



Neutral Citation Number: [2020] EWHC 624 (Admin)

Case No: CO/2531/2019

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**DIVISIONAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17/03/2020

**Before:**

**THE RIGHT HONOURABLE LORD JUSTICE FLAUX**  
**HONOURABLE MR JUSTICE LEWIS**

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**Between:**

<b>R on the application of SXM</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>THE DISCLOSURE AND BARRING SERVICE</b>	<b><u>Defendant</u></b>
<b>-and-</b>	
<b>TXJ</b>	<b><u>Interested Party</u></b>

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**Adam Straw (instructed by Irwin Mitchell) for the Claimant**  
**Gemma White Q.C. and Carine Patry (instructed by The Government Legal Department)**  
**for the Defendant.**  
**The Interested Party did not appear and was not represented**

Hearing date: 3 March 2020  
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**Approved Judgment**

**Lord Justice Flaux and Mr Justice Lewis:**

**INTRODUCTION**

1. This is a claim for judicial review of a refusal by the defendant, the Disclosure and Barring Service (“the DBS”), to inform the claimant, SXM, whether or not the interested party, TXJ, had been placed on the list of persons barred from engaging in regulated activity relating to children (the children’s barred list maintained by the DBS under section 2 of the Safeguarding Vulnerable Groups Act 2006 (“the 2006 Act”). That refusal is contained in a letter dated 1 April 2019.
2. In summary, the claimant alleges that she was the subject of sexual abuse by TXJ when, as a child, she attended a horse riding school run by TXJ. The local authority referred the question of whether TXJ should be included on the children’s barred list to the DBS. The claimant contends that the refusal of the DBS to provide her with the decision on whether to bar TXJ from regulated activity, and the reasons for it, is unlawful as it frustrates her right of access to a court and is disproportionate and unreasonable. She further contends that the defendant is under a positive obligation to provide her with the information by reason of Article 8 of the European Convention on Human Rights (“the Convention”).
3. The DBS contends that there is a detailed statutory scheme in place governing the making of decisions to place persons on the children’s barred list and disclosure of information. The statutory scheme does not provide for disclosure of information to third parties such as the claimant who allege that they have been the victim of abuse by the person referred to the DBS. In those circumstances, the DBS contend that claimant is not entitled to the information sought and it did not act unlawfully in refusing to provide it.

**THE FACTS**

***The Allegations***

4. SXM was born on in early January 2000. Between 2009 and 2010, and again in 2011, she attended a horse riding school run by TXJ. He was also her riding instructor. She was aged between 9 and 12 at the material time. She alleges that she was subjected to sexual and physical abuse by TXJ. It is said that the alleged abuse has caused the very severe mental health problems that SXM has experienced.

***The Police Involvement***

5. SXM told her mother of the sexual abuse in about September 2015. Her mother contacted the police. SXM was interviewed. TXJ was also interviewed under caution. On 17 May 2016, the police advised the claimant’s mother that they had decided to take no further action against TXJ. That decision was reviewed and, on 8 June 2016, the police decided again not to take further action against TXJ on the basis that there was insufficient evidence to provide a realistic prospect of conviction. In December 2016, solicitors acting for the claimant wrote to the police asking them to refer the matter to a specialist prosecutor to determine whether the test for bringing a prosecution was satisfied. In January 2017, the solicitors for the claimant wrote to the police stating that they had been instructed to investigate a potential claim for judicial

review of the failure to refer the allegations of sexual and physical abuse to the Crown Prosecution Service. Further investigative steps were taken by the police including a further interview with the claimant and obtaining medical evidence. On 25 May 2019, the police wrote to the claimant's mother stating that an evidential review had been completed. The officer explained that police had concluded again that there was insufficient evidence to provide a realistic prospect of conviction and set out detailed reasons why that was the case.

### **The Referral to the DBS**

6. In November 2017 and again in February 2018, the solicitors for the claimant wrote to her social worker asking that the local authority refer TXJ to the DBS to determine whether he should be included in the children's barred list. On 3 April 2018, the solicitors invited the local authority to obtain relevant information from the social worker and the police. On 10 May 2018, the local authority confirmed that it had considered the request and sought information from the police. It said it had decided not to refer the matter to the DBS. On 19 June 2018, the solicitors sent a pre-action protocol letter to the local authority indicating that the claimant intended to bring a claim for judicial review of the decision not to refer TXJ to the DBS. Following that, the local authority reviewed its decision and decided to make a referral under section 30 of the 2006 Act.
7. On 25 February 2019, solicitors for the claimant wrote to the DBS about the referral of TXJ asking that they be informed of the outcome of the referral. The letter stated that:

“This referral was made following allegations by our client [SXM], that she was abused by [TXJ] when she attended his horse riding school as a child.”
8. On 1 March 2019, the DBS replied saying:

“Article 7 of the Safeguarding Vulnerable Groups Act (Miscellaneous Amendments) Order 2012/2157 enables the Disclosure and Barring Service (DBS) on request from a person or organisation that has demonstrated a legitimate interest to provide barred list information in relation to a person.

“The DBS is required by the legislation under which it operates to inform a referred individual of its decision to bar. As a public law body, DBS also notify an individual when a decision is made not to include them in a barred list. The Final Decision Letter is sent directly to the referred individual. In accordance with the DBS' process, both the referred individual and any nominated third party receive notification of the final decision, however, only the referred individual receives the Final Decision Letter. This information is communicated in the DBS' third party consent form.”
9. The claimant's solicitors replied on 5 March 2019 indicating that, for the reasons set out in their letter of 25 February 2019, the claimant had a legitimate interest in the outcome of the referral.

### **The Decision**

10. By letter dated 1 April 2019, the DBS wrote declining to inform the claimant of the outcome of the referral of TXJ to the DBS. The letter said as follows:

**“Informing a person with a legitimate interest of a barring decision**

Under the Safeguarding Vulnerable Groups (Miscellaneous Amendments) Order 2012 and the Safeguarding Vulnerable Groups (Miscellaneous Amendments) Order (Northern Ireland) 2012, the DBS may at the request of person X with a legitimate interest in knowing if person Y is barred, inform person X if person Y is included in the DBS barred lists. The Orders commenced on 10 September 2012 and supersede previous Orders in operation from 12 October 2009.

DBS considers that a legitimate interest in whether a person is included on either or both of the DBS barred lists exists if the requester is in a position to, and intends to, use the information to take appropriate action in relation to the protection of children or adults in receipt of a regulated activity i.e. employs the individual or is looking to employ the individual.

