



***MM v Decision and Barring Service***  
**[2023] UKUT 275 (AAC)**

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No UA-2022-000563-V**

**Between:**

**MM**

Appellant

- v -

**DBS**

Respondent

**Before: Upper Tribunal Judge Church, and Tribunal Members Graham and Jacoby**

Decided following an oral hearing at Field House, London on 5 October 2023

**Representation:**

Appellant: Mr Robert Kitching of counsel (instructed by Ms Louise Straw of Burton Copeland LLP)

Respondent: Mr Benjamin Gray of counsel (instructed by Mr Gajandran Balachandran of DLA Piper LLP)

**DECISION**

On appeal from the Disclosure and Barring Service (“**DBS**”)

DBS Reference: DBS 6191

Final Decision Letter: 17 February 2022

**The decision of the Upper Tribunal is to refuse the appeal.** The decision of DBS made on 17 February 2023 was not based on any mistake of fact and was not made in error of law, and that decision is confirmed.

## REASONS FOR DECISION

### What this appeal is about

1. This appeal is about MM, who was in 1999 convicted of two counts of sexual assault, and whose name was added to the adults' and children's barred list in 2022. MM wants his name removed from both barred lists so that he can undertake voluntary work for the Roman Catholic church and related charities, and so that he can pursue the possibility of being ordained as a priest.
2. The appeal raises two important legal issues:
  - (1) when considering including an individual's name on a barred list, what significance must the DBS attach to the passage of time since the occurrence of relevant conduct?
  - (2) whether, and if so in what circumstances, the DBS is entitled to place an individual's name on the children's barred list based on concerns arising from that individual's sexual offending against adults even where the evidence doesn't establish any sexual interest in children.
3. Our conclusion in relation to the first issue is "it depends", but the passage of time without any repetition of the relevant behaviour (even if a very long time) is not enough on its own to make inclusion on a barred list irrational, unreasonable or disproportionate. What "it depends" on will usually be the degree of insight that the relevant individual has developed into their past behaviour and how to manage the risk that they might act similarly again.
4. Our conclusion on the second issue is that where an individual has engaged in relevant activity against vulnerable adults of a sexual nature, it is not a condition of inclusion of that individual's name on the children's barred list that the individual has a sexual interest in children. The DBS is obliged to consider the evidence and to make an evidence-based assessment of the appropriateness of inclusion in the children's barred list. If inclusion is based on a concern that the individual may engage in sexual activity with a child, the DBS must have a rational basis for assessing there to be such a risk. Because of the way that "child" is defined in the relevant legislation, when considering the risk that a child might be endangered, the DBS must consider not only pre-pubescent and pubescent children, but also physically mature under 18s.
5. Where an individual's past conduct has demonstrated a willingness to cross boundaries and to exploit vulnerabilities it may, depending on the circumstances, be permissible to infer from an individual's willingness to transgress one boundary that that person might be willing to transgress another boundary. It was neither unreasonable nor irrational for the DBS to infer from MM's willingness to transgress the boundaries prohibiting sexual contact between a nurse and a patient in his care as well as the boundary prohibiting sexual touching without consent, that MM might be willing to transgress the boundaries prohibiting sexual contact with someone under the age of 18, or between a priest and a member of his congregation.

## **Factual background**

6. In May 1999 the Appellant was convicted, following a Crown Court trial at which he pleaded “not guilty”, of two offences of indecent assault.

7. In each case the assault took place at the hospital at which the Appellant was employed as a nurse. In each case the victim of the assault was an adult male patient in MM’s care. The first assault took place while MM carried out pre-operative blood pressure checks on his victim, who was then awaiting surgery. It is not known why the second victim was on the ward, but MM accepts that he was in hospital for treatment and that the assault was carried out while the Appellant provided care for him. Each assault involved MM rubbing the victim’s penis repeatedly with his elbow.

8. On conviction, MM was sentenced to two periods of 6 months’ imprisonment, to be served concurrently. He was dismissed by his employer and referred to his regulator, who struck him off the nursing register indefinitely on 9 May 2000 on the basis that he had been convicted of criminal offences which established that he had been guilty of gross misconduct. MM did not contest this sanction.

9. MM has, since leaving prison, gained employment and qualifications, including a degree. He became active in trade union matters, in local politics and in LGBTQ support and advocacy.

10. An enhanced DBS check was made in connection with MM’s application for a volunteering role with his local church. This resulted in a referral to the DBS by Greater Manchester Police, which invited representations from MM. On 17 February 2022, having received written representations from MM and positive character references, the DBS decided to place MM’s name on both the children’s and adults’ barred lists (the “**Barring Decisions**”).

## **The statutory framework**

11. DBS was established by the Protection of Freedoms Act 2012, taking on the functions of the Criminal Records Bureau and the Independent Safeguarding Authority. One of its main functions is the maintenance of the children’s barred list and the adults’ barred list (the “**Barred Lists**”, and each a “**Barred List**”). Its power and duty to do so arises under the Safeguarding Vulnerable Groups Act 2006 (the “**2006 Act**”).

