IN THE UPPER TRIBUNAL **Appeal No. UA-2021-001737-V**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the Disclosure and Barring Service

Between:

W.W.

Appellant

- v –

The Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Nicholas Wikeley
Upper Tribunal Member Roger Graham
Upper Tribunal Member Rachael Smith

Hearing date: 8 September 2023
Decision date: 25 September 2023

Representation:
Appellant: Mr Edward Harrison of Counsel, instructed *pro bono* by Advocate
Respondent: Ms Fiona Scolding KC, instructed by DLA Piper UK LLP

DECISION

1. The decision of the Upper Tribunal is to allow the appeal by the Appellant.

2. The Respondent's decision taken on 15 May 2020 to include the Appellant's name on the Children's Barred List involved an error of law. The Respondent's decision of 15 May 2020 is accordingly set aside. Further to section 4(6)(b) of the Safeguarding Vulnerable Groups Act 2006, the Respondent must now make a new decision.

3. Pursuant to section 4(7)(b) of the Safeguarding Vulnerable Groups Act 2006, the Upper Tribunal directs that the Appellant's name is to remain on the Children's Barred List until such time as the Respondent makes its new decision.

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

ORDERS

Pursuant to rule 14(1)(a) the Upper Tribunal orders that no documents or information should be disclosed in relation to these proceedings that would tend to identify any person who has been involved in the circumstances giving rise to this appeal.

Pursuant to rule 14(1)(b) the Upper Tribunal orders that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify the Appellant, his former wife or his current wife. The decision itself may be made public, but not the cover sheet, which is not part of the decision and identifies the Appellant by name.

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

REASONS FOR DECISION

Introduction

1. This is the Appellant's appeal against the Disclosure and Barring Service's final decision, dated 15 May 2020, to include him on the Children's Barred List under Schedule 3 to the Safeguarding Vulnerable Groups Act (SVGA) 2006 ('the 2006 Act').

The outcome of this appeal to the Upper Tribunal in a sentence

2. We allow this appeal to the Upper Tribunal by the Appellant (who we also refer to as 'Mr W' in this decision), but on only one of the four grounds of appeal.

A summary of the Upper Tribunal's decision and what happens next

3. Our decision is that the Disclosure and Barring Service made a material error of law in deciding to include the Appellant on the Children's Barred List. That error of law was the failure to escalate the case for decision by the DBS Head of Service, in contravention of the DBS's own guidance. Accordingly, we set the DBS decision aside. We remit the matter to be re-decided by the DBS. In the meantime, Mr W should remain on the Children's Barred List (which, for convenience, we refer to in this decision as 'the CBL').

The background

4. Some four years ago the Appellant, a teacher, was convicted of two counts of rape under section 1 of the Sexual Offences Act 2003. Both offences were committed against his ex-wife and the incidents in question took place over a period which is now some 20 years ago. He was sentenced to two concurrent terms of imprisonment, with the longer term being for 11½ years. The Court of Appeal (Criminal Division) has since refused an appeal against conviction and sentence, but Mr W maintains his innocence and has received assistance from a body that deals with actual or alleged miscarriages of justice. He is supported in these endeavours by his current wife.

The oral hearing of the Upper Tribunal appeal

5. We held a hearing of this appeal at the Rolls Building in London on 8 September 2023. The Appellant, as he is still serving a term of imprisonment, attended remotely by way of a CVP video-link. We are indebted to the HM Prison in question for facilitating his virtual attendance. The Appellant was ably represented by Mr Edward Harrison of counsel, acting *pro bono*, instructed by Advocate, the Bar Council's pro bono unit. We thank him especially, not least as we are under no illusion as to the practical difficulties facing the Appellant in giving instructions to Mr Harrison. The Respondent (the Disclosure and Barring Service or 'the DBS') was likewise ably represented by Ms Fiona Scolding KC, instructed by DLA Piper UK LLP. Indeed, we are very grateful to both counsel for their careful and well-focussed presentations.

The Orders made on this appeal

6. We refer to the Appellant in this decision as Mr W even though this is not the true initial for his surname. By the same token this decision, if cited, should be referred

to as *WW v Disclosure and Barring Service*. We do so, and make the Orders included at the head of this decision, for two reasons. First, the provisions of the Sexual Offences (Amendment) Act 1992, notably section 1, apply to this case. As a result, no matter relating to the complainant (Mr W's ex-wife) shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that individual as the victim of a sexual offence. Second, we are satisfied that neither the Appellant nor his (current) wife or child should be identified in this decision, whether directly by name or indirectly. Having regard to the interests of justice, we are accordingly satisfied that it is proportionate to make the rule 14 Orders. To avoid the possibility of 'jigsaw identification', we omit from our discussion all bar the essential facts of the case. We have therefore deliberately redacted some potentially identifying details that appear in the original source documents from which we cite.

The statutory framework

7. There are essentially three ways under Schedule 3 to the 2006 Act in which a person may be included on one or other (or both) of the two barred lists. The first is 'automatic inclusion', where the DBS must include a person on e.g. the CBL where specified criteria (e.g. conviction for certain criminal offences) are met (Schedule 3, paragraph 1). The second is 'inclusion subject to consideration of representations', also known as 'autobar with representations', where the DBS must consider (subject to representations) whether to include a person on the CBL if particular criteria (e.g. conviction for various other offences) are met (Schedule 3, paragraph 2). The third discretionary category comprises cases in which the DBS must first decide whether there is 'relevant conduct' or a 'risk of harm' (Schedule 3, paragraphs 3 and 5).

8. Paragraph 2 of Schedule 3 (as amended), which is headed 'Inclusion subject to consideration of representations', provides as follows:

> 2(1) This paragraph applies to a person if any of the criteria prescribed for the purposes of this paragraph is satisfied in relation to the person.
>
> (2) Sub-paragraph (4) applies if it appears to DBS that—
>
> (a) this paragraph applies to a person, and
>
> (b) the person is or has been, or might in future be, engaged in regulated activity relating to children.
>
> (4) DBS must give the person the opportunity to make representations as to why the person should not be included in the children's barred list.
>
> (5) Sub-paragraph (6) applies if—
>
> (a) the person does not make representations before the end of any time prescribed for the purpose, or
>
> (b) the duty in sub-paragraph (4) does not apply by virtue of paragraph 16(2).
>
> (6) If DBS —
>
> (a) is satisfied that this paragraph applies to the person, and

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

it must include the person in the list.