Legitimate interest cannot be used purely for information gathering purposes. Such information sharing would not be necessary and therefore not proportionate when considered in relation to the person’s right to privacy.

I have considered your request under the SVGA legitimate interest provisions and determined it does not meet criteria stated above and would be disproportionate with regard to the data subjects right to privacy.

SVGA paragraphs 47 & 49 provide a power for Registers and Supervisory authorities to apply for information, however your request does not fall under this criteria.

**GDPR Article 6 (f) processing for the purposes of legitimate interest**

DBS process information under Safeguarding Vulnerable Groups Act and in consideration of disclosing the requested information this is overridden by the interests and fundamental rights and freedoms of the data subject.

**DPA Paragraph 6 Schedule 9**

This provides conditions for processing an individual’s data, it does not provide disclosure powers of the information to another individual.

Therefore, in summary DBS are unable to lawfully disclose the requested information as it would be unwarranted and prejudice the rights and freedoms or legitimate interests of the data subject.”

11. By a claim form filed on 28 June 2019, the claimant sought judicial review of that decision. Permission to apply for judicial review was granted on 2 October 2019.

**THE LEGISLATIVE FRAMEWORK**

12. The 2006 Act is concerned with the protection of children and vulnerable adults. It provides for a mechanism by which individuals may be barred from working with

children or vulnerable adults. For present purposes, it is necessary only to deal with the provisions governing children. Responsibility for the performance of functions under the 2006 Act has been transferred to the DBS, a body corporate established by section 87 of the Protection of Freedoms Act 2012 (“the 2012 Act”).

### **The Children’s Barred List**

13. By virtue of section 2(1)(a) of the 2006 Act, the DBS must maintain the children’s barred list. A person included in that list is barred from engaging in regulated activity relating to children (see section 3 of the 2006 Act). Regulated activity is defined in the 2006 Act and includes, broadly, any form of teaching, training or instruction, or care or supervision of children (see section 5 and paragraphs 1 and 2 of Schedule 4 to the 2006 Act). An individual who is included in the children’s barred list may appeal to the Upper Tribunal against the decision to include him in the list (or not to remove him from it) pursuant to section 4 of the 2006 Act. An individual commits an offence if he seeks or offers to engage, or engages, in regulated activity from which he is barred (see section 7 of the 2006 Act).

### **Referrals to the DBS**

14. Sections 35 and 36 of the 2006 Act provide that a regulated activity provider and a personnel supplier, respectively, must provide the DBS with prescribed information about an individual if, amongst other things, he considers that the person has engaged in “relevant conduct” or “the harm test is satisfied”. Other bodies including local authorities (section 39), keepers of relevant registers, such as registers of teachers, social workers or persons engaged in various health care professions (section 41) and supervisory authorities (section 45) have power to provide the DBS with information about a person if they think that a person has engaged in relevant conduct or that the harm test is satisfied.
15. Relevant conduct is defined in paragraph 4 of Schedule 3 to the 2006 Act as:
  - “(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.”
16. The harm test is defined in section 35(4) of the 2006 Act (and in materially identical terms in other sections) as follows:

“(4) The harm test is that P may–

- (a) harm a child or vulnerable adult,
- (b) cause a child or vulnerable adult to be harmed,
- (c) put a child or vulnerable adult at risk of harm,
- (d) attempt to harm a child or vulnerable adult, or
- (e) incite another to harm a child or vulnerable adult.”

***The process for deciding on inclusion within the Children’s Barred List***

17. There are provisions for automatic inclusion in the children’s barred list, or for inclusion subject to consideration of representations by the individual concerned, if certain prescribed criteria are satisfied (see paragraphs 1 and 2 of Part 1 of Schedule 4 to the 2006 Act. In addition, paragraphs 3 and 5 provide for inclusion in cases where the individual has engaged in relevant conduct or might harm a child. They provide, so far as material, as follows:

“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.”

and

“5(1) This paragraph applies to a person if–

(a) it appears to DBS that the person

- (i) falls within sub-paragraph (4), 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 falls within sub-paragraph (4),

(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.

(4) A person falls within this sub-paragraph if he may–

(a) harm a child,

(b) cause a child to be harmed,

(c) put a child at risk of harm,

(d) attempt to harm a child, or

(e) incite another to harm a child.”

18. The DBS has powers to acquire information necessary to carry out its task. It may require a regulated activity provider, personnel supplier, a local authority, a keeper of a relevant register or a supervisory authority to provide prescribed information (see sections 37, 40, and 45 of the 2006 Act). The DBS may receive information from those or other sources, including individuals, and paragraph 13(1) of Schedule 3 to the 2006 Act provides that:

“13(1) DBS must ensure that in respect of any information it receives in relation to an individual from whatever source or of whatever nature it considers whether the information is relevant to its consideration as to whether the individual should be included within each barred list.”

19. In addition, the individual must be given an opportunity to make representations before he is included in the children's barred list: see paragraphs 3(2) and 5(2) of Schedule 3 to the 2006 Act. That includes an entitlement to make representations on all the information on which DBS intends to rely in taking a decision on whether to include the person in a barred list: see paragraph 16 of Schedule 3 to the 2006 Act.
20. The range of information that may be acquired in a particular case is illustrated by the DBS "Barring Decision Process" document. That indicates that information may be gathered, or assessments made, about the interests of individual in sexual matters, violence or other harmful behaviour and about the individual's attitudes and beliefs. The information may also include information on his emotional attitudes and relationships, his lifestyle and problem solving abilities.

***Disclosure of the decision to include a person in a barred list***

21. There are specific provisions in the 2006 Act providing for the DBS to disclose the fact that a person has been included on a barred list to particular persons or bodies. These include the following:
  - (1) There is a duty to take all reasonable steps to notify the individual concerned that he has been included in a barred list (paragraph 14 of Schedule 3 to the 2006 Act);
  - (2) DBS must inform (a) a keeper of a relevant register (b) a supervisory authority that a person has been included on a list if that body applies to DSB for that information (see section 43(3) and 47(2) of the 2006 Act);
  - (3) DBS must provide a barred list, or information as to whether a person is barred, to a chief officer of police who requests it (section 50A(1A) of the 2006 Act);
  - (4) DBS must provide information about whether a person is barred to the Secretary of State exercising functions in relation to prisons or to the provider of probation services if requested and may do so if it considers to be relevant to that authority (see sections 50A(1B) and (1C) of the 2006 Act).
22. The DBS also has power to disclose information to certain bodies if it thinks it relevant to their functions. These include disclosure of relevant information to a supervisory authority (section 50), the police (section 50A(1)), or probation services (section 50A(1b) and (4)).
23. Section 30 of, and Schedule 7 to, the 2006 Act would have enabled employers and other specified persons to obtain information with the consent of the individual concerned. That provision was not brought into force. Section 72 of the 2012 Act will, when in force, substitute a new section 30A of the 2006 Act. That will provide for the DBS to provide a person listed in Schedule 7 to the 2006 Act with information about another person if the other person consents to the provision of the information.
24. In the meantime, Article 7 of the Safeguarding Vulnerable Groups (Miscellaneous Amendments) Order 2012 ("the 2012 Order") provides that:



“(1) The Disclosure and Barring Service may, at the request of a person (X) who meets the requirement specified in paragraph (3), inform that person whether a person (Y) falls within paragraph (2).