### ***Duty to maintain the Barred Lists***

12. Section 2(1)(a) of the 2006 Act places a duty on the DBS to maintain the Barred Lists. Under Section 3(2)(a) of the 2006 Act a person is barred from “regulated activity” relating to children if they are included in the children’s barred list. Under Section 3(3)(a) a person is barred from “regulated activity” relating to vulnerable adults if they are included in the adults’ barred list.

### ***Criteria for inclusion in the Barred Lists***

13. Schedule 3 to the 2006 Act applies for the purposes of DBS determining whether an individual is included in either or both Barred Lists.

14. By section 59 of the 2006 Act “child” means a person who has not attained the age of 18.

15. By section 60 of the 2006 Act, a vulnerable adult means any adult to whom an activity which is a regulated activity relating to vulnerable adults by virtue of any paragraph of paragraph 7(1) of Schedule 4 is provided.

16. Under Section 3(2)(a) of the 2006 Act a person is barred from “regulated activity” relating to children if they are included in the children’s barred list. Under Section 3(3)(a) a person is barred from “regulated activity” relating to vulnerable adults if they are included in the adults’ barred list.

17. MM has been included by the DBS on the Barred Lists pursuant to Schedule 3, Part 1, paragraph 3 of the SVGA (which relates to children and is headed “Behaviour”) and Schedule 3, Part 2, paragraph 9 (the equivalent provision relating to vulnerable adults, which is also headed “Behaviour”).

18. Paragraph 3 of Part 1 of Schedule 3 to the 2006 Act provides:

- “3. (1) This paragraph applies to a person if –
- (a) it appears to DBS that the person—
    - (i) has (at any time) engaged in relevant conduct, and
    - (ii) is or has been, or might in future be, engaged in regulated activity relating to children, and
  - (b) DBS proposes to include him in the children’s barred list.
- (2) DBS must give the person the opportunity to make representations as to why he should not be included in the children’s barred list.
- (3) DBS must include the person in the children’s barred list if —
- (a) it is satisfied that the person has engaged in relevant conduct,
    - (aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and
  - (b) it is satisfied that it is appropriate to include the person in the list.
- ...”

19. By section 5(1) of the 2006 Act, a reference to regulated activity relating to children must be construed in accordance with Part 1 of Schedule 4. Regulated activity relating to children includes any form of care or supervision of children (paragraph 2(1)(b) of Schedule 4), and any form of advice or guidance provided wholly or mainly for children (paragraph 2(1)(c) of Schedule 4) carried out frequently by the same person (paragraph 1(1)(b) of Schedule 4).

20. “Relevant conduct” in relation to children is explained in paragraph 4 of Part 1 of Schedule 3 to the 2006 Act as follows:

- “4. (1) For the purposes of paragraph 3 relevant conduct is –
- (a) conduct which endangers a child or is likely to endanger a child;
  - (b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;
  - (c) conduct involving sexual material relating to children (including possession of such material);

- (d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;
  - (e) conduct of a sexual nature involving a child, if it appears to DBS that the conduct is inappropriate.
- (2) A person's conduct endangers a child if he –
- (a) harms a child,
  - (b) causes a child to be harmed,
  - (c) puts a child at risk of harm,
  - (d) attempts to harm a child, or
  - (e) incites another to harm a child.
- ...

21. The DBS have also included MM on the Adults' Barred List pursuant to paragraph 9 of Part 2 of Schedule 3 to the 2006 Act. That paragraph provides:

- "9. (1) This paragraph applies to a person if-
- (a) it appears to DBS that the person—
    - (i) has (at any time) engaged in relevant conduct, and
    - (j) is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and
  - (b) DBS proposes to include him in the adults' barred list.
- (2) DBS must give the person the opportunity to make representations as to why he should not be included in the adults' barred list.
- (3) DBS must include the person in the adults' barred list if-
- (a) it is satisfied that the person has engaged in relevant conduct,
  - (aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and
  - (b) it is satisfied that it is appropriate to include the person in the list."

22. By section 5(2) of the 2006 Act, a reference to regulated activity relating to vulnerable adults must be construed in accordance with Part 2 of Schedule 4. By section 60 of the 2006 Act, a vulnerable adult means any adult to whom an activity which is a regulated activity relating to vulnerable adults by virtue of any paragraph of paragraph 7(1) of Schedule 4 is provided.

23. "Relevant conduct" in relation to vulnerable adults is explained in paragraph 10 of Part 2 of Schedule 3 to the 2006 Act as follows:

- "10.(1) For the purposes of paragraph 9 relevant conduct is –
- (f) conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult;

- (g) conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him;
  - (h) conduct involving sexual material relating to children (including possession of such material);
  - (i) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;
  - (j) conduct of a sexual nature involving a vulnerable adult, if it appears to DBS that the conduct is inappropriate.
- (2) A person's conduct endangers a vulnerable adult if he –
- (f) harms a vulnerable adult,
  - (g) causes a vulnerable adult to be harmed,
  - (h) puts a vulnerable adult at risk of harm,
  - (i) attempts to harm a vulnerable adult, or
  - (j) incites another to harm a vulnerable adult.
- ...”

