IN THE UPPER TRIBUNAL **Case No V/954/2019 (V)**
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD, TRIBUNAL MEMBERS Ms. S. PREWETT and Mr. J. HUTCHINSON

Attendances:

For the Appellant:	Ms M Smith, acting pro bono through "Advocate"
For the Respondent:	Mr S Lewis, instructed by Legal Adviser, Disclosure and Barring Service

Decision: The appeal is dismissed.

The case is to be known as CD v Disclosure and Barring Service.

The application for an order under Rule 14 is refused.

REASONS FOR DECISION

The background events and respondent's decision

1. The appellant had been employed in education, most recently as a classroom teacher in a primary school, between July 2015 and January 2018. On 3 January 2018 he was convicted of the office of causing/inciting a child under the age of 16 to engage in sexual activity, contrary to s.10(1)(a) of the Sexual Offences Act 2003. He had pleaded guilty and was sentenced to 8 months imprisonment (suspended for 24 months), a sexual harm prevention order ("SHPO") for 10 years[1], a sex offenders notice, an unpaid work requirement and a programme requirement and was ordered to pay a victim surcharge. The terms of the SHPO prevent him from having or seeking contact with, or communicating by whatever means with, under 16s, unless (in each case) appropriately supervised, and from seeking or undertaking any employment likely to allow him unsupervised access to under 16s. It was the appellant's first conviction.

2. In fact, there had been no actual "child". The appellant had responded to a decoy claiming to be a 15 year old boy on the "Grindr" dating app and messages sent to the "boy" via the app were what constituted the offence. The entrapment which occurred is unappealing and in that regard one may have some sympathy with the appellant whose weakness was exploited. However, the fact remains that the offence was committed and that, at the time, he did not know he was not engaging with a real boy.

[1] under s.103A of the Sexual Offences Act 2003.

3. The appellant's case was referred to the respondent on 15 January 2018 by the local authority which had employed him. The offence of which the appellant was convicted falls within the category known colloquially as "autobar with reps", falling within para.2 of schedule 3 of the Safeguarding Vulnerable Groups Act 2006. The respondent followed a process of seeking representations from the appellant, which he provided. We return below to the process and to the representations. On 7 February 2019 the respondent decided to include the appellant on the Children's Barred List.

The grounds of appeal

4. Judge Ward gave permission to appeal following an oral hearing at which the appellant appeared in person and the respondent by counsel. The matters which led to permission being given were:

> a. whether the respondent erred in law by failing to request a report from the probation service to supplement the brief letter that had been provided to the respondent as part of the appellant's representations and/or by failing to defer the decision until a more meaningful report could be obtained from the probation service; and
>
> b. whether the respondent made material errors of fact in finding in its decision letter that "you are yet to fully come to terms with your offending which is deemed to heighten the likelihood that you may repeat your offending behaviour again in the future" and "there is no tangible evidence that you have fully addressed your sexual offending".

5. The grounds reflect the two limbs of s.4 of the 2006 Act, under which:

> "(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."

It is convenient to note here that:

> "(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."

6. While permission to appeal was not formally limited, Ms Smith confirmed that she did not seek to advance any further grounds than those above.

The remote hearing

7. As required, we record that this was a remote hearing which had been consented to by the parties. The form of remote hearing was V (Skype for

Business). A face to face hearing was not held because it was not practicable due to public health constraints, exacerbated by the number of participants in a variety of different locations, and all issues could be determined in a remote hearing. The documents that we were referred to are in the Upper Tribunal bundle, totalling 454 pages, plus a copy of the first ARMS assessment (see below) provided after the hearing at the request of the panel. The Upper Tribunal's decision is set out above.

The appellant's representations to the respondent

8. The appellant's initial representations (24 May 2018) referred to his commitment to the well-being of the children he had taught, the circumstances of the entrapment which had led to the commission of the offence and a series of points in mitigation. He then wrote:

> "After my conviction and during a probation meeting, an assessment was conducted to determine the level of danger I possess. The assessment concluded that I have no desire or interest in having a sexual relationship with a child and it also stated that the risk of this happening again are *(sic)* extremely low. I am not a child sex offender and never will be."

9. By 4 January 2019 the respondent had obtained information from the police, the local authority and the Teaching Regulation Authority, which was duly sent to the appellant for his comments.

10. On 1 February 2019 he provided further representations, suggesting that he had accepted responsibility for his actions, which had been "extremely out of character". Relevantly for present purposes he continued that

> "Since the event, I have accepted help from the National Probation Service, the Christian Congregation that I belong *(sic)* and my own determination to ensure such uncontrol never occurs again."

