IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001108-V**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 239 (AAC)**

ON APPEAL FROM:
Appellant: GR
Respondent: Disclosure and Barring Service

Between:

GR

Appellant

- v –

DISCLOSURE AND BARRING SERVICE

Respondent

Before: **Upper Tribunal Judge Rupert Jones**
Tribunal Member Rachael Smith
Tribunal Member Dr Elizabeth Stuart Cole

Hearing date: 10 July 2024
Decision date: 5 August 2024

Representation:
Appellant: Appeared in person
Respondent: Ashley Serr, Counsel instructed on behalf of the DBS

DECISION

The decision of the Upper Tribunal is to dismiss the appeal of the Appellant.

The decision of the Disclosure and Barring Service taken on 29 April 2022 to include the Appellant's name on the Children's and Adults' Barred Lists did not involve any mistake on a point of law nor was it based upon material mistakes in findings of fact. The decision of the DBS is confirmed. This decision is given under section 4(5) of the Safeguarding Vulnerable Groups Act 2006.

The Upper Tribunal has already made anonymity orders on 10 October 2022 directing that there is to be no publication of any matter or disclosure of any documents likely to lead members of the public directly or indirectly to identify the Appellant, witnesses, complainants or any person who has been involved in

the circumstances giving rise to this appeal. The anonymity order and directions were made rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Introduction

1. The Appellant (also referred to as 'GR') appeals to the Upper Tribunal against the decision of the Respondent (the Disclosure and Barring Service or 'DBS') dated 29 April 2022 to include her name on the Children's Barred List ('CBL') and vulnerable Adults' Barred List ('ABL') pursuant to paragraphs 3 and 9 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 ("the Act").

2. Permission to appeal to the Upper Tribunal ('UT') was granted by the Judge on 9 January 2024 in respect of the grounds raised by the Appellant in the notice of appeal and at that permission hearing. In summary, the grounds of appeal were that each of the two findings that the Appellant committed relevant conduct were based on mistake of facts and there was a mistake of law– the DBS made a disproportionate decision to bar her from working with children and vulnerable adults.

3. We held a remote oral hearing of the appeal by CVP video software on 10 July 2024. The Appellant appeared and participated in person by giving oral evidence and making submissions.

4. The Respondent (the DBS) was represented at the hearing by Mr Ashley Serr of counsel. We are grateful to him and the Appellant for the quality of their written and oral submissions.

The Background

5. In broad summary, the background is as follows (page references are references to the hearing bundle prepared by the DBS).

6. GR was at the material time a residential childcare worker. She was experienced having been a childcare worker for 21 years and well qualified for the role.

7. In January 2019 she began work for X services for children as a residential therapeutic childcare worker at a looked after children's home ("the Home"). The Home housed children and young persons who were looked after by X on behalf of the local authority. The children were highly vulnerable being previously subject to neglect or abuse.

8. In November 2020, an incident occurred which led to GR receiving a first and final written warning from X services. The warning is contained in a letter dated 10/11/20 at pp72-73. The notice set out X's finding that while she was working at the Home GR allowed J, a young girl and looked after person, to use GR's mobile phone; gave J a gift in the form of a toy (2 harry potter wands and a monkey); bought J food (fish and chips) at the same time she bought some food for colleagues; dropping food to a member of her own family whilst

on shift and with a young person in her car (the allegation was that she dropped some food off at her (GR's) house for her daughter while J was in the car with her).

9. It is of note that there was a further allegation that GR had allowed J to visit GR's home address. This was found by X not to be substantiated due to insufficient evidence. The warning letter does state however that "it was clear that you had shared so much personal information with the young person in question that she was able to give detailed information about parts of your home such that suggested that this could have been the case, which clearly demonstrated that you had inappropriately shared personal details with her".

10. The matters found proven were considered serious breaches of X's policies and procedures. Principally because it was a blurring of professional boundaries and conduct which may have given the impression of preferential treatment to the child or others.

11. The outcome was a final written warning, not dismissal, because GR's actions were not maliciously motivated, she was genuinely remorseful, she did not intend J to form an attachment to her and she was aware that any recurrence would result in dismissal.

12. GR was also required to undertake training. She was given the right of appeal against the final written warning, which she did not exercise.

13. GR then moved jobs to work at a different Home that was operated by X services so she remained X's employee.

14. On 9 March 2021 GR had a regular supervision session with her supervisor HP. Within the notes of the session a service user, N, is referred to.

15. N was a very vulnerable then 16-year-old looked after child. His care plan noted that he was on a SEN/EHCP [Statement of Education/Education, Health and Care Plan]. The plan also noted under 'what I might need help with', that:

"N suffers with anxiety which he has been offered a CAMHS [Child and Adolescent Mental Health Services] consultation where it was identified there were underlying issues and was also referred to Eating Disorder. N has also been prescribed anti-depressant medication by his GP for his anxieties but hasn't taken any previously. N may need support with this and supporting him to learn what helps him to regulate such feelings. N may also need support with eating healthy and nutritional meals and to support in support from Eating Disorder specialists"- p. 178.

16. The notes of 9 March 2021 supervision session state "N- [GR] is building a positive relationship with N. N is a pleasure to be around and understands

why he is at the home because of his ways. N girlfriend being pregnant has made him more responsible and is thinking of the future"- p.187.

17. On 14 April 2021 another allegation of misconduct arose. This was an allegation by N. The allegation was that he had gone to GR's home and smoked cannabis she had given him. The allegation was made by N to another employee - PS - on 14/4/21 -p.57.

18. On 15 April 2021 the allegation was discussed with the county's Local Authority Designated Officer ('LADO') and a LADO form completed. LADO updated X services that the allegation had been referred to police but that this did not meet their threshold for investigation at this stage. LADO confirmed that and internal investigation was the next course of action and that an update be given following the outcome.

19. GR (who was in her notice period having resigned from her employment previously on 8 April 2021 due to health and personal reasons) was suspended from work.

