IN THE UPPER TRIBUNAL **Appeal No: V/964/2017**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright
Upper Tribunal Member Derrick
Upper Tribunal Member Joffe

ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellant in these proceedings, his son or any other member of his family.

DECISION

The Upper Tribunal dismisses the appeal of the appellant.

Representation: Ms Obi-Ezekpazu of counsel for PP.

Ms Ward of counsel for the Disclosure and Barring Service.

REASONS FOR DECISION

1. We set out at the outset the sole basis on which the appellant was given permission to appeal the decision of the Disclosure and Barring Service ("DBS") of 4 January 2016. This was whether the DBS had erred in law "in failing to apply (or give reasoned consideration to applying) the *structured judgment process* in either its 4 May 2011 decision or its 4 January 2016 decision, or both". Permission was not given to appeal on any other grounds and so our consideration is limited on this appeal to the above ground. We are satisfied that there was no error of law on the part of the DBS in not applying the "structured judgment process" on either of

the said decisions and it therefore committed no material error in not explaining why the structured judgment process did not apply.

2. We record simply for completeness that the Upper Tribunal refused the appellant permission to argue any other points on this appeal. This was made clear in the Upper Tribunal's *Notice of Determination of Application for Permission to Appeal* dated 14 July 2016, where, as the judge addressing the application for permission to appeal, Judge Wright, on the papers before him, and having given permission to appeal on the ground set out above, said:

> "8. I do not, however, give permission to appeal on any of the other grounds the appellant seeks to advance. Permission can only be given if it is arguable with a realistic prospect of success that the DBS either erred materially in law in its decision or arguably arrived at a decision based on a material error of fact.
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> 9. The ground relied on in the UT10 form is failure to have regard to the judgment of Lady Justice Hale (as she then was) from August 2002 refusing the appellant permission to appeal from Judge Lowden's judgment of July 2002 that he had abused his son. However I can identify no arguable basis upon which sight of that judgment would or could have made any difference to the DBS's decision as it was not for Lady Justice Hale to make any findings of fact, nor did she make any such findings, and nothing she said in any way undermined the findings of fact Judge Lowden made. Indeed, properly read, what Lady Justice Hale was saying was that Judge Lowden was entitled to come to the findings he did on the evidence before him.
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> 10. Nor can I identify any arguable errors of law or errors of material fact in the appellant's written submission of 5 June 2016. His loss of employment and the process by which that occurred was not material to the DB's decision. That is, it was not evidence the DBS relied on as supporting its review decision to keep him on the children's barred list, as a read through of its decision letter of 4 January 2016 shows. The central and crucial factual finding that decision relies on is the sexual abuse of his son by the appellant based on the findings Judge Lowden made. Similar considerations apply to the evidence relating to the South Tyneside Family Proceedings Court from 10 May 2001 and the view taken then by social services. These predate and are overset by Judge Lowden's judgment over a year later and do not provide any factual basis for challenging the factual findings Judge Lowden made and on which DBS rely. The presentation of the testimonial evidence does not reveal any arguable error of fact or law, and the decision shows this evidence was taken into account and no material error made as to the facts set out in that evidence. Most of the other points are simply an attempt to reargue arguments the appellant made before but were not accepted by Judge Lowden, and the other points are subsumed in the ground on which I

> have given permission to appeal (i.e. did the DBS direct itself properly in determining risk in 2011/2016?)."

The appellant abandoned any attempt to reargue these, or any other, grounds for seeking permission to appeal at an oral hearing, and so the appeal is limited to the above ground.

3. The structured judgment process ("SJP") is part of the "Barring Decision Making Process". It was helpfully and accurately described by the Upper Tribunal in paragraph 10 of *SR –v- DBS* [2013] UKUT 103 (AAC); [2013] AACR 31 as follows.