He provided a commentary on the record of his police interview and in a further two pages his observations on the evidence of those responsible for his entrapment.

11. With his representations he included a letter from his Offender Manager from the National Probation Service, Ms Mann. So far as material, she indicated that he had complied well with, and had completed, the unpaid work requirement. He was required to attend the accredited programme "Horizon" to address his sexual offending, which had started on 7 September 2018, had attended regularly, complied well and was due to complete it on 20 February 2019. Since Ms Mann had taken over the appellant's case he had attended all probation appointments, home visits as instructed, had engaged well and was "polite and respectable". The letter included a report from Mr Bowe, the facilitator of the Horizon programme. It gave a brief overview of the areas

covered by the programme. Mr Bowe indicated that the appellant had taken a full and active part in the work, often helping others, and

> "presented as being highly motivated to maintain and build upon the positive progress he has made in his life."

It is common ground that this letter does not address what level of risk the appellant was considered to pose at that stage, following the partially completed interventions by the Probation Service and the Horizon programme.

12. His representations concluded with a request that the respondent bear the contents of his letter in mind when making their final decision.

13. The respondent's Barring Decision Process document noted inter alia the letter from Ms Mann, incorporating evidence from Mr Bowe, and referred to it in the final review of appropriateness and proportionality. The Barring Decision Process document contains no indication that consideration was given to the sufficiency of the evidence available.

The respondent's procedures

14. The letter indicating an intention to include in the barred list is accompanied by a factsheet, which is presumably a standard document. It encourages the reader to involve their union or professional association where applicable; it directs those who feel they may need further advice or assistance towards Citizens Advice or towards seeking legal representation.

15. In a section entitled "What are representations?" it explains that "you now have the right to provide any information that could explain why including you in the barred list(s) would be inappropriate or disproportionate." It provides a non-exhaustive list of possible types of representation, including "any reports from medical experts, probation service or any other professional". It states that "If you want to provide a report from a third party, it is your responsibility to send it to us; we cannot arrange to get it for you."

16. The factsheet explains that the respondent is required to allow 8 weeks in which to make representations and refers to the possibility of an appellant requesting an extension of time if the appellant needs it.

17. In a section entitled "What happens when I have provided my representations?", the factsheet indicates:

> "Once the 8 week time period has expired or you have confirmed you have nothing further to provide we will assess your representations. If necessary we will request additional information from other organisations. If we obtain additional information we will send a copy to you to allow you to provide further representations. This would normally require a response within two weeks. When we are confident

> that we have all of the relevant information available we will complete our assessment and make a final decision on your case."

18. The published DBS referral guide (as updated 20 May 2016) contains a similar list of examples of information that may be provided in representations, among them "probation reports (including OASys reports)". When the step "Autobar stage two: consideration of representations and evidence evaluation" is reached, certain steps have to be confirmed before a decision can be made, the first of which is that "the necessary information to make a fair and robust decision is available". Stage three involves the use of the structured judgement process risk assessment tool. It is not required in all cases but

> "an SJP assessment should be undertaken if there is sufficient information and it would assist the caseworker in determining risk and the appropriateness of including a person in either of the barred lists."

In the present case, no SJP was undertaken.

19. There is very little statutory provision in respect of enquiries to be made by the respondent or the obtaining of information and none of what there is is relevant to this case. Neither counsel suggests that the absence of express provision should be determinative of this appeal. It is clear that seeking the additional information for the purposes of a barring decision would be covered by the wide incidental powers conferred by Protection of Freedoms Act 2012, sch 8, para 18 and s.87.

The Upper Tribunal proceedings and associated evidential developments

20. In his application, dated 1 April 2019, the appellant indicated that:

> "An ARMS (Active Risk Management System) assessment was conducted shortly after the conviction, and this profoundly *(sic)* concluded that there is **no evidence** to suggest sexual or violent re-offending would occur. A part of this system also assessed my sexual interests; asking intrusive questions regarding sexual desires, motivations and arousals. For this part of the assessment, I scored LOW risk – meaning I **do not** possess inappropriate sexual preferences." (Emphasis in original)

21. He also referred to having received a "very encouraging report" from the Horizon Programme, suggesting that a copy is "available to the tribunal service" from 8th April. He indicated that the ARMS Report and the Horizon report would be posted to the Upper Tribunal at the earliest opportunity.

