

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 80237/13
Peter HARVEY
against the United Kingdom

The European Court of Human Rights (First Section), sitting on 21 November 2017 as a Chamber composed of:

Linos-Alexandre Sicilianos, *President,*
Kristina Pardalos,
Aleš Pejchal,
Ksenija Turković,
Armen Harutyunyan,
Pauliine Koskelo,
Tim Eicke, *judges,*
and Renata Degener, *Deputy Section Registrar*,

Having regard to the above application lodged on 22 November 2013,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Peter Harvey, is a British national, who was born in 1959 and lives in Mansfield. He was represented before the Court by Ms K. Lea, a lawyer practising in Nottingham.

2. The United Kingdom Government ("the Government") were represented by their Agent, Ms M. Macmillan, of the Foreign and Commonwealth Office.

A. The circumstances of the case

3. At the relevant time, the applicant was a schoolteacher with around twenty years of teaching experience. In December 2008 he was diagnosed with depression and granted sick leave from work. He returned to work in April 2009.

4. On 8 July 2009, following provocative behaviour from several pupils in his class, he assaulted a pupil with a dumbbell. The pupil sustained a serious head injury requiring hospital treatment. It was also alleged that during the incident the applicant had kicked a female pupil and thrown the dumbbell at another pupil. The applicant was arrested and remanded into custody.

5. He was subsequently charged with attempted murder and grievous bodily harm with intent under section 18 of the Offences against the Person Act 1861. He pleaded guilty to grievous bodily harm (without specific intent) under section 20 of the 1861 Act. On 29 April 2010 he was found not guilty of attempted murder and of grievous bodily harm with intent following a jury trial in the Crown Court. At the sentencing hearing on 24 May 2010, the judge sentenced the applicant to two years' community service, taking into account the time spent in pre-trial detention.

6. The judge referred to significant mitigation in the case, including the applicant's depressive illness, difficult personal and family circumstances at the relevant time and his previously unblemished record of teaching over nearly twenty years. The judge declined to make a disqualification order against the applicant precluding him from working with children, on the basis that he was satisfied that the applicant was unlikely to commit any further offence against a child, largely because as a teacher he was subject to a professional code of practice and disciplinary arrangements and he had recognised that his career teaching children was over.

7. On 27 May 2010, following disciplinary proceedings, the applicant was dismissed from his post for gross misconduct.

B. The barring procedure

1. The Independent Safeguarding Authority

8. On 16 July 2010 the local authority referred the matter to the Independent Safeguarding Authority ("ISA"), a body established by the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act"), to consider whether to bar the applicant from working with children or vulnerable adults. Meanwhile, the applicant commenced voluntary work at a small local charity, run by the Church, providing support to homeless persons.

9. By a letter dated 17 November 2010, the ISA informed the applicant that it had received the referral and was minded to bar him from working with children and vulnerable adults in light of his conviction. He was

therefore invited to make written representations as to why he should not be barred. He submitted written representations through his solicitors on 7 January 2011 and disputed that he represented a threat to children when operating in a supervised environment, or a threat to vulnerable adults in any circumstances.

10. By letter dated 10 February 2011 the ISA notified the applicant of its decision to include the applicant's name in both the Children's Barred List and Adults' Barred List. It referred to his conviction and considered that he had engaged in conduct which had endangered a child and which constituted "relevant conduct", within the meaning of the 2006 Act, justifying inclusion in the barred lists.

11. As regards the risk to vulnerable adults, the letter stated:

> "We also remain of the view that you may harm a vulnerable adult and it is appropriate to include you on the Adults' Barred List. This is because vulnerable adults with learning difficulties or mental health issues could exhibit similarly challenging behavioural traits as children in certain situations. There are insufficient reassurances that should you engage in 'regulated activity' in a vulnerable adult setting, you would not pose a similar significant risk to those in your care."

12. The accompanying "Barring Decision Process" document, prepared by an ISA case worker, reviewed the applicant's conduct and the risk he posed. The document explained that the applicant was considered to pose a significant risk to children if placed in a similar situation in the future. As regards vulnerable adults, the document stated:

> "It would not be unreasonable to surmise that vulnerable adults, particularly those with learning difficulties or mental health issues, could exhibit similar challenging behavioural traits in certain situations. Because of this there are real concerns that [the applicant] might react in a similar manner as he did at [school], if he was placed in a difficult position with vulnerable adults. While there is no evidence to indicate that he has worked in a paid or voluntary capacity with vulnerable adults in the past, he might in the future and his risk is such at the present time that he would pose a risk of harm if he was allowed to do so. [The applicant's] harmful behaviour clearly constitutes risk of harm and a minded to bar decision is proportionate on the Adults' Barred List."