***Appeals of decisions to include, or not to remove, persons in the Barred Lists***

24. Section 4 of the 2006 Act provides for a right of appeal to the Upper Tribunal in limited circumstances:

**“4. Appeals**

- (1) An individual who is included in a barred list may appeal to the Upper Tribunal against-  
.....
  - (b) a decision under paragraph 2, 3, 5, 8, 9 or 11 of Schedule 3 to include him in the list;
  - (c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.
- (2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake-
  - (a) on any point of law;
  - (b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.
- (3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.
- (4) An appeal under subsection (1) may be made only with permission of the Upper Tribunal.
- (5) Unless the Upper Tribunal finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS.
- (6) If the Upper Tribunal finds that DBS has made such a mistake it must-
  - (a) direct DBS to remove the person from the list, or
  - (b) remit the matter to DBS for a new decision.
- (7) If the Upper Tribunal remits a matter to DBS under subsection 6(b)-

- (a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and
- (b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.”

**The authorities on the Upper Tribunal’s jurisdiction**

25. In *DBS v AB* [2021] EWCA Civ 1575 the Court of Appeal (LJ Lewis) considered the respective roles of the DBS and the Upper Tribunal. At paragraph [43] he said:

“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”

26. Further, the comments of Elias LJ in *Khakh* were cited with approval by Lewis LJ at paragraph [44]:

“44. The role of the Upper Tribunal was considered in relation to the Independent Safeguarding Authority or ISA (the predecessor to the DBS) in *Khakh v Independent Safeguarding Authority (now the Disclosure and Barring Service)* [2012] EWCA Civ1341. At paragraph 18, Elias LJ, with whom the other members of the Court agreed, said:

“18..... The jurisdiction of the UT when considering an appeal from a decision not to remove the appellant from a barred list is limited to cases where the ISA has made a mistake on any point of law, or in any finding of fact on which its decision was based: section 4(2). A point of law, as Mr Grodzinski QC, counsel for the ISA, properly concedes, includes a challenge on *Wednesbury* grounds and a human rights challenge. But it will not otherwise entitle an applicant to challenge the balancing exercise conducted by the ISA when determining whether or not it is appropriate to keep someone on the list. In my view that is plain from traditional principles of administrative law but in any event it is put beyond doubt by section 4(3) which states in terms that the decision whether or not it is appropriate to retain someone on a barred list is not a question of law or fact. It follows that an allegation of unreasonableness has to be a *Wednesbury* rationality challenge i.e. that the decision is perverse.”

27. However, what constitutes for the purposes of section 4(2)(b) a mistake in the findings of fact made by the DBS and on which the decision was based was considered recently by the Upper Tribunal in *PF v DBS* [2020] UKUT 256 (AAC). At paragraph [39] the panel stated:

“There is no limit to the form that a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or an omission. It may relate to anything that may properly be the subject of a finding of fact. This includes matters such as who did what, when, where and how. It includes inactions as well as actions. It also includes states of mind like intentions, motives and beliefs.”

28. In *AB v DBS*, in the context of discussing the Upper Tribunal’s power to make findings of fact under section 4(7) of the 2006 Act, Lewis LJ noted (at [55]) the

“need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter. By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to marriage being a “strong” marriage or a “mutually supportive one” may be more of a value judgment rather than a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third “finding” would certainly not involve a finding of fact.”

29. It was noted in *PF v DBS* that:

“41. The mistake may be in a primary fact or in an inference... A primary fact is one found from direct evidence. An inference is a fact found by a process of rational reasoning from the primary facts likely to accompany those facts.

42. One way, but not the only way, to show a mistake is to call further evidence to show that a different finding should have been made. The mistake does not have to have been one on the evidence before the DBS. It is sufficient if the mistake only appears in the light of further evidence or consideration.”

30. In *DBS v JHB* [2023] EWCA Civ 982 the Court of Appeal returned to the issue of the extent of the Upper Tribunal’s jurisdiction under the 2006 Act on issues of fact. Laing LJ said that a finding may be “wrong” even if even if there was some evidence to support it, or it was not irrational, and it may also be “wrong” if it is a finding about which the Upper Tribunal has heard evidence which was not before the DBS, and that new evidence shows that a finding by the DBS was wrong (see paragraph [95]). However, the Court of Appeal decided that, while the Upper Tribunal had identified what it *said* were mistakes of fact, it did not explain why the relevant DBS findings were “wrong” or outside “the generous ambit within which reasonable disagreement is possible”. Rather, it had looked at very substantially the same materials as the DBS and made its own findings on those materials, which differed from those of the DBS. This, the Court of Appeal said, was impermissible, because it was only entitled to carry out its own evaluation of the evidence that was before the DBS if it had first identified that the DBS had made a finding which was not available to it on the evidence on the balance of probabilities.

