, involving fresh rounds of submissions and possible further evidence. It seems to me that a gatekeeping letter refusing to open the gate to a review is conceptually not the same as the review itself."

31. We recognise that was a case concerning a potential review under paragraph 18A, not paragraph 18, and that Judge Ward did not have full argument on the point. However, we also acknowledge Upper Tribunal Judge Jones likewise reached the same *obiter* conclusion, but again also in the context of paragraph 18A, and in passing, in *IK v Disclosure and Barring Service* (V/244/2018, at paragraph 54). That was a decision which turned on its facts so that it is not available on the Upper Tribunal's decisions website for this Chamber.

Our analysis of paragraph 18 of Schedule 3 to the 2006 Act

32. Reverting to paragraph 18, we agree with Mr Jaffey QC that an examination of both the wording and the structure of paragraph 18 leads ineluctably to the conclusion that a DBS decision to refuse permission to conduct a paragraph 18 review does not carry with it the statutory right of appeal. Instead, the only route of challenge is by way of an application for judicial review of the DBS's decision to refuse permission for a review. Our reasoning is as follows.

33. As a matter of statutory construction, the language and structure of paragraph 18 of Schedule 3 to the 2006 Act must be considered in both its internal and external context.

34. Looked at from an internal perspective, with an exclusive focus on paragraph 18 itself, paragraph 18(2) provides that "An application for a review may be made only with the permission of DBS". It follows that the DBS deciding to agree to

conduct a review is a necessarily and logically prior decision to the decision on the substantive review. Paragraph 18(3) then specifies the two conditions which a person must satisfy in order to make a valid application. The first is that "the application is made after the end of the minimum barred period" (paragraph 18(3)(a), and see paragraph 18(6) on the meaning of the "minimum barred period"), while the second is that the application is not a repeat application within a prescribed period (paragraph 18(3)(b)). Paragraph 18(4) further stipulates that the DBS must not grant permission unless satisfied of two matters, namely "(a) that the person's circumstances have changed since he was included in the list or since he last applied for permission (as the case may be), and (b) that the change is such that permission should be granted." Thus paragraph 18 does not provide for a right to a periodic substantive review of the appropriateness of a person's inclusion, but for such a review only if the DBS decision maker concludes that a change of circumstances justifies such a review. It is only if permission is granted that the DBS then moves to consideration of the substantive review. According to paragraph 18(5), "if DBS is satisfied that it is no longer appropriate for him to be included in the list it must remove him from it; otherwise it must dismiss the application". This step-by-step process for an application for a review as foreshadowed by paragraph 18 indicates that there is a conceptual distinction between the permission stage (when the focus is on whether there has been a (material) change of circumstances) and the substantive review stage (when the focus is on the appropriateness (or not) of the continued listing).

35. Looked at from an external perspective, paragraph 18 must be read in its broader legislative context. This reflects the general principle of statutory construction that provisions in a single piece of legislation should be read together. It also reflects the fact that paragraphs 17, 18 and 18A form part of a suite of supplementary measures under Part 3 of Schedule 3 to the 2006 Act. In addition, section 4(1) of the Act draws a distinction between two categories of cases where the right of appeal is conferred. The first category comprises the right of appeal against a DBS decision under one of the relevant provisions of Schedule 3 that a person *be included* on a barred list (section 4(1)(b)). The second is the right of appeal against a DBS decision under paragraphs 17, 18 and 18A of Schedule 3 that a person *not be removed* from a barred list (section 4(1)(c)). The statutory architecture of paragraphs 17 and 18A may therefore shed light on the proper construction of paragraph 18 itself.

36. Turning first to paragraph 17, this deals with cases where an individual has been barred without the DBS considering any representations but where the person concerned makes late representations 'after the event'. It is noteworthy that the paragraph draws a distinction between two types of case.

37. The first type of case is where the DBS has barred an individual having been "unable to ascertain his whereabouts" (paragraph 17(1)). In such a case the DBS must consider his late representations and must remove him from the barred list if it is no longer appropriate for him to be included (paragraph 17(3)). There is, therefore, no preliminary DBS permission stage to be overcome before the representations are considered. It would plainly be unfair to have

such a restriction where the individual has in effect been barred without their knowledge and without a meaningful opportunity to make representations. In the event the person is not removed from the barred list, they then have the statutory right of appeal under section 4(1)(c), subject only to the Upper Tribunal itself granting permission to appeal.