13. As to whether it was appropriate to bar the applicant from working with children or vulnerable adults, the document concluded that it was. In particular, as regards the bar on working with vulnerable adults, the document stated:

> "There is no evidence to indicate that [the applicant] has worked in paid or voluntary capacity with vulnerable adults in the past. However, consideration needs to be given to whether it would be appropriate for him to work in regulated activity within a vulnerable adults setting in the future. It is important to consider if [the applicant] was to obtain employment with vulnerable adults with learning difficulties or mental health issues, they could exhibit similar challenging behavioural traits as children in certain situations. There is a potential, significant risk that if he was placed in a similarly difficult situation in a vulnerable setting he could react in a similar manner with potential fatal consequences. Therefore it is deemed appropriate to include [the applicant's] name on the Adults' Barred List."

14. The applicant subsequently ceased his voluntary work with the homeless charity, having received legal advice that the work was potentially contrary to the ISA barring decision.

2. The Upper Tribunal

15. The applicant appealed the decision to include him in the Adults' Barred List to the Upper Tribunal. He did not appeal the decision to include him in the Children's Barred List. He argued that the ISA had wrongly found that he had kicked a female pupil and that the decision to bar him from working with vulnerable adults was disproportionate and thereby in breach of Article 8 of the Convention. He obtained a report from a consultant psychiatrist, Dr M., to assist the tribunal to assess his level of risk. The report confirmed that the applicant's diagnosis was one of a recurrent depressive disorder and that as a result of depression and considerable work stress he had assaulted his pupil in 2009. It noted that, since that time and with medical assistance, his situation had significantly improved.

16. Following receipt of the psychiatric report, the parties requested that the proceedings be stayed in order to allow the ISA to review its decision. A stay was granted.

17. By letter dated 11 November 2011 the ISA confirmed its decision to include the applicant's name on the Adults' Barred List but retracted its finding of fact that the applicant had kicked a female pupil in light of further inquiries into that incident. The ISA review letter noted that Dr M.'s report showed that, since the incident, the applicant had taken significant steps to address his long-term issues with depression through psychiatric support, psychotherapy and support from his general practitioner. However, while acknowledging the significant progress that he had made, the letter emphasised that a relatively short period of time had elapsed since this marked improvement. Although Dr M.'s report was compelling, it was also apparent from the report that he believed that "some basic safeguards would seem prudent" to mitigate against future risk. The ISA concluded that Dr M.'s report served to strengthen its view that there continued to be an unacceptable risk, noting that the report proposed a risk assessment for any post for which the applicant wished to apply and recorded the applicant's recognition of the fact that he should not work alone. The ISA noted that it had no scope to impose a "partial bar" or any type of restriction on the applicant which would allow the recommendations made by Dr M. to be incorporated into any future employment and, accordingly, it had to balance the level and nature of the risk identified against the impact on the applicant of continued inclusion on the Adults' Barred List.

18. On 20 March 2012 the Upper Tribunal quashed the ISA decision to include the applicant's name in the Adults' Barred List. It commented that the ISA caseworker had not specifically addressed proportionality in the

context of the decision-making process. The tribunal considered the correct approach to its review of the ISA decision was that set out in its previous judgment in *SB*, at that time pending before the Court of Appeal (see further "Relevant domestic law and practice", below), namely that it should examine the evidence and allocate weight to it, and decide whether the balance had been struck in the right place. It noted that the ISA had not had the opportunity of hearing the applicant give evidence whereas the tribunal, with two experienced, specialist members, had heard his evidence and tested it in some detail. It considered that the ISA had "fundamentally misconstrued" Dr M.'s report since the tribunal failed to see how that report could have strengthened ISA's view that there continued to be an unacceptable risk. It was of the view that Dr M.'s suggestion that there be a basic risk assessment before the applicant was engaged in work with vulnerable adults was a very sensible one and one which, the tribunal understood, would in any event be carried out by the Church in respect of the homelessness project in which the applicant was interested.

19. The tribunal therefore directed the ISA to remove the applicant's name from the Adults' Barred List. It also directed that:

> "...there is to be no publication of the any matter likely to lead members of the public directly or indirectly to identify any person, including the Appellant, who has been involved in the circumstances giving rise to this Appeal".