22. On reviewing the file on 17 June following receipt of the respondent's case papers, Judge Ward issued further directions noting that it appeared odd that,

if the March 2018[2] ARMS report was as positive as claimed, the appellant had not submitted it to the respondent; and that neither the ARMS report nor the Horizon report to which the appellant had referred had been received by the Upper Tribunal some 11 weeks after his application. This prompted a reply from the appellant explaining that he only saw the ARMS assessment when it was shown him by the probation officer on the review of it in April 2019 and a section was available to him to quote from. It was however a police protected document, which made it difficult to get hold of. The appellant indicated he had made a subject access request to the National Probation Service to try to get hold of it. Meanwhile he provided a further letter (dated 23 July 2019) from Ms Mann, indicating that the appellant:

> "has demonstrated deep regrets for his actions and has taken responsibility; his behaviour to date has demonstrated a determination to overcome the obstacles he may now face in terms including disclosure and he is committed to not re-offending. There is no evidence at this time of any risky behaviours and he has shown a positive attitude to his order so far. Therefore, his general risk management level has been assessed and set as Low.
>
> Low Level indicates there are *(sic)* no evidence of active risk factors of further sexual or violent offending with stable protective factors evident. Whilst ongoing active investigation is not considered necessary the case would benefit from further engagement with the offender in line with national minimum standards to enable the ongoing review of the assessment."

23. In his reply, he also said he was enclosing the report from the Horizon Programme (but did not in the event do so).

24. On 23 August Judge Ward, noting the continued absence of material from the ARMS report and/or the Horizon programme, voiced his concern in Directions that the appellant as a litigant in person might not have presented his case to best advantage to the respondent and was in danger of failing to do so to the Upper Tribunal. He directed an oral hearing of the application and set a time limit in which the appellant was permitted to request the Upper Tribunal to make an order compelling the production of the ARMS assessment and the Horizon report. In the event the appellant requested such an order in respect of the ARMS assessment, which resulted in the assessment dated 9 May 2019 ("the second ARMS assessment") being made available. The appellant subsequently, and belatedly, also received the April 2018 ARMS assessment ("the first ARMS assessment") in response to his subject access request and it was rather belatedly provided to the Upper Tribunal following the oral hearing of the appeal. No application for an order was made in respect of the Horizon report and the Upper Tribunal has never seen this document.

[2] Now that it has been provided, it is evident that its formal "Assessment date" is stated as 23 April 2018

The ARMS assessments

25. Part A examines matters which may lead to risk, and protective factors which may reduce it, across 11 different domains. In respect of each of them, the assessor can rate the outcome as "high priority", "medium priority" or "low priority." In relation to risk, a "medium priority" rating "indicates only the partial presence of this factor. It is likely to have only a small or limited risk effect." A "low priority" rating "indicates this factor is not present. It does not pose a risk effect." In relation to protective factors, "low priority" arises where the factor being examined is "likely to have a significant protective effect". "Medium priority" indicates that the factor "is likely to have only a small or limited protective effect." "High priority" is not relevant to this case. The 11 domains are "Opportunity", "Sexual preoccupation", "Offence related sexual interests", "Emotional congruence with children", "Hostile orientation", "Poor self-management", "Social influences", "Commitment to desist", "Intimate relationship", "Employment or positive routine" and "Social investment – 'Giving Something Back'. There is then a summary checklist and the ARMS priority rating is assessed on a scale, this time with four categories.

26. The appellant was assessed as "Low" on both assessments, for which the rubric reads:

> "Although some ratings may vary, a predominance of factors rated Low Priority indicate minimal evidence of risk of further sexual offending with stable protective factors evident. Whilst active investigation is considered unnecessary the case would benefit from further engagement with the offender in line with national minimum standards so that ongoing review of the assessment can be maintained."

27. Part B of the ARMS assessment requires the assessor to take into account also the products of the Risk Matrix 2000 V or OVP level and the OASys Risk of harm level (these were assessed as "low" and "medium" respectively) and to provide an overall risk management level, with rationale in support. The outcome was a "Low" rating.

28. In the first ARMS assessment, the appellant was assessed at "Low Priority" in respect of 9 of the 11 domains and "Medium Priority" in the two remaining ones. In the second ARMS assessment, one of the "Medium Priority" domains was now a "Low Priority", so 10 out of 11 were now "Low". It is not necessary to conduct a detailed comparison of the content of the first and second ARMS assessments: it suffices to observe that the overwhelming bulk of the content was created through the first assessment, with updating that was limited in scope being present in the second one.

29. The appellant's evidence was that he had been asked in-depth, personal questions at his first probation meeting in February 2018 by the Public Protection Unit Officer in order to enable the police to ascertain the level of risk the appellant was considered to pose, so as to be able to shape his future

supervision. As to the first ARMS assessment itself, he was first aware of the first ARMS assessment in May 2018. He was briefly shown the outcome statements for each section at a probation meeting but was not permitted to read the report. However, he took away from the meeting that the assessment had concluded that he was a low risk and so informed the respondent of that in his representations of 24 May 2018.