> "The structured judgement process is a matrix enabling predispositional factors, cognitive factors, emotional factors and behavioural factors (22 in all) to be examined. It provides a structure for "indications" and "counter indications" to be identified. In respect of each of the 22 factors it is possible to identify that there is "no information", "no concerns", "some concerns" or "definite concerns". The structured judgement process provides the opportunity to identify the number of "definite concerns" and to review the impact of risk factors identified as "definite concerns" or areas identified as "critical concerns". It provides an opportunity for the decision-maker to consider whether the representations and supporting documentary evidence cast doubt on the original barring decision and to identify whether a specialist referral is considered appropriate."

4. The issue before us is not whether as a matter of professional judgment the DBS was wrong not to apply the SJP in its decision making on the appellant's case. Nor is it for the members of this Upper Tribunal to express a view as to whether the application of the SJP would have assisted the DBS in making more rounded decisions on the appellant's case. This follows for two reasons. First, and as a matter of general approach, the appropriateness of the DBS's decision is not a matter for the Upper Tribunal on appeal: *R(RCN and others) –v- SSHD* [2010] EWHC 2761 (Admin). Second, and more particularly given the limited basis on which permission to appeal was given to the appellant, the issue for us is whether the DBS **erred in law** in not applying the SJP in its decision making. As the caselaw makes clear, that in turn depends on whether the appellant had a legitimate expectation founded

on clear promise that the SJP would be applied in the decision making by the DBS in his case.

5. There are three decisions we need to address. The first we need only mention as background and to give this appeal the necessary factual context. The first decision was made on 12 November 2007 and included the appellant on the lists maintained under the Protection of Children Act 1999 of people unsuitable to work with children and under the Care Standards Act 2000 of people unsuitable to work with vulnerable adults. The appellant had been referred for consideration for inclusion on those two lists by his former employer, South Tyneside Council, after it became aware that he had been refused contact with his son following findings of sexual abuse made against the appellant by HHJ Lowden at Sunderland County Court on 12 July 2002. An appeal made by the appellant against his inclusion on these two lists was withdrawn by him on 9 May 2008. Further and in any event, it was not disputed before us that the SJP did not exist at the time the 12 November 2007 decision was made. Accordingly, even if for some reason that decision was before us, there can be no question of the appellant having had a legitimate expectation that the SJP would have applied in the process that led to the 12 November 2007 decision.

6. The next decision was one made on 4 May 2011. This followed the change in legislative regime in respect of barring people from working with children and vulnerable adults introduced by the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act") with effect from 12 October 2009. As part of that process of change, or migration, the appellant had been notified on 4 January 2010 that he had been included in the Children's Barred List and the Adults' Barred List with effect from 4 January 2010. He was told, accurately, that pursuant article 2(5)(b) (and article 4(5)(b)) of the Safeguarding Vulnerable Groups Act 2006 (Transitional Provisions) Order 2008 (the "TPO") that he could make representations as to his inclusion in these two Lists only in respect of his engaging in regulated activity relating to children

(and adults). (In other words, the decision could not reconsider whether the appellant had been correctly "barred" in the first place on 12 November 2007.) Having made his representations, the decision made by the Independent Safeguarding Authority (the predecessor of the DBS), on 4 May 2011 was to remove the appellant from the Adults' Barred List but that he should remain on the Children's Barred List. The appellant did not exercise his right of appeal against the 4 May 2011 decision.

7. This leads us to the final decision of 4 January 2016. This decision has to form the primary focus of our consideration of this appeal because it is that decision which permission to appeal has been given against. The decision arose from an application by the appellant on 5 September 2015 for a review of his continuing inclusion on the Children's Barred List under paragraph 18A(3) of Schedule 3 to the 2006 Act. This provision was added to the 2006 Act by Protection of Freedoms Act 2012. It allows the DBS to remove the person from the (relevant) 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 [the] DBS,
>
> it is not appropriate for the person to be included on the list."

8. Although the appellant made his application for review on the ground of change of circumstances, it more readily fell as an application under 18A(3)(a) and information which had not been available at the time of 4 May 2011 decision. This is because foremost amongst the information on which the appellant sought to rely in his review application was a "Specialist Independent Risk Assessment" report written on 21 December 2011 in respect of the appellant by Dennis G Smith, who was a social worker and consultant in child protection.