(2) Y falls within this paragraph if Y is-

(a) included in the list kept under section 1 of the Protection of Children Act 1999;

(b) included in the list kept under section 81 of the Care Standards Act 2000;

(c) subject to a direction under section 142 of the Education Act 2002; or

(d) barred from regulated activity.

(3) The requirement is that X satisfies the Disclosure and Barring Service that X has a legitimate interest in knowing whether Y falls within paragraph (2).”

25. Article 6 of the 2012 Order provides that Article 7 applies for the period beginning with the date when the Order was made (i.e. 20 August 2012) until the day on which section 72 of the 2012 Act is brought into force for the purpose of inserting section 30A into the 2006 Act.
26. The Police Act 1997 also makes provision for disclosure of information about whether a person is barred from regulated activity relating to children in certain specified circumstances.

### ***Additional Powers***

27. Paragraph 16 and 18 of Schedule 8 to the 2012 Act provides the following powers to the DBS:

“16. Information obtained by the DBS in connection with the exercise of any of its functions may be used by the DBS in connection with the exercise of its other functions.”

And

“18. In connection with the exercise of its functions DBS may enter into contracts and other agreements (whether legally binding or not),

acquire and dispose of property (including land),

borrow money, and

do such other things as DBS considers necessary or expedient.”

28. Further, the courts are likely to hold that the DBS may have an implied power to do those things that are reasonably incidental or consequential to the exercise of its statutory functions: see *Attorney General v Great Eastern Ry. Co.* (1880) 5 App. Cas. 473 at page 478.

### THE ISSUES

29. Against that background, the three grounds of challenge to the decision of 1 April 2019 refusing to disclose whether TXJ had been included in the children's barred list, and the reasons for the decision, are that the refusal is unlawful:

- (1) as it frustrates the claimant's right of access to a court as it effectively prevents her from challenging the decision by way of judicial review;
- (2) is disproportionate and unreasonable;
- (3) is incompatible with the claimant's rights under Article 8 of the Convention.

### GROUND 1 – RIGHT OF ACCESS TO A COURT

#### Submissions

30. Mr Straw for the claimant submitted that the claimant would have a sufficient interest to bring a claim for judicial review of any decision refusing to include TXJ in the children's barred list. The claimant was the victim of the alleged abuse which led to TXJ being referred to DBS. As such, she had an interest in the outcome of the referral, particularly if that decision involved findings that she was or was not abused. That would represent a formal finding by the state as to whether her allegation was, or was not, well founded. Further, there is evidence from her mother in her witness statement of 18 December 2019 that the DBS's refusal to tell SXM whether it has placed TXJ on the children's barred list has contributed to SXM's stress and she remains concerned about the risk that she believes TXJ poses to other children. Furthermore, Mr Straw submitted that the claimant was well-placed to see if the DBS had overlooked any important piece of evidence and no other person could be expected to challenge the decision.
31. Next, Mr Straw submitted that, as a person with sufficient interest to bring a claim for judicial review, a refusal to inform the claimant whether TXJ has been included in the children's barred list, or if not, the reasons for that decision, effectively prevents her bringing such a claim. That, he submitted, is unlawful, as it frustrated the constitutional right to access to a court. In oral submissions, Mr Straw submitted that any person, body or organisation with standing had the right to be told of DBS's decision and the reasons for it, or at least the claimant, as the victim of the alleged abuse which led to the referral was entitled to be told of the decision. He relied upon the dicta of Green J, as he then was, in *R (Privacy International) v Revenue & Customs Commissioners* [2015] 1 WLR 397 that there was a right of access to a court to challenge decisions not to take further action in relation to complaints and that right would become academic in the absence of a decision notifying an interested person of

the decision. He relied generally on cases where victims of alleged crimes were able to bring claims against decisions not to prosecute the alleged perpetrators. He further relied on *R (D and another) v Parole Board* [2019] Q.B. 285 where it was accepted that victims of crime were able to bring a claim for judicial review of a direction by the Parole Board that an offender be released on licence. He also relied on *R v General Council of the Bar ex p. Percival* [1991] Q.B. 212 at page 231B-D where the Court of Appeal held that a person who made a complaint to the relevant professional body had standing to challenge a decision not to refer the complaint to a disciplinary tribunal, and on a decision of the Court of Appeal of Northern Ireland in *Re McBride's Application for Judicial Review (No. 2)* [2013] NICA 23.

32. Mr Straw's next step in his argument was that the power to disclose the information came from Article 7 of the 2012 Order or, alternatively, from paragraphs 15 or 18 of Schedule 8 to the 2012 Act. He indicated that there may be other sources of power. In any event the defendant accepted that, if the claimant had a constitutional right of access to a court which entitled her to be informed of the decision and reasons, it would have power to disclose the decision and reasons. Finally, Mr Straw made a number of submissions as to why disclosure of the decision and reasons would not involve a breach of the relevant European Union Regulation on the processing of data known as the General Data Protection Regulation or "GDPR" and the provisions of the Data Protection Act 2018 ("the 2018 Act") or TXJ's right to respect for his private life under Article 8 of the Convention.
33. Ms White Q.C. for the defendant submitted that the maintenance of the children's barred list is part of the regime intended to protect children. The scheme was not punitive of individuals for their past conduct but was forward looking and aimed at safeguarding children. It focussed on whether a person should be allowed to engage in a regulated activity and did not seek to prevent contact with children in other contexts. It involved the acquisition and retention of significant personal information relating to individuals. Parliament had created a detailed statutory scheme governing how and when persons could be included in the children's barred list and to whom that information should be disclosed. That included certain public bodies and persons who might employ or engage a person to carry out services. There was no scope for concluding that Parliament impliedly intended the DBS to be able disclose information as to whether a person was barred, and the reasons for it, to persons who said they were the victims of abuse by a person referred to the DBS. To do so could have severe consequences for the individual concerned. It would involve a breach of the GDPR and the DPA and would involve an infringement of the individual's right to respect for private life under Article 8(1) which would have to be justified under Article 8(2) of the Convention.
34. Furthermore, there would in practice be real difficulties in controlling the further dissemination of the information. The suggestion that the person concerned could bring a claim for breach of privacy would not necessarily prevent the information being disclosed. Nor would disclosure subject to an agreement to maintain its confidentiality be easily policed or enforced. The cases dealing with complainants and victims of crime were distinguishable as the functions of the DBS were different in nature. They were not prosecutorial or adjudicatory. Further, the statutory scheme governing the acquisition and disclosure of information did not permit of disclosure to third parties who contended that they were the victims of alleged abuse.