30. As to the second ARMS report, his evidence was that it was not until the course of the second assessment, carried out between February 2019 and May 2019 that he "became fully aware of the existence of the [first ARMS report] and its contents" and was not aware of its potential significance until this time.

31. The panel finds that the appellant was aware of the existence of the first ARMS report in May 2018. He had been shown at least parts of it, albeit briefly. What he was "fully" aware of can only sensibly be related to its contents. The panel accepts in the light of the considerable difficulties the appellant faced in getting hold of a copy of the ARMS assessment that it was a document guarded with some zeal and that he would not have been given an opportunity to read it in full at the time, but only the "outcome statements for each section".

Submissions for the appellant

32. Ms Smith submitted that in a case of the "autobar with reps" type, the ARMS assessment was relevant. A duty existed on the respondent to obtain third party evidence in certain cases. Here, the appellant had in his submission raised the relevance of the ARMS assessment (not by name, but by the mentions in his submission of May 2018 (see [8]) and 1 February 2019 (see [11]) he had sufficiently indicated the views held by the Probation Service and the importance of that service to his strategy to avoid re-offending. In the light of his representations and the limited (in that it failed to address risk) evidence from Ms Mann, the evidence which the ARMS assessment would provide was materially relevant. The respondent had failed to follow its published Guidance without good reason. Accordingly, in failing to request the ARMS Report (necessarily the first one, as the second was not in existence at the time of the respondent's decision) the respondent erred in law; alternatively, it erred in law by failing to defer its decision until an ARMS report (the second one) could be provided. She submitted that under s.4 of the 2006 Act it was not necessary to demonstrate the materiality of any error of law, but in any event, the appellant could do so.

33. Amplifying her submission that the duty arises only in certain cases, the ARMS assessment provides an example, specific to this case, of what was or could have been available. The provisions of the fact sheet summarised at [14-17] above indicated that there were instances when the respondent would obtain information from third parties and obtaining material evidence such as a risk assessment which someone could not obtain for themselves because of the restrictions on disclosure (demonstrated by the fact that it was initially only

provided in response to the Upper Tribunal's order) was one such category. While the respondent might seek information from third parties for the purposes of verification which it wished to carry out, the scope for obtaining third party information was not limited to what facilitated the DBS in taking a decision in favour of barring. It should have been apparent to the decision maker that Ms Mann's evidence was insufficient and that there was extra evidence to obtain, but the decision maker failed adequately to engage with Ms Mann's evidence s/he had. What is shown by an ARMS assessment was not something that was already covered by evidence from another source.

34. By 1 February 2019 the Probation Service would have been supervising the appellant for a year, during which time he had been in the community, with the opportunities to go astray which ordinary life provides, and would be able to express an informed view, based on regular contact. That contact and the professional skills of a probation officer would enable the officer to asses the veracity of what was being said to her.

35. Had the ARMS assessment been obtained, it would have demonstrated that in the view of the probation officer the risk was Low Priority (as to the meaning of which, see above.) That is the lowest rating it was possible to achieve as the Probation Service was required to continue providing an appropriate level of supervision (hence the refence to "national minimum standards") for the duration of the community sentence.

36. The respondent's objection that if the appellant had wanted the ARMS assessment to be obtained by DBS he should have asked them to was not valid: the appellant, acting in person, had identified its relevance in the submissions he had made. He could not have asked for them earlier. His evidence was that in May 2018 he was briefly shown the outcome statements for each section of the ARMS assessment but was not permitted to read it and so mentioned it in his first representations. It was not until 20 February 2019 (after the date of the respondent's decision) that he had the opportunity to read the (first) ARMS assessment, following which he took steps to try to obtain a copy, initially unsuccessfully, as set out above.

37. The complaint that the respondent erred in law by not deferring its decision rested essentially on the same factors, plus the references in the Factsheet and the Guidance that they would only go ahead when they had the "necessary information to make a fair and robust decision". On what the respondent had, it was or should have been evident that they did not have all the necessary evidence. In public law terms, to go ahead without it was irrational or perverse.

38. As to the submissions made by Mr Lewis in relation to the appellant's first representations, if they are read in the round the appellant seeks to demonstrate both acceptance of what he had done wrong ("I am not deferring - *sic* - the responsibility for what was said on the dating application – it was a fundamental error of judgment") and mitigation. That his representations also dealt with the entrapment should not detract from his acceptance of

responsibility for what he had done. The statement that he is "not a child sex offender" was unhelpful but he did "when it mattered" take responsibility for his offending.