3. The Court of Appeal

20. The ISA appealed to the Court of Appeal on four grounds, namely: (i) that the Upper Tribunal had erred in law in its approach to proportionality by failing to give appropriate weight to the ISA decision; (ii) that the ISA decision was not, as a matter of law, disproportionate; (iii) that the Upper Tribunal had failed to take into account the nature of the risk posed by the applicant; and (iv) that the Upper Tribunal had erred in placing reliance on safeguards in place at the applicant's proposed place of work and had failed to take into account the risk that would be posed if the applicant worked with vulnerable adults in other environments.

21. The Court of Appeal subsequently handed down judgment in *SB*, overturning the judgment of the Upper Tribunal in that case and clarifying the correct approach to be taken when reviewing an ISA decision (see "Relevant domestic law and practice", below).

22. The functions of the ISA were transferred to the Disclosure and Barring Service in December 2012 and the appeal continued in the latter's name.

23. In his skeleton argument of 1 February 2013, the applicant invited the Court of Appeal to uphold the decision of the Upper Tribunal that the decision to include him in the Adults' Barred List was disproportionate and thus unlawful. He argued, in particular, that proportionality had always to involve the striking of a fair balance between the rights of the individual and

the interests of the community, inherent in the whole of the Convention; that where the individual had not been interviewed by the primary decision-maker, the appellate authority was much better placed to investigate the facts and test the evidence; that it was for the court before which the issue was raised to decide whether Convention rights had been breached and that this court was not merely to concern itself with whether the primary decision-maker took the relevant rights into account; and that the court had to treat with appropriate respect the views of those who had the primary responsibility to make the judgments in question, especially where they had addressed their minds to the relevant issues.

24. On 13 March 2013 the Court of Appeal quashed the decision of the Upper Tribunal and reinstated the ISA decision. Lord Justice Treacy, delivering the lead judgment (with which the other two members of the Court of Appeal agreed), considered that the process through which the ISA had worked in coming to its judgment that the applicant should be included on the Adults' Barred List was a "thorough and careful" one. That view had then been reviewed in the light of Dr M.'s evidence, and the confirmed conclusion had "appropriately recognised the force of Dr M.'s evidence in relation to the improvement in [the applicant's] condition, but went on, after due consideration of the whole picture, to conclude that it did not provide a reason for reversing the decision, and if anything strengthened it". The judge continued:

> "39. I have found in the documentation relating to the ISA's decision-making the clearest evidence of careful thought and reasoning. I therefore find the Upper Tribunal's view that the ISA had not given any detailed thought to its decision and that it had failed to carry out a balancing exercise to be very surprising. It seems to me to be clearly wrong.
>
> 40. Very considerable reliance was placed by the Upper Tribunal on Dr M.'s report and the ISA is criticised for having "misconstrued the evidence of Dr M.". Insofar as the Upper Tribunal placed additional reliance on the fact that it had heard oral evidence from Mr Harvey, I accept the submission of [the applicant's lawyer] that in reality this does no more than confirm the evidence already before the tribunal from Dr M. to the effect that Mr Harvey had improved and was currently well motivated to avoid a repetition of his conduct. However, it seems to me that the Upper Tribunal's reliance on Dr M.'s evidence, together with its dismissal of the ISA's approach to it, was misconceived."

25. He also found that the Upper Tribunal was wrong to treat the ISA's view of the safeguards mentioned by Dr M. as strengthening its case. He noted that the safeguards mentioned related to a man whose condition had improved, but only in the context of a person suffering from a recurrent depressive disorder and whose improvement was over a relatively short time span. These considerations, which weighed with the ISA, appeared to have been ignored by the Upper Tribunal, which had also concluded that the safeguards "will be in place", thus rendering an absolute bar disproportionate. However, the judge noted, there was no guarantee

whatsoever that the safeguards which Dr M. thought prudent and which would exist under the aegis of the work which the applicant envisaged would necessarily apply in other employments or other situations. The judge considered that the Upper Tribunal's assertion that those safeguards would be in place could not safely be made, nor could the safeguards be implemented as conditions attaching to any future work with vulnerable adults.

26. The judge saw "considerable force" in the ISA's argument that the Upper Tribunal had not taken the approach to proportionality mandated by the Court of Appeal in SB, which required it to accord weight to the judgment of the ISA. The judge therefore concluded:

> "47. The effect of the Tribunal's decision was wrongly to characterise the ISA's decision as an error of law. There was, in my judgment, no such error made by the ISA whose valid decision was wrongly quashed."

