PROTECTION OF CHILDREN ACT TRIBUNAL

Michael Barnes 0070

V

Secretary of State for Health

Hearing dates

5th, 6th, 7th March 2002

His Honour Judge David Pearl
(President)
Mr Peter Sarll
Mr Stewart Sinclair

DECISION

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1. Michael Barnes appeals under s 4(3) of the Protection of Children Act 1999 against the decision of the Secretary of State for Health to include him in the list kept by the Secretary of State under s 1 of that Act as being unsuitable to work with children. The letter informing him of the decision was dated 4th January 2001.
2. Mr Barnes was included in the s 1 list after consideration by the Secretary of State of his position in the light of s 3(4)(5)(6)(7) of the Protection of Children Act 1999 inserted into that Act by s 99 of the Care Standards Act 2000. These sections read as follows:

(4) Subsections (5) and (6) below apply where –
(a) a relevant inquiry has been held;
(b) the report of the person who held the inquiry names an individual who is or has been employed in a child care position;
(c) it appears to the Secretary of State from the report –
(i) that the person who held the inquiry found that the individual was guilty of relevant misconduct; and
(ii) that the individual is unsuitable to work with children; and
(d) the individual is included in the Consultancy Service Index (otherwise than provisionally) immediately before the commencement of section 1 above.
(5) The Secretary of State shall –
(a) invite observations from the individual on the report, so far as relating to him, and, if the Secretary of State thinks fit, on any observations submitted under paragraph (b) below; and
(b) invite observations from the relevant employer on any observations on the report and, if the Secretary of State thinks fit, on any other observations under paragraph (a) above.
(6) The Secretary of State shall include the individual in the list kept by him under section 1 above if, after he has considered the report, any observations submitted to him and any other information which he considers relevant, he is of the opinion –
(a) that the person who held the inquiry reasonably considered the individual to be guilty of relevant misconduct; and
(b) that the individual is unsuitable to work with children.
(7) In this section –
……
"relevant inquiry" has the same meaning as in section 2B

[this includes an inquiry to which the Tribunals of Inquiry (Evidence) Act 1921 applies]

"relevant misconduct" means misconduct which harmed a child or placed a child at risk of harm and was committed (whether or not in the course of his employment) at a time when the individual was employed in a child care position.

3. These sections were applied by the Secretary of State in the case of Mr Barnes. He was named in the Report of the Tribunal of Inquiry into the abuse of children in care in the former county council areas of Gwynedd and Clwyd since 1974 (Lost in Care) (Sir Ronald Waterhouse, Chairman) that reported on 15th February 2000. On 10th March 2000, the Department wrote to Mr Barnes to tell him that in the light of the findings made by the Tribunal his name had been included on the Consultancy Index on a temporary basis. He was asked for representations. Having considered these representations, the Department wrote again to Mr Barnes on 29th September 2000 confirming his name on the Consultancy Index. On the 4th January 2001 the Department wrote to Mr Barnes informing him that his name was being included in the list established under s 1.

4. A relevant inquiry has been held in this case (the Waterhouse Inquiry), and this inquiry named Mr Barnes in a manner that the Secretary of State decided showed that the inquiry "reasonably considered [Mr Barnes] to be guilty of relevant misconduct." The Secretary of State came to the conclusion, after consideration of representations by Mr Barnes, that he was "unsuitable to work with children."
5. In the appeal before us, Mr Robert Palmer of Counsel represented the Secretary of State, and Miss Vanessa Marshall of Counsel represented Mr Barnes.
6. Our powers are as set out in s 4(3) of the Act. This states:

> If on an appeal or determination under this section the Tribunal is not satisfied of either of the following, namely –
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> (a) that the individual was guilty of misconduct (whether or not in the course of his duties) which harmed a child or placed a child at risk of harm; and
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> (b) that the individual is unsuitable to work with children,
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> the Tribunal shall allow the appeal or determine the issue in the individual's favour and (in either case) direct his removal from the list; otherwise it shall dismiss the appeal or direct the individual's inclusion in the list.