Submissions for the respondent

39. Mr Lewis made the preliminary remarks that s.10 of the Sexual Offences Act 2003, under which the appellant was convicted, fell within a part of the Act under the heading "Child sex offences". As noted above, he was subject to a sexual harm prevention order; to make such an order, the sentencing court had to be satisfied that there was a risk of sexual harm and that it was necessary to protect against risk. While the minimum duration of such an order was 5 years, the sentencing court had chosen to make it for 10 years.

40. Mr Lewis relied on features of the fact sheet set out above – encouragement to seek advice, the statement that it is an individual's responsibility to get third party reports, the mention of probation reports as one category of report a person might wish to include as part of representations – as demonstrating a clear onus on the appellant to provide any additional material.

41. The appellant's initial representations were (and would have been perceived by the decision maker as being) lacking in credibility. The claimed commitment to protect every child, the suggestion that no child was at risk, that he never had a genuine intention to meet the child, that he was "not a child sex offender and never will be" and his denial of sexual intent were all at odds with the circumstances in which the offence had been committed (Mr Lewis referred to specific parts of the police evidence in support of the overtly sexual nature of the exchanges and pointed out that the appellant had made further contact with the "boy" the following day and thus that more than a temporary loss of control had been involved). There had then followed points about entrapment i.e. relating to the conduct of others rather than the appellant's own and only then, a final, brief reference to an assessment (now known to be the first ARMS assessment).

42. As to his second representations, they had been in parts vague ("not demonstrating acceptable control"), in parts flew in the face of the offence (a "commitment to keeping young people safe") and in several respects sought credit for matters which in reality cut both ways. The reference to having accepted help from the National Probation Service was "light" and made no reference to any assessment or report. The representations contained no request for help, nor for more time, and concluded in terms contemplating that the respondent would now proceed to a final decision. The respondent accepted that the letter from Ms Mann contained positive comments on compliance and a generally positive account of progress, but not long had passed for the appellant to be able to demonstrate a transformed character.

43. When the matter came before the decision maker, considerable material was available, sufficient to enable the issue to be properly determined. While

there may always be more evidence available, the respondent was not required to explore all possible lines of enquiry. The respondent was entitled to conclude that what it had was sufficient. The mere existence of other material was not sufficient to trigger a duty on the respondent to pursue it: it would have to be both relevant and necessary to the making of the decision in question and here the additional material was not.

44. Delaying the decision would increase the time for which children were left unprotected. It was accepted that the delay in waiting for an updated assessment in this case would have been 3 months.

45. The failure had been the appellant's. He had known by February 2018 that some form of assessment had been done and did in the end get hold of it.

46. Whereas the Probation Service focuses on the risk of offending, the concerns of the respondent are wider, going to appropriateness, which incudes the consequences if the offending behaviour were to come to pass.

47. Turning to the ARMS reports, they should not be read solely as if a "numbers game"; more important is the quality and purpose of the assessment. Mr Lewis accepted that it would be unsurprising if the second one was more favourable than the first, given the appellant's case that he had benefitted from help from the Probation Service and participation in the Horizon programme. However, the second report was in Mr Lewis's submission unduly generous; it was in the appellant's interest to behave while still subject to his sentence; some of the risk factors such as alcohol and Grindr were still in use. Most fundamentally, the assessment was conducted on the basis that the appellant was no longer working with children, so his opportunity for offending would be low. The effect of removing him from the list would be to enable him to work with 16 and 17 year olds (the SHPO would rule out working with under 16s in any event); that would need to be addressed in any assessment and the ARMS report did not do that. The assessment was not as helpful as the appellant sought to assert.

48. In conclusion on the error of law point, the decision, taken when it was and without seeking further information from the Probation Service, was not irrational nor otherwise unlawful. The bar was a high one and the challenge did not come close.

49. As to the claimed errors of fact, the key word in each case was "fully". Some steps may have been taken, but neither at the time of decision nor subsequently has he fully addressed his offending. At the time of his first representations he had not completed the programme and in any event completing the sex offenders programme would not, without more, be sufficient. At the time of his representations he was still challenging various matters, among them asserting that he was not a child sex offender. He had never adequately explained why he sent the messages and displayed a lack of insight into them, failing to appreciate that such a message would be harmful in and of itself.

Analysis and conclusions

50. Given the statutory remit of the respondent, it is reasonable to attribute to it an awareness of the statutory function of the Probation Service. After all, a significant part, though by no means all, of the respondent's work is concerned with offences which are either "autobar" or "autobar with reps", with the consequence that their involvement is triggered by criminal proceedings having happened.