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

(8) If DBS —

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

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

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

it must include the person in the list.

9. The offence of rape committed against an adult (contrary to section 1 of the Sexual Offences Act 2003) is specified for the purposes of paragraph 2(1) of Schedule 3 to the 2006 Act: see the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 (SI 2009/37) regulation 4(5) and the Schedule, paragraph 2(e)). The Appellant's case therefore falls within the second category described in paragraph 7 above. As such – given that Mr W had made representations and had been engaged in regulated activity relating to children – the sole issue for the DBS to determine in this case was whether it was "satisfied that it is appropriate to include the person in the children's barred list" within paragraph 2(8)(c).

10. In terms of the DBS's own internal processes, the procedure for these cases of 'autobar with representations' involves four decision-making stages. If a case progresses to stage 3, the DBS is required to apply a Structured Judgment Process (or 'SJP'), which is a form of risk assessment covering a total of 21 potential risk factors. Stage 4 then involves the application of the final test of appropriateness for inclusion on the relevant barred list.

11. The right of appeal is governed by section 4 of the 2006 Act. An appeal may only be brought against one of a number of specified decisions (section 4(1)). The only grounds of appeal are for a mistake on "any point of law" or in "any finding of fact which it has made and on which the decision mentioned" in subsection (1) is based (section 4(2)). However, for these purposes "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" (section 4(3)) and so is effectively non-appealable.

The DBS decision to bar the Appellant under the SVGA 2006

12. In July 2019 the DBS sent Mr W an "intention to include in barred list" letter to the effect that it was considering whether to place him on the CBL. This letter did not reach the Appellant at the time and had to be reissued later that year. The Appellant (and his wife) made detailed written representations and provided positive character references, including from colleagues in the teaching profession.

13. On 15 May 2020 the DBS issued its final decision letter, notifying Mr W that the DBS had decided it was appropriate and proportionate to include him on the CBL. The central findings were put in these terms in that letter:

> **Why we are writing to you**
>
> We wrote to you on 03 July 2019 to tell you that we intended to include you in the Children's Barred List and explained why.
>
> We have carefully considered all of the information we have received, including your representations, and we have reached our final decision that it is appropriate to include you in the Children's Barred List.
>
> **How we reached this decision**
>
> We remain of the view that you have previously been / might in the future be engaged in regulated activity with children. This is because you were previously employed as a teacher.
>
> You have made representations disputing whether the events that gave rise to your conviction happened. We have not considered your representations in this regard. This is because we do not re-examine the facts that gave rise to your conviction but treat them as proven so long as the conviction stands.
>
> Having considered your representations, we have decided that it is appropriate to include you in the Children's Barred List.
>
> This is because we are satisfied that you prioritised your sexual needs above those of the victim/felt entitled to have sex with her and disregarded her wishes, as on both occasions she told you she didn't want to have sex and crossed her legs, to prevent you doing this, but you forced these apart/pinned her arms back before penetrating her.
>
> The DBS is also satisfied that you committed the offending behaviour in the context of having gradually eroded [your ex-wife's] self-esteem/confidence and established domination/control of her in verbally abusing her, calling her a 'bitch/cow' etc, using 'mind games', such as telling her 'you hate me/you don't love me'/telling her off for leaving things out and putting things in the 'wrong place'.
>
> You also attempted to manipulate [your ex-wife] when after the first incident of Rape, you told her to be 'careful of what she was insinuating'.
>
> We are satisfied that, in committing the offending behaviour, you focussed on your own needs with no consideration as to the potential impact on [your ex-wife] or her feelings.
>
> The DBS is satisfied that on both occasions, you were intoxicated and [she] stated that your moods when drinking would become 'aggressive and scary'.
>
> Your lack of empathy is further evidenced by the fact that after [she] had complained about you 'prodding' her, you told her that she was a 'wimp' and that it wasn't anything to moan about'.

> We consider the offending behaviour to be transferrable to regulated activity where you could be in a position where you could prioritise you own needs and manipulate/dominate a child with a view to satiating your sexual needs with them.
>
> This is compounded by the fact that you deny the offending behaviour and therefore, the DBS has no reassurance that you would not repeat this, should you work with children again.
>
> The DBS is satisfied that if you were to repeat the offending behaviour in regulated activity, children could suffer serious sexual and/or emotional harm.
>
> The serious level of harm caused to the victim is evidenced by the fact that she stated she feels 'disgraced, demeaned and belittled' by your behaviour and now struggles to trust males, suffers from anxiety, panic attacks, depression/has resorted to self-harming.

14. The final decision letter then continued by addressing human rights arguments around Article 8 of the ECHR, as incorporated by the Human Rights Act 1998, along with considerations relevant to both the proportionality and appropriateness of making a barring decision. We refer to the relevant passage in the context of our discussion of Ground 3 at paragraph 52 below. The final decision letter then concluded as follows:

> In conclusion, the serious nature of the harmful behaviour is reflected in the fact that you established dominance over the victim before disregarding her wishes in raping her on two occasions. The serious level of harm caused to the victim is evidenced by her police statement and you continue to deny the offending behaviour. Consequently, despite the passage of time and your evidently appropriate engagement with children over a period of over 30 years, the DBS is satisfied that it is proportionate to include your name in the Children's Barred List and we give particular emphasis this respect to public confidence in the DBS's ability to safeguard vulnerable groups, in the event of a decision not to bar you from working with children.
>
> 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 14 May 2020.

15. As such, the DBS were in effect highlighting three factors to support its decision that it was appropriate to include Mr W on the CBL. These were the seriousness of the offending behaviour, his denial of that behaviour and public confidence in the ability of the DBS to safeguard vulnerable groups.

The application for permission to appeal to the Upper Tribunal

16. In August 2020 the Appellant lodged his application for permission to appeal with the Upper Tribunal. He pointed out that there had never been any concerns or complaints raised against him from his record of working with children for more than 30 years. Mr W argued that the DBS's barring decision was punishing him for maintaining his innocence. He questioned the evidential basis for the DBS's finding that the offences were committed "in a state of intoxication". He also took

issue with the DBS's statement that a decision not to bar him could undermine public confidence in the safeguarding system. He concluded as follows:

> I am not a risk to children. There is not one single piece of evidence to prove that I have ever posed a risk to children in my entire career of working with children. The conviction I am contesting covered 5 years (*redacted*) of my "unblemished" 30 year plus record of working with children (*redacted*), so why am I now perceived as posing a risk to children? Why have you now decided to include me in the Children's Barred List?