27. In these circumstances, the Court of Appeal considered that it was not appropriate to remit the case to the Upper Tribunal and instead ordered that the decision of the ISA be restored.

28. The Court of Appeal also observed:

> "17. There have been amendments to the 2006 Act pursuant to the Protection of Freedoms Act 2012 since the Upper Tribunal decision. However, none of those amendments impacts upon this appeal or the question of the correctness of the Upper Tribunal's decision.
>
> 18. A recent change which will have an impact for the Respondent is that, whereas previously ISA's decision would not be subject to review for a period of ten years, the position has now been altered so that a review may take place at any time if new information emerges, or there has been a change of circumstances, or it becomes apparent that ISA has made an error. See Section 18A of the Safeguarding Vulnerable Groups Act 2006 as inserted by the Protection of Freedoms Act 2012".

4. The Supreme Court

29. The applicant sought permission to appeal from the Supreme Court. He argued, inter alia, that the 2006 scheme was unlawful in failing to provide for a full-merits review on appeal. If there was no requirement for a full-merits review on appeal, then at the very least the Upper Tribunal had to be permitted to carry out a robust proportionality exercise. In his submission, if the narrow remit afforded by the Court of Appeal to the Upper Tribunal in his case were left undisturbed, this would mean that the barring scheme was incompatible with Articles 6 and 8 of the Convention. He further argued that the scheme was unlawful in that it did not allow the Disclosure and Barring Service to implement a partial bar on working with vulnerable adults (the "all-or-nothing" ground). The absolute bar that it was obliged to impose was disproportionate and in breach of Article 8. The Disclosure and Barring Service therefore had to be empowered to impose a partial bar so that in appropriate cases individuals could only be

excluded from positions where they would pose a significant risk to the relevant vulnerable group. If no such power could be read into the 2006 Act then a declaration of incompatibility under section 4 of the Human Rights Act 1998 (see "Relevant domestic law and practice", below) should be made.

30. On 6 June 2013 the Supreme Court refused permission to appeal. It stated that the application did not raise a point of law of general public importance and that the "all-or-nothing" ground did raise a point of law of general public importance but that it was too late to raise it at this stage.

C. Relevant domestic law and practice

The Safeguarding Vulnerable Groups Act 2006

(a) Inclusion in the Barred Lists

31. Section 1 of the 2006 Act and its Schedule 1 created the ISA, to consist of a chairman and members appointed by the Secretary of State who appeared to him to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults. Appointment was for a term not exceeding five years and a member could be removed by the Secretary of State on various specified grounds, including that he was unable or unfit to carry out his functions.

32. Section 2 of the Act requires the ISA to keep two lists of individuals deemed unsuitable to work with children and vulnerable adults respectively. Section 3 provides that a person whose name has been included on one of the barred lists is precluded from taking part in "regulated activity" with the relevant group. Section 5 and Schedule 4 define "regulated activity". The definition of "regulated activity" was amended by the Protection of Freedoms Act 2012 to focus on work which involves close and unsupervised contact with vulnerable groups, thus reducing its scope. Section 7 makes it an offence for a person included in the barred lists to engage in "regulated activity".

33. The criteria for inclusion in the barred lists are set out in Schedule 3. Under paragraph 3 of Schedule 3, the Disclosure and Barring Service (formerly the ISA) is obliged to include a person in the Children's Barred List if satisfied, following consideration of representations by the affected person, that he has engaged in "relevant conduct" and that it is appropriate to include him in the list. "Relevant conduct" is defined in paragraph 4 as including conduct that endangered a child.

34. Paragraph 11 of Schedule 3 provides that the Disclosure and Barring Service (formerly the ISA) is obliged to include a person in the Adults' Barred List if satisfied, following consideration of representations, that he has engaged in conduct which fell within paragraph 11(4) and that it is appropriate to include him in the list. Paragraph 11(4) provides as follows:

"A person falls within this sub-paragraph if he may—

(a) harm a vulnerable adult,

(b) cause a vulnerable adult to be harmed,

(c) put a vulnerable adult at risk of harm,

(d) attempt to harm a vulnerable adult, or

(e) incite another to harm a vulnerable adult."

35. Section 4(1) of the 2006 Act provides for a right of appeal to the Upper Tribunal against a decision to include a person in the barred lists. For the purposes of determining appeals, the Upper Tribunal sits with a constitution of one legally-qualified judge and two specialist, non-legal members.