## ***Discussion***

### *Analysis of the Claim and the Proper Approach*

35. The claimant seeks disclosure of the decision as to whether TXJ has been included on the children's barred list and, if not, the reasons for that decision. The basis upon which she seeks disclosure is that she claims she was a victim of abuse by TXJ and has sufficient interest in the matter to bring a claim for judicial review in respect of a decision on whether TXJ should be included in the children's barred list. The claim, in essence, is that any express or implied powers available to the DBS should be used to provide disclosure to avoid frustrating the claimant's ability to bring judicial review proceedings of the decision, if she thinks it appropriate to do so.
36. The claim for disclosure of information arises in the context of a specific statutory scheme. The proper approach to assessing that claim is as follows. First, the starting point must be consideration of the provisions of the statutory scheme. Secondly, it is necessary to consider whether any of the specific powers providing for disclosure of information require disclosure of decisions to persons contending that they were the victims of abuse by a person being considered for inclusion in a barred list. Thirdly, it is appropriate to consider whether the exercise of any other power to give disclosure of information would be consistent with the statutory scheme. Fourthly, and related to the third question, consideration needs to be given as to whether there are other factors indicating that those powers are to be interpreted in ways which enable disclosure of information to some groups of persons, notably in this case, persons claiming to be victims of abuse.

### *The Statutory Scheme*

37. The relevant features of the statutory scheme are as follows. First, the material parts of the scheme for present purposes are concerned with the protection of children. It seeks to achieve that aim by ensuring that persons are barred from engaging in regulated activities (essentially, teaching, training, instruction or care of children) which would allow them to come into contact with children. The scheme does that by providing a mechanism for a person to be included on the children's barred list, at which point it would be a criminal offence for him to engage in regulated activities. The DBS may include a person in the children's barred list if (1) he has engaged in relevant conduct, i.e. conduct endangering a child or involving conduct of an inappropriate sexual nature, or presents a risk of harm to a child; and (2) the DBS considers it appropriate to include the person in the barred list (see paragraphs 3 and 5 of Schedule 3 to the 2006 Act). There are duties on certain persons (such as employers) and public bodies, or powers, to provide information to DBS.
38. Against that background, it is clear that the function of DBS is a protective forward-looking function, intended to prevent the risk of harm to children by excluding persons from involvement in regulated activities. DBS is not performing a prosecutorial or adjudicatory role and it is not engaged in considering complaints from individuals and imposing punishments. It may, as part of its task, have to form a view as to whether a person has engaged in conduct likely to endanger a child or sexually inappropriate conduct, or the case may involve conduct posing a risk of harm. It will need also to consider questions as to whether it is appropriate to include

the person on the children's barred list. However, it is not there to receive and adjudicate upon complaints from individuals.

39. Secondly, the DBS has powers to acquire a broad range of information, often sensitive personal information, about the individual concerned and other persons as part of that process. Information may be obtained from a number of sources such as local authorities and their children and social services department and from the police.
40. Thirdly, the statutory scheme contains detailed provisions governing the circumstances in which, and the persons to whom, DBS may disclose the decision to include a person on the children's barred list and other information. They include disclosure to specific public bodies for specific purposes (such as the police and probation services: see section 50A of the 2006 Act) and specified regulatory bodies (keepers of relevant registers and supervisory bodies). It also has power to provide other relevant information to specific bodies (supervisory authorities, police and probation).

#### Specific Powers of Disclosure

41. The only relevant power dealing with disclosure to an individual is, currently, Article 7 of the 2012 Order. That article provides for the disclosure of limited information to particular persons.
42. First, the information that may be disclosed is whether a person falls within paragraph 7(2) of the 2012 Order, that is, he is a person who is barred from regulated activity. Secondly, the person to whom that information may be disclosed is a person with "a legitimate interest in knowing whether [the person] falls within paragraph (2)".
43. Read in the context of the scheme in the 2006 Act, a person will have a legitimate interest in knowing that another person is barred from regulated activity if he intends to employ or engage someone who will be involved in regulated activity with children, e.g. he intends to employ him to provide training or instruction or care for children. The person will need to know if the other person is barred from carrying out regulated activity with children.
44. Article 7 of the 2012 Order does not provide that disclosure may be made to persons with a "legitimate interest" in knowing the outcome of a referral because they allege that the person abused them. The wording of article 7 is narrower. Further, as the claimant accepts, the only information that may be disclosed is if the person is barred from regulated activity. If not, article 7 does not provide for the giving of reasons for, or further information as to why, the person is not included in the list. The article would not, therefore, enable the claimant to be provided with reasons for a decision not to include TXJ in the children's barred list. That is the information that she wants, and says she needs, to bring judicial review proceedings. More generally, the fact that the article does not provide for disclosure of that information reinforces the conclusion that the article is not intended to provide for disclosure to persons claiming to be victims of abuse and wanting to consider bringing judicial review proceedings of decisions not to include a person in a barred list. The meaning and scope of "legitimate interest" in article 7 of the 2012 Order does not extend to such groups.