7. The interrrelationship between ss 3(3)-(7) and s 4(3) is an important issue. Mr Palmer submitted at the outset that in ss 3(3)-(7) cases, it was relevant to bear in mind the basis upon which the individual has been listed, and thus to that extent we must treat consideration of s 4(3) on a different footing as compared with other cases.
8. He developed this approach in his closing submissions. He suggested that we should adopt the following approach to the findings of the Waterhouse Inquiry. He said that the findings amount to *very substantial weight* for the following reasons:
   (a) The Waterhouse Inquiry was an inquiry under the Tribunals of Inquiry (Evidence) Act 1921. Accordingly, it had the power (and exercised its power) to require the attendance and examination of witnesses under oath and the production of documents. Parties before the inquiry were entitled to be represented by solicitors and counsel, through whom they were entitled to be cross examined by counsel;
   (b) The Waterhouse Inquiry had a thorough understanding and overview of the culture and practice in North Wales's children's homes during the relevant period, and was uniquely able to assess the evidence of witnesses who appeared before them against that backdrop.
9. We were invited to be very slow to depart from these findings. First, it was submitted that new evidence must be weighed and set in the balance against the very substantial weight of the Inquiry report. Secondly, matters drawn to our attention which were raised before the Inquiry should be given no weight when set against the Inquiry's findings because they have already been taken into account when reaching those findings. Thirdly, evidence which could reasonably have been raised before the Inquiry but which was not raised, should be given little or no weight. Thus, in summary on this aspect of the case Mr Palmer made four points.

- Proper respect is afforded to the status of the Waterhouse Inquiry, and proper weight is given to its findings
- This approach acknowledges the duty upon the Tribunal to satisfy itself under s 4(3) of the 1999 Act
- It fairly allows new matters to be raised where appropriate
- It avoids the piecemeal rehearing of the Waterhouse Inquiry.

10. Miss Marshall's approach, made in her closing submissions, is expressed at the outset of these submissions as follows: "Mr Barnes comes to this Tribunal not seeking to appeal against the findings of the Waterhouse Inquiry nor seeking to disregard the undoubted findings of general abuse…in relation to children in a number of homes across Wales at that time but in an attempt to show that had all the evidence that has been before this Tribunal been before Waterhouse, no such finding in relation to him, would have been made."
11. There is perhaps no more than a difference of emphasis between the two positions. We observe that s 4(4) of the 1999 Act states that "where an individual has been convicted of an offence involving misconduct (whether or not in the course of his employment) which harmed a child or placed a child at risk of harm, no finding of fact on which the conviction must be taken to have been based shall be challenged on an appeal or determination under this section." It is noteworthy that Parliament did not extend s 4(4) so as to include findings made by Tribunals of Inquiry. Thus we are clearly not bound by any specific findings that may have been made by the Waterhouse Inquiry.
12. Miss Marshall does not seek to appeal against the findings of the Inquiry, and she must be correct in this approach. It would be wrong of this Tribunal to enter into any analysis of the procedures adopted by this Inquiry, or indeed any other Inquiry defined by s 2B of the 1999 Act. That is not our function. Rather our function is limited to s 4(3) of the 1999 Act. We agree with Mr Palmer when he submits that the Tribunal must give very substantial weight to findings of the Waterhouse Inquiry. However, we are also of the view that it is incumbent on us to look closely at the evidence that was before the Waterhouse Inquiry (as available to us in the transcripts of the Inquiry) and compare what was available to that Inquiry with what has been made available to us. Thus, our approach, although fairly close to that suggested to us by Mr Palmer and set out in paragraph 9 above, departs from it in a number of respects.
13. Evidence that was not before the Waterhouse Inquiry but has been placed before us must be analysed by us in the same manner as we would analyse any evidence. We do not believe that the right approach is simply to "set [this new evidence] in the balance against the very substantial weight of the Inquiry report." Rather, as "new" evidence we must give it close attention. It may support the Waterhouse findings; it may undermine the findings; it may be neutral. The fact that the "new" evidence could have been raised before Waterhouse but was not is a matter that may be of relevance, depending on the reason why it was not raised.