9. The DBS's review decision of 4 January 2016 was to maintain the appellant on the Children's Barred List. As we have indicated above, the issue for us on this appeal is not whether it was not appropriate for the appellant to be included on that list in January 2016. Taking that 4 January 2016 review decision first, the issue for us is whether the appeal had a legitimate expectation, founded on a clear promise, that on that review, and in considering the appropriateness of keeping the appellant on the Children's Barred List, the DBS **would** apply the SJP as part of its review and as part of its consideration of the appropriateness of the appellant remaining on that list.

10. We were taken in this respect to the publicly available guidance of the DBS which was in place at the time of the 4 January 2016 decision. This is set out in our appeal papers at pages 140-149. It is titled *DBS referrals guide: referral and decision making process* ("the 2016 Guide"). We are satisfied from its structure that the 2016 guide is primarily concerned with what may be termed the initial decision making on discretionary referrals or autobar cases, and that it is within that context that the section addressing the SJP falls to be considered. This is apparent in our judgment from consideration of the sections in this guide dealing with the **Typical discretionary barring decision making process**. This takes the reader through: stage one, the initial case assessment; stage two information gathering; stage three, the SJP risk assessment tool; stage four, representations; and stage five, the barring decision; but all in a context where it is plain that what is in issue in a "typical discretionary process" is cases referred to the DBS from , for example, employers. That is why we consider it, and the SJP within it, to be concerned with what we have termed the initial decision making process on a referral.

11. The 2016 Guide adopts a similar structure in respect of decision making on "autobar with reps" cases.

12. Pausing at this point, we do not consider that either of these parts of the 2016 Guide give rise to a clear and unequivocal promise to someone who is not at the initial decision making stage (i.e. as the appellant was not in 2016) that the SJP would apply to the DBS's process of decision-making on their decision. This is made even clearer in our view by the fact that the 2016 Guide deals with "Review of bar" separately, at the end of the guide after all of the above five stages have been addressed for the initial decision making, where what is being spoken about is "a barred person will have the right to request a review of a DBS decision" (our underling added to indicate this is a process *after* the initial barring decision has been made), and where nothing in the review section of the 2016 Guide indicates, let alone assures, that the SJP will apply on the review.

13. The 2016 Guide does refer in its "Review of a bar" section to further information in a "Factsheet 8 - DBS Referral guide: Reviews". We were shown a copy of this additional document. Nothing in it sets out any clear assurance to the reader that the SJP will be involved in the review process, and the appellant's case on the ground for which he has permission to appeal depends on him demonstrating that such an assurance or promise was made to him. At highest there is a passage towards the end of the "DBS Referral guide: Reviews" which says: "Should the DBS be satisfied that any change in the person's circumstances is appropriate grounds for **permission to review**, a review will be undertaken. The DBS will write to the person stating a review has been granted and will then carry out a full **review** of the case" (emphasis in the original). We expressed to Ms Ward at the hearing our concerns that the words "full review" were potentially ambiguous and ideally should be spelled out further. However, there is nothing that ties the full review spoken of to the SJP being applied, and so even this passage cannot assist the appellant.

14. It is for these reasons that we have concluded the appellant had no legitimate expectation in 2016 that the review decision and any

consideration of appropriateness involved in it would involve the DBS using the SJP.

15. That then leaves the decision of the 4 May 2011. We recognise that the time for appealing that decision has long since passed. However, for the purposes of argument we are prepared to assume, without deciding the point, that review in 2016 could have been made under paragraph 18A(3)(c) of Schedule 3 to the 2006 Act on the basis of an error by the DBS in not applying the SJP in 2011 when it ought to have done so. We say this with some caution however because it was not the subject of any real argument before us and in any event the appellant cannot succeed on this point. The argument would have to be that the error was in not applying the SJP the appellant had a legitimate expectation would be applied in 2011, even if he had no such expectation in 2016, *and* that that error meant it was no longer appropriate in 2016 to keep him on the Children's Barred List.