20. A disciplinary investigation report was produced dated 20 April 2021 by an employee of X services, KH - p.48-55. Various pieces of evidence were considered including the logs that showed that GR did take N out on trips in the car although there is no detail as to what purpose the trips were for. On one occasion GR was dropped off at a bus stop close to her home by an ex-staff member and N was present in the car. The ex-staff member confirmed this.

21. The report also attached a note taken on 19 April 2021 with N and HP, the deputy manager, of a discussion between her and N -p.56. N described GR's house (lounge on the right, kitchen on the left, garden with shed and a wall, stairs in front of the entrance). N confirmed he smoked cannabis there after GR had driven him to her house. N told HP that GR's daughter and daughter's boyfriend was present. He said he smoked the drugs in the garden. N said to HP that on the way back to the Home GR asked N to tell PS, if he asked, that they had been out for a long drive.

22. A disciplinary hearing took place on 20 April 2021 with GR and CV - the Home manager. GR denied the allegation. The logs noted that GR had been on regular car journeys with N. N was able to give a description of the layout of GR's home.

23. On 22 April 2021 GR was sent a letter stating that she would have been dismissed from her employment on the basis that the allegations concerning her conduct towards N were substantiated. Although the letter states that she would have been dismissed had she not already been in the currency of her notice period, this may amount in law to a dismissal as the notice period was cut short with immediate effect-p.63. In any event nothing turns on the legal effect of the 'dismissal' letter.

24. X services referred GR to the DBS on 29 April 2021-p.36-39

Barring Procedure

25. On 29 May 2021 the DBS wrote to GR notifying her of the referral -p.27-28. A minded to bar letter was sent to GR on 2 March 2022- pp30-34. The allegations of relevant conduct were that:

• on 2/11/20 she failed to follow strict policies and procedures which resulted in allowing J to use her mobile phone to listen to Spotify; gave her toys; purchased food for her using her own personal money; dropped food off for a family member with J in the car.
• On an unspecified dated prior to 14/4/21 while working at the Home and supporting N a resident aged approximately 16, took him to her house and supplied him with cannabis.

26. The letter states inter alia:

‘Between November 2020 and April 2021 there appears to have been an escalation of behaviour towards those children you cared for. The evidence we have shows that you acted irresponsibly and recklessly towards J and N. It is unknown if this behaviour has been addressed and therefore you pose a risk of being unable to follow policies and procedures in any job in regulated activity, resulting in the likelihood of repetition or physical and emotional harm in a regulated setting. It would be reasonable to conclude that the level of harm will be high if displayed towards them and therefore it may be appropriate to include your name in the CBL.’

27. In respect of the issue of transferability of her relevant conduct to inclusion on the ABL, it stated

‘Although your behaviour was demonstrated towards children it is likely that you will work with vulnerable adults and we have significant concerns that by being unable to follow policies and procedures this may transfer towards them. Therefore having considered the same concerns in relation to vulnerable adults it may be appropriate to include your name in the adults barred list.’

28. Submissions were invited from GR in writing. GR made written submissions on 19 April 2022. She denied the allegation of supplying cannabis stating that the date on which it was supposed to have happened was unclear, the report stated that the allegation could not be founded by evidence, no other staff members witnessed evidence of cannabis use by N and she has a 21 year unblemished record in the industry-p.75-78.

The Respondent's barring decision dated 29 April 2022

29. The Final Decision Letter from the Respondent dated 29 April 2022 notified the Appellant that it was including her on the Children's and Adults' Barred Lists p.91-96. The allegations of relevant conduct were both found proven.

30. The two findings of relevant conduct made by the DBS are as summarised above and specifically:

    (i) On 02 November 2020 whilst working at X supporting J, a resident, you failed to follow strict policies and procedures which resulted in allowing J to use your own personal mobile phone to listen to Spotify; gave her toys, purchased food for her using your own personal money and dropped food off for a family member with J in your car ("Finding 1").

    (ii) On an unspecified date prior to 14 April 2021, whilst working at X and supporting N a resident aged approximately 16, you took him to your home and supplied him with cannabis which he smoked ("Finding 2").

31. The DBS went on to conclude GR's conduct amounted to relevant conduct within the meaning of the Act, and that, in all the circumstances, it was appropriate and proportionate to include her on the Children's and Adults' Barred Lists.

32. On 21 July 2022 GR appealed the barring decision to the Upper Tribunal.

33. By a decision made on 9 January 2024 and promulgated on 23 January 2024, the UT granted permission to appeal. The basis for the grant of permission was that based on what GR told the UT at the oral permission hearing ('OPH'), it was arguable that the DBS had in fact made mistakes of fact in concluding that she had committed the alleged relevant conduct towards service users J and N.

Appellant's Grounds of Appeal

34. In her Grounds of Appeal (the "Reasons for Appealing" section) enclosed with her notice of appeal, the Appellant submitted that the barring decision was based on material mistakes of fact or mistakes of law (the decision was irrational and/or disproportionate which amounts to an error of law). She stated:

    'I would like to appeal the decision made to include my name on the safeguarding vulnerable groups children's and adults' barred lists as the allegations were unsupported and there was no evidence of any proof of wrongdoing. In light of the recent report it has been evidenced that X services for children are under investigation for their treatment towards staff and the way the company was run.

I have worked in the care industry since I was a school leaver for 25 years. I have never had any allegations made against me, in fact all of my references I have ever received have been outstanding.

I believe the decision to bar me is unfair, unsupported and has ruined my career which I thoroughly enjoy, thrive in and have worked hard to achieve to get where I am.

Please find some of the most recent references to support my appeal.'

35. The Appellant provided character and professional references in support of her appeal.

36. On 9 January 2024 the Appellant was granted permission to appeal in respect of her grounds of appeal. The Upper Tribunal refined the grounds in relation to the alleged mistakes of fact when granting permission to appeal following the OPH on 9 January 2024. During the OPH, the Appellant challenged each of the findings of relevant conduct. She submits that each of the two findings was based on a mistake of fact. She relied in part on the representations she made in this regard to the DBS prior to the barring decision – see her letter dated 19 April 22 and enclosures at pages 75-90 of the bundle.