14. We must emphasise here that we are dealing specifically in the previous paragraph with "new" evidence. If it is simply "old" evidence, in the sense that the very same evidence was before Waterhouse, then attempts to persuade us to give greater weight to that evidence than Waterhouse did, or to ignore that evidence, would be tantamount to asking the Tribunal to act as a court of appeal. This, the Tribunal will not do.
15. It is the duty of the Tribunal therefore to analyse in detail the findings of the Waterhouse Inquiry as they relate to Mr Barnes, and to examine the evidence on which those findings were made. We must then look at the "new" evidence that is before us. We must bear in mind always that the Secretary of State has the burden of proof, and he discharges this burden if he satisfies us on a balance of probability both as to s 4(3)(a) and s 4(3)(b) of the 1999 Act.
16. The burden of proof: It is common ground that s 4 of the Act places the burden of proof on the Respondent. We approach an analysis of the evidence therefore bearing in mind that it is the Respondent whom must discharge the burden.
The Standard of Proof: In **Re H and ors [1996] 1 All ER 1** Lord Nicholls stated:

> "Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability…The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability…the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred."

Lord Hoffman in **Secretary of State v Rehman [2002] 1 All ER 122** at 141 said much the same:

> "It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that he was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has…behaved in some…reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."

We apply these authorities to the issues before us in this case.

17. The Waterhouse Inquiry

We consider first the findings of the Waterhouse Inquiry as they relate to Mr Barnes. The findings appear in Chapter 13, and in particular at 13.56 and 13.57 of the report. [These are reproduced at E4, E5 of the Tribunal bundle to which reference will be made in this decision]. The findings of Waterhouse are as follows:

> "13.56. It is noteworthy that Barnes' main involvement was with children who were being held on a short term basis for assessment or otherwise pending placement and it is reasonably clear that a high proportion of the children at Bersham Hall were seriously disturbed in one way or another. It may be for these reasons that Barnes did not attempt to develop close relationships with the children in his care and saw himself as a disciplinarian. Whatever may have been the reason, however, we are satisfied that Barnes was viewed by some of the residents as a remote, unfriendly and arrogant figure and that he was responsible for instituting, or at least maintaining, what they saw as an oppressive and authoritarian regime at Bersham Hall…
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> 13.57. There does not appear to have been any significant softening in Barnes' general approach as a result of his CQSW course between 1982 and 1984 but it is right to say that the main allegations against him of personal violence pre-date that course. Although we regarded some of the comparatively small number of witnesses who complained of physical assaults by him as unreliable, we do not think that all the allegations have been invented and we are satisfied that he did, on occasions, use excessive force against residents both by way of restraint and in response to impertinence and indiscipline by them".
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> "14.82. [E8]. ..in our judgment, he was better on paper than in practice. He had some defects of personality, which were counterproductive in his relationships with staff and children,…"

18. The Secretary of State in response to the direction of Mr John Reddish dated 1st October 2001, sent to the Tribunal and to Mr Barnes' solicitors full particulars in writing of the instances of misconduct of which it is alleged Mr Barnes was guilty. They were all alleged to have taken place at Bersham Community Home/ Children's Centre. This document appears at Tribunal Bundle A20-21 and is as follows:

19. (1). In 1975 (corrected to 1976 at the hearing), he threw to the floor David Roberts, a 16 year old resident at that home, who was under his care, spat at him, and punched him in the stomach.

    (2). Between March 1974 and July 1974, he punched Timothy Williams, a child resident at that home, who was under his care, on three to four occasions.

    (3). Between March 1974 and July 1974, he punched various boys who were residents at that home and who were under his care.

    (4). Some time between January 1975 and January 1978 he lifted up Keith William, a child resident at that home, who was under his care, by the scruff of the neck, kneed him in the back and threw him into a corridor.