16. However, even assuming (which we shall shortly see was not the case) the appellant had a legitimate expectation that the SJP would be, and therefore ought to have been, applied when the 4 May 2011 decision was made, it is by no means clear to what it might have applied. We say this because both in the 2016 Guide and the 2011 Guide (see below) the SJP is described as a risk assessment tool for assessing the presence or absence of long-term risk factors for future harmful behaviour. Given the limited issue the 4 May 2011 decision could concern itself under the terms of article 2(5)(b) the TPO – that is, representations the appellant could make as to his engaging in regulated activity relating to children - it is not immediately apparent on what basis the SJP would be relevant to assessing the cogency of those representations.

17. This issue need not trouble us any further, however, because we were taken to the "DBS referrals guide: referral and decision making process" Guide from 2011 ("the 2011 Guide") and it was the same in all relevant particulars to the 2016 Guide. It is of course the case that in 2011 the issue was not one of review of a "barring" decision. However

the points made above about the SJP *only* being relevant to the initial decision making processes on discretionary referral cases and autobar with reps cases hold equally true to the 2011 Guide. There is therefore nothing we can identify that set out a clear promise to the appellant that when his case migrated to the 2006 Act scheme between 2010 and 2011 the SJP would apply to the (limited) issue that had to be decided on 4 May 2011.

18. This conclusion is not undermined or rendered any different, in our view, by consideration of the longer, August 2010 *Guidance Notes for the Barring Decision Making Process* ("the 2010 Guide"). These were helpfully put before us by Ms Obi-Ezekpazu on behalf of the appellant. It would seem likely from what we were told that it was this 2010 Guide which was in place when the 4 May 2011 decision was made.

19. The structure of the 2010 Guide is as instructive as the 2011 Guide and 2016 Guide. It starts by saying that the guidance notes are "intended to be used by case workers in the determination of decisions with regard to whether referred individual should be barred from working with regular groups" (our underling added for emphasis). It is apparent from this and the rest of the 2010 Guide that its primary focus is again on what we have described as the initial decision making process. The five stages of process are similar to those set out in the 2011 Guide and the 2016 Guide. The SJP appears again at Stage 3, though here it is called "Case Assessment". More instructively still, what are called the "determination cases" under the TPO are only addressed at the end of Stage 4, which is the "representation" stage that precedes the final decision at stage 5. It is clear to us for the reasons we have already given that the appellant's case in 2011 was a determination case covered by (in terms of children) the terms of article 2(5)(b) the TPO. We agree with Ms Ward for the DBS that there is nothing in the "representations" part of the 2010 Guide dealing with "determination cases" that indicates that the earlier, Stage 3 "Case Assessment" (i.e. SJP) stage is to be applied. What the 2010 Guide shows is that the

representations *follow* any cases assessment (SJP) that has been made and do not lead on to any case assessment (SJP).

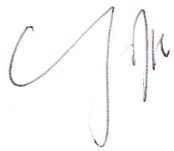
20. Moreover, the contrast in the language used in the paragraphs of the 2010 Guide dealing with representations on determination cases is also instructive. It speaks (at paragraph 7.7.3) in terms of limited representations that may be made under the TPO, but it contrasts this (paragraph 7.8.7) with the right for the person to make 'full' representations if the ISA (as it then was) was also minded to bar the person from the other list to which the TPO did not apply. This would seem to underscore the point we have suggested in paragraph 16 above about the SJP not being relevant to the assessment of representations under article 2(5)(b) (and/or article 4(5)(b)) of the TPO.

21. It is for all these reasons that the appeal must in our judgment be dismissed.

Signed and dated (on the original)

Stewart Wright
Judge of the Upper Tribunal

Sally Derrick
Member of the Upper Tribunal



Caroline Joffe
Member of the Upper Tribunal

Dated 10th August 2017