**The agreed facts**

31. MM accepts that he has worked in “regulated activity” in the past as a nurse. Since his dismissal and his removal from the Nursing and Midwifery Register in the context of his offending MM has not worked in regulated activity and he says he has no intention of seeking a return to nursing.

32. However, MM is considering training for the Roman Catholic priesthood, and he intends to engage in charitable work related to the church. He accepts that this would be likely to involve “regulated activity” in relation both to children and to vulnerable adults.

33. There is, therefore, no dispute that the regulated activity condition in paragraphs 3(3)(aa) or Part 1 and 9(3)(aa) of Part 2 of Schedule 3 to the 2006 Act is satisfied.



34. MM also accepts (as he must, given his convictions) that he committed the sexual assaults referred to in paragraph 7 above, and that the commission of those assaults amounts to “relevant conduct” in relation to vulnerable adults for the purposes of Schedule 3 Part 2 paragraph 10 of the 2006 Act.

### **MM’s grounds of appeal**

35. MM points to the passage of more than 22 years between the “relevant conduct” relied upon and the Barring Decisions. MM maintains that the absence of any convictions, or indeed evidence of any allegations of similar conduct, in such a long period demonstrates that the risk of repetition of such conduct was so low as to make the Barring Decisions irrational and disproportionate (“**Ground 1**”).

36. Further, in relation to the decision to place his name on the children’s barred list, MM argues that he has no sexual interest in children and poses no risk of harm to children. He maintains that, given the DBS’s own finding in its Barring Process Decision document that it “would not be able to establish that [MM] has a sexual interest in children”, the inclusion of his name in the children’s barred list was irrational (“**Ground 2**”).

37. I granted permission to appeal because I considered that the grounds put forward were arguable with a “realistic” as opposed to a “fanciful” prospect of success. I directed an oral hearing because I decided that it was in the interests of justice to allow the Appellant to give evidence and to give the DBS’s counsel the opportunity to cross-examine him.

### **The appeal hearing**

38. An oral hearing of the appeal took place at Field House, London on Thursday 4 October 2023. The Appellant was represented by Mr Robin Kitching of counsel, instructed by Burton Copeland LLP. The DBS was represented by Mr Benjamin Gray of counsel, instructed by DLA Piper LLP.

39. The panel heard evidence from the Appellant, who gave evidence in person, and from Father Murphy, who gave his evidence remotely by video link. Both witnesses were available for cross-examination by Mr Gray (albeit that he declined to cross-examine Father Murphy), and both were questioned by members of the panel.

40. We are grateful both to Mr Kitching and to Mr Gray for the clear and helpful way in which they each presented their arguments.

### **The oral evidence**

#### ***Father Murphy***

41. Father Murphy, who is MM’s parish priest, adopted what he had said previously in the character reference he had provided about MM (see page [20] of the appeal bundle).

42. He said he had known MM since 2020 and MM had, in the course of confession, disclosed his conviction for sexually assaulting two men about 25 years ago. He told us that he and MM had subsequently discussed these matters further outside the confessional. He said MM had expressed contrition and acknowledged full responsibility for his actions. Father Murphy said he understood MM to be celibate

and that MM had told him that he had no interest in exploring sexual relations with anyone.

43. Father Murphy told the panel that MM had expressed a wish to explore his vocation to become a Catholic priest, which would involve six years of training. He said there was no prospect of MM being able to realise his vocation while he remains on the Barred Lists.

44. In response to questioning from the panel, Father Murphy said that MM's ability to have insight into his actions and their impact on those he assaulted, had developed in the course of their discussions. He explained his statement in his character reference that MM "sees things in black and white" to mean that he sees things as "either right or wrong", that he has high expectations of himself, and that he is trying to "live the gospel".

45. Father Murphy explained that his diocese was aware of MM's conviction and of the fact of his inclusion on the Barred Lists. He said that a safeguarding plan could be put in place by the diocese to prevent MM from being alone with children and/or vulnerable adults (as the case may be) for so long as his name is included on the Barred Lists, but said that if MM's name were to be removed from the Barred Lists matters would be reviewed and he expected that such arrangements would come to an end.

***MM***

46. MM adopted his written statement and expanded on his evidence orally.

47. Under cross-examination by Mr Gray about his first offence, MM accepted that his victim was his patient, and that he rubbed the patient's penis with his elbow while carrying out blood pressure checks. Mr Gray suggested that MM's use of his elbow, rather than his hand, was designed to conceal what he was doing, giving him the opportunity to claim the touch to be accidental should he be challenged. MM denied this. MM said that he rubbed the patient's penis with his elbow because he "wanted to give him pleasure". He said that he had never thought about whether the patient consented.

48. Under cross-examination MM accepted that the offences occurred 8 years after he had completed his nursing training, and that he knew from his training that there was no situation in which it would be permitted for him to touch a patient sexually. His evidence was that at the time of his offences his sexual drive was such that the boundary between work and his sex life "blurred", and while he was carrying out the assaults "that distinction went".