37. In relation to both findings of relevant conduct - the UT took the view that it was arguable that DBS made a mistake of fact and there was a mistake of law– the DBS made a disproportionate decision to bar.

The evidence in the appeal

38. The DBS relied on written evidence from witnesses and notes or transcripts of interviews contained in the bundle of evidence it filed and served which contained 224 pages. It included all the evidence relied upon by the DBS in making the barring decision and in defending the appeal as well as the material provided by the Appellant.

39. The witnesses relied on by the DBS included those from the X Services, and colleagues or managers from the two Homes GR worked in together with the record of interviews conducted by her employer with GR and statements taken from her colleagues.

40. As we note, none of these witnesses on behalf of the DBS made formal witness statements containing statements of truth, nor gave oral evidence nor were cross examined – their evidence was therefore untested hearsay. This is a matter to take into account when considering the weight it is to be given and its reliability.

41. This was the evidence relied upon by the DBS in making the barring decision and in defending the appeal. The Appellant relied upon her written

submissions and statements sent to the DBS and oral evidence given to the Tribunal together with her professional / character references.

42. The relevant evidence [with paragraph numbers and page numbers in square brackets] is referred to in the discussion section below. Therein, we make findings of fact and draw conclusions based upon it.

The Appellant's oral evidence

43. The Appellant relied upon her notice of appeal and the submissions of fact she made at the OPH. She supplemented this with her evidence of fact given orally at the appeal hearing before us which was consistent with the evidence she gave at the OPH.

44. The Appellant was cross examined during the hearing and denied the allegations of relevant conduct. It goes without saying that all subsequent written and oral evidence was not available to the DBS when making its barring decision.

45. Again, we make findings of fact in relation to this evidence in the discussion section below and give our reasons therefor.

46. In summary, we have come to the conclusion that the Appellant's oral evidence was not substantially reliable nor credible for the reasons we give within the discussion section.

47. Despite our findings that the evidence given denying the allegations is not reliable nor credible in relation to the key issues in dispute, we summarise the Appellant's oral evidence in chief as follows.

Finding 1

- She had been working at the home and took J out in the late afternoon / evening in her car and stopped and got the two staff dinner from the fish and chips shop on the way back. J had not had tea at the Home so she bought her some food from the fish and chips shop. It was agreed by the duty manager that it would be fine for her to pay for J's food out of J's pocket money and this could be deducted from the pocket money later that evening. She got the food – and when she got back to the Home in boot of the car she had a box of old Harry Potter toys that she was going to get rid of by giving them to charity. J took a Harry Potter plastic wand out and asked if she could hold it and she said it was fine. She then dished up the food and had to sort out the money so J could pay her back for food she had bought.

- She mentioned the wand that J had on her to the staff and was sure that J was allowed to keep a Harry Potter wand. She agreed with the other staff that she would retrieve the wand from J while J was asleep. An incident happened just before bed. She was ready to sign out but got into an incident with one of the children who lived at the address. By the time it was written

up in the paperwork it was late – she normally finished at 10pm. She then said all she had to do was to get all the money tomorrow – the food did not come out her budget. The money for the staff's meals came out of the house budget and that was fine. She notified the others that J said that still had the wand and J then went to fall asleep – and she intended that the night staff get the wand off J while she was asleep.

- The next day the manager called in and said it had been reported that she had bought food out of her own pocket and gave J toys and was not allowed to give things. She explained that everything was in the book for what happened with the incidents and thought she had cleared it up and got the wand back off J. The manager explained she could not give J toys and she went through to the main office and explained that there was no problem. It was decided by the main duty manager that there was nothing malicious and she thought it had all been dropped and nothing else would come of it. She could not understand why it was later pursued.

- J did not use her phone to access Spotify / J only and simply chose the music from the phone and it went through the stereo in the car.

- When she looks back, she should have fought what her former employer was saying about the incident but she was quite new to the job and the company never supported the staff. She felt pressured during the disciplinary meeting and just accepted the allegation. She accepted that she would take the extra training - and that was not an issue – and updated her training. She is clear that at the time she said to the employer that she did not do anything wrong and she did not buy J food with her own money and it was from the house budget. There was no giving of a toy. She told the employer that J had taken the wand. She had used her own car for the trip as the employer had asked staff to use personal cars rather than company cars. Everyone was aware and noted to remove the wand from J. J was a child with severe autism and attachment problems so they would know that they could not just go in and take it off her. They had to ask night staff to remove it and put in the office.

- She did say this all in the meeting but felt pressured to accept the allegations and didn't have any support from the managers to try and show them there was no problem.

- There was no dropping off food for a family member on the trip and she did not understand and J had never met her daughter or came to her house. However, the company would allow members of staff to come to the Home and they had met her daughter before. She was not trying to blame others but it was just so much about the company – she was not seeking to engage in tit for tat but trying to explain what was going on.

Finding 2

- She was present when N arrived at the Home and she was specifically told that N was not allowed to be supervised one to one and needed 2:1 care as he made up accusations. The company did not let staff supervise at 2:1 ratios and made them supervise children at 1:1. The children were from difficult backgrounds and put into care.

- She did build a relationship with N and built a working relationship and she was his main carer at the time. They did a lot of work around his girlfriend being pregnant and she went with him to supermarkets and looked at baby food and clothes There was quite a good relationship with N.

- Another boy moved in. When N came the first day he gave her his materials for smoking cannabis and said while she was there he would not smoke cannabis. She had done work with him to stop him smoking cannabis but another boy moved in who was told could smoke cannabis on the grounds. He got N into smoking into cannabis. She reported multiple times that this was happening.

- By April 2021 she had bad personal problems at her own home and had to leave work and she had to care for her own children. She therefore gave in her notice to the company and was signed off sick and depressed by the doctor. It was nothing to do with work but the company came back to her and said they did not accept her doctor's note and they said would dismiss her for gross misconduct unless she worked out her notice. She said she was depressed and could not work and went off sick. While off sick she received the accusation relating to N. One of colleagues working there spoke to her and she said she had spoken to N and he accepted he made up these accusations and he confided to her colleague that he was annoyed she had left all of sudden and that she had gone off sick.