45. Finally, it is relevant to note the legislative context in which article 7 of the 2012 Order was adopted. The article continues in force until the provisions of section 30A of the 2006 Act come into force. That section will provide for the DBS to provide information to a person who falls within column 1 of schedule 7 to the 2006 Act. The column, essentially, comprises persons or public bodies who are permitting or considering permitting persons to engage in regulated activity. It is correct, as the claimant says, that the provisions of section 30A are not yet in force and are not the law. Nevertheless, the legislative context in which article 7 was adopted is relevant to considering its interpretation. It is intended to provide a mechanism for limited disclosure pending the commencement of section 30A of the 2006 Act. That indicates that it is intended to perform a similar function to section 30A and will cease to be needed, and therefore cease to have effect, when section 30A comes into force. As section 30A is intended to regulate disclosure to persons contemplating allowing someone to engage in regulated activity, that is a further indicator that article 7 of the 2012 Order is intended to perform a similar function. That, in turn, reinforces the conclusion that a person has a legitimate interest in knowing if another person is barred from regulated activity if he is contemplating permitting that other person to engage in regulated activity.
46. For those reasons, we do not consider that the claimant has a legitimate interest within the meaning of article 7 of the 2012 Order. Accordingly, the defendant was correct in its letter of 1 April 2019 in concluding that the claimant did not have a legitimate interest within the meaning of that article.

#### Other Powers

47. The claimant contends that the defendant has other powers which could be used to provide her with the information she seeks. Mr Straw referred to the power in paragraph 18 of Schedule 8 to the 2012 Act to do such other things as the DBS “considers necessary or expedient” in connection with its functions or the implied power to do things reasonably incidental and consequential to the exercise of its functions.
48. The first question is whether the use of those powers to disclose the information sought to persons claiming to be victims of abuse by persons referred to the DBS would be consistent with the statutory scheme. Powers of that nature cannot be exercised in a way that is contradictory to or inconsistent with a statutory scheme. As Neill LJ. observed in another context in *Credit Suisse v Waltham Forest LBC* [1997] Q.B. 362 at page 374B-D:
- “where Parliament has made detailed provisions as to how certain statutory functions are to be carried out there is no scope for implying the existence of additional powers which lie outside the statutory code”.
49. The provisions of the 2006 Act do set out a detailed statutory code governing the process of barring individuals from regulated activity. That code provides a detailed set of provisions governing when, and to whom, information may be provided about whether a person has been barred from regulated activity and who may be provided with other relevant information. Those provisions reflect a careful balancing of the interests of the individual referred, and the interests of others, in the context of dealing with sensitive personal information about individuals. There is no specific provision

permitting disclosure of information to those who allege that they have been victims of abuse by persons referred to the DBS. Disclosing information to other persons, more specifically to those claiming to be victims of abuse by persons referred to the DBS would appear to run counter to the restrictions and limits on the dissemination of information provided for by the statutory scheme.

50. We turn then to the reasons why it is said that the disclosure of information to those claiming to be victims of abuse is said to be consistent with the scheme in this case, and more generally.
51. First it is submitted that the claimant is a victim of alleged abuse with an interest in the outcome of the referral. That of itself would not justify providing disclosure to such persons. In creating the scheme for safeguarding children, Parliament would have been well aware of the possibility that there would be individuals who had, or were alleging that they had, been abused by persons referred to the DBS. Nonetheless, the statutory scheme does not provide for disclosure to that group of individuals.
52. Secondly, the claimant contends that if the DBS have found that she was abused by TXJ, that would amount to a formal finding by the state that such abuse occurred. That is not, in fact, the role of the DBS. Its task is not to adjudicate on allegations made by individuals. It has a forward-looking task of seeking to protect children from harm. It may have to consider and form a view on whether a person has engaged in conduct endangering a child. It may be considering a risk of harm. It may have information from a wide range of sources. It would not be correct to describe its decision to include a person in the barred list as a finding, still less a formal finding by the state, on allegations of abuse made by one or more individuals. That consideration would not justify the disclosure of information in circumstances not specifically provided for by the statutory scheme.
53. Third, the claimant says that she is well placed to assist the DBS in deciding whether TXJ should be included in the children's barred list given that she says that she was abused by TXJ and was the source of the information which led to the referral by the local authority. In fact, that contention is not made out. The claimant does not have any specified role in the making of the decision. She may provide information to a referring body (as she did here) or, it seems, to the DBS direct. She is not, however, a person entitled to see the information provided or to make representations about that information. More significantly, what the claimant seeks is disclosure of a decision that has already been taken and, if the decision is not to bar TXJ, to have reasons so that she can, if appropriate, bring judicial review proceedings of that decision. As Mr Straw accepted during argument, the claimant would be unlikely to be able to challenge any decision by way of judicial review by contending that there is new or additional evidence available. As he also accepted, the claimant would be simply considering the decision, and the reasons, and seeing whether, on conventional public law grounds, there is any scope for challenging that decision. Disclosure to an individual for those purposes is not provided for by the scheme. Nor it is immediately apparent that the claimant would be better placed than any other person to carry out that task. This consideration, therefore, would not justify disclosure in the present case.
54. Finally, the evidence from the claimant's mother contends that not knowing the outcome of the referral is contributing to the claimant's distress and that she is

worried that other children might be abused in the way that she says she was. The claimant, sadly, has a number of severe mental health issues and the implication is that not knowing the outcome of the referral is causing, or exacerbating, her mental health conditions. We have every sympathy for the claimant who, clearly, has had severe difficulties over recent years. However, we do not consider that the particular circumstances of this claimant can justify the disclosure of information in circumstances not contemplated by the statutory scheme.

55. Those considerations are reinforced by a further consideration. There is a real concern as to how further dissemination could be controlled if information were disclosed to persons alleging that they had been abused by someone who has been referred to DBS. Those persons may wish to show the information to family or friends, or lawyers or others such as doctors or healthcare professionals. They may wish to show the information to other parents out of concern for other children, or to members of the public more widely. There is no ready mechanism for controlling such dissemination. One suggestion was for the DBS to provide the information subject to the recipient entering into agreements to preserve its confidentiality. There is doubt as to the extent to which these agreements could be effectively enforced by the DBS to stop the dissemination of information or the extent to which in practice the DBS could, or would have the resources to, take action to enforce the agreement. Mr Straw submitted that the person concerned may have a right to sue for breach of privacy if information forming part of the DBS's decision-making process were further disclosed for no good reason, relying by analogy upon the decision in *Richard v British Broadcasting Corporation* [2019] Ch. 160 dealing with the entitlement to privacy of a suspect in relation to a police investigation. We doubt if the prospect of a claim for breach of privacy would be a realistic or effective means in all cases for controlling the further dissemination of information provided to persons claiming that they had been the victim of abuse.
56. More generally, it is relevant that the statutory scheme does not include any specific provision dealing with the use that such persons could make of information, and regulating the consequences of further, unauthorised dissemination (by making it a criminal offence for example). It reinforces our conclusion that Parliament did not intend information about a decision to bar, or not bar, a person from regulated activity to be provided to persons other than those provided for by the scheme. We consider that Parliament would have included detailed provisions governing the use to which such information could be put if it intended it to be provided to classes of persons such as those alleging that they were abused by a person referred to DBS.
57. For all those reasons, we would not consider that disclosure of information to the claimant, as a person alleging that she was abused by the person referred to DBS, was consistent with the statutory scheme.