51. The Offender Management Act 2007 materially provides:

> "1.(1) In this Part *"the probation purposes"* means the purposes of providing for–
> …
> (c) the supervision and rehabilitation of persons charged with or convicted of offences;
> …
>
> 2.(1) It is the function of the Secretary of State to ensure that sufficient provision is made throughout England and Wales–
> (a) for the probation purposes;
> …
> and any provision which the Secretary of State considers should be made for a purpose mentioned above is referred to in this Part as "probation provision".
>
> (2) The Secretary of State shall discharge his function under subsection (1) in relation to any probation provision by making and carrying out arrangements under section 3.
>
> (3) The Secretary of State must have regard to the aims mentioned in subsection (4) in the exercise of his functions under subsections (1) and (2) (so far as they may be exercised for any of the probation purposes).
>
> (4) Those aims are–
> (a) the protection of the public;
> (b) the reduction of re-offending;
> (c) the proper punishment of offenders;
> (d) ensuring offenders' awareness of the effects of crime on the victims of crimes and the public; and
> (e) the rehabilitation of offenders.
>
> (5) …
> …"

52. In relation to the management of offenders, the following provisions of the Criminal Justice Act 2003 are relevant.

> "196.(1) In this Chapter "relevant order" means—
> (a) a community order, or
> …
> (c) a suspended sentence order.
>
> (1A) In this Chapter "suspended sentence order" means a suspended sentence order that imposes one or more community requirements.
>
> 197.(1) For the purposes of this Part, "the responsible officer", in relation to an offender to whom a relevant order relates, means the person who is for the time being responsible for discharging the functions conferred by this Part on the responsible officer in accordance with arrangements made by the Secretary of State.
>
> (2) The responsible officer must be—
> (a) an officer of a provider of probation services,
> ….
>
> 198.(1) Where a relevant order has effect, it is the duty of the responsible officer—
> (a) to make any arrangements that are necessary in connection with the requirements imposed by the order, and
> (b) to promote the offender's compliance with those requirements …"

53. In particular in the aims of protection of the public and the rehabilitation of offenders found in s.2(4) of the 2007 Act, there is a clear overlap with the matters addressed by the system of barred lists. Whilst the role of the responsible officer is targeted on ensuring compliance with the order of the sentencing court, if Mr Lewis was intending to suggest that the Probation Service's concern is only with re-offending, he put it somewhat too narrowly. Indeed, the potential for relevant overlap is reflected in the acknowledgement in the respondent's factsheet and guidance that probation and OASys reports may be among the material which an individual may wish to submit as part of his representations.

54. The fact is that the present appellant did not do so, despite knowing that some sort of assessment had been done. It is easy to be wise after the event and suggest that he should have pressed the Probation Service sooner, and harder, to provide evidence of what they considered the risk he posed to be. With the benefit of hindsight, it might have been good then to have asked for a delay in the respondent reaching a decision so that the second ARMS report could also have been submitted, with a view to demonstrating that, with the passage of time, low levels of risk and significant protective factors had been maintained or even built upon.

55. All of this goes to show how difficult the system may be to navigate for someone caught up in it for the first time, very possibly in emotive circumstances. The encouragement provided by the factsheet to seek support from a union or professional association or to seek advice is entirely

appropriate. However, in the sorts of circumstances with which the respondent is concerned, the individual may well have lost their employment and not be in a position to afford professional advice.

56. The question though for this tribunal is limited to the matters in section 4 of the 2006 Act. As to whether the respondent should have done more, or waited, before reaching its decision when it had not been asked to, it is reasonable given its specialist knowledge to attribute to it an awareness of the structure and purpose of an ARMS report: they are standard documents, in a format prepared by the National Offender Management Service. It might have been a reasonable step for the respondent, faced with the appellant's somewhat diffuse and ill-targeted submissions which did nonetheless refer to the Probation Service's assessment and which provided a letter from the probation officer which, however positive in some respects, entirely failed to address the crucial question, to have sought such material from the Probation Service, but that does not mean that it was necessarily in error of law if it failed to do so.

57. By 7 February 2019 when the decision under appeal was taken, the appellant knew perfectly well that the first ARMS assessment had been carried out and had done so since May 2018. He had been shown its conclusions, so he knew it existed as a document. He had been asked the in-depth and at times very personal questions by the PPU officer and been told that its purpose was to shape his supervision arrangements. He had appreciated its significance in the present context sufficiently to include a (somewhat inaccurate) reference to its conclusions in his May 2018 representations. He had plenty of opportunity in the intervening 9 months to try to obtain the report (not least as he was regularly meeting his probation officer) or indeed to raise the matter with the respondent, but did neither until April 2019.