17. Following the disclosure by the DBS of the relevant documentation and the receipt of further representations from the Appellant, Upper Tribunal Judge Wikeley directed the Respondent to provide a written response to the application:

> 3. In the circumstances, and given the further representations and arguments advanced by the Applicant in the course of these proceedings, I consider it would be helpful to have a written submission on this application from the Respondent. In normal circumstances I would not consider that a necessary or appropriate step where an Applicant is serving a substantial term of imprisonment for a very serious offence. However, this may not be a 'typical' case. In particular, it may be that some of the DBS fact-finding and reasoning may be open to challenge. For example, the final decision letter states that the Respondent considers "the offending behaviour to be transferrable to regulated activity", which is obviously right at the level of a statement of general principle. However, it goes on to say that the Applicant "could be in a position where you could prioritise you [sic] own needs and manipulate/dominate a child with a view to satiating your sexual needs with them". It is not perhaps immediately obvious that the DBS has laid a proper factual foundation for moving on from the statement of general principle to the particular circumstances of this case, bearing in mind (1) the Applicant has it seems shown no sexual interest in children; (2) the Applicant has an apparently unblemished and long career in teaching; and (3) the offences were committed in the context of a spousal relationship. Point (3) is not intended in any way to downplay the seriousness of the offences, but rather to stress that context may be everything when assessing the likelihood of offending behaviour being repeated. A similar point may be made in relation to the only domain in the Structured Judgement Process where there were "definite concerns", namely entitlement to sex. There appears to be no suggestion of any indication of such thought processes outside the spousal relationship.
>
> 4. The comments above are intended by way of "thinking aloud". They do not express a decided view. It remains to be decided whether the Applicant has established an arguable case for being granted permission to appeal.

18. The DBS duly provided a written submission, prepared by counsel (then Ms Ward), in which the Respondent explained its reasons for resisting the application for permission to appeal. The DBS's submission identified the fairness of the process as one of Mr W's grounds of appeal, "in particular whether [his] inclusion in the CBL was 'automatic' and why and in what circumstances the DBS is entitled to depart from its usual guidance that inclusion in the CBL will be appropriate if 'definite concerns' are shown in more than one domain" (DBS written response

21 October 2021, paragraph 6(i)). The DBS's submission addressed this argument as follows:

> 7. Dealing with each of those points in tum, firstly the term "autobar" is used to distinguish between cases where DBS must consider the appropriateness of including a person on the CBL under paragraph 2 of Schedule 3 to the 2006 Act, because specific criteria (here, the fact of [Mr W's] conviction) are met, and "discretionary" cases, where it must first consider whether there is relevant conduct or a risk of harm. In 2016, the DBS published guidance which explains this difference: DBS referrals guide: referral and decisionmaking process - GOV.UK (w-vvw.gov.uk) ("the 2016 Guidance").
>
> 8. As the 2016 Guidance also explains, ""The SJP is an internal risk assessment tool developed to help determine whether, based on all available relevant information, there is a future risk of harm to vulnerable groups, including children." It is therefore expressly designed to help determine that issue, but will not of itself be determinative of all cases. It is right that the DBS ordinarily views "Definite Concerns" in two fields, or "Critical Concerns" in one field, as likely to lead to a decision to bar, but this is not an inflexible formula.
>
> 9. The 2016 Guidance refers to a process of escalation to senior management and, where appropriate, the DBS Board Quality Standards Committee ("QSC"), including in cases where the findings of the risk assessment do not appear to support a barring decision but the caseworker considers it would be appropriate to consider barring (or vice versa), and where public confidence is the determining factor. In this case, the decision to depart from the position that "Definite Concerns" in one field will not ordinarily lead to a barring decision was escalated to a team leader and approved for the reasons that are set out in the BDMP.
>
> 10. There was, therefore, nothing "automatic" about [Mr W's] inclusion on the CBL, save for the fact that he was automatically considered for inclusion as a result of his conviction.
>
> 11. It is right to draw the attention of the Tribunal and [Mr W] to the fact that the 2016 Guidance insofar as it relates to the escalation process has been superseded by revised internal guidance reflecting the fact that the QSC is no longer in place. A decision to depart from guidance (such as the ordinary position on "Definite Concerns" in one area of the SJP not leading to a decision to bar) must be escalated to a team leader. Under the new escalation guidance, a decision which relies upon public confidence as a deciding factor must be escalated to the Head of Service. That was not done in this case.
>
> 12. The Tribunal has previously considered a (small) number of cases in which the DBS has not followed its own internal guidance. In *AP v ISA* [2012] UKUT 412 (AAC), the Tribunal stated at [21] that:
>
> > ...the provisions of the SJP form part of an administrative, rather than a judicial, decision making process, and the doctrine of legitimate expectation does not in our view confer the status of a legal procedural

> code on a document which has been developed to assist administrative decision makers in making barring decisions which are, to quote the ISA's factsheet, "fair, rigorous, consistent, transparent and legitimate". Persons who may be affected by barring decisions are doubtless entitled to expect that the SJP will be applied conscientiously and fairly, but a decision by the authority not to apply a provision of the process will in our judgment only amount to an error of law if it results in unfairness in a legal sense. In particular, we consider that the authority will not be held to have erred in law if they decide to omit a stage in their procedures which in a particular case adds no value to the decision-making process.
>
> 13. There is no arguable unfairness to [Mr W] in the process followed in this case. The process applied was consistent with the published 2016 Guidance. Escalation to the Head of Service on the public confidence issue would not have resulted in a different outcome. All relevant factors were clearly and transparently considered in the BDMP, and this is unarguably a case in which public confidence is an important consideration and was rightly given weight.