- N admitted to her colleague that he made up all the accusations. She offered him the care at the time but thinks N may have been upset because she left without saying goodbye to him.

- There was no evidence of N coming back to her home and he did not. He did not come back to her home high on cannabis or smoke cannabis there. All staff said he was fine and not under the effects of cannabis. Another member of staff who dropped her off at home one night and had N in the car and this maybe where he came up with the allegation that he had been to her home. She did not take him to her home.

- The allegation was just his word against hers and she disputed it. She told the company that the car was tracked and dashcams and could track where

they had been and asked them to check the tracker and they refused – this would have proved her innocence that she did not take N to her home.

- It was just a case of her feeling they were like pushing her out of the company and they were angry that she left without working her notice but she did not ask to put in any official complaint about the company and the way they treated the staff and leaving them 1:1 rather than 2:1 which was meant to be. She feels finding the misconduct proved against her was a get out clause by the company to stop her from leaving without working her notice.

- There's no concrete evidence and N did not go to her house nor come back from any drive they went on stoned – or under the influence of cannabis and every member of staff agreed and no one witnessed that. There were no findings to prove that N went to her house or came back stoned after being out with her in the car. The staff could have checked the dash cam (dashboard camera) and seen the route taken and it was out towards Reading.

- There was no evidence to say that she had done any of this. She had worked in care since she was 15 years old and it was not in her nature and not something she would do – not put a child in care at risk and not put her own children in risk. She referred to her character references.

- She did not take N to her own home – the tracker would prove this and she never dropped him at her house. When he was in the car once and she was dropped off by another member of staff not at her house but a bus stop near and not at her front door so N could not see where her house was so N never saw her house. This was on a completely separate night to the one in question and N never came to her house.

Proportionality

- The DBS Barring had negatively affected her life and she had been working in care since 15 and did not know anything else. It's one of the worst feelings in the world and someone to make the false accusation. She has 2 children of her own with autism and schizophrenia and that there is nothing else she wanted to do with her life other than care.

- The company was awful and she did contact the BBC as they did a documentary about him and it. Some of the houses they operated got shut down for neglect and J got neglected and documentary highlighted the company was awful. Staff were there to do a job and help look after children in a difficult situation in their lives.

- She worked full time and now works full time in housing association. Everything she had done in her whole life was in care and the character references demonstrate she was caring. As well as working as she had done a lot of work with her referees and looked after those who can't get carers and took one of her referees on holiday who is a wheelchair user with cerebral palsy. She used to go to her house at night and put her to bed and it had a massive impact on her as she has not been able to do take on that caring role since the barring decision but this person is one of the character references and she changed her life.

  She wants to clear her name and work in care.

Cross examination

48. The Appellant was cross examined by Mr Serr in relation to all of her evidence. He suggested that both of the findings of relevant conduct were accurate and there was no mistake of fact. He put each of the relevant pieces of documentary evidence to her and suggested her account was neither reliable nor truthful. She denied all the allegations put to her in cross examination.

49. Nonetheless, we found her denials to be unreliable and lacking credibility for the reasons we give in the discussion section below.

Law

50. The full relevant statutory provisions and authorities are set out in the Appendix to this decision. Therefore, we only draw attention to the most relevant law at this stage.

51. There are, broadly speaking, three separate ways under Part 1 of Schedule 3 to the Act in which a person may be included in the CBL or ABL, which can generally be described as: (a) Autobar (for Automatic Barring Offences), (b) Autobar (for Automatic Inclusion Offences) and (c) Discretionary or non-automatic barring.

52. The third category applies in this case. The appeal concerns discretionary barring where a person does not meet the prescribed criteria (has not been convicted of specified criminal offences), but paragraphs 3 and 9 of Schedule 3 to the Act applies.

53. Paragraphs 3 and 9 of Schedule 3 to the Act, set out the provisions in relation to inclusion on the CBL or ABL. It provides that, following an opportunity for and consideration of representations, DBS "must" include a person on the List if: (i) it is satisfied that they have "engaged in relevant conduct"; (ii) it has reason to believe that they have been (or might in future) be "engaged in regulated activity relating to children/vulnerable adults"; and (iii) it is satisfied that it is "appropriate" to include them.

54. Under paragraph 3(3) or 9(3) of Schedule 3 the DBS must include the person in the children's or adults' barred lists if:
(a) it is satisfied that the person has engaged in relevant conduct, and
(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 / vulnerable adults, and
(b) it is satisfied that it is appropriate to include the person in the list.

55. An activity is a "regulated activity relating to children" for the purposes of paragraph 2(8)(b) of Schedule 3 if it falls within one of the subparagraphs in paragraph 1 of Schedule 4 to the Act; that provision broadly defines "regulated activity" and includes, in relation to children, "any form of teaching, training or instruction of children, unless the teaching, training or instruction is merely incidental to teaching, training or instruction of persons who are not children".

56. 'Relevant conduct' is defined under paragraphs 4 and 10 of Schedule 3 to the Act as set out in the Appendix. Paragraphs 4(1) and 10(1) of the same, sets out the meaning of "relevant conduct". It includes: (i) "conduct which endangers a child / vulnerable adult or is likely to endanger a child / vulnerable adult"; (ii) "conduct which, if repeated against or in relation to a child / vulnerable adult, would endanger that child / vulnerable adult or would be likely to endanger him". Paragraphs 4(2) and 10(2) of the same, provides that conduct "endangers a child / vulnerable adult if" among other things it: (i) "harms" a child / vulnerable adult ; or (ii) puts a child / vulnerable adult "at risk of harm".

57. Section 4 of the Act provides:

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

(7) If the [Upper] Tribunal remits a matter to [DBS]6 under subsection (6)(b)–
(a) the [Upper] Tribunal may set out any findings of fact which it has made (on which [DBS] must base its new decision); and
(b) the person must be removed from the list until [DBS] makes its new decision, unless the [Upper]1 Tribunal directs otherwise.