### The Case law

58. We turn next to consider the case law relied upon by the claimant and the submission by Mr Straw that persons with standing to bring a claim for judicial review are entitled to disclosure of the decision on whether an individual has been included within the barred list, and if not, the reasons for not doing so. That case law raises two related questions: (1) whether a person such as the claimant would have sufficient interest to challenge a decision to include, or not include, a person within the



children's barred list and (2) whether such persons are entitled to be provided with the decision, and reasons, to enable them to do so. That second question, entitlement to information, however, cannot in our judgment, be divorced from consideration of the provisions of the statutory scheme.

59. The cases relied upon by the claimant fall, essentially, into three groups. First, there are cases where it is recognised that complainants may have standing to challenge a decision not to take further action in relation to that complaint. Those cases primarily involve challenges to decisions of the police or the Director of Public Prosecutions not to take action to prosecute an individual accused of criminal conduct. Those cases are different in context from the present case. The role of the decision-maker there is to decide whether or not to prosecute an individual for alleged crimes. Furthermore, prosecution for crimes will necessarily involve an element of publication of information. A decision to prosecute an individual will be publicly known as the process of criminal justice is an open one. The victim will know if no prosecution has taken place.

60. It is also recognised that the interests of the victim is one of the significant interests to be considered, as appears from the decision of the Court of Appeal (Criminal Division) in *R v Killick* [2012] 1 Cr. App. R. 10. There the Court was dealing with the scope of a request for a review of a decision not to prosecute. The Court considered that the prosecutor was bound to carry out such a review for three reasons. First, its published procedures required that. Second, an interested party had a right to seek judicial review of a decision not to prosecute and it would be disproportionate for the public authority not to have a system of review. Third, and significantly for present purposes,

“in considering whether to prosecute the prosecutor has to take into account the interests of the state, the defendant and the victim – the three interests in a criminal proceeding as identified for example by Lord Woolf C.J. in *R v B (Brian S)* [2003] EWCA Crim 319; [2003] 2 Cr App. R. 13 (p. 197) at [27]. As a decision to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision, particularly as the police have such a right under the charging guidance”.

61. In considering the significance of this line of authority, it is important to bear in mind the differences between the functions of a prosecuting authority and those of the DBS. The DBS is not a prosecuting authority. It is not adjudicating on individual allegations by a victim. It is carrying out child protection functions concerning those taking part in regulated activities which might bring them into contact with children in future. Whilst it may take into account, amongst other things, conduct said to have been engaged in by those referred to it, the function of the DBS, unlike the criminal courts, is not to adjudicate on whether individuals have been guilty of particular misconduct in the past or to impose penalties.

62. Against that background, the case that specifically considers the question of entitlement to decisions and information in the context of complaints is *R (Privacy International) v Revenue and Customs Commissioners* [2015] 1 WLR 397. That case concerned the functions of Her Majesty's Commissioners of Revenue and Customs (“HMRC”) in relation to export controls. It had power to investigate and prosecute

alleged contraventions of regulations restricting exports. A non-governmental organisation complained to HMRC that a named company was exporting computer software which was being used for surveillance in breach of the relevant regulations. The organisation asked for confirmation as to whether there would be an investigation into the activities of the named company and if not, reasons for that. HMRC responded saying that it had no power to comment on individual cases. In fact, the relevant statute prohibited disclosure by HMRC officials of information but provided for exceptions to that prohibition where, amongst other things, (1) disclosure was made for the purposes of a function of HMRC or (2) was made for the purpose of a criminal investigation. Green J. quashed the decision and remitted the matter to HMRC to consider whether or not it wished to disclose information pursuant to those sections.

63. Green J. also made observations on the considerations which HMRC may wish to take into account when considering disclosure. In considering those observations, it is right to bear in mind that investigations conducted by HMRC were equivalent to police investigations which might result in prosecutions (see paragraph 62 of the judgment). It was in that context that the judge observed that HMRC would need to consider the nature and status of the person seeking information and of persons who were the subject of complaints. Those could include pressure groups, non-governmental organisations, the press, victims of crime, witnesses, complainants and exporters (see paragraph 76). He considered the question of the right of access to the court. He referred to the decision of the House of Lords in *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604 noting that a person directly affected by a decision was entitled to know of that decision (subject to other considerations) and that may be necessary to ensure that the person has access to a court: see paragraph 145. Green J. noted that the right of a person with standing to seek judicial review of decisions by prosecutorial authorities was different from the financial right in issue in *Anufrijeva*. Nevertheless, he appeared to equate the two situations and did not consider that what he described as the first limitation in *Anufrijeva* (that a person was directly affected by the decision) applied in the context of those challenging decisions not to prosecute: see paragraphs 146 and 148 of the judgment. It was in that context that Green J. considered that a right of access to a court may carry with it the right to know of a decision not to take action, and the reasons for such a decision.
64. It is clear from these *obiter* observations of Green J in *Privacy International* that he regarded that case as one where HMRC would be making a prosecutorial decision. For the reasons already given, the decision made by the DBS in the present case is not akin or analogous to a decision of a prosecutorial authority. Furthermore, the provisions of the specific statutory scheme are different from the statutory provisions in issue in *Privacy International*. In general, therefore, we do not consider that that case or the other authorities relating to prosecution decisions assist in deciding whether persons like the claimant, who allege that they were abused by a person referred to the DBS, are entitled to know whether the person is barred from regulated activity and if not, why not.
65. The second category of case upon which the claimant particularly relied is the decision of the Divisional Court in *R (D) v Parole Board* [2019] Q.B. 285. In that case there was a challenge to a decision of the Parole Board directing the release of a convicted rapist on licence. The claim for judicial review was brought by, amongst

others, two victims of the offender. The basis of their challenge was that the decision of the Parole Board was irrational and, separately, that a rule prohibiting the Parole Board from giving information about proceedings before the Parole Board was ultra vires the parent statute regulating the Parole Board's functions. The claimants were not, in fact, seeking reasons for the decision to direct release: see paragraphs 182 and 184 of the judgment. It was accepted that they had sufficient interest in the matter to bring a claim for judicial review.