19. At this juncture it is helpful to refer to the DBS's Barring Casework Escalation Guidance, which provides as follows:

> **1.0 Escalation Guidance**
>
> **1.1 Introduction to the guidance**
>
> This document is intended to provide direction and advice in relation to escalation in the production of barring casework. This document does not stand alone and should be considered alongside other guidance depending on the circumstances of the individual case.
>
> In terms of this guidance 'escalation' means an escalation of the full case material, and is distinct from escalation for Team manager sign off purposes.
>
> The Barring and Safeguarding Directorate encourages individual decision making and responsibility in the production of casework. Caseworkers are encouraged to avail themselves of the various avenues of support and advice (such as QA wraparound, peer support, guidance etc.) in coming to any decision, and this escalation guidance is intended for scenarios which need a further level of authority before case progression. This includes those cases requiring mandatory escalation, and those that may benefit from discretionary escalation.
>
> Where a case is escalated; the steps outlined in the Escalation section of the System Basics Procedure should be followed. Itis important that escalations and the responses to them provide an accurate record of any detailed discussions/advice/decisions regarding the case.
>
> **1.2 Cases which MUST be escalated to a team manager.**
>
> There are some cases which require mandatory escalation prior to a case being progressed. The following casework scenarios must be escalated:
>
> • Where the recommendation is "not to include" in the list or; or "remove

following a review", but a judge has imposed a Disqualification from Working with Children Order (DO).
• Where the caseworker intends to depart from the guidance and such a departure maybe subject to legal challenge. (e.g. SJP guidance)
• Where the recommendation is to bar on risk of harm only (i.e. no relevant conduct in relation to either children or vulnerable adults)
• Where a case involving allegations of a sexual nature, psychological harm or serious violence and the caseworker to whom the case has been allocated is of the view that the case should be closed no further action.
• Where the caseworker intends to make a barring or no further action decision which is contrary to the expectations or norms of DBS
• Where a caseworker thinks that a previous decision to close a case, following a further or duplicate referral, was incorrect. The team manager will then refer the case to QSAT who will consider the case as a potential IBO or safeguarding event.
• Following a no risk event from QSAT, where the outcome is agreed as correct, but rework has been recommended. In cases where the agreed correct action is a closure, the team manager will agree to any required rework, and instruct the caseworker accordingly.

1.3 Cases which MAY benefit from escalation to a Team manager.

Any case may be formally escalated at the discretion of a caseworker; however, the following scenarios are examples which may benefit from escalation to a Team manager depending on the individual circumstances on a case by case basis.

• Where passage of time alone is considered a deciding factor.
• Where the decision to bar (or not to bar) is so finely balanced that the caseworker requires formal advice.
• Cases where Autobar offences have been quashed on appeal and where we may wish to consider under the discretionary route
• Where there is a fundamental difference in expert/specialist opinion on the case.
• Where the reason for the person being under consideration solely relates to their connection or association with another individual who has been identified as posing a safeguarding risk e.g. individuals disqualified from working with children such as a registered sex offender living with a child minder. Cases where a person is found not guilty by jury (after having the evidence tested in court) but findings have been made on the balance of probabilities arising from the evidence.

1.4 Cases which MUST be escalated to Head of Service.

• Where a decision relies upon public confidence as a deciding factor.
• Where there is potential for reputational/legal/policy impact (for instance high profile cases)
• Following a no risk event from QSAT, where the outcome is a bar and the recommended rework is disputed by the team manager.
• In all cases that have previously been awarded an HRE or an IBO rating, where the amended decision significantly deviates from either the QSAT feedback or the Head of Service instruction. This includes cases which the

> caseworker feels a no action closure is appropriate following representations.
> • Any case which the caseworker and Team manager think likely to result in a Safeguarding event
>
> **1.5 Cases which MUST be escalated to the Executive Director of Barring and Safeguarding.**
>
> Cases which have been assessed as potential IBO or Safeguarding event will be escalated by QSAT along with an analysis of the case.
>
> The Executive Director for Barring and Safeguarding is also responsible for ensuring that, for information, DBS Board is made aware of cases which are known to be politically sensitive, or which have a high profile and which are likely to attract the attention of the media.

20. In its formal response to the Appellant's appeal, the DBS argued as follows:

> … the question for the Tribunal must be whether there was any unfairness caused to [Mr W] by that failure to escalate to the Head of Service. That would only be the case if it might have led to a different conclusion, i.e. the Head of Service may have taken a different view on the public confidence issue. The DBS confirms that, having reviewed the case at a senior level, the decision to include [Mr W] in the CBL is considered to be correct, and is maintained.

The grounds of appeal before the Upper Tribunal

21. It will be evident from this official guidance that some types of cases *must* be escalated to a team leader whilst others *may* be so referred upwards. Additionally, other cases *must* be escalated to the Head of Service while others *must* be referred to the Executive Director of Barring and Safeguarding. There are no categories of cases which *may* be referred to the Head of Service or Executive Director.

22. On 25 July 2022 Judge Wikeley gave Mr W permission to appeal, albeit with some reservations, and observing as follows:

> 4. This not to say that [Mr W's] case is without difficulty. For example, the whole question of whether barring is "appropriate" is "off limits" and so non-reviewable for the Upper Tribunal by virtue of section 4(3) of the 2006 Act. However, I consider there is sufficient here to justify granting permission to appeal, as the threshold is whether the grounds are arguable, and not that they will necessarily succeed. I say that particularly as regards the fact that the case was not escalated to the Head of Service, as seems to have been required by DBS policy documents. Ms Ward asserts that a different outcome would not have eventuated (p.248 at para 13). That may or may not be right but I do not think I should refuse permission on the basis of that assertion alone. I also bear in mind the previous authority of *AP v ISA* [2013] AACR 17. In that context I consider that *SR v DBS* [2013] UKUT 103 (AAC); [2013] AACR 31 may be relevant. I am slightly surprised this decision is not referred to in the DBS response, not least given there are some similarities (although also some differences) between that case and the present case. The grant of permission to appeal is not limited to this point, although I do suggest it would appear to be [Mr W's] strongest point.

23. The Appellant was subsequently provided with assistance by Advocate, the Bar Council's pro bono unit. By the time the matter came on for hearing, Mr W's grounds of appeal had been helpfully refined into four principal areas of challenge. Ground 1 concerned the failure to escalate the case to the DBS Head of Service. Ground 2 was that the Respondent had erred in law in concluding that any risk of harm was transferable from adults to children. Ground 3 was that the Appellant's inclusion on the CBL was disproportionate, while Ground 4 concerned the Respondent's reliance on the fact that the Appellant was intoxicated when committing the offences for which he was convicted.

Ground 1: the failure to escalate to the DBS Head of Service

24. The first ground of appeal is that the DBS failed to follow its own guidance and policies by not escalating the case to the DBS Head of Service for decision. The essence of the parties' respective positions can be summarised in the following way.