(5). Between June 1980 and August 1980, in the course of his employment…he pushed to the floor Peter Smith (Ellis) an 11 year old resident…who was under his care and punched him on the arms and body.

(6). Between 1 August 1980 and 1 December 1980, …in the course of his employment, he grabbed Kevin Mayer/Maher a 12 year old resident who was under his care around the throat and chest and threw him into an office.

(7). In or about 1985, in the course of his employment, he physically assaulted Darlene Keidel, by pushing her into a wall and banging her head.

(8). In or about 1985, in the course of his employment, he physically assaulted Darlene Keidel by tying her hand and feet on a bed and beating her.

(9). In 1981, in the course of his employment, he physically assaulted Maria Davies, a 12 year old girl by grabbing her by the throat and pushing her arms up behind her back while she was on the floor.

20. We consider each of these alleged instances of misconduct in turn, dealing with them, for convenience, in the order that they have been listed by the Secretary of State in the pleadings. The first allegation concerns David Roberts reproduced above at paragraph 19(1).
21. **David Roberts** made a very serious allegation in his Police Statement dated 27.09.95 [D(5)91]. He says in this statement that when he was 16 years, Michael Barnes pushed him to the ground, pinned him down with his knees, spat at him, punched him in the stomach and slapped him around the face. He was interviewed by a Social Services Officer on 22.10.96 at Gartree Prison when he is reported as saying "That night, about 8 pm, the young people were sitting round a table in the kitchen having supper. Mike Barnes told everyone to go out. He then punched me in the stomach, he hit me, slapped me across the face. I fell to the floor, he kicked me and threatened and growled at me…The other children were watching from outside the kitchen through a window". He made a statement to the Waterhouse Inquiry that his statement to the Police was true and accurate, and that he had not told anyone about this incident before because no one would have believed him. David Roberts gave evidence to the Waterhouse Inquiry and we have read carefully his evidence [D(4)52-53,57-8]. He repeats the same incident in his evidence. It is possible to identify the date this happened because he said this happened when he was at Bersham Hall just before he was sent for Borstal training when he would have been 17. In his evidence before the Inquiry, Mr Barnes said that he could well have restrained David Roberts but certainly not in the manner that he described. He told the Inquiry that he had no recollection of the event at all.
22. Mr Barnes has been able to obtain documents from the David Roberts case file concerning his time at Bersham Hall in October 1976. We have seen a contemporaneous running note written, we suspect, by a social worker dated 12.10.76 to 25.10.76. David Roberts turned 17 on 22.10.76. The writer of these notes has the following entry against the date 25.10.76:

    "Visit Bersham Hall. Informed that David [Roberts] had absconded the previous evening. Police informed. David had been causing a lot of trouble interfering with the fire alarm system etc. To the home – David at home –

alleging illtreatment at Bersham Hall – cigs and money taken from him. Eventually returned to Bersham with Mrs Roberts and sister Tina. Mrs Roberts confronted Mr Burke with David's allegation. These were flatly denied. David insisted on seeing Mike Barnes. Mrs Roberts repeated the allegations to Mr Barnes and she accused Mr Barnes. David then said that it was not Mr Barnes but Mr Hughes. Up to now the allegations were groundless but Mr Barnes assured Mrs Roberts he would look into the matter."