49. When asked whether he believed that it was OK for a nurse to stimulate a patient sexually without consent he said that he did it "without thinking" and that "boundaries became blurred, and consent didn't come into [his] mind". He said that the boundary was "obvious with hindsight, but not at the time".

50. MM insisted that, at the time that he committed his offences, his intent was to give pleasure to the patient, and the acts were not done for his own gratification. When it was put to him that it was highly improbable that a patient who was about to go into theatre for surgery would derive any pleasure from unsolicited sexual touching from a nurse in whom he had placed his trust, MM said that he honestly believed at the time that he would give pleasure. He said that he adopted a "passive role" in sexual

relationships, and that “when you are ‘a passive’ it is more about giving pleasure to the other person”.

51. MM maintained that the sole driver for his offending was that he had reached a “stage of sexual excess” and his libido overwhelmed all other considerations at that time. When questioned about his reference in his statement to “desiring young men as they lay in their bed”, and whether he was attracted to the patients’ vulnerability, MM said it was purely about sexual attraction, and he denied enjoying the feeling of having power over patients in his nursing role. He said that “the power thing” was not “a concept [he] knew anything about”, and he had only become aware of it in the context of the recent press coverage of Philip Schofield’s relationship with a junior broadcasting colleague.

52. In terms of the circumstances of his offending, MM accepted that one victim was awaiting surgery at the time of the assault (which he said was “not major surgery”), and the other was on the ward. He couldn’t remember what the second victim was in hospital for but recalled that he was “not seriously ill”.

53. MM was questioned about the letter from one of his character references, which appeared to indicate that the referee was only aware of one of MM’s offences, and which referred to MM having said that he had “misread signals”. MM was asked whether he had minimised his offending to that referee. His evidence was that he had explained the circumstances to the referee openly and truthfully during the course of a quick telephone call, in which he had explained the DBS process and asked for a reference. He said the referee may not have had a full grasp of the situation due to his “clumsy words” and said that he hadn’t seen the reference before it was sent so he didn’t know what it said.

54. In terms of his “not guilty” pleas, MM said he did not immediately own up to the offences because he was frightened, and he wishes he had owned up at the beginning and had had an opportunity to apologise to his victims. He said he had had lots of time to reflect and had gained insight.

55. The panel questioned MM about what he had said about having had time to reflect and explore his feelings about his offending. MM said he had thought about it for the last 24 years and that it “never leaves you”.

56. He clarified that he had not undergone any sex offender training, any counselling, or any risk assessment, but he had engaged in self-reflection and conversations with his priest. MM referred to a Veronese painting, sometimes called ‘Respect’, which depicts a Roman soldier tempted by the sight of a sleeping woman. He said the soldier “didn’t go through with the sexual act because he had to respect the individual first”. He said his own offending had shown a total lack of respect for the individual, that it was “disgraceful”, and it “should never have happened”. He said he had learned lessons from the past, had considered the impact of his actions on the individuals he offended against, and that he now had respect for the individual, and he would be “doing the Lord’s work”.

57. When asked how the tribunal could be sure that he would not offend again, MM said he now suffered from Type II Diabetes and was taking Citalopram for his mental health. He said these factors had led to an 8 stone weight increase and to a diminution in his sex drive. He said he rarely got sexual urges now, and “in terms of wanting to

do something about it”, he had only masturbated once in the past year. He said that, because he was now celibate, he “doesn’t really think about sex anymore”.

58. MM said he was “sickened and shocked” by his inclusion in the children’s barred list, as he could not understand how anyone could harm a child. He pointed out that his victims were both adults in their 30s and insisted that his sexual attraction was to adult males only.

## **Discussion**

### ***Ground 1 – given the passage of time, were the Barring Decisions irrational or disproportionate?***

59. MM’s offences were clearly serious: they involved repeated sexual touching, without consent, of the penises of two adult men who were then patients in his care. They involved an abuse of power as MM was in a position of trust as a nurse. MM’s actions breached clear sexual, social, professional, and legal boundaries. The consequences for MM were also serious: he lost his job, was struck off the nursing register by his regulator and, following a criminal trial, was sentenced to a term of immediate imprisonment.

60. Mr Kitching, for MM, argued that the Barring Decisions were in error of law because the DBS failed to give due weight to the lengthy passage of time since the offences without repetition of offending behaviour. He says the only objective evidence about the level of risk that MM presents was the fact that he had not, in the almost 23 years between his convictions and the Barring Decisions, engaged in any repetition of relevant conduct. To bar him after such a long period with no offences was, he contended, both irrational and disproportionate.

61. Mr Gray’s response to that was that, given that MM’s nursing career came to an abrupt end due to his offences, and the roles he has carried out since he left prison have not involved regulated activity, the risk that he may engage in relevant conduct again if placed in a position where he has access to vulnerable people has not been tested, despite the long time that has elapsed.