58. As underlined above, an Appellant may appeal against the barring on the ground that the DBS has made a mistake:

a. "on any point of law" (section 4(2)(a) of the Act).
b. "in any finding of fact which it has made and on which the decision … was based" (section 4(2)(b) of the Act).

59. However, for these purposes "the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact" (section 4(3))

60. The only issue in this appeal therefore is whether there was a material mistake of law or fact in including the Appellant on the CBL and ABL.

61. In *Khakh v Independent Safeguarding Authority* [2013] EWCA Civ. 1341 the Court of Appeal stated:

"18 …A point of law…includes a challenge on Wednesbury grounds and a human rights challenge. But it will not otherwise entitle an applicant to challenge the balancing exercise conducted by the ISA [now DBS] when determining whether or not it is appropriate to keep someone on the list. In my view that is plain from traditional principles of administrative law but in any event it is put beyond doubt by section 4(3) which states in terms that the decision whether or not it is appropriate to retain someone on a barred list is not a question of law or fact. It follows that an allegation of unreasonableness has to be a Wednesbury rationality challenge i.e. that the decision is perverse."

62. At para 23 the Court said of the DBS duty to give reasons:

"23.I would accept that the ISA must give sufficient reasons properly to enable the individual to pursue the right of appeal. This means that it must notify the barred person of the basic findings of fact on which its decision is based, and a short recitation of the reasons why it chose to maintain the person on the list notwithstanding the representations. But the ISA is not a court of law. It does not have to engage with every issue raised by the applicant; it is enough that intelligible reasons are stated sufficient to enable the applicant to know why his representations were to no avail."

63. Despite the exclusion of 'appropriateness' from the Upper Tribunal's appellate jurisdiction, it is "empowered to determine proportionality" - *B v Independent Safeguarding Authority [2012] EWCA Civ. 977* - see the appendix for further details.

64. In *CM v DBS* (2015) UKUT 707 the following proposition was cited with approval:

‘We therefore reject the argument that our jurisdiction is limited to what is often termed *Wednesbury* unreasonableness – that the actions of ISA are so unreasonable that no reasonable body of a similar nature could have reached that decision. The Upper Tribunal will have in all cases the duty to ensure that proper findings of fact are made. This will include both considering any alleged factual errors in the ISA decision and also whether ISA has both identified all relevant evidence and given an appellant a chance to make representations on all relevant evidence. Conversely ISA must ignore irrelevant evidence. In cases of dispute it will be for the Upper Tribunal (and of course the courts on further appeal) to indicate what is relevant.’

65. The jurisdiction for the Tribunal to consider a challenge based on a mistake of fact was considered in *PF v DBS* UKUT [2020] 256 AAC where a three-judge panel stated at [51]:

a) In those narrow but well-established circumstances in which an error of fact may give rise to an error of law, the tribunal has jurisdiction to interfere with a decision of the DBS under section 4(2)(a).
b) In relation to factual mistakes, the tribunal may only interfere with the DBS decision if the decision was based on the mistaken finding of fact. This means that the mistake of fact must be material to the decision: it must have made a material contribution to the overall decision.
c) In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose.
d) The tribunal has the power to consider all factual matters other than those relating only to whether or not it is appropriate for an individual to be included in a barred list, which is a matter for the DBS (section 4(3)).
e) In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it.
f) The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS’s factual findings in matters that engage its expertise. Matters of specialist judgment relating to the risk to the public which an appellant may pose are likely to engage the DBS’s expertise and will therefore in general be accorded weight.
g) The starting point for the tribunal’s consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker.

66. The Court of Appeal has further considered the mistake of fact jurisdiction recently in *DBS v RI* [2024] EWCA Civ. 95 and confirmed that *PF* represents the correct interpretation of the UT’s fact-finding jurisdiction at [28]-[29]:

‘28.I agree with the observation that there is no longer any point of legal principle raised by this appeal which requires determination by the court, but I do not accept that the parties are in agreement as to the interpretation and scope of the mistake of fact jurisdiction. Far from it. In their further supplementary skeleton argument on behalf of *RI* Mr Kemp and Mr Gillie write:-

> "The Upper Tribunal is entitled to make a finding that an appellant's denial of wrongdoing is credible, such that it is a mistake of fact to find that she did the

impugned act. In so doing, the Upper Tribunal is entitled to hear oral evidence from an appellant and to assess it against the documentary evidence on which the DBS based its decision. That is different from merely reviewing the evidence that was before the DBS and coming to different conclusions (which is not open to the Upper Tribunal)."

29.That is in my view an accurate description of the mistake of fact jurisdiction and corresponds with the guidance given by the Presidential Panel of the Upper Tribunal in *PF,* approved by this court in *Kihembo.'*

67. *PF* should also be read in the light of the judgment in *DBS v AB* [2021] EWCA Civ 1575 where Lewis LJ, for the Court of Appeal, stated at [43] and [55]:

'43. By way of preliminary observation, the role of the Upper Tribunal on considering an appeal needs to be borne in mind. The Act is intended to ensure the protection of children and vulnerable adults. It does so by providing that the DBS may include people within a list of persons who are barred from engaging in certain activities with children or vulnerable adults. The DBS must decide whether or not the criteria for inclusion of a person within the relevant barred list are satisfied, or, as here, if it is satisfied that it is no longer appropriate to continue to include a person's name in the list. The role of the Upper Tribunal on an appeal is to consider if the DBS has made a mistake on any point of law or in any finding of fact. It cannot consider the appropriateness of listing (see section 4(3) of the Act). That is, unless the decision of the DBS is legally or factually flawed, the assessment of the risk presented by the person concerned, and the appropriateness of including him in a list barring him from regulated activity with children or vulnerable adults, is a matter for the DBS.