23. This document suggests that the contemporaneous complaint made at the time by David Roberts concerned cigarettes and money being stolen, and that Mr Barnes was in no way responsible. There are other aspects of David Roberts' allegation that we find troublesome. First, he describes Mr Barnes in a manner that we believe, from a photograph we were shown of Mr Barnes at that time, bears no relationship to him. Secondly, he said that Mr Barnes lived in a cottage on the grounds. We have no reason to doubt Mr Barnes' statement to us that he did not live in the cottage on the grounds. Thirdly, he referred to girls being present, when the records show that no girls were in residence at that time.
24. We have of course given great weight to the Inquiry's view of Mr Roberts. At 9.27 [E10], the Inquiry refer to Mr Roberts' evidence relating to a Mr Anglesea. The Inquiry says: "Moreover, the circumstances in which this witness's allegation came to be made leave many lingering doubts, about his motivation." The key passage about Mr Barnes is 13.57 were it is said that the Inquiry formed the view of some of the witnesses who complained of physical assaults as unreliable. The Inquiry does not in terms say that it regards Mr Roberts as unreliable in the context of Mr Barnes, although it does in effect in relation to Mr Anglesea. Neither however does the Inquiry state that Mr Roberts is one of those against whom Mr Barnes used excessive force. It is our view on this allegation, in the light of the new contemporaneous evidence, read together with the general concern that the Inquiry expressed about Mr Roberts in relation to another of his allegations, that the Department has failed to prove on a balance of probability that Mr Barnes attacked Mr Roberts in the manner he alleged in his witness statement set out in paragraph 21 above.
25. We turn now to deal with the allegations made by **Timothy Williams**. The instances of misconduct in the pleadings states that Mr Barnes punched him on three or four occasions. In his evidence [D(5)114] before the Inquiry, Timothy Williams said in answer to questions that one incident happened in the kitchen, that he felt it was serious because of a clenched fist and his intention to hurt. Mr Palmer accepts that the allegations, though serious, are relatively modest and specific. He drew our attention to the fact that Timothy Williams told the Inquiry that "Mike Barnes was one of the members of staff that you knew could be severe in his chastising, and you would avoid him." We have not seen the police statements relating to these allegations, and we have no contemporaneous documentation at all. We must bear in mind at all times that the Secretary of State needs to satisfy us on a balance of probability that these incidents happened. We must not speculate, and we can only respond to evidence. We accept Miss Marshall's submission that there is simply no evidence in support of Timothy

Williams' allegation, and we have formed the view that it is more probable than not that one of the "unreliable" witnesses referred to by the Inquiry in relation to Mr Barnes at 13.57 [E5] is Timothy Williams. Our conclusion in relation to Instance of Misconduct 2 necessarily applies also to Instances of Misconduct 3. We have heard no direct evidence whatsoever in relation to other boys being punched. So far as we can tell neither was there any direct evidence before the Inquiry.

26. We turn now to allegation made by **Keith Williams**. Here, for the reasons that we shall set out, we are satisfied on a balance of probability that the incident as described by Keith Williams happened although not in the dramatic and graphic way Keith Williams would have us believe. In his statement to the Police on 19.04.95, Keith Williams says:

> "I had only been at Bersham Hall for a period of about 2 or 3 months when I got involved in a fight with one of the other lads in care, I am unable to recall who this lad was or anything about him, or what we were fighting about. I do recall that we were fighting by the main entrance door to Bersham Hall, by the offices which are on the right hand side as you enter. I remember Michael Barnes coming out of the office. I think he was the deputy head of Bersham at that time. Michael Barnes lifted me up by my jacket collar from behind and as he did so he lifted his knee up and kneed me in the base of my spine and at the same time he released his grip on my jacket collar. I ended up flying down the corridor and landing in the dining room area which was some 16 to 18 feet away from the entrance door. As a result of this assault by Michael Barnes I suffered great pain for several weeks and had great difficulty in sitting down".