38. The second type of case by inference applies where the DBS *was* able "to ascertain his whereabouts" but the person concerned failed to respond in time to the 'minded to bar' letter with any representations, but makes representations later and so out of time. In such a case the DBS must again consider his late representations and remove him from the barred list if it is no longer appropriate for him to be included (paragraph 17(3)). However, this obligation only arises if the DBS "grants him permission to make such representations out of time" (paragraph 17(2)(b)).

39. Paragraph 17 accordingly draws a distinction between the person who never knew of their proposed barring – who has the normal right of appeal, subject only to the Upper Tribunal giving permission – and the person who knew of their proposed barring but failed to respond in a timely manner (who only gets a substantive appealable decision if the DBS gives permission to make late representations). Thus, paragraph 17 makes the same type of distinction in the exercise of appeal rights as we have seen in paragraph 18.

40. Turning next to paragraph 18A, as noted above this was inserted by the Protection of Freedoms Act 2012. As Mr Jaffey QC observed, the new provision reflected Parliament's intention that the scope of the review power should be expanded. Paragraph 18A(2) provides that the "DBS may, at any time, review the person's inclusion in the list", so long as the individual does not have proceedings under paragraph 18 on foot (paragraph 18A(1)). If the DBS does conduct a paragraph 18A review, then according to paragraph 18A(3) it "may remove the person from the list if, and only if, it is satisfied that, in the light of—

> (a) information which it did not have at the time of the person's inclusion in the list,
>
> (b) any change of circumstances relating to the person concerned, or
>
> (c) any error by DBS,

it is not appropriate for the person to be included in the list."

41. Three features of paragraph 18A stand out. First, and unlike under paragraph 18, a paragraph 18A review can take place "at any time" (paragraph 18A(2)). Secondly, there is no formal permission stage under paragraph 18A (thus there is nothing akin to paragraph 17(2)(b) or paragraph 18(2)). The absence of any formal permission stage reflects the fact that a paragraph 18A review can be initiated either by the DBS of its own motion or by a listed person making an application. Thirdly, considerable discretion is vested in the DBS at both the procedural and substantive stages of consideration – it "may" review a person's inclusion in a barred list (paragraph 18A(2)) and it "may" remove a person from a barred list if certain criteria are met (paragraph 18A(3)). Although the issue does not directly arise for decision before us, in our view the right of appeal

under section 4(1)(c) applies to the substantive decision on whether the person should remain included on the list (paragraph 18A(3)) and not to the procedural decision on whether to conduct a review (paragraph 18A(2)). This distinction is consistent with our reading of paragraph 18. We therefore approve the dicta of Upper Tribunal Judges Ward and Jones in the decisions referred to above at paragraphs 30-31.

42. It is not just the overall legislative structure of paragraph 18 (and as read in the context of its associated provisions paragraphs 17 and 18A) that leads us to agree with Mr Jaffey QC. A close reading of the statutory text brings us to the same conclusion. We accept Mr Jaffey's submission that it is no accident that section 4(1) and paragraph 18 use the same language. Section 4(1)(c) provides for an individual's right of appeal against a DBS decision under one of the relevant paragraphs "not to remove him from the list". Correspondingly, paragraph 18(5) provides for the DBS to make a substantive review decision such that where "it is no longer appropriate for him to be included in the list *it must remove him from it*; otherwise it must dismiss the application" (emphasis added).

43. Furthermore, and as Mr Jaffey QC submitted, if Parliament had intended that the procedural decision as to whether to give permission to undertake a paragraph 18 review should carry a right of appeal, then this could have been readily achieved in either of two ways. In the first place, section 4(1)(c) could have been drafted by omitting the closing words, so as to give a general right of appeal against simply "a decision under paragraph 17, 18 or 18A of that Schedule." Alternatively, section 4(1)(c) could have been drafted so as to confer appeal rights against "a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list or a decision to refuse permission for a review". However, neither such drafting route was adopted. Furthermore, nor does section 4(1)(c) give a right of appeal in terms against "a decision under paragraph 17, 18 or 18A of that Schedule *which has the effect of not removing him* from the list".

44. Mr Jaffey QC also sought to justify his construction of the scope of section 4(1)(c) by reference to policy considerations. He pointed out that it was in the nature of review cases that there had been, at some earlier stage, an opportunity for a barred person to seek permission to appeal to the Upper Tribunal against the original barring decision. A paragraph 18 review was simply concerned with a potential reconsideration of that barring decision where there had been some later change of circumstances. From a policy perspective more limited appeal rights could be justified in circumstances where the individual concerned had already had a full right of appeal against the original decision. Mr Jaffey QC acknowledged that views may differ as to whether such an approach was right or wrong, but that was the balance Parliament had struck in reading section 4 and paragraph 18 of Schedule 3 together.