25. Mr Harrison, for the Appellant, points to the clear terms of the DBS's Escalation Guidance. This was a case in which the DBS placed "particular emphasis" on the issue of public confidence in reaching its decision to include Mr W on the CBL. As such, the "full case material" should have been, but was not, escalated to the Head of Service. As a matter of public law, the Appellant was entitled to have his case considered pursuant to whatever policy or practice was applied by the authority in question unless there was good reason for the policy to be departed from. No such good reason had been advanced in the instant case. Consequently the Appellant had been deprived of an important procedural safeguard, in that his case had not been decided at the appropriate level of decision-maker, such failure amounting to a material error of law.

26. Ms Scolding, for the DBS, acknowledged that escalation to the Head of Service in accordance with the Respondent's procedures did not take place. However, she submitted that the failure to escalate the case was not material to the decision made. Rather, the process followed was not procedurally unfair and moreover all relevant considerations had been carefully taken into account. The decision-making process had grappled with the Appellant's representations and had given detailed reasons for its conclusions. Furthermore, the Respondent denied that any public law principle of legitimate expectation or good administration had been breached in this case.

27. We start our consideration of this ground of appeal by addressing the case law to which counsel helpfully directed our attention. In this context an instructive starting point is the judgment of Laws LJ in *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68]:

> … Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good

> administration, by which public bodies ought to deal straightforwardly and consistently with the public. … The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.

28. The same point was put rather more pithily by Lord Dyson JSC in *R (WL (Congo)) v Secretary of State for the Home Department* [2012] 1 AC 245 at [35]:

> The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute.

29. As Lord Wilson JSC subsequently recognised in the Supreme Court's judgment in *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; [2015] 1 WLR 4546 at [31], Lord Dyson JSC articulated two qualifications to this principle in in *R (WL (Congo)) v Secretary of State for the Home Department* [2012] 1 AC 245. The first was that the policy should not be so rigid as to amount to a fetter on the discretion of decision-makers. The second was that the decision-maker should follow the published official policy unless there were good reasons for not doing so.

30. The application of these public law principles in the context of procedures under the 2006 Act has been considered in two previous Upper Tribunal decisions, *AP v Independent Safeguarding Authority* [2012] UKUT 412 (AAC); [2013] AACR 17 ('*AP v ISA*'; UTJ Bano presiding) and *SR v Disclosure and Barring Service* [2013] UKUT 103 (AAC); [2013] AACR 31 ('*SR v DBS*'; UTJ Ward presiding).

31. In the first case, *AP v ISA* (the ISA essentially being the DBS's immediate forerunner), the Authority's decision had been made without following its own procedures: the normal risk assessment at Stage 3 of the Structured Judgement Process (SJP) had been omitted, as in ISA's view there was insufficient information to complete the process, and the case had not been referred to either a senior manager or the ISA Board. On the facts the Upper Tribunal concluded that the evidence before the ISA fully justified the barring decision without the need for the SJP to be applied. Accordingly, there was no injustice to the appellant in the decision in that case not to carry out the normal risk assessment at Stage 3 of the SJP. In terms of the legal principles to be applied, the Upper Tribunal held as follows (at paragraph 21):

> Although in *Nadarajah* Laws LJ preferred to base the concept of legitimate expectation on the requirement for good and consistent administration rather than on the need for fairness, it is clear from *Bhatt Murphy* that there must nevertheless be unfairness sufficient to amount to an abuse of process for the concept of legitimate expectation to come into play. Since barring decisions will often not only affect a person's reputation but also their livelihood, it may be that the threshold of unfairness which has to be established in such cases in order to show the breach of a legitimate expectation is lower than in cases where less vital interests are at stake. However, the provisions of the SJP form part of an administrative, rather than a judicial, decision making process, and the doctrine of legitimate expectation does not in our view confer the status of a legal procedural code on a document which has been developed to assist administrative decision

> makers in making barring decisions which are, to quote the ISA's factsheet, "fair, rigorous, consistent, transparent and legitimate". Persons who may be affected by barring decisions are doubtless entitled to expect that the SJP will be applied conscientiously and fairly, but a decision by the authority not to apply a provision of the process will in our judgement only amount to an error of law if it results in unfairness in a legal sense. In particular, we consider that the authority will not be held to have erred in law if they decide to omit a stage in their procedures which in a particular case adds no value to the decision making process.

32. The second case, *SR v DBS*, was factually similar to Mr W's case, at least in as much as it concerned a case of spousal rape. As in *AP v ISA*, the Authority (as it was then) had also failed to follow its own procedures – it had omitted the SJP Stage 3 risk assessment on the basis that there was insufficient information and had failed either to consider the issue of public confidence expressly or to refer the case to the Board. (In the present case, of course, a full risk assessment had been carried out and public confidence had been considered, albeit not at the level of the Head of Service.) The Upper Tribunal in *SR v DBS* held that the failure to apply Stage 3 of the SJP amounted to an error of law: "The present case is not a case where we can say that the stage omitted was one which 'adds no value to the decision-making process' (at paragraph 19).

33. It now falls to us to apply the principles identified in the case law to the circumstances of the present appeal. Stepping back for a moment, we note that the DBS's Escalation Guidance identified two relevant sets of circumstances for escalation. The first was followed in the present case but not the second.

34. The first concerned cases which 'must' be escalated to a team manager. These include cases "Where the caseworker intends to depart from the guidance and such a departure maybe subject to legal challenge (e.g. SJP guidance)" (paragraph 1.2, second bullet point). This criterion applied as the DBS's guidance stipulates that a decision to bar 'ordinarily' requires either 'critical concerns' in one of the SJP fields or 'definite concerns' in two such fields. The general guidance was departed from in the present case as the Appellant had no 'critical concerns' identified and only one 'definite concern'. The matter was accordingly escalated to a team leader in line with the Escalation Guidance.

35. The second, and the subject of this ground of appeal, concerned cases which 'must' be escalated to the Head of Service. The first such category comprises cases "Where a decision relies upon public confidence as a deciding factor (paragraph 1.4, first bullet point). Public confidence was plainly a factor on which the DBS placed "particular emphasis" in this case and yet no such escalation took place. The DBS has vouchsafed no explanation as to why this upward referral did not take place. It is therefore unclear whether this was by deliberate decision or by accidental oversight and we make no finding either way.

36. Does this failure to escalate to the Head of Service matter in the particular circumstances of this case? We consider that it does, for the following reasons.