62. This scenario is a common one in barring appeals: the barred person points to a period without offending and the DBS retorts that this proves nothing because they haven’t had the opportunity to offend, leaving the barred person to ask how they can ever demonstrate that it is safe for them to come off the list when their continued inclusion prevents them from engaging in regulated activity.

63. This can seem like a scenario devised by Kafka, but there is a solution to the conundrum, and the solution is: insight.

64. While the passage of time without further offending is clearly positive, it does not on its own necessarily demonstrate a reduction in risk. However, if a barred person is able to demonstrate that in that time they have achieved an understanding of what drove them to carry out the conduct of concern and what the potential triggers to a repetition of their behaviour might be, and if they can show that they have learned strategies to prevent them from responding to those triggers in a potentially harmful way, or taken other steps to manage the risk of them responding in a potentially harmful way, these things are all capable of establishing a reduction in risk. Such a

reduction in risk is, in turn, capable of tipping the balance between what is proportionate and what is not, when it comes to inclusion in the Barred Lists.

65. MM made representations to the DBS against his inclusion on the Barred Lists and he provided supportive references from his parish priest, his local MP (and friend) and two colleagues with whom he worked on trade union matters (see pages [53]-[56] of the appeal bundle).

66. In the representations made by MM's solicitor on his behalf it is said that MM accepted that he had, in his offending, transgressed sexual, social, and legal boundaries and that his victims are likely to have experienced emotional harm. The representations pointed to the absence of any further offending, to his successes in employment and education since his release from prison, and to his vocation to engage in charity work and to seek ordination into the priesthood.

67. Father Murphy's reference spoke of MM having a sincere desire to explore the possibility of ordination. It said that he was dedicated to prayer and social justice, and it spoke to MM having helped Father Murphy with administrative work in the parish. The references from MM's colleagues spoke to his support for equality and diversity within the workplace and his interest in mental health and wellbeing issues. One of the colleagues describes MM as "honest, respectful, non-judgmental and considerate". The other speaks of MM being "widely admired and respected for his openness and honesty" and notes his passion for the church. They confirm that they are aware that their reference is for the purpose of an appeal against barring and say they have witnessed no untoward behaviour on MM's part in the time that they have known him. The reference from MM's MP describes MM as a good and supportive friend and says she has no doubts about his truthfulness.

68. It is clear from the terms of the 'Final Decision Letter' and the 'Barring Process Decision' document that the DBS considered the representations and the positive references, as well as evidence provided of MM's academic achievements since his release from prison. While the DBS assessed MM as having demonstrated some insight into the harm he caused his victims and as having acknowledged that his actions are likely to have caused his victims some emotional harm at the time, it was troubled by the lack of understanding of what had driven MM's behaviour (see pages [92]-[93] of the appeal bundle), and it decided that the evidence of remorse and insight provided was insufficient to show that the risk that he might act in the same way again in the future had reduced to a safe level.

69. It was for the DBS to consider the evidence and to make its assessment of the appropriateness of including MM's name in the Barred Lists. That is a matter on which the Upper Tribunal is prohibited from trespassing unless the DBS's decision making was vitiated by the making of a material error of law or it was based on a mistake of fact.

70. We are satisfied that the DBS was entitled, on the evidence before it, to make the findings that it did on the degree of MM's insight and remorse. We are satisfied that it was also entitled, based on those findings as to insight and remorse, to make the risk assessment that it did and to find that it was appropriate to include MM's name on both Barred Lists.

71. However, we had the benefit of evidence that wasn't available to the decision maker at the DBS when the Barring Decisions were made, namely the oral evidence

that Father Murphy and MM gave at the hearing of the appeal. That is evidence that we are entitled to have regard to in deciding this appeal.

72. We found Father Murphy to be an honest witness, and we accepted his evidence. However, that evidence didn't take us very far in terms of resolving the issues in the appeal as it shed very little light on MM's understanding of his offending.

73. MM's evidence was much more to the point. While we accept that MM did his best to give full and truthful answers to the questions put to him by the panel and by Mr Gray, we were struck by the partial nature of his insight into his offending: why he offended as he did, what the impact on his victims was, and the risk of his offending again should he be placed in a position which gives him access to vulnerable individuals, and indeed should he find himself in a position that gives him power over vulnerable people (such as in the priesthood or another role in the church). We found that his evidence was impaired by this lack of insight, and by an inability to square his past behaviour with his values and beliefs, and indeed his faith.

74. MM says that he deeply regrets his offending and that it never leaves him. The panel accepts that MM has spent time reflecting on his offending. However, we note that he has not sought any external support other than in the confessional and in conversations with Father Murphy. He has not undergone any counselling or psychotherapy and he has not engaged in any relevant training, such as sex offender work.

75. While nearly a quarter of a century has passed since his offences, it was apparent from MM's evidence at the hearing that he struggles to understand his offending.