55. Section 4(7) of the Act provides that where the Upper Tribunal remits a matter to the DBS it "may set out any findings of fact which it has made (on which DBS must base its new decision)". It is neither necessary nor feasible to set out precisely the limits on that power. The following should, however, be borne in mind. First, the Upper Tribunal may set out findings of fact. It will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter. By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to a marriage being a "strong" marriage or a "mutually-supportive one" may be more of a value judgment rather than a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third "finding" would certainly not involve a finding of fact.
Secondly, an Upper Tribunal will need to consider carefully whether it is appropriate for it to set out particular facts on which the DBS must base its decision when remitting a matter to the DBS for a new decision. For example, an Upper Tribunal would have to have sufficient evidence to find a fact. Further, given that the primary responsibility for assessing the appropriateness of including a person in the children's barred list (or the adults' barred list) is for the DBS, the Upper Tribunal will have to consider whether, in context, it is appropriate for it to find facts on which the DBS must base its new decision.'

68. Therefore, the UT has a full jurisdiction to identify and make findings on the evidence heard as to whether there has been a mistake of fact. An

assessment of risk however is generally speaking for the DBS, as the expert assessor of risk, and what is and is not a fact should be considered with care.

69. Only if a risk assessment is made by the DBS in error of fact, eg. based on an incorrect fact, or made in error of law, for example, that a risk assessment relied upon by the DBS is irrational (one that no properly directed decision maker could reasonably have arrived at on the evidence before it), can the barring decision on which it is based be disturbed on appeal.

70. Thus, the role of the Upper Tribunal on an appeal is to consider if the DBS has made a mistake on any point of law or in any finding of fact. It cannot consider the appropriateness of listing (see section 4(3) of the Act). That is, unless the decision of the DBS is legally or factually flawed, the assessment of the risk presented by the person concerned, and the appropriateness of including him in a list barring him from regulated activity with children or vulnerable adults, is a matter for the DBS.

71. If the Upper Tribunal finds that DBS made a mistake of law or fact, as described in section 4(2), section 4(6) requires the Upper Tribunal to either:

    (a) direct DBS to remove the person from the list, or
    (b) remit the matter to DBS for a new decision.

72. After *AB* the usual order will be remission back to the DBS unless no other decision than removal is possible on the facts found.

The parties' submissions on the grounds of appeal

73. The Appellant gave evidence and made oral submissions in support of her appeal which we have incorporated and addressed above and below.

74. Mr Serr made submissions on behalf of the DBS in resisting the appeal, many of which we agree with and adopt in our reasoning below.

Discussion: Findings of Fact and Analysis of grounds of appeal

75. We have examined all the evidence in the case with care, both that which was before the DBS and that provided by the Appellant as part of her appeal (must of which was not available to the DBS at the time it made its Decision). The evidence that was before the DBS when it made its Decision obviously did not include all the factual representations and evidence we received from the Appellant during the hearing. Those factual representations and evidence, denying the allegations, were in similar terms to the matters contained in the notice of appeal dated April 2022 and OPH (but more detailed).

76. We make findings of fact on the balance of probabilities as set out below. In light of these, we consider whether the DBS made mistakes of fact in accordance with the approach set out in *PF v DBS*. The burden of proof

remained on the DBS when establishing the facts and making its findings of relevant conduct in its barring decision. Thereafter on the appeal to the UT, the burden was on the Appellant to establish a mistake of fact (see *PF* at [51]):

> 'The starting point for the tribunal's consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker.'

77. Furthermore, '*In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose…. In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it...The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS's factual findings in matters that engage its expertise*.'

78. We note that the Appellant attended the hearing of the appeal, gave evidence and was cross examined. This is in contrast to the witnesses relied upon by the DBS who did not. Their evidence was written and untested, it consisted of handwritten or typewritten notes of answers given to questions or in interview.

79. While potentially less weight is to be given to the written evidence of those DBS witnesses, and their reliability and credibility has been impugned by the Appellant, we have had to balance this against our assessment of the Appellant's reliability and credibility having heard her give oral evidence.

80. We are not satisfied that the Appellant was a reliable and credible witness. We set out our reasoning for this in the section below when addressing Grounds 1 and 2 (claiming mistakes of fact in relation to the two findings of relevant conduct). We find that the Appellant's explanations for why colleagues and a child under her care (N) have made up false allegations against are implausible – inherently unlikely. They are also unsupported by any contemporaneous or documentary evidence.

81. Further, we are satisfied that the Appellant's evidence is inconsistent with the contemporaneous evidence and a number of witnesses who gave evidence against her. Her written and oral evidence to the Tribunal was also internally inconsistent and contradicted the earlier accounts given by her to X services, her former employer, in relation to Finding 1. The Appellant's explanation for the first incident in November 2020, which she has relied on since April 2022, also deviated and was inconsistent with the more contemporaneous account in relation to Finding 1 that she gave to colleagues at the Home and her

employer. The Appellant's contemporaneous account in relation to Finding 1 came close to a full admission to the relevant conduct.

Ground 1

Material mistake of fact: first finding of relevant conduct – Finding 1

82. The first finding of relevant conduct is that the Appellant:

    • on 2/11/20 failed to follow strict policies and procedures which resulted in:
    (i) allowing J to use her mobile phone to listen to Spotify;
    (ii) gave her toys;
    (iii) purchased food for her using her own personal money; and
    (iv) dropped food off for a family member with J in the car.

83. In summary, the Appellant's response to this finding in her oral evidence in chief was as follows. GR says that the food for J was purchased as part of an order for the staff paid for by J out of her pocket money. The Harry Potter wand was given to J temporarily out of the boot of her car and the other staff were aware and GR asked for it to be removed from J's possession at night once she was asleep. J did not use GR's phone to access Spotify - she just chose the music from GR's phone. She did not drop off food for a family member on the trip when she had J in the car.

84. We are not satisfied that DBS made any mistake in finding that GR had committed this relevant conduct. We, like the DBS are satisfied "on the balance of probabilities" that the Appellant committed the relevant conduct, including all four sub-findings, as alleged.