45. We were not fully persuaded by this last submission. Our doubts are prompted by the particular circumstances of Mr M's case. He was not an individual who was originally barred under paragraph 2 of Schedule 3 to the 2006 Act with the appeal rights to the Upper Tribunal that flowed from section 4(1)(b). Rather, as

noted above, he was originally placed on the former List 99, which as we understand it had more limited appeal rights. We did not consider it necessary to explore this 'wrinkle' further, not least as we agreed with the approach to statutory construction and drafting advanced by Mr Jaffey QC.

46. Conversely, we were not persuaded by Ms Bayley's submissions to the contrary, which did not address the arguments on the proper statutory construction of the relevant legislative provisions with the same degree of forensic rigour as Mr Jaffey QC. Rather, and as already noted above, her submissions were pitched at a more generalised level.

47. First, she contended that Mr M's decision letter was necessarily a decision made under paragraph 18 of Schedule 3 to the 2006 Act which had the effect of not removing him from the Children's Barred List. As such, she submitted, it carried the right of appeal provided for by section 4(1)(c). The short answer to this submission is that it fails to recognise the dichotomy inherent in the drafting of paragraph 18, which distinguishes between the procedural decision on whether to give permission to conduct a review and the substantive decision on the appropriateness of the continued listing.

48. Second, Ms Bayley submitted that the DBS decision letter, although "dressed up" as a refusal of permission to carry out a paragraph 18 review, was in fact and in substance a refusal to remove Mr M from the barred list following such a review. In support of this submission she pointed both to the DBS's detailed consideration of the merits of the issues (as set out in its lengthy decision letter) and to case law emphasising the importance of focussing on substance over form (e.g. by analogy *R (Mujahid) v First-tier Tribunal (IAC) and SSHD* [2021] EWCA Civ 449 at paragraph 29). However, this submission faces a similar problem to the first. In particular, the procedural decision (about giving permission to conduct a review) necessarily requires consideration as to whether there has been a change of circumstances sufficient to warrant such a review (see paragraph 18(4)). If that process is carried out conscientiously, it will by definition involve careful analysis of the arguments advanced by the applicant in support of their review request. However, that process will stop short of considering the appropriateness of the continued listing, which will take into account a wider range of considerations. The decision letter in Mr M's case, properly analysed, reflected that conceptual demarcation line.

49. Ms Bayley also contended that if the DBS's submissions were correct, then the purpose of section 4(1)(c) was defeated – thus the DBS, simply by exercising its discretion so as to refuse permission to conduct a review of a person's listing, could issue a barred person with a non-appealable decision. This was said to be contrary to both the overriding objective of dealing with cases fairly and justly (see rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and Article 6. However, on closer examination neither point advances the Applicant's case.

50. As to the former, it is unclear to us how a procedural provision, such as the overriding objective, can have any determinative effect on a pure matter of statutory construction (see rule 2(3)).

51. As to the latter, it was said that judicial review (of a refusal to give permission for a review) was not an adequate remedy for the purposes of Article 6. Article 6(1) does not require a full merits appeal from all matters of fact and discretion when dealing with administrative decision-making in specialist areas: see *Bryan v UK* (1995) 21 EHRR 342 at paras 44-47. Moreover, as the Court of Appeal has since reminded us, "In determining what standard of review is required by article 6 it is necessary to assess the nature of the administrative decision and the nature of the exercise which the reviewing court or tribunal is called upon to perform in each particular case" (*R (XH) v Secretary of State for the Home Department* [2018] QB 355 at [147]). The Court continued as follows:

> "We agree with the Divisional Court that the present case falls clearly on the same side of the line as *Begum* and *Ali* as opposed to the *Tsfayo* side of the line. The decision is one which requires the exercise of judgment and a particular expertise. While factual decisions are required to be made they are, in Lord Bingham's phrase 'staging posts on the way to the much broader judgments which the authority had to make.' In making her decision the Secretary of State is obliged under domestic public law to act fairly, and the court on judicial review can quash her decision if she does not. Of course, what fairness requires in relation to disclosure may be affected by the national security context, just as it is under EU law. Conventional judicial review is a flexible remedy which can extend to investigation of the factual basis of a decision, where appropriate, without assuming an independent fact-finding role. We are satisfied that the adherence of the Divisional Court to conventional standards of judicial review met the needs of this particular case…"

52. We agree with Mr Jaffey QC that the present case falls on the same side of the line as *Begum v Tower Hamlets LBC* [2003] 2 AC 430 and *Ali v Birmingham CC* [2015] 63 EHRR 20 (judicial review an adequate remedy to challenge administrative decision) as opposed to the *Tsfayo v United Kingdom* [2007] LGR 1 side (judicial review not an adequate remedy). This is because of the cumulative effect of a number of features, including the facts that the decision on whether to grant permission for a review involves the exercise of judgement and expertise and that the DBS is under a domestic public law duty to act fairly, reasonably and (pursuant to the Human Rights Act 1998) proportionately.