37. Our starting point is the nature and purpose of escalation in this context. So far as its nature is concerned, the official guidance explains that "'escalation' means an escalation of the full case material, and is distinct from escalation for Team manager sign off purposes." Its purpose is therefore to ensure that a senior staff

member at the designated grade undertakes a full reconsideration of the case rather than a limited 'tick box' quality assurance review of the decision on the case. The thinking behind this is presumably that the senior colleague will have a better handle on the public interest considerations in the light of their greater experience and expertise. We agree with Mr Harrison's submission that this is not a stage of which it can be said that it "adds no value to the decision-making process" (*AP v ISA* at paragraph 21).

38. Ms Scolding submits that both of the two qualifications to the *Nadarajah* principle of adherence to good administration, as endorsed by the Supreme Court in *Mandalia*, apply in the context of the instant case. We disagree. The first of those qualifications was that the policy should not be so rigid as to amount to a fetter on the discretion of the decision-maker. However, the requirement to escalate to the Head of Service does not in our view create undue rigidity. After all, it is the Escalation Guidance itself which has put this type of case into the narrow category of cases that 'must' be escalated to the Head of Service. The second qualification was that the policy need not apply if there were good reason to depart from it. Ms Scolding's submission was that the good reason was that the procedural failing was not material so as to cause any unfairness.

39. What then of the Respondent's argument that it would have made no difference to the outcome of the process because a subsequent review of the case "at a senior level" had adjudged the decision to be correct? We were unimpressed by this submission, principally for two reasons.

40. First, and as a matter of principle, a healthy degree of scepticism is in order in evaluating such assertions. As Sales LJ (as he then was) put it, "self-interested speculations of this kind by an official of the public authority which has been found to have acted unlawfully should be approached with a degree of scepticism by a court (*Public and Commercial Services Union v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin) (at [91]). Furthermore, any analysis of whether a procedural flaw made a difference to an outcome "should normally be based on material in existence at the time of the decision and not simply post-decision speculation by an individual decision maker. Any other course runs the risk of reducing the importance of compliance with duties of procedural fairness and statutory or other requirements that certain matters be taken into account and others disregarded" (*R (Logan) v Havering LBC* [2015] EWHC 3139 *per* Blake J at [55]). In addition, it is not enough to say that the decision would probably have been the same in any event; rather, it must be the case that no other outcome was possible (see e.g. *Smith v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291 per May LJ at [10]).

41. Second, and as already highlighted, there is a distinct absence of detail about this *ex post facto* review undertaken by the DBS. We do not know when it took place. We do not know what format it took. We do not know the grade of the senior staff member who undertook the review. Given the starting point of healthy scepticism, in those circumstances we cannot be satisfied that the failure to escalate to the Head of Service was not material.

42. We therefore conclude that the appeal succeeds on Ground 1.

Ground 2: the DBS erred in law in concluding that any risk of harm was transferable from adults to children

43. The Appellant's second ground of appeal is that the DBS's conclusion, namely that he should be included on the CBL in the light of his conduct in relation to an adult, was *Wednesbury* unreasonable and/or irrational. Mr Harrison rightly acknowledged that, in principle, conduct in relation to adults may be transferable to children (and vice versa). However, he submitted that the DBS had not asked itself the correct question. As such, he argued, the DBS's reasoning had failed to identify a proper factual foundation for a conclusion of transferability in this case and that reasoning was inconsistent with, and contradicted by, the DBS's own risk assessment. The proper starting point, Mr Harrison submitted, was that a conviction for adult rape, despite being self-evidently an extremely serious matter, does not necessarily lead to an individual being included in the CBL, given the structure of Schedule 3 to the 2006 Act.

44. Mr Harrison then identified several contextual factors that militated against a finding that the risk of harm was transferable from adults to children (such as there being no evidence that Mr W ever had a sexual interest in children and there was no evidence of any harm to children having been perpetrated throughout a long career in education). In addition, the sole 'definite concern' identified in the Barring Decision Process document was 'entitlement to sex', which flowed directly from the fact of his convictions. Mr Harrison highlighted the following passage in the final decision letter: "We consider the offending behaviour to be transferrable to regulated activity where you could be in a position where you could prioritise you own needs and manipulate/dominate a child with a view to satiating your sexual needs with them." This was, he contended, at best confused in that it focussed on whether the Appellant would have the opportunity in regulated activity to commit the offending behaviour rather than on whether that behaviour was transferable in the sense of creating an unacceptable risk that the Appellant would cause harm to children in a different context. At worst, Mr Harrison submitted, it was a bare and unreasoned assertion of transferability.

45. Ms Scolding took issue with Mr Harrison's starting point for this ground of appeal, arguing that "the legislature has identified that these offences are sufficiently serious so that a risk of harm is by presumption established" (Respondent's skeleton argument at §11). With respect, we consider that the language of a "presumption" is not helpful in this context, for the reasons identified by the Upper Tribunal in *SR v DBS* (at paragraph 14). However, where Ms Scolding is on much firmer ground is on her preferred starting point, namely that the Upper Tribunal has to give a margin of respect to the DBS's expertise in its analysis, particularly of risk assessment. Thus, according to the Court of Appeal in *B v Independent Safeguarding Authority* [2013] 1 WLR 310, the Upper Tribunal must "give appropriate weight to the decision of a body charged by statute with a task of expert evaluation" (at 316E). As Lewis LJ in the Court of Appeal further explained in *Disclosure and Barring Service v AB* [2021] EWCA Civ 1575; [2022] 1 WLR 1002:

> 43. By way of preliminary observation, the role of the Upper Tribunal on considering an appeal needs to be borne in mind. The Act is intended to ensure the protection of children and vulnerable adults. It does so by providing that the DBS may include people within a list of persons who are

> barred from engaging in certain activities with children or vulnerable adults. The DBS must decide whether or not the criteria for inclusion of a person within the relevant barred list are satisfied, or, as here, if it is satisfied that it is no longer appropriate to continue to include a person's name in the list. The role of the Upper Tribunal on an appeal is to consider if the DBS has made a mistake on any point of law or in any finding of fact. It cannot consider the appropriateness of listing (see section 4(3) of the Act). That is, unless the decision of the DBS is legally or factually flawed, the assessment of the risk presented by the person concerned, and the appropriateness of including him in a list barring him from regulated activity with children or vulnerable adults, is a matter for the DBS.