76. It was put to MM at the hearing that it was most improbable that a patient who was in hospital because he was due to undergo surgery or to receive treatment, with whom MM had had no prior contact other than carrying out observations or providing treatment, with whom MM had not spoken except to explain pre-operative tests or the treatment administered, and with to whom MM was assigned in his role as a nurse, would receive pleasure from unsolicited sexual touching at a time when he was particularly vulnerable. However, MM continued to maintain that his motivation in touching the penises of the two patients whom he assaulted was to give them pleasure.

77. MM's explanation of this was that as "a passive" he had no intent to penetrate or to cause any harm, and his focus was giving others pleasure. The way he spoke about his assaults indicates that he doesn't understand the key difference between a situation in which consenting adults meeting in a social context indulge their sexual preferences, and the situation where a patient has gone to hospital for treatment or assessment and finds himself sexually touched by the nurse in whom he has placed his trust.

78. We do not accept that MM was motivated by the desire to give his victims pleasure. Instead, we find that he committed the acts that he did to satisfy his own needs and he was, at best, highly reckless as to the impact of his actions on the vulnerable patients who had placed their trust in him. We are troubled by his inability to accept this.

79. In his oral evidence at the hearing MM described that one of his victims, whose penis he had stroked with his elbow three times, only pulled away when he stroked his penis the third time, in an apparent attempt to suggest that he genuinely believed that his patient was consenting. This tends to undermine MM's assertion that he has gained significant insight into his offending.

80. When asked at the hearing about the circumstances of his victims at the time of the assaults, MM said one was waiting to go into theatre for surgery, which he clarified that the surgery was "not major surgery", and the other was in hospital because he was ill, but "not seriously ill". We found that these clarifications were attempts to minimise the gravity of his offending, which again tended to undermine MM's claim to have gained insight.

81. It was apparent from what MM said in his oral evidence that his understanding of the importance of the boundaries applicable to medical professionals working with patients is worryingly superficial. MM said that he was "a fool" and that what he did was wrong because he didn't check that the men consented to be touched sexually, but he didn't recognise that his behaviour was predatory and exploitative of the power imbalance that was inherent in him being a medical professional, and the other party being a patient under his professional care.

82. MM told us that the issue of the risk of exploitation arising from an imbalance of power between two people with different statuses, such as a nurse and a patient, was not something that had even occurred to him until very recently. We accept MM's evidence in this regard to be honest, but we consider such a lack of insight to be very concerning in terms of his ability to understand the potential triggers for his behaviour and the risk that he might engage in exploitative and harmful behaviour towards vulnerable people (whether adults or children) in the future.

83. The explanation that MM had given in his representations of the circumstances of his offending was that, when he saw these young men lying in their hospital beds, he found them attractive and he "couldn't wait". He elaborated on this at the hearing, saying that he became overwhelmed by his sexual urges and the boundaries became "blurred" and he simply couldn't wait to pursue a legitimate sexual encounter outside work, so he satisfied his urges by touching his patients. He sought to reassure the panel that, due to his anti-depressant medication, diabetes and significant weight gain, his libido had diminished significantly, and he no longer has such urges.

84. We are not reassured by these assertions. A mere assertion of a reduction in libido is insufficient to establish a reduction in risk, and even if that assertion is accepted at face value, it leaves open the possibility that these circumstances might change, and his libido might increase again. MM's insight is so incomplete that we cannot have any confidence that he would be able to control any urges that he might have.

85. Were MM to pursue ordination into the priesthood he would have access to vulnerable adults and children. Father Murphy's evidence was that safeguarding measures would be put in place to avoid MM being alone with vulnerable adults and children, but he did not expect such arrangements to continue if MM were taken off the Barred Lists. A priest, or even a church volunteer, can be expected to hold a great deal of power over a member of his congregation or someone seeking solace from

the church in time of crisis. The fact that issues around power dynamics remain wholly unexplored by MM is a cause for concern.

86. Nothing in the additional evidence we heard persuades us that any of the findings that the DBS made were “wrong”. Rather, the evidence we heard tended to add further support for the DBS’s findings.

87. Neither does that new evidence persuade us that the DBS erred in law in its assessment of the appropriateness of including MM’s name on the Barred Lists or the proportionality of doing so, notwithstanding the passage of such a long period since his offences without any further convictions or evidence of further allegations, due to its assessment of MM’s insight.

***Ground 2 – was inclusion in the children’s barred list irrational or disproportionate?***

88. DBS’s reasons for including MM in the children’s barred list were explained in its ‘Final Decision Letter’ (see page [66] of the DBS appeal bundle) as follows:

“With regards to the Children’s Barred List; whilst you have argued in your representations that you do not pose a risk to children, that you have never sought to work with that group, and that the victims of your offending behaviour were both adult males, concerns remain with regards to the risk that you would pose if allowed to work in regulated activity with children.

This is because you have shown a propensity to cross sexual, social and legal boundaries on more than one occasion and exploited the opportunities which were available to you while working in regulated activity for your own sexual gratification without any apparent consideration as to the impact your behaviour might have on your victims.