27. It is not entirely clear when this happened but the contemporaneous notes taken by Bryn Williams, the Social Worker (that were not before the Inquiry) would place such an incident as being before 14.10.75. We are satisfied that Mr Barnes separated Keith Williams from a fight, and that Mr Barnes admitted to Bryn Williams when they discussed the matter on 16.10.75 that his knee may well have come into contact with Keith Williams' back. Mr Barnes admitted as much both in his witness statement before us at 6.16 [D(5)28], and in his evidence to us.
28. This incident is in our view separated in time from another incident involving Keith Williams that took place during the late evening of 16.10.75. That second incident is well documented in contemporaneous notes by Bryn Williams [D143] and in letters and a Report written by Mr Barnes to the Director of Social Services [D145-152]. It is noteworthy that Mr Barnes, in his Report on the "second" incident remarks that he is also aware that Mrs Williams and/or Keith have commented on other incidents, which give them cause for concern. We believe that this other incident must have occurred some time prior to 14.10.75. The records show that he was admitted to Bersham Hall on 19.9.75 and absconded on 14.10.75. We are drawn to this conclusion primarily because Mr Bryn Williams' contemporaneous note refers to discussions he had had at that time with Keith's parents on 15.10.75. He wrote: "They alleged assault by Mike Barnes. I refused to be drawn into speculation on this aspect, but merely said that I had known Mike since he moved to Bersham Hall and that he was very much against physical

punishment." Bryn Williams raised the matter with Mr Barnes when he brought Keith back to Bersham Hall on 16.10.75, and Bryn Williams wrote: "With regard to the alleged assault by himself, Mike said that Keith and Gary were fighting and both boys had completely lost control…[T]he situation had demanded immediate action, and Mike took what he felt was appropriate action. He separated the boys for their own safety, and attempted to take Keith upstairs. Keith struggled violently and Mike felt that at some stage his knee may have come into contact with Keith's back." The note then goes on to say "We discussed the events of the previous day." It is clear to us from a reading of these notes that the "first incident" involving Mr Barnes separating two fighting boys happened prior to 14.10.75.

29. It is only the first incident that we are concerned with in this hearing, and we have formed the view that this incident is one of those incidents that the Inquiry was satisfied happened to the extent that that the Inquiry found as a fact that Mr Barnes did use excessive force both by way of restraint and in response to impertinence or indiscipline. Nothing in the documentation that we have seen, or the evidence that we heard, conflicts with the finding of the Inquiry in relation to that matter.
30. We turn now to consider the Instance of Misconduct relating to **Peter Smith (Ellis).** The allegation in this case is of a serious and sustained attack without any provocation whatsoever. In his police witness statement dated 14.06.92 [D(5)156], Mr Smith says:

    "While I was at Bersham I remember that one day I ran away with lad called John McTear. We were caught in Rhyl and we were returned to Bersham. I was taken to the office and Mike Barnes was there. He asked me what I was playing at and I said I wasn't playing at anything. I had been fed up of the place and being in care. I raised my voice and he told me not to raise my voice and stood up. As far as I can remember he then pushed me to the floor. Then after a while he called another member of staff in, his name was Chris…This Chris took me to a secure unit and Mike Barnes followed a short while after. Chris left leaving me alone with Mike Barnes. He never said anything but just started punching me to my arms, head and body. He hit me so hard he knocked me to the floor. As a result of this beating by Mike Barnes I suffered bruising to my body and I had bumps on my head."

31. We have read the transcript of the evidence he gave to the Inquiry [D(4)39], and looked closely at the archive material that was not before the Inquiry, namely the absconsion books, the admission books and the Staff Register of Bersham Hall for the relevant period [D(5),172,173,177,178,179,180] As Miss Marshall rightly draws to our attention, these books show that on only one occasion does it appear that Peter Ellis and John McTear abscond together to Rhyl and that was on 21.08.80. Peter Ellis and John McTear were found in Rhyl on that day in Mrs McTear's house and they said that they absconded because they did not want to be separated. On that occasion, it would seem that Chris was not on duty, but equally important Mr Barnes was on annual leave. If Mr Barnes attacked Peter Ellis in the way described it could not have been after he had absconded to Rhyl.