46. Ms Scolding went on to observe that so far as this ground of appeal was concerned there was no suggestion that there had been a mistake of fact on the part of the DBS. Instead, Mr Harrison's submission was that the DBS's evaluation of the risk posed by the Appellant was irrational and indeed perverse. The reality of the matter, she suggested, was that the Appellant was in effect inviting the Upper Tribunal to engage with the assessment of appropriateness, despite Mr Harrison's avowed acknowledgement that such an enquiry was precluded by section 4(3) of the 2006 Act.

47. Turning to the assessment of the risk of harm and its transferability, Ms Scolding submitted that the DBS's evaluative judgement as to the risk of harm in the context of regulated activity was founded on facts that provided a proper foundation for a conclusion on transferability. These findings were principally that the Appellant had prioritised his sexual needs over those of the complainant and had demonstrated an 'entitlement' to have sex with someone with whom he was in a relationship, that he had shown what could fairly be described as 'coercive control' and had manipulated the complainant when she indicated that she considered his actions amounted to rape. Furthermore, the Appellant had become aggressive when intoxicated and had demonstrated a lack of empathy when she complained about being prodded by him.

48. Ms Scolding rejected Mr Harrison's submission that the DBS's reasoning was inconsistent with, and contradicted by, its own risk assessment. As well as the 'definite concerns' identified over 'entitlement to sex', the DBS had found 'some concerns' in relation to exploitative attitudes, lack of empathy and poor problem solving or coping skills. These were all relevant risk factors and, Ms Scolding submitted, they were more than sufficient to constitute facts which gave rise to a risk of harm, and even a low risk of a serious harm had to be accorded great weight.

49. We have given anxious consideration to this ground of appeal but in the final analysis we are persuaded by Ms Scolding's submissions. We must not lose sight of the fact that this is not a full merits review type of appeal. We therefore reminded ourselves that on an appeal under the 2006 Act it is not our role to decide afresh whether any risk of harm posed by the Appellant to adults is transferable to children. The DBS has an expertise in risk assessment and it is not our function to second guess that evaluation. In the present case the DBS had established the evidential basis for a risk of harm through its factual findings about the Appellant's offending behaviour. The DBS had weighed up both the positive and negative considerations and reached the conclusion that the latter

outweighed the former. This DBS assessment was reinforced by its conclusions as to the sole 'definite concern' and several 'some concerns' about the various domains considered in the Barring Decision Process document. These concerns were all transferable, involving as they did the abuse of power in an intimate relationship, amounting to an abuse of trust. Attractively presented as though his submissions were, we were not persuaded by Mr Harrison that the DBS's assessment of the risk of harm and transferability was irrational – this was, at heart, a difference of opinion that fell quite some way short of the required threshold for perversity.

50. As a result, we must dismiss Ground 2.

Ground 3: the Appellant's inclusion on the CBL was disproportionate

51. The third ground of appeal is that the DBS decision to include the Appellant on the CBL was disproportionate. Before we consider the parties' respective submissions, we start by considering how the DBS approached the question of proportionality.

52. The final decision letter, which drew on the discussion in the Barring Decision Process document, dealt with this issue as follows:

> We acknowledge that Article 8 of the Human Rights Act is engaged in this case as including you in the Children's Barred List would bar you from a range of employment and could constitute an interference of your right to a private life.
>
> We recognise that this is particularly relevant in your case as your CV/testimonials confirm that for over 30 years, you have worked in various educational roles, such as teacher [*redacted*] We recognise therefore, that you may have been financially dependent on working in regulated activity with children and that consequently, inclusion in the Children's Barred List could constitute a particularly serious interference of your right to a private life.
>
> We also acknowledge that, given that you have served your community as [*redacted*] it is reasonable to conclude that including you in the Children's Barred List could lead to you suffering from stigma.
>
> We are also satisfied that you committed the offending behaviour outside of regulated activity, sixteen years ago and there is no evidence that you have repeated this.
>
> As stated, we recognise that your representations/testimonials confirm that for over 30 years, you worked with children in education roles, which equates to the period before, during and subsequent to the offending behaviour, with no evidence of you harming any child during this time.
>
> We acknowledge that your testimonials stated that you cared for those you supported, that you were empathetic/an excellent listener and that you were sensitive when dealing with personal/emotional issues. Your referees also highlight your "genuine desire to improve the situation for staff/pupils' and describe you as 'highly respected/trusted by staff and the community'.
>
> This notwithstanding, you continue to deny the offending behaviour. Consequently the DBS has no insight or remorse from you as to why you

committed this and despite your long/unblemished career working with children, we have no reassurance that you would not repeat this, should you work with children again.

We also consider it to be significant that, given that you committed the offending behaviour in a state of intoxication, you have not provided any evidence that you have addressed your alcohol problems or reduced your alcohol consumption.

We acknowledge that potential safeguards exist in this case as your conviction would be revealed on any prospective enhanced disclosure check should you attempt to work in regulated activity again. However, the DBS considers that this is dependent on employers performing the necessary checks and consequently, we afford limited weight to this as a safeguarding measure.

Given the serious nature of the offending behaviour and your continued denial of this, it is reasonable to suggest that, despite the passage of time that has elapsed/long and unblemished career in regulated activity, it is reasonable to conclude that a decision not to include you in the Children's Barred List, could undermine public confidence in the ability of the DBS to safeguard vulnerable groups.

53. Mr Harrison drew our attention to the well-known four-stage test for assessing proportionality as adumbrated in the relevant case law of the Supreme Court. In particular, he focussed on the third and fourth stages of that test, namely whether inclusion on the CBL is no more than is necessary to achieve the relevant objectives and whether inclusion strikes a fair balance between the individual's rights and the wider community's interests. In that context Mr Harrison stressed the Appellant's lengthy and unblemished teaching career and the stigma associated with inclusion on the CBL. Taking account also of the factors highlighted under Ground 2, Mr Harrison submitted that inclusion of the Appellant on the CBL represented a particularly severe interference with his Article 8 rights. It was argued that there would be sufficient other procedural safeguards in place on the Appellant's release – he would be on the sex offenders' register, subject to his (as yet unknown) specified licence conditions and his convictions would be apparent on any DBS check. Last but not least, Mr Harrison contended that the DBS's decision showed that it was erroneously treating public confidence as a trump card in its assessment of proportionality. For all these reasons, he argued, the decision to include the Appellant on the CBL was disproportionate.