36. Section 4(2) of the Act stipulates that an appeal can only be made on the grounds that the ISA has made a mistake on a point of law or in a finding of fact on which the decision was based. In section 4(3), the decision whether it was appropriate for a person to be included in a barred list is stated to be neither a question of law nor of fact.

37. Paragraphs 18 and 18A of Schedule 3 to the Act allowed a person included in a barred list to apply to the Disclosure and Barring Service (formerly the ISA) for a review of his inclusion. At the time the applicant was placed on the Adults' Barred List, a review could only proceed after the end of the "minimum barring period", which in the applicant's case was a ten-year period, and with the permission of the Disclosure and Barring Service.

38. However, following amendments introduced by the Protection of Freedoms Act 2012, a review may now take place at any time and a person's name is to be removed from the list if the Disclosure and Barring Service is satisfied that, in the light of information which it did not have at the time of inclusion in the list, any change of circumstances or any error by ISA, it is not appropriate for the person to be included in the list.

(b) Challenges to inclusion in the Barred Lists

39. In *R (Royal College of Nursing) v. Secretary of State for the Home Department* [2010] EWHC 2761 (Admin), the claimants argued that the scheme established by the 2006 Act did not permit an oral hearing and thus did not comply with Article 6 of the Convention; and did not give individuals placed on a barred list the opportunity for a full merits review on appeal, contrary to Article 6. Mr Justice Wyn Williams, sitting in the High Court, said:

"103. In light of the fact that the Upper Tribunal can put right any errors of law and any material errors of fact and, further, can do so at an oral hearing if that is necessary for the fair and just disposition of the appeal I have reached the conclusion that the absence of a right to an oral hearing before the [ISA] and the absence of a full merits based appeal to the Upper Tribunal does not infringe Article 6 EHCR. To repeat, an

oral hearing before the [ISA] is permissible under the statutory scheme and there is no reason to suppose that in an appropriate case the [ISA] would not hold such a hearing ... Indeed, a failure or refusal to conduct an oral hearing in circumstances which would allow of an argument that the failure or refusal was unreasonable or irrational would itself raise the prospect of an appeal to the Upper Tribunal on a point of law. Further, any other error of law and relevant errors of fact made by the [ISA] can be put right on an appeal which, itself, may be conducted by way of oral hearing in an appropriate case.

104. I am more troubled by the absence of a full merits based appeal but I am persuaded that its absence does not render the scheme as a whole in breach of Article 6 for the following reasons. First, the [ISA] is a body which is independent of the executive agencies which will have referred individuals for inclusion/possible inclusion upon the barred lists. It is an expert body consisting of a board of individuals appointed under regulations governing public appointments and a team of highly-trained case workers. Paragraph 1(2)(b) of Schedule 1 to the 2006 Act specifies that the chairman and members 'must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults'. The [ISA] is in the best position to make a reasoned judgment as to when it is appropriate to include an individual's name on a barred list or remove an individual from the barred list. In the absence of an error of law or fact it is difficult to envisage a situation in which an appeal against the judgment of the [ISA] would have any realistic prospect of success. Second, if the [ISA] reached a decision that it was appropriate for an individual to be included in a barred list or appropriate to refuse to remove an individual from a barred list yet that conclusion was unreasonable or irrational that would constitute an error of law. I do not read section 4(3) of the Act as precluding a challenge to the ultimate decision on grounds that a decision to include an individual upon a barred list or to refuse to remove him from a list was unreasonable or irrational or ... disproportionate. In my judgment all that section 4(3) precludes is an appeal against the ultimate decision when that decision is not flawed by any error of law or fact."

40. The Upper Tribunal considered the *R (Royal College of Nursing)* judgment in *SB v. ISA* [2011] UKUT 404 (AAC). It referred to counsel's submission that the weight the ISA attached to a particular feature was not a matter which the tribunal could redetermine but rather went to "appropriateness", expressly excluded by section 4(3) of the 2006 Act, and said:

"40. We are not able to agree with this submission. We are mindful that we must read section 4(3) in a way that is compatible with the Human Rights Act 1998, and the approach adopted by Wyn Williams J, in our view, is the correct way to proceed. If a decision taken by ISA to place a person on a list, or not to remove him from the list, is disproportionate to the facts as presented to the [ISA], then there is an error of law, and the Tribunal on appeal is entitled, indeed obliged, to direct ISA to remove the person from the list, or remit the matter to ISA for a new decision.