It is also on the basis that working in regulated activity would afford you the opportunity to repeat similar behaviour towards a child and while it is accepted that there is no indication that you have a sexual interest in younger children it is believed that you may indecently assault an older, post-pubescent child who has the physical characteristics of an adult male.

Consequently we are satisfied that it is also appropriate to include your name in the Children’s Barred List.”

89. Mr Kitching, for MM, submitted that the DBS’s logic in concluding that MM should be placed on the children’s barred list notwithstanding that it accepted that it would not, on the evidence, be able to establish that he has a sexual interest in children, was “not merely tortured logic, but perverted logic”. He said there was “more than a whiff of homophobia about” the decision to include his name on the children’s barred list.

90. We did not find this submission to be persuasive. The definition of “child” for the purposes of the 2006 Act must be borne in mind when considering the rationality of the decision to include MM’s name in the children’s barred list. A “child” is defined as “a person who has not attained the age of 18”. It would therefore encompass a post-pubescent child who has the physical characteristics of an adult.



91. The DBS acknowledged that the evidence didn't support a finding that MM has a sexual interest in children, but that was not determinative of whether there was an unacceptable risk that MM might engage in conduct that would, or would be likely to, endanger a child. It only had to establish that, just as MM was tempted by the sight of "young men as they lay in their beds" to sexually assault his adult male victims, he might similarly be tempted, if given the opportunity, to sexually assault a physically mature young male who happened to be under the age of 18.

92. It was neither unreasonable nor irrational for the DBS to conclude that there was an unacceptable risk that MM might indecently assault such a child, given the circumstances of his offending. He assaulted his victims in circumstances where he was charged with providing them with nursing care. He had no reason whatsoever to believe that they might be amenable to being touched sexually and there was every reason to believe that they would not. He didn't stop to ascertain whether his victims would welcome such attention. He has explained this in terms of being so overwhelmed by his sexual desires that boundaries that were otherwise "obvious" became blurred. The DBS was entitled to decide that there was an unacceptable risk that MM would not, if faced with an opportunity to sexually assault a physically mature child, stop to ascertain their age if he were overwhelmed by sexual desire, and to control his urges should he find that the person is under 18.

93. The DBS's reasoning that MM had "shown a propensity to cross sexual, social and legal boundaries on more than one occasion and exploited the opportunities which were available to [him] while working in regulated activity for [his] own sexual gratification without any apparent consideration as to the impact [his] behaviour might have on [his] victims" provides a rational basis for its concern that he might fail to respect the boundary between an adult and a child of 17.

94. Nothing in the further evidence that we heard (and which was not available to the decision maker) persuaded us that DBS was mistaken in reaching the conclusions that it reached. Rather, MM's evidence about being so overwhelmed by sexual desire that he didn't even think about issues such as professional ethics, consent, criminality or the impact on his victims, and the lack of insight that he demonstrated into what happened and why, tends to provide additional support for the decision to include his name in the children's barred list.

95. We find the suggestion made in submissions that the DBS's decision to include MM's name on the children's barred list was homophobic to be wholly unfounded. The DBS expressly acknowledged that MM has a sexual interest in men, which it said was "a normal sexual interest" that didn't raise any significant concerns (see page [85] of the appeal bundle). What it found to be problematic was not MM's homosexuality. It was his inability to respect boundaries and his willingness to exploit others for his own gratification.

96. In terms of the proportionality of the decision to include MM's name on the children's barred list, DBS had to conduct a balancing exercise between the public interest in keeping children safe and MM's own interests, including his Article 8 rights. It acknowledged the likely impact that barring would have on MM, including his future employment opportunities, his volunteering opportunities and his ambition to be ordained as a priest, as well as the stigma that inclusion would attract and the potential impact on MM's mental health and general wellbeing (see page [96] of the appeal bundle). It also considered whether other measures provided a sufficient safeguard

without including MM's name on the children's barred list. It decided that, given the risk that it identified and the gravity of the potential harm to children should the risk eventuate, they did not (see page [96] of the appeal bundle). In all the circumstances, it was entitled to reach that conclusion.

**Conclusion**

97. The DBS heard no oral evidence. We did. However, there was very little disagreement on the facts relevant to MM's offending, and none of the further evidence before us indicated that any of DBS's factual findings were "wrong".

98. Neither did any of the additional evidence we heard persuade us that DBS was not reasonably entitled to conclude that, despite the passage of nearly 23 years between his offending and the decision to bar him without further incidents of a similar nature and despite MM's expressions of regret and remorse, there remains a risk that MM might engage in conduct which would, or would be likely to, endanger vulnerable people. Its decision was neither irrational nor disproportionate.

99. The Barring Decisions are therefore confirmed, and the appeal is dismissed.

**Thomas Church**  
**Judge of the Upper Tribunal**

**Mr Roger Graham**  
**Tribunal Member**

**Ms Suzanna Jacoby**  
**Tribunal Member**

**Authorised for issue on 13 November 2023**