53. Looking across the piece, the distinction between gateway decisions by administrative decision-makers (susceptible only to judicial review) and substantive decisions (carrying merits review appeal rights before an independent tribunal) is in no way unusual. As Mr Jaffey QC noted in his skeleton argument, "Not every decision made by a specialist decision maker is appealable to a specialist tribunal. It will often be the case that some matters are properly dealt with by way of a claim for judicial review." A notable example is the recent decision of the Supreme Court in *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] 2 WLR 556, where some issues were dealt with by way of statutory appeal to the Special Immigration Appeals Commission (SIAC), whilst other issues were dealt with by way of judicial review because they were, on a proper analysis, outside the jurisdiction of SIAC

(like the Upper Tribunal, a superior court of record of limited statutory jurisdiction).

54. We also considered a tentative analysis adumbrated by the Upper Tribunal itself in previous case management directions which questioned the DBS's approach. This postulated an argument that to deny a right of appeal against a decision to refuse to conduct a review could result in a perverse outcome, as once permission has been granted then the essence of the substantive decision turns on the appropriateness of continued listing (see paragraph 18(5)), yet the question of appropriateness itself lies outside the jurisdiction of the Upper Tribunal (see section 4(3)). On further reflection, we agree with Mr Jaffey QC that this apparent paradox melts away. This is because, although the issue of appropriateness itself is off limits, the Upper Tribunal nonetheless retains jurisdiction to consider appeals against (for example) the DBS's findings of fact which are made on the way to reaching a conclusion on appropriateness. It follows that an appeal against a substantive review decision is not a nugatory exercise.

Three practical implications

55. We also cannot leave this decision without briefly highlighting three practical implications which flow from our reasoning and which may be relevant to other cases where the DBS refuse permission to conduct a paragraph 18 review.

56. The first is that the existence of the permission stage for a paragraph 18 review, where the procedural decision is susceptible only to challenge by way of judicial review, means that it is important for applicants to argue their case fully at the outset. We note that in the present case much of the evidential material relied upon by Mr M in his application was historic and piecemeal in nature. Given the lengthy periods between paragraph 18 reviews, it is also incumbent on the DBS to make it clear in its guidance as to the types of evidence that will assist applicants in demonstrating that there has been a change of circumstances sufficient to satisfy the gateway permission requirement.

57. The second matter is that an applicant who makes an application in the Administrative Court for permission to apply for judicial review of a DBS decision to refuse permission to conduct (for example) a Schedule 3 paragraph 18 review is not necessarily destined to remain in the High Court for the duration of such proceedings. Such judicial reviews cannot be instituted in the Administrative Appeals Chamber of the Upper Tribunal as they do not currently fall within the terms of the Lord Chief Justice's *Practice Direction (Upper Tribunal: Judicial Review Jurisdiction)* [2009] 1 WLR 327. However, it is always open to the Administrative Court, as a matter of discretion, and either on its own initiative or on application, to transfer such a judicial review application to this Chamber of the Upper Tribunal under section 31A of the Senior Courts Act 1981 (as amended, and see further section 19 of the Tribunals, Courts and Enforcement Act 2007).

58. The third consequential point relates to the clarity of drafting in some of the DBS's standard template letters. It may be telling in itself that the information about appeal rights (or rather the lack of them) in the present case came

towards the end of the decision letter and did not prevent a solicitor from filing an application for permission to appeal in circumstances where that jurisdiction did not arise. We have seen DBS correspondence in other cases where the information communicated about applicants' rights of challenge has been both confused and confusing.

Conclusion

59. Be all that as it may, our decision is that the Upper Tribunal does not have jurisdiction to consider Mr M's challenge to the DBS letter of 2 December 2019 refusing him permission to conduct a review under paragraph 18 of Schedule 3 to the 2006 Act. It follows that Mr M's purported application for permission to appeal is not admitted.

Mrs Justice Farbey DBE

Upper Tribunal Judge Nicholas Wikeley

Upper Tribunal Judge Mark Hemingway

Authorised for issue on 10 June 2021