41. The only way in which a Tribunal can form a view as to whether a decision of the [ISA] is disproportionate is to engage in 'a weighing of evidence exercise', not so as to ascertain whether the decision is or is not appropriate (that is a matter solely for the [ISA]) but so as to ascertain whether it is disproportionate and therefore out with the lawful decision making exercise of the [ISA]. It is therefore the totality of the evidence that the Tribunal must concern itself with. In considering the totality of the evidence, it is in our view necessary to look carefully at individual aspects to that

evidence and to form a view whether the conclusion that the [ISA] has placed on the totality of the evidence is disproportionate.

...

45. ... On an appeal, the Tribunal is entitled to examine the evidence and to allocate weight to it and to decide whether the balance has been struck in the right place."

41. The Upper Tribunal's judgment in *SB* was subsequently overturned on appeal. Delivering the lead judgment for the Court of Appeal on 18 July 2012 ([2012] EWCA Civ 977), Lord Justice Maurice Kay explained:

"21. ... The [ISA] assessment was a fair representation of the many indications and counter indications and specific mention was made of the numerous references and the fact that SB had voluntarily sought counselling.

22. This brings me to two particular points. First, there is the fact that, unlike the ISA, the [Upper Tribunal] saw and heard SB giving evidence. However, it cannot be suggested that it was unlawful for the ISA not to do so. It had had at its disposal a wealth of material, not least the material upon which the criminal conviction had been founded and which had informed the sentencing process. The objective facts were not in dispute. Secondly, Mr Ian Wise QC, on behalf of the Royal College of Nursing, emphasises the fact that the [Upper Tribunal] is not a non-specialist court reviewing the decision of a specialist decision-maker, which would necessitate the according of considerable weight to the original decision. It is itself a specialist tribunal. Whilst there is truth in this submission, it has its limitations for the following reasons: (1) unlike its predecessor, the Care Standards Tribunal, it is statutorily disabled from revisiting the appropriateness of an individual being included in a Barred List, simpliciter; and (2) whereas the [Upper Tribunal] judge is flanked by non-legal members who themselves come from a variety of relevant professions, they are or may be less specialised than the ISA decision-makers who, by paragraph 1(2) of schedule 1 to the 2006 Act 'must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults'. I intend no disrespect to the judicial or non-legal members of the [Upper Tribunal] in the present or any other case when I say that, by necessary statutory qualification, the ISA is particularly equipped to make safeguarding decisions of this kind, whereas the [Upper Tribunal] is designed not to consider the appropriateness of listing but more to adjudicate upon mistakes on points of law or findings of fact (section 4(3)).

23. For all these reasons I consider that the complaint that the [Upper Tribunal] did not accord 'appropriate weight' to the decision of the ISA is justified."

COMPLAINTS

42. The applicant complained under Article 6 § 1 of the Convention that the procedure before the ISA did not comply with the requirements of that Article. He also complained that his placement on the Adults' Barred list was disproportionate under Article 8 of the Convention.

THE LAW

A. Article 6 of the Convention

43. Article 6 § 1 of the Convention reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

1. The parties' submissions

44. The Government argued that the impugned proceedings were not in violation of Article 6 § 1 for the following reasons. First, Article 6 in its "civil" limb does not apply to the impugned proceedings. However, in the event it did apply, the applicant's complaint that the ISA's decision was unfair because it did not hold a public hearing was not more than a general assertion, and the applicant has not provided any explanation of how the failure to hold a hearing resulted in any particular unfairness to him. Finally, the Upper Tribunal did have full jurisdiction within the meaning of Article 6.

45. The applicant maintained that because the ISA did not hold a public hearing its decision to place him on the Adults' Barred List was inappropriate. The failure to hold a public hearing also meant that the necessary element of public scrutiny was missing. These problems were not remedied on appeal to the Upper Tribunal because although the Upper Tribunal can and did hold a public hearing in which it hears evidence, it does not have full jurisdiction and is limited to examining mistakes of fact and law by the ISA.

2. The Court's assessment

46. The Court turns to the Government's first objection to the applicant's complaint, which is that Article 6 in its "civil" limb does not apply to the impugned proceedings. That is because a decision barring the applicant, who has retired from teaching, from working with vulnerable adults does not amount to "contestation" over a "right".