58. Seen from the perspective of the legality of the respondent's actions, the statutory framework indicates, and their own documents acknowledge, that such a report *might* be relevant. However, a person whose barring is under consideration may chose not to provide such material (or indeed other material) for a variety of reasons.[3] It may be thought to add nothing. It may be thought to be positively unhelpful to the individual's case. The terms of both sets of representations indicated in effect that he was content for the respondent to proceed on the basis of the material it then had, read together with those representations. The panel cannot identify a legal duty to go behind the appellant's choice of material to submit (or not submit). Reference in the factsheet to "the necessary information to make a fair and robust decision" must be understood in that light; if the individual is not asserting that the assessment itself (and so the detail within it) is relevant, it is not "necessary". It might have been desirable to have it to obtain the fullest

[3] In this regard, the continuing absence of the report from the Horizon programme previously referred to is noted.

picture, but its absence does not put the respondent in breach of its own published procedure, nor otherwise in error of law.

59. Essentially the same point arises in relation to the failure to defer the decision. If there was no error of law for the reasons given in failing to obtain the first ARMS assessment, nor was there one in failing to defer in order to obtain the second ARMS assessment. The second assessment may have added weight to the information provided by the first assessment, in that rather than being based initially on questions asked in the relatively proximate aftermath of the conviction, it would have been tested over a further year of contacts between the appellant and his probation officer and in the light of any intervening events in the appellant's life. But that again goes to whether it might have been useful to have submitted it (and to have sought an extension of time in order to do so) rather than to whether the respondent was in error of law for not doing so.

60. Lest we be wrong in the conclusion that there is nothing in this case amounting (or which may amount) to an error of law, we record that we do not accept Ms Smith's submission that materiality is not in the present context a requirement for an error of law to arise. Classic statements of the law, such as that in *R(Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 make clear that materiality is an essential feature of all the possible types of error of law which could be relevant to the present case and there is nothing in the 2006 Act which provides any basis for departing from the general principle. However, an error is not material only if the same decision would be bound to have been reached, notwithstanding the error of law: *Detamu v Secretary of State for the Home Department* [2006] EWCA Civ 604. If, contrary to our view, the fact that the respondent did not call for either or both of the ARMS assessments does otherwise amount to an error of law, whilst we acknowledge Mr Lewis' point that there are some criticisms which may be made of the assessments, we cannot say that the same decision would be bound to have been reached. It would have been a matter for evaluative judgment by the respondent.

61. Turning to the grounds based on s.4(2)(b) of the 2006 Act, the precise scope of this provision is currently the subject of a pending decision by a three-judge panel in V/0565/2019. The relevant principles were not the subject of any submission before us. In particular, no attempt was made to suggest that we were restricted to anything less than a full re-examination of the findings of fact concerned and we approach it accordingly in this decision.

62. The messages sent by the appellant to the supposed 15 year old included "U horny" "UR hot lad" "come for a snuggle" and "we could spoon, kiss n get naked. N see what happens" and offering to pay for a taxi for the "boy" to attend at his address. There was further contact via the app on the following day before the appellant terminated contact thereafter. The content was thus overtly sexual and was directed at someone believed to be, in law, a child and under the age of consent.

63. It is plain from the material which we have that the appellant has ben a valued teacher and enjoys the support and respect of a number in his community. However, sending such messages to a supposed 15 year old does raise significant questions about the sexual offending which took place. The appellant has submitted that there was "uncontrolled behaviour" and that he had been drinking heavily – though this has not been corroborated and is doubtful given that contact continued on a second day– but even if that were so, the subject of sexual attraction which became evidenced on that occasion and the apparent willingness to act on that attraction (even if prevented by extrinsic circumstances from doing so) are of significant concern to the panel, drawing on the experience of its specialist members. The appellant's representations were largely attempts to deflect responsibility from those admittedly difficult and personal matters. The fact that the appellant may have been a competent teacher in a primary school, including attending correctly to matters of safeguarding, is not really to the point, given the different age groups involved. Nor is the entrapment, as to which we have commented above. The part of his representations where the appellant points to matters which did not feature in the offence – in effect arguing that it could have been so much worse – do not call the respondent's finding into question about the appellant's approach to what actually did take place. His comments on the evidence given to the police do, as Mr Lewis submits, cut both ways and are lacking in credibility; if, as the appellant told the police, his intentions were "nothing sexual" and that he got no sexual gratification from the messages, why <u>was</u> he sending them?