85. In coming to this conclusion, we have taken into account the Appellant's character and professional references that speak highly of her previously unblemished career in the care sector. This goes to her propensity to commit relevant conduct and her reliability or credibility when giving evidence. We also take into account that GR gave oral evidence and was tested under cross examination unlike the witnesses relied on by DBS. We have also taken into account the fact that there was no dismissal by the employer in relation to these findings.

86. Nonetheless, there are a number of reasons why we reject the Appellant's evidence.

87. The first is the contemporaneous documentation supporting this allegation (at [64-73]).

88. The email of LR (team leader) at the Home to other members of staff dated 4/11/20 (some two days after the incident) supports the assertion that J was bought a meal and given toys by GR [64-65]. The email states as follows:

‘Monday 2/11/20 evening shift GR had been assigned to support J• (LR supporting P and RH supporting NR) LR could hear loud music coming from the lounge LR presumed this was J’s IPod. J walked passed LR later in the corridor (LR believes the Time of this was around 1700 But cannot be more precise due to not having access to a clock, it was before dog therapy came.)

LR questioned who's phone was she using (said in a cheerful voice to J.. J■ replied [GR]'s she always lets me use it. GR was in the hallway with J and LR now. J stated that [GR] always lets me use it because I give it back when she gets a message. GR in a humorous way said you got me told off now and we laughed gave the phone back . LR went to cook dinner dog therapy arrived and J interacted with this in the lounge.

LR cooked pasta for PCW and NR staff decided they didn't want to eat this and would get something later. Before 1900 LR RH GR and J9Mas in the kitchen with PCW walking around NR had just gone to the bathroom. Staff were talking about what they might like for dinner J was making suggestions. Chips was mentioned J said you can have that to GR as it's your choice we laughed as this is a known saying that J uses about her choices. RH left the room to be with NR. J asked if she could have chips LR reminded her that she had requested taco's and that it wasn't a house treat staff were paying with there own money for there food. J accepted this and was happy.

J and GR went out in GR car for a drive. When they returned home not much later than 1945 LR and RH was in the office GR and walked past J, had an armful of toys. LR questioned What have you got J responded my friend gave them to me. LR asked who her friend was? J said my friend. LR asked what it was J first didn't want to show but when LR said it looks like a monkey, J then briefly showed LR and said yeah it talks.

LR went into the kitchen to get her food noticing the door was closed saw that J had been brought a child's meal. NR was eating some food that GR had shared with him. LR went out of the kitchen as PCW was watching TV in his room.’

89. GR had an investigatory and disciplinary meeting the same day in relation to the allegations. Certain admissions are recorded in the note of the meeting with GR in respect of the food and toys on 4/11/20 (at [67]).

‘Meeting with [GR] on the 4/11/10 to discuss whistleblowing concern of the 2/11/20

1. Did you let young person use your mobile phone on the 2/11/20 and access You Tube or Tik Tok?
Answer: yes, I stopped though as soon as L said. Did not access TikTok or You Tube as I don’t have it on phone. Only thing is Spotify to listen to music.

2. Did you buy J fish and chips on the 2/11/20? Did you leave her in the car?
Answer: yes I did. J hadn’t eaten dinner. I bought out of my own money. L and R asked me to pick something up for them as they didn’t like the pasta. J came in the fish and chip shop with me.

3. Did you drop off food to your home during the shift while the YP was in your care?
Answer: I gave food to T out of car window, she was waiting at the bus stop along the dual carriageway.

4. Had you asked permission to give J toys?
Answer: no I did not know I had to. Was only 2 harry potter wands and a monkey which I had in the car.

5. Has this YP or any YP ever entered your house?
Answer: No children have ever been in my house. MSH has been outside my house when he came with staff to pick up a sofa from outside. MSH did not know it was my house.
…'

90. There was a further disciplinary interview with GR regarding the allegations. In the note of interview there are various other admissions by GR about letting J use the mobile phone and about giving J toys (she admitted it could look like favouritism and was horrified by her actions) [69-70]:

'Point 1 - Allowing a young person use your own personal mobile phone
…
SD asks if GR has read and understand the mobile phone policy? GR agreed her understanding of this policy. GR refers to her supervisions where this has been discussed and there are no issues. GR explains that she has no Spotify on her phone.
LS refers to GR's comment about Spotify as this is what J was listening to. GR corrects herself and advises Tik Tok is what GR does not have on her phone.
LS asks GR to confirm that even though there is a mobile phone policy, the phone was brought out for a young person to use and this was used with J
GR confirmed yes. LS asked GR the reasons GR allowed the use of her mobile phone when GR confirmed she knew of a policy?
GR did not think and as J asked her to listen to music, this happened.
LS expressed what could have been done and how if J wished to listen to music, this could have been via other sources.
GR understood the difference.

Point 2 - Giving of gifts to a young person in your care

SD asked GR to explain the gifts.
GR stated that this was a complete misunderstanding. Before GR had given a bag of clothes to a young person and did ask AA before. SD asked specifically about giving gifts to J
GR explained that J had lost her Harry Potter wand and as GR had one at home, GR gave it to her.
GR didn't think this was an issue. J saw the wand and some other stuff in GR's car and this is when J wanted the toys.
SD asked GR how does she think this is seen, giving gifts to J GR confirmed after thinking about it she can see that this looks like favouritism. GR can now see the bigger picture and GR is horrified about this.'

91. So far as the allegation of buying food for J was concerned, GR admitted to taking J for a ride in her car while she purchased food for the staff and purchased J a meal as well as giving her own daughter groceries enroute [70].

'Point 3 - Buying a young person food with your own money

SD asked GR to explain what happened to make GR buy J some food out of her own money.
GR explained that the cooking rota showed the Team Leader & another young person cooking dinner that night. LS asked who the TL was? GR confirmed LR. GR arrived at the house at 2.40pm and LR did not come out of the office until approx. 8.00pm. GR stated that LR said that she "couldn't be bothered" to cook. However, when GR went into the kitchen, two young people had eaten.
SD asked GR to confirm if LR did cook the meal? GR confirmed yes. GR continued to advise that LR then wanted fish and chips for their supper and asked GR to go and get some. J wanted a drive so went with GR in the car. GR stated she would normally question this. SD asked her why she did not question and GR confirmed that she was more concerned about getting J out.
GR proceeded to buy fish and chips for the home and J asked for some food. GR brought J a saveloy and chips kids' meal.
SD asks if going out for food happens a lot for the staff?
GR states yes it does. The Deputy Manager and others asked to get McDonalds or asks people to take them.