47. For Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("contestation" in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (*De Tommaso v. Italy* [GC], no. 43395/09, § 144, ECHR 2017).

48. The Court observes that there has been a shift in its own case-law towards applying the civil limb of Article 6 to cases which might not initially appear to concern a civil right but which may have direct and significant repercussions on a private right belonging to an individual (see *De Tommaso,* § 151, cited above).

49. The Court notes that the applicant's situation in this case bears some similarity to that of the applicant in *De Tommaso* (cited above), who was also subject to restrictions on his daily activities following a criminal conviction. However, it considers that there is no need to decide in this case whether the civil limb of Article 6 applies to the applicant's claim because his application is manifestly ill-founded for the reasons set out below.

50. Insofar as the gravamen of the applicant's complaint is a challenge to the compliance of the ISA with Article 6 § 1, the Court recalls that even where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1" (*Albert and Le Compte v. Belgium*, judgment of 10 February 1983, Series A no. 58, § 29). The Court must therefore look at the proceedings as a whole, including the stages before the Upper Tribunal and the Court of Appeal. Accordingly, insofar as the applicant's arguments concern the ISA alone, they are not convincing, nor do they reflect the Court's usual approach to such cases. The Court therefore turns to examine the procedure as a whole.

51. Dealing first with the applicant's complaint that the lack of hearing before the ISA resulted in unfairness to him, the Court has already underlined that the applicant could have requested the ISA to hold a hearing, and the ISA would have held such a hearing if it had been appropriate (see paragraph 39 above) In any event, there were two hearings before the Upper Tribunal and one before the Court of Appeal. Further, the Court of Appeal concluded that the oral evidence ultimately heard by the Upper Tribunal did no more than confirm the evidence already before the Tribunal and the ISA (see paragraph 24). Therefore, this complaint cannot be sustained.

52. Neither is the Court convinced by the applicant's argument that the lack of a hearing meant that the necessary element of public scrutiny was missing. It recalls that the right to a public hearing is not absolute, in accordance with the wording of the provision "... the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"; (see *Martinie v. France* [GC], no. 58675/00, § 40, ECHR 2006-...). In this

connection the Court takes account of the fact that the Upper Tribunal prefaced its decision with an indication to limit publication of any matter which might identify anyone in the appeal and that the Order of the Court of Appeal expressly ordered that the names of the Applicant's children and of any child involved in the incidents that led to his inclusion on the Barred Lists should not be included in any report of the case, indicating that the domestic courts considered the issues to be of some sensitivity (see paragraph 19).

53. Therefore, the fact that the applicant could have requested a hearing before the ISA; two hearings were held before the Upper Tribunal and one before the Court of Appeal; and the judgments of the Upper Tribunal and the Court of Appeal are publicly available; and taking into account the concerns expressed by the Upper Tribunal about the sensitivity of publishing information contained in the judgments; there has not been any absence of the necessary public scrutiny in this case.

54. Moving onto the applicant's complaint about the limited jurisdiction of the Upper Tribunal, the Court notes that all of the arguments at the domestic level focussed on whether the ISA and subsequently the Upper Tribunal correctly assessed the level of risk the applicant posed to vulnerable adults. The ISA assessed this risk as high. The Upper Tribunal assessed the risk as low; concluded that the ISA's assessment was disproportionate in law and quashed the ISA's decision. This assessment by the Upper Tribunal was not affected by the alleged limited nature of its jurisdiction. In fact, the Court of Appeal quashed the decision of the Upper Tribunal because it considered this conclusion to be "perverse" and found that it had:

> "46 ... failed to give due weight to important factors in the ISA's assessment, such as the transferability of risk from children to vulnerable adults and the level of possible harm, and also the fact that safeguards could not be insisted on."

As the Court of Appeal's judgment makes clear, the Upper Tribunal had made an error of law which was corrected on appeal; the question of limited jurisdiction was not germane to the proceedings. Accordingly, the applicant has not shown that the purported problem of limited jurisdiction resulted in any unfairness to him (see *De Tommaso,* § 170, cited above).

55. The Court also takes note of the fact that in any event, the ISA re-took its barring decision on the basis of the new evidence presented by the applicant to the Upper Tribunal (see paragraph 17 above). Therefore, regardless of the question of the Tribunal's jurisdiction, the flexible approach of the ISA to the proceedings resulted in a substantive re-examination of the applicant's case.