66. The Divisional Court noted that the Parole Board was a judicial body required to provide reasons for its decisions to the parties before it (i.e. the offender and the Secretary of State). In the context of the challenge to the rule prohibiting publication of information, the Divisional Court noted that an individual, which included a person with standing to seek judicial review, should be in a position to challenge a decision. It further noted that the "right to information, which flows from the right of access to the court, is not absolute and will have to yield to stronger competing interests": see paragraph 186. In that case, the Divisional Court concluded that the victims' right of access to a court entitled them to be given some information about the substance of the decision to direct the release of the prisoner. It concluded that the general provisions of the parent act providing power for the Secretary of State to make rules with respect to the proceedings of the Parole Board did not authorise a blanket ban on the publication of any information. The rule was therefore ultra vires the parent act. See generally paragraphs 189 to 200. We do not consider that the reasoning in that case assists in determining the issue in the present case. The legal and factual context, and the statutory provisions in issue, are different from the considerations that arise in relation to the statutory scheme we are considering, and the specific issue in this case.
67. The third set of cases concern persons who make a complaint and wish to challenge the way in which that complaint is dealt with. Mr Straw relied, in particular upon, the decision in *R v General Council of the Bar ex p. Percival* [1991] Q.B. 212. The Court of Appeal accepted that "unless the disappointed complainant is regarded as having sufficient locus standi to challenge the decision it is difficult to see who else could be expected to do it" at page 231B-D (and see the observations in *Re McBride's application for Judicial Review (No.2)* [2003] NICA 23 at para. 27. Mr Straw contends that if a person who alleges she was the victim of abuse, and whose allegations led to a local authority referring a matter to the DBS cannot challenge the decision of the DBS, it is unlikely in practice that any other body would have any interest in challenging.
68. Ultimately, however, the question is whether the statutory scheme is intended to provide information to alleged victims of persons referred to the DBS. The statutory scheme simply does not provide, as a general rule, for disclosure of information to that category of persons. Rather, it includes specific provision about who may be told that a person is included in the barred list and specific provision about which bodies may, more generally be given information relevant to their functions (e.g. supervisory bodies, the police and probation services). We do not consider that it is appropriate to graft on to the statutory scheme a further, general requirement to disclose information to persons who allege that they were abused.
69. We recognise that this could potentially mean that a decision could be taken not to include a person in a barred list which is legally flawed. It is not possible to evaluate the likelihood of such decisions occurring and we bear in mind, in the context of the

aim of protecting children, the undesirability of even one situation occurring where a child could be put at risk. The extent to which disclosure of information to alleged victims would enable them to seek judicial review of such a decision is, however, likely to be limited. An alleged victim seeking to challenge that decision would be doing so on general public law grounds. The victim would not, generally, be able to introduce further or new evidence to challenge that decision. Further, the specified bodies remain under a duty to refer a person if they think that the person has engaged in conduct or presents a risk of harm. The process of safeguarding children is a continuous one and does not end with one decision.

70. Those factors are not the reasons why we consider that information is not required under the statutory scheme to be disclosed to alleged victims of abuse by persons referred to DBS. They do, however, suggest that a scheme which is based on duties to refer, the power to acquire sensitive personal information, and strict limits on who may be provided with information is a reasonable and proportionate one. It seeks to balance the aims of protecting children against the legitimate concerns over dissemination of private information. In any event, given the detailed statutory provisions governing disclosure, we do not consider that a court can or should supplement those provisions by requiring provision of information to a class of persons, alleged victims of abuse, where the scheme does not provide for that.

#### Ancillary Matters

71. Even if the DBS had a power to disclose information to victims of alleged abuse which it wished to exercise, it would have to ensure that the disclosure complied with the requirements of the GDPR and the DPA, also the Human Rights Act 1998 (“the 1998”). We have heard limited argument on those issues which may turn on the specific facts of what information would be disclosed. In view of our general conclusion that the statutory provisions do not require the DBS to provide information to alleged victims of abuse, we do not consider it necessary or appropriate to address those issues.
72. For completeness, we record our provisional view that processing, in the form of disclosing information to the claimant, would be unlikely to be necessary for the exercise of a function conferred on the DBS (see article 6(1)(e) of the GDPR and section 8(1)(c) of the DPA. In relation to article 6(1)(f) of the GDPR, consideration would need to be given as to whether the processing was necessary (1) for the purposes of the legitimate interests of the claimant and (2) whether those interests were overridden by the interests of TXJ. Disclosure of information about TXJ would also be likely to involve an interference with his right to respect for his private life within the meaning of Article 8(1) of the Convention. Consideration would then need to be given as to whether the disclosure of information to the claimant would be justified under Article 8(2) of the Convention. We do not have the relevant material to form a view on that.

#### Conclusion on Ground 1

73. Standing back from the details, the claimant contends that she should be informed of the decision whether TXJ has been included in the children’s barred list and if not reasons for that decision. The sole basis for that claim is, as appears from her solicitors’ letter of 25 February 2019, because “the referral was made following

allegations by [SXM] that she was abused by [TXJ] when she attended his horse riding school as a child". There is a detailed statutory scheme governing in what circumstances and to whom details of decisions, and other information, may be disclosed. That statutory scheme does not expressly provide for disclosure to alleged victims. In those circumstances, we do not consider that this court can or should require the DBS to exercise any general powers it has to provide disclosure of decisions on barring individuals from regulated activities, and reasons for not doing so, to alleged victims of abuse. To do so would run counter to the statutory scheme that Parliament has created.

## **GROUND 2 – REFUSAL OF INFORMATION IS UNREASONABLE OR DISPROPORTIONATE**

### ***Submissions***

74. Mr Straw submitted that the decision not to disclose information about the barring decision, or the reasons, is unreasonable or disproportionate. He submitted that the nature of review in this context was stricter than that required generally in judicial review and that it was appropriate for the court itself to decide whether disclosure would be proportionate having regard to TXJ's decision.
75. Ms White submitted that the only basis upon which the claimant sought disclosure of the information was that she said that she was the alleged victim of abuse and her allegations had led to the referral. The DBS did not consider disclosure for that purpose appropriate. There was nothing unlawful in that decision having regard to the nature of the statutory scheme.