54. Ms Scolding acknowledged that the Appellant's Article 8 rights were engaged by the decision to place him on the CBL. However, she emphasised that Article 8 is a qualified right and the qualifications are themselves expressed in broad terms. Ms Scolding further submitted that we should resist Mr Harrison's implied invitation to usurp the DBS's function and to re-weigh the various factors in the scales of proportionality. As such, she suggested that Mr Harrison was straying into asking the Upper Tribunal to engage in a full merits review, when both statute and case law demonstrated that the Tribunal's role was not so extensive. Public confidence, she argued, was part and parcel of the assessment of proportionality. Furthermore, and in any event, public confidence had not operated as a trump card in the DBS's assessment of proportionality in this case. Rather, the

Respondent had relied on the aggregated impact of three factors, namely the seriousness of the offending behaviour, the Appellant's continued denial of that behaviour and the issue of public confidence.

55. In short, we agree with Ms Scolding on this ground of appeal. The starting point (and in some respects the end point) must be the limited role of the Upper Tribunal in appeals under the 2006 Act. Thus, the Upper Tribunal is precluded from engaging in "a de novo consideration of its own" (*B v Independent Safeguarding Authority* [2013] 1 WLR 310 at 316F). Subsequent case law has only reinforced this principle (see notably *DBS v AB* [2021] EWCA Civ 1575 and *DBS v JHB* [2023] EWCA Civ 982). It follows that the fact that as a panel we might have come to a different decision on the issue of proportionality does not mean in and of itself that the DBS's decision to include the Appellant on the CBL was disproportionate.

56. We note in passing that the Appellant explained to us that his main reason for objecting to his inclusion on the children's barred list was the effect on his wife and young child. He appeared to be concerned that his barred status would on his release from prison curtail his family life with his child e.g. providing lifts for his child and their friends. But as Ms Scolding explained, a person's barred status stops them from engaging in regulated activity and not in their family life. Thus, activities carried out in the course of a family relationship are excluded from the scope of the 2006 Act (section 58) and so this concern will count for little in the scales of proportionality.

57. As such, and for all the reasons above, we dismiss Ground 3.

Ground 4: the Respondent's reliance on the fact that the Appellant was intoxicated when committing the offences

58. The fourth ground of appeal concerns a discrete and rather narrow point. It concerns the DBS's reliance on the fact that the Appellant was intoxicated when committing the offences. In its final decision letter, the DBS stated it was "satisfied that on both occasions, you were intoxicated and [your ex-wife] stated that your moods when drinking would become 'aggressive and scary'." In addition, in its treatment of proportionality and appropriateness, the Respondent stated: "We also consider it to be significant that, given that you committed the offending behaviour in a state of intoxication, you have not provided any evidence that you have addressed your alcohol problems or reduced you [*sic*] alcohol consumption."

59. In this respect Mr Harrison submitted that the Respondent should have concluded that there was no evidence that the Appellant's alcohol intake had ever affected his role as a teacher and his engagement with regulated activity. Mr Harrison further contended that the DBS's decision to rely on intoxication as a significant factor in support of its conclusion that Mr W posed a risk to children and/or it was appropriate to include him on the CBL was not just misplaced but was irrational and/or based on a mistake as to the facts. Alternatively, he argued, the DBS's approach to this issue represented an error of law in that it had failed to take into account a relevant consideration.

60. In response Ms Scolding submitted that the DBS's finding of fact that the offences were committed while the Appellant was intoxicated was justified on the available

evidence. The statement that the Appellant had not provided any evidence that he had addressed his alcohol problems or reduced his alcohol intake simply reflected the evidential position. In that context, however, we note Mr W's oral evidence to us that he had not taken any alcohol since he began his sentence over four years ago.

61. We agree with Ms Scolding that the fact that the Appellant was not intoxicated when working with children does not mean that his intoxication in other contexts is irrelevant or is a factor that cannot be weighed in the balance when judging the scales of proportionality and appropriateness. Moreover, on a fair reading of the final decision letter and the Barring Decision Process document, the issue of intoxication was simply one factor among several and was by no means the most prominent.

62. It follows that the DBS's decision in this regard involves no error of law or mistake of material fact and so we dismiss Ground 4.

Disposal

63. In terms of how we should dispose of the appeal, the relevant law is set out in section 4(5)-(7) of the 2006 Act as follows:

> (5) Unless the Upper Tribunal finds that 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.

64. Plainly section 4(5) does not apply, as we have concluded that the DBS's decision involved an error of law. It follows this is not a case in which we *must* confirm the DBS's decision. Accordingly, the choice for disposal is between either directing the DBS to remove the Appellant from the CBL or remitting the matter to DBS for a new decision (section 4(6)(a) or (b) respectively).

65. In applying section 4(6), we are bound by the decision in *DBS v AB* [2021] EWCA 1575, where the Court of Appeal held (at [72]) that "Unless it is clear that the only decision that the DBS could lawfully come to is removal, the matter should be remitted to the DBS to consider." We do not consider the section 4(6)(a) option of a direction to DBS for the removal of Mr W's name from the Children's Barred List is appropriate. We say that as in our view this is not a case where there is only one possible outcome. Also, we recognise that not all the Appellant's

grounds of appeal have been successful. We therefore remit the matter to the DBS for a new decision under section 4(6)(b). Given the limited oral evidence we heard, we do not consider it appropriate for us to set out any findings of fact (under section 4(7)(a) of the 2006 Act) on which the Respondent should base its new decision.

66. It is not for us to direct the DBS as to how it goes about the process of making a fresh decision on the Appellant's case. That said, obviously we would anticipate that the case will be escalated to the Head of Service in accordance with the DBS's Escalation Guidance. We would also suggest that serious consideration is given to commissioning an independent expert to undertake a specialist risk assessment, given the case has particular nuances and idiosyncrasies that may warrant a more specialised assessment.

67. Finally, by section 4(7)(b) of the 2006 Act the Appellant must be removed from the barred list until the Respondent makes its new decision, unless the Upper Tribunal directs otherwise. We do direct otherwise as this is not a straightforward case and we consider it needs to be properly evaluated according to the proper DBS procedures if and before any change is made.

Conclusion

68. It follows from our reasons that the Appellant's appeal to the Upper Tribunal succeeds to the limited extent set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Roger Graham
Specialist Member of the Upper Tribunal

Rachael Smith
Specialist Member of the Upper Tribunal

Approved for issue on 25 September 2023