32. The records show that Peter Ellis absconded with others, including John McTear, on another occasion, namely on 11.6.80, but on that occasion it was to Colwyn Bay. Mr Barnes was on duty at that time, but the records do not show that Chris was on duty. Mr Palmer, in his closing remarks, agrees that Peter Ellis' recollection is confused in relation to whom he absconded with and where he absconded. Accordingly, Mr Palmer submitted that Peter Ellis may well have confused the dates and places because of the passage of time. However, we do not accept this explanation. Peter Ellis appears to know the area well, and it is our view that he would be unlikely to have confused Rhyl with Colwyn Bay especially because from the evidence taken from the book detailing absconders, the reason for going to Rhyl was to visit John McTear's mother who lived there.
33. We are not satisfied on a balance of probability that this event happened. The Waterhouse Inquiry at 13.57 states that they were satisfied that on occasions excessive force was used by Mr Barnes both by way of restraint and in response to impertinence or indiscipline. The allegation by Mr Ellis is an allegation of an unprovoked and brutal attack, rather than an allegation of excessive force. We do not believe that the Inquiry included such an attack in their finding on 13.57. The allegation by Mr Ellis is of a totally different kind altogether. The archive material demonstrates that Mr Barnes was not present when Peter Ellis was returned from Rhyl, and thus if the event happened it was not Mr Barnes who was responsible. On a balance of probability we are not satisfied that the incident happened when he was returned from Colwyn Bay on 11.6.80. Chris does not appear to have been present, Mr Ellis said he had absconded with John McTear only rather than with a group of boys, and he is clear in the Police statement that the absconsion was to Rhyl.
34. **Kevin Mayer/Maher.** As Mr Palmer accepts, the allegation brought by Kevin Mayer is a limited allegation, although it is nonetheless serious. In his Police Statement dated 16.08.94, he says that he has no complaint to make against Mr Barnes, but that he has used unnecessary violence against him which he would classify as "over the top chastisement." In his statement to the Inquiry, he recalled one incident when, after absconsion, Mr Barnes "grabbed me around the throat and threw me over a chair." We have looked at the absconsion book records, and of course these records were not before the Waterhouse Inquiry. All the other evidence relating to Kevin Mayer was before the Waterhouse Inquiry. In accordance with the approach that we have adopted in this decision we have reached the conclusion that the incident referred to by Kevin Mayer happened, although from the absconsion book records it may not necessarily have been immediately after an absconsion, because Mr Barnes does not appear to have been on duty on any of the three periods of absconding. We are reminded that Mr Barnes in his own evidence to the Inquiry accepted that it may have been necessary to admonish Kevin Mayer and accepts that it is possible that he grabbed Mr Mayer to remove him from an incident. [D(3)70]. This admission is sufficient to persuade us that Mr Mayer's allegation is one of the incidents referred to by Waterhouse in their conclusions on 13.57.

35. **Darlene Keidel/ Maria Davies.** In his concluding submissions, Mr Palmer states that "both girls submitted statements only, whose contents are summarised in the report at 13.54. It is clear that the Tribunal did not rely on uncrossexamined statements to support adverse conclusions." Darlene Keidel, in an unsigned witness statement [D(5)227] said that Mike Barnes tied her hand and foot on the bed. It is clear to us that the Waterhouse Inquiry considered Darlene to be an unreliable witness [Waterhouse Report 17.69-17.71] in relation to allegations concerning others, and it is our view that her allegations concerning Mr Barnes play no part in the adverse findings against Mr Barnes in 13.57. We have formed a similar view of Maria Davies, and it is apparent to us that Mr Palmer did not draw attention to Maria Davies' allegations except to remind us that Maria Davies' statement to the police on 22.9.92 [D(5)255) was not untypical, in his view, of Mr Barnes' behaviour towards some children. In this statement she said that she recalled that on the first occasion she went to Bersham Hall the man in charge was Mr Barnes. She said that after her mother left her in the office with him (ie Mr Barnes) "he got me by the neck and I ended up against the wall he held me by the throat". The archive material that we have seen, not of course before the Waterhouse Inquiry, suggests that Miss Davies was admitted first on 20.01.81 [D(5)262] when according to the records Mr Barnes was on annual leave [D(5)268], and on the second occasion when she was admitted on 6.11.84, he had time off in lieu of extra hours worked [D(5)269]. On the second occasion, someone else admitted her [D(5)270]. We do not believe that Mr Barnes was responsible for this, or any of the other allegations [D(5)258;D(5)260] made against him by Maria Davies.
36. **In summary in relation to s 4(3)(a) of the protection of Children Act 1999, we have decided on a balance of probability, that Mr Barnes was guilty of misconduct which harmed a child or placed a child at risk of harm on two specific occasions as set out in paragraph 4 (Keith Williams, although not in the dramatic way as described by him) and paragraph 6 (Kevin Mayer/Maher) of the Instances of Misconduct [A20-21]. We are not satisfied on a balance of probability as to any of the other allegations.**
37. We must now address the other issue that we are concerned with in this appeal, namely, having found as fact evidence of misconduct, is Mr Barnes "unsuitable to work with children." If we are not satisfied that he is unsuitable to work with children, then we must allow the appeal. There will of course be cases where it necessarily follows that a finding of misconduct carries with it the inevitable finding of unsuitability. There will be other cases where a finding of misconduct does not carry with it this consequence. Each case must be looked at on its own facts. It must said that context, in this situation, is very important indeed. We have found proved two allegations of excessive discipline that occurred more than 20 years ago. Mr Barnes had responsibility, on any showing, for some very disturbed youngsters. Miss Marshall draws to our attention the many years of devoted service and the overwhelming respect in which he is held. We have read the witness statements in support of Mr Barnes written by senior practitioners in the field who have all known Mr Barnes and his work over many years. We are