### ***Discussion***

76. In light of our decision on the first ground, we can state our conclusions on this issue shortly. The basis upon which the claimant sought disclosure was that she was a victim of alleged abuse by the person referred. That does not amount to a legitimate interest within the meaning of article 7 of the 2012 Order. The claimant is not entitled under the statutory provisions to disclosure of barring decisions, or reasons for them. A decision, therefore, not to provide the information cannot be said to be unlawful in public law terms and is not (if that is the test) disproportionate. The decision is consistent with the statutory scheme and is based on a correct interpretation of its provisions. The decision is for the DBS to take not the courts. For that reason, ground 2 fails.

## **GROUND 3 – ARTICLE 8 OF THE CONVENTION**

### ***Submissions***

77. Mr Straw submitted that the refusal by the DBS to tell the claimant of its barring decision and reasons is incompatible with a positive obligation imposed on it by Article 8 of the Convention. He submitted that that Article requires an effective and accessible procedure enabling the claimant to have access to all relevant and appropriate information to alleviate the anxiety and stress the claimant suffers by not knowing the outcome of the referral. He relied on, amongst other authorities, *Roche v United Kingdom* (2006) 42 ECHR 30 (dealing with access to information about tests

carried out on the claimant) and *MG v United Kingdom* (2003) EHRR 3 (dealing with access to social services records).

78. Ms White submitted that the positive obligation recognised under Article 8 of the Convention is concerned with access to information concerning risk to health or information concerning a person's early childhood or tracing their natural parents, relying on the articulation of the principle in *Szulc v Poland* (2013) EHRR 5 at paragraph 85. The scope of the obligation does not extend to the provision of information because a refusal causes anxiety and stress to an individual. Ms White submitted that there is no compelling evidence of the adverse effect on the claimant said to give rise to the need for the disclosure of the information sought. Further, Ms White submitted that the statutory framework struck a fair balance between the interests of the claimant, the interests of TXJ in protection of his personal information, and the community generally in setting up a scheme to ensure that those unsuitable to work with children are prevented from doing so.

### ***Discussion***

79. Article 8 of the Convention provides:

*“Right to Respect for private and family life*

- (1) Everyone has the right to respect for his private and family life and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

### **The Evidence**

80. The contention is that there is a positive obligation on the DBS to tell the claimant of the barring decision, and the reasons for any decision not to bar TXJ from regulated activity. Not knowing the outcome is said to be contributing to the distress suffered by claimant. In that regard, the evidence before this court comes in a witness statement from her mother. She records the effect of the alleged abuse on the claimant. She says that the abuse has resulted in the deterioration of the claimant's mental health since 2011, leading to a diagnosis of posttraumatic stress disorder, an eating disorder and other problems. It is the alleged abuse in 2009 to 2011 which is said to have caused those conditions, not the refusal to disclose information. The claimant's mother then highlights extracts from the claimant's medical notes between 20 March 2016 and 8 August 2016 (see paragraphs 35 to 42 of her witness statement) which relate to the time of the police investigation (and predate the request to the local authority to refer TXJ to the DBS). The claimant's mother says the DBS' refusal to tell SXM whether it has placed TXJ on the children's barred list “has contributed to her distress” and “Not knowing whether he is barred, or whether children are protected from him, causes her distress. This is considerable since her extremely fragile mental state is easily upset”.

The Scope of the Positive Obligation

81. The position governing the scope of the positive obligation in Article 8 of the Convention is usefully summarised by the European Court of Human Rights in paragraphs 84 to 86 of its judgment in *Szule v Poland* [2013] 57 EHRR 5 in the following terms (footnotes omitted):

“84. The Court recalls that, in addition to the primarily negative undertakings in art. 8 of the Convention, there may be positive obligations inherent in effective respect for private life. In determining whether or not such a positive obligation exists, it will have regard to the fair balance that has to be struck between the general interest of the community and the competing interests of the individual concerned, the aims in the second paragraph of art. 8 being of a certain relevance.

85. With regard to access to personal files held by the public authorities, with the exception of information relating to national security considerations, the Court has recognised a vital interest, protected by the Convention, of persons wishing to receive information necessary to know and to understand their childhood and early development, or to trace their origins, in particular the identify of one’s natural parents or information concerning health risk to which interested persons were exposed.

86. In those contexts, the Court has considered that a positive obligation arose on the respondent State to provide “an effective and accessible procedure” enabling the applicant to have access to “all relevant and appropriate information”.

82. The reference to information concerning health risks is a reference to the decision of the European Court of Human Rights in *Roche v United Kingdom* (2006) 42 EHRR 30. That case concerned a serviceman who participated in tests at Porton Down involving exposure to mustard gas. The applicant subsequently developed medical conditions including high blood pressure and respiratory illnesses. He was concerned that those conditions might be linked to the chemicals to which he had been exposed during the tests. He wished therefore to access relevant records relating to the tests. It was in that context that the Court said at paragraph 161 that:

“...the applicant’s uncertainty as to whether or not he had been put at risk through his participation in the tests carried out in Porton Down, could reasonably be accepted to have caused him substantial anxiety and distress”

83. The Court considered the evidence as to the existence of relevant documents and the fact that the government of the United Kingdom had not asserted any pressing reason for withholding the documents. The Court considered at paragraph 162 that:

“In such circumstances, the Court considers that a positive obligation arose to provide an “effective and accessible procedure” enabling the applicant to have access to “all relevant and appropriate information” which would allow him to assess any risk to which he had been exposed during his participation in the tests”.

### The Present Case

84. The case law of the European Court of Human Rights recognises that there may be a positive obligation to provide information concerning health risks to which a person may have been exposed. The obligation does not extend to an obligation to provide information, still less personal and potentially sensitive information, about another person, because not knowing the information contributes to stress and anxiety. In those circumstances, we do not consider that there is a positive obligation on the DBS under Article 8 of the Convention to disclose information about its barring decisions concerning other persons to the claimant because not knowing the outcome of the referral may contribute to her stress and anxiety.
85. Accordingly, it is not necessary to reach a conclusion on whether the current statutory scheme strikes a fair balance between the interests of TXJ in his personal information not being disclosed and the interests of the claimant who wishes to know the outcome of a referral to DBS.

### CONCLUSION

86. The refusal to disclose the information on whether to bar a person had been barred from regulated activity with children, or the reasons for not doing so, to a person who alleged that she had been the victim of abuse by that person was lawful. The refusal to provide that information did not amount to a breach of any positive obligation imposed by Article 8 of the Convention. For those reasons, this claim for judicial review is dismissed.