56. Finally, in the absence of any analysis by the domestic courts on this issue in the present case, compelling arguments would need to be advanced for the Court to cast doubt on the conclusion of Mr Justice Wyn Williams that proceedings before the ISA and the Upper Tribunal do not infringe

Article 6 (in *R (Royal College of Nursing) v. Secretary of State for the Home Department* and upheld on appeal (see paragraph 39 above)), in particular as that conclusion replies to precisely the criticisms made by the applicant in this case. No such arguments have been advanced in this case.

57. Accordingly, the Court concludes that this part of the applicant's complaint is manifestly ill-founded.

B. Article 8 of the Convention

58. Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home 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 the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

59. The Government argued that the applicant had not exhausted his domestic remedies and that in the alternative, placing him on the Adults' Barred List was proportionate.

60. The applicant argued that his inclusion on the Adults' Barred List constituted a disproportionate interference with his right to "private and family life" because there was strong evidence that the risk he posed to vulnerable adults was low. He also argued that the list imposed a blanket prohibition permitting no exceptions, and was therefore disproportionate.

2. The Court's assessment

61. The Court considers that it is not for it to examine the level of risk posed by the applicant to vulnerable adults. This is a technical matter which was assessed by the ISA and the domestic courts based on their analyses of expert evidence. It is not the function of this Court to deal with errors of fact or law allegedly committed by a national court or to substitute its own assessment for that of the national courts or other national authorities unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, for example, *García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29, ECHR 1999-I). In other words, the Court cannot question the assessment of the domestic authorities unless there is clear evidence of arbitrariness (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 89, ECHR 2007-I).

62. The Court does not consider that there is any evidence that the decisions of the ISA or the domestic courts were clearly arbitrary. On the contrary, the evidence, and the applicant's arguments concerning the

assessment of the evidence were the subject of careful and in-depth review by the Upper Tribunal and the Court of Appeal and the Court finds the conclusions of the latter compelling. It notes in particular the analysis conducted by the Court of Appeal of the evaluation of risk made by the ISA and the Upper Tribunal and its conclusion that:

> "The ISA had given careful and proper consideration to the risk posed by Mr Harvey".

63. Turning then to the question of the blanket nature of the barring scheme, the Government underline that at no point in the domestic proceedings did the applicant argue that the barring scheme as a whole was disproportionate, although he could have done so. They rely in this respect on the conclusion of the Supreme Court (see paragraph 30 above) that the "all-or-nothing" ground did identify a point of law of general public importance but that it was too late to raise it at this stage. They also highlight the fact that the applicant had the procedural possibility to raise the argument before the Court of Appeal, even though he was successful on a different point before the Upper Tribunal.

64. This Court agrees and accordingly considers that by only raising this argument at a late stage, when it was unlikely to be considered in substance, the applicant did not provide the domestic courts, with the opportunity which is in principle intended to be afforded to a Contracting State by Article 35 § 1 of the Convention, namely the opportunity of addressing, and thereby preventing or putting right, the particular Convention violation alleged against it (see *Peacock v. the United Kingdom*, § 40, 52335/12 [Dec.] 5 January 2016). Indeed, the applicant stated in his application that he "did not consider it relevant" to raise this point in the proceedings before the Upper Tribunal or the Court of Appeal. The Court observes that it may not have been relevant to the applicant at the time of those proceedings. However, it is relevant to the claim before this Court that the applicant now seeks to make.

65. The Court underlines that its conclusion in this case does not mean that a failure to raise a Convention argument at some stage before the lower courts will always mean that an applicant has failed to comply with the rule on the exhaustion of effective domestic remedies. However, the Court takes into account the circumstances of the present case, including the averred decision on the part of the applicant not to raise this argument previously, and that he had legal representation throughout the proceedings and must therefore have been aware of the procedural possibilities.

66. In light of the foregoing, this part of the application must be rejected as inadmissible in accordance with Article 35 §§ 1 and 4 of the Convention.

67. Finally, like the Supreme Court, the Court also considers that the blanket nature of the barring scheme could have raised an issue of importance under Article 8. It therefore recalls that since the time of the

domestic proceedings, the relevant legislation has been amended (see paragraph 28 above). The functioning of the amended scheme may fall to be reviewed by this Court in the context of any future applications. However, the Court notes the fact that a review of an ISA decision may now take place at any time if new information emerges, or there has been a change of circumstances, or it becomes apparent that ISA has made an error, and the applicant is able to benefit from those changes.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 14 December 2017.

Renata Degener Deputy Registrar	Linos-Alexandre Sicilianos President