impressed by these testimonials. We have given special weight to the evidence of Robert Meirion Hughes, who gave oral evidence to us. When Mr Hughes wrote his statement he was the Director of Social Services at Denbighshire. He then became the Acting Chief Executive for a brief while and he has now retired. He writes at paragraph 8 of his statement [D(2)36] that he was always impressed with Mr Barnes' energy, and his commitment to promoting good standards of care. He says that Mr Barnes has always striven to improve standards and raise the profile of residential child-care. He has never had cause to be concerned about his conduct and regards Mr Barnes as a person of integrity. Mr Jevons [D(2)42] speaks of Mr Barnes as a hard working manager with an overriding commitment to the interests of children in care. Mr John Thomas, a former Director of Social Services, says [D(2)46] that Mr Barnes always worked to the highest standards of integrity and that he never had any reason to be concerned about his performance as an Officer in Charge or as a Principal Social Worker employed by Clwyd.

38. We have of course considered the comments made by the Waterhouse Inquiry at 14.82 [E8] referring to Mr Barnes' management at Chevet Hay. In their view, Mr Barnes was better on paper than in practice, that he had some defects of personality which were counterproductive in his relationships with staff and children, and that he appeared to condone the activities of Marshall Jones to some extent during his period in charge. The Inquiry recognised that Mr Barnes, at that time, had great difficulties in securing an adequate response from headquarters when he sought assistance in dealing with his problems. The Waterhouse Inquiry was not of course considering the issue of unsuitability to work with children. In any event, we do not read 14.82 as suggesting anything of the sort. We are therefore faced with the difficult task of assessing the suitability of Mr Barnes today to work with children. Whether he intends to do so or not is not relevant. We have placed in the balance our findings as to misconduct, when they happened and the context in which they occurred, as against his career as a social worker extending over many years as placed before us by a number of senior public servants in the field who know Mr Barnes well and can speak of his work to us. It is our view that the Protection of Children Act 1999 obliges us to adopt a proportionate response to our findings of misconduct. In this case, having heard all that has been said on behalf of Mr Barnes, and taking into account the two findings of misconduct, **we are not satisfied on a balance of probability that Mr Barnes is unsuitable to work with children.**

Accordingly, and for the reasons set out in detail, we allow the appeal and direct the removal of the name of Mr Michael Barnes from the Protection of Children Act list.

His Honour Judge David Pearl
(President)
Mr Peter Sarll
Mr Stewart Sinclair

Dated 22nd March 2002