64. On the evidence thus far i.e. what was before the respondent, it was entitled to reach the findings it did. But that would be the question if the jurisdiction were confined to error of law, but it is not and so we proceed to the rest of the evidence. It has not been suggested on behalf of the respondent that the Upper Tribunal may not lawfully do so. For this purpose, the second ARMS assessment is the most relevant.

65. The evidence from the ARMS assessment, based on what the appellant has said, is that he continues to make use of Grindr for dating purposes. He informed the probation officer that he regulates his use of pornography so as to ensure the people he views are over 18. He stated that he likes attractive men, particularly those who look young for their age but denied being attracted to underage males. He drinks alcohol for enjoyment but it is controlled drinking. He "has made efforts to avoid using dating sites when he has drunk alcohol." More generally, the ARMS report suggests that he is committed to avoiding re-offending.

66. In his Form UT1, the appellant wholeheartedly disagreed with the statement that he "holds a sexual interest in male children around 15 years of age." He indicated that his wish to be removed from the Children's Barred List was because he hoped to work with students aged 16, 17 and 18 years. He acknowledged that the SHPO prevents him from working with under 16s for 10 years.

67. Mr Lewis drew attention to the word "fully" in both the findings which the appellant was given permission to challenge. The panel is wary of placing too much reliance on that and would not be persuaded by a submission that some minor detail meant that offending, while very substantially addressed, had not been "fully" addressed. However, Mr Lewis suggested that a key issue is how the appellant would relate to the 16-18 year old age group. In the panel's view he was quite right to do so. The appellant likes attractive men, particularly those who look young for their age. That is a matter of his personal sexual preferences. However, in view of that and given the circumstances of the offence, the panel finds the denial of a sexual interest in 15 year old males unrealistic and unbelievable. Even if (let it be assumed) nothing further was going to happen, sending sexually charged messages to someone believed to be aged 15 has, as Mr Lewis submits, the potential to cause harm in and of itself and the panel further notes that the circumstances also pose the question – also raised by the Probation Service – of whether the appellant might have carried through the offence, had extrinsic circumstances been more conducive to doing so. The panel concludes even on the evidence it has now that the appellant has not yet fully addressed his offending in terms of the implications of his sexual preferences and his ability to manage them, were he to be in circumstances where he was in regular contact with boys in the 15-17 age range. This is of sufficient importance to justify the respondent's findings that the offending has not been "fully" addressed or come to terms with and the panel concludes that no mistake falling within s.4(2)(b) was made.

68. The panel acknowledges that the appellant has in many ways behaved responsibly and conscientiously as he has had to face up to the consequences of his misguided actions. He has been business-like and courteous not only in his dealings with the panel but it appears with all those he has come into contact with during the various aspects of his sentence. Whilst complying with his sentence was of course compulsory, there are ways of complying and the appellant's approach has been very much to his credit, as are such steps as he has taken in terms of self-management.

69. Nonetheless, for the reasons above, the panel's conclusion is that the respondent's decision to include him on the Children's Barred List cannot be impugned on any of the grounds which section 4 of the 2006 Act permits.

70. Mr Lewis suggested (though, we think, without any intention to commit the respondent at this stage) that a possible way forward for the appellant might be for the appellant to obtain an expert assessment on the particular issue of the risk to boys in the above age group and to forward it to the respondent seeking a review. The panel would suggest that the appellant seeks to explore it with the respondent as a possible way forward first before committing funds to such a course, as the holding of a review at this stage is at the respondent's discretion.

71. At the outset of the hearing, Ms Smith made an application for an order under r.14. Initially no grounds were advanced but it was then suggested that

the order would be appropriate because of the references to the ARMS assessments, which in general terms appear to be treated as a confidential document. Mr Lewis for the respondent had no instructions, but the respondent afterwards indicated it had no submission to make on the issue. The references to the ARMS assessments in the decision are relatively low-key and do not appear likely to prejudice the management of offenders nor any third party. Nor was any application made by the Probation Service or the police for such an order in these proceedings. Orders under r.14 should be the exception rather than the rule and in the panel's view no order is necessary. The decision has been written in an anonymised style and the case given a title which does not identify the appellant. Only those already familiar with the case (which, it should be recalled, will have involved a guilty plea in open court) might be able to piece together the identity of the appellant.

72. The panel expresses its thanks to both counsel for their helpful submissions and to Ms Smith for representing the appellant pro bono.

CG Ward
Judge of the Upper Tribunal

Ms S Prewett
Member of the Upper Tribunal

Mr J Hutchinson
Member of the Upper Tribunal

8 July 2020