Point 4 - Dropping food to a member of your own family whilst on shift and with a young person in your car

SD moves onto dropping food off for her own family whilst being in the car? GR confirmed that there was food in a Tesco bag in her car and her own daughter contacted her to see what was for tea. As GR's daughter was walking home, GR advised her to meet her at a bus stop which GR confirmed was not near her home. GR's daughter picked up the bag from the boot of the car.'

92. Following the disciplinary proceedings, GR's explanation was considered in respect of these four sub-findings in respect of 'J', in November 2020. There was not any serious challenge to the facts by the Appellant at the time. They were largely admitted at the time and were the subject of a final written warning that was not appealed.
93. All four sub-findings were upheld by her employer (albeit that the fifth allegation of allowing J to visit GR's house was not upheld). GR received a Final Written Warning and a training requirement on 10/11/20. The employer's letter to GR stated [72-73]:

'• You admitted, and your training record reflects, that you are fully aware that allowing a child any use of your personal mobile phone, even for an ostensibly "innocent" reason, is strictly forbidden under our safeguarding rules and procedures as this can be at best indicative of preferential treatment, and at worst providing them with access to unsuitable information and to your personal details.
• You are also aware that giving gifts to children is strictly forbidden and a serious breach of our safeguarding rules and procedures, as this can be indicative of

preferential treatment designed to cultivate an unprofessionally, and inappropriately close relationship.
• Similarly, buying food for a child with your own money, and including them in a group order has the potential to cultivate in the child a feeling that they have privileged standing or access, and this is also strictly forbidden for the same reasons as the matter above.
• Your contract of employment requires that you devote the whole of your time and attention to your duties during working time, and the running of personal errands during work time is not permitted unless prior authorisation has been given.'

94. These reasons explain why the four sub-findings amount to relevant conduct – conduct which is likely to cause a risk of (emotional or psychological) harm to J, a vulnerable child.

95. This much was accepted by GR in her oral evidence to the Tribunal during cross examination.

96. GR was given the right of appeal against the final written warning, which she did not exercise.

97. GR therefore made extensive contemporaneous admissions and Finding 1 is supported by evidence from the team leader on the night.

98. We are satisfied that the subsequent denials/explanations given to the Tribunal by GR at the OPH and in her oral evidence in chief regarding the four sub-findings during the hearing are not reliable.

99. First, they are significantly inconsistent with the admissions she made in her more contemporaneous statements to her employer.

100. Second, when she was cross examined, GR, sensibly, accepted the account she gave at the time as being largely accurate and accepted her behaviour had fallen short.

101. Even during cross examination, GR did however continue to dispute that she ever handed J her phone in order to listen to Spotify, albeit that she accepted that she allowed J to choose the songs from her phone. She also continued to dispute whether J's food was intended to be paid for her or by J – she stated that the intention was that she would be repaid from J's pocket money.

102. However, given the contemporaneous admissions and inconsistencies in her oral evidence, we are not satisfied these denials are reliable on the balance of probabilities. We are satisfied that all four sub-findings of relevant conduct are established on the balance of probabilities.

103. We are therefore satisfied that the DBS has not made a mistake of fact in relation to the first finding of relevant conduct and the four sub-findings. We dismiss ground 1. There was no material mistake of fact in the DBS's

first finding of relevant conduct – the four sub-findings are established on the balance of probabilities.

Mistake of fact: second finding of relevant conduct – Finding 2

104. The DBS's second finding of relevant conduct was that:

- On an unspecified dated prior to 14/4/21 while working at the Home and supporting N a resident aged approximately 16, took him to her house and supplied him with cannabis.

105. We are not satisfied that DBS made any material mistake in finding that GR had committed this relevant conduct. We, like the DBS are satisfied "on the balance of probabilities" that the Appellant committed the relevant conduct, including the material parts of the finding of fact as alleged.

106. In coming to this conclusion, we have taken into account the Appellant's character and professional references that speak highly of her previously unblemished career in the care sector. They go to her propensity to commit relevant conduct and her reliability or credibility when giving evidence. We also take into account that she gave oral evidence and was tested under cross examination unlike the witnesses relied on by DBS. We have also taken into account the fact that there was no action taken by the police against GR. The absence of any criminal proceedings or prosecution being instituted against GR in respect of the allegations in this finding is not determinative: it reflects the markedly higher standard of proof in such proceedings compared to the civil standard applied by the DBS and this Tribunal.

107. In her oral evidence to the Tribunal, GR denied the finding. A summary of her oral evidence at the OPH and during her evidence in chief during the hearing is as follows: GR says that N should have been supervised with 2 carers not 1:1 due to him making up false allegations; N had fabricated the allegations against GR because he was unhappy that GR had left the service without telling him; it was just his word against hers; she never took N to her home or allowed him to smoke cannabis; the dash cam and data from the car would have established that N never went to her house.

108. There are a number of reasons why we reject the Appellant's evidence.

109. First, we are satisfied that N volunteered his two accounts of the alleged incident unprompted, relatively contemporaneously, to two different staff members and consistently. We are satisfied that the staff members' records of N's accounts are reliable and accurate.

110. N said the following unprompted to PS, a member of staff, on 14 April 2021 [52 & 57] which he took a note of:

'I took N on a drive and whilst on a drive N told me that GR had taken him to her house and gave him Cannabis and smoked it with him, I then said are you being

serious? N replied that he was being 100% serious. I explained that this was not ok and that I will have to report this, N said don't as he isn't a snitch. I then explained this is a matter that isn't taken lightly.'

111. N said the following to HP, a different member of staff, on 19 April 2021 who also made a note:

'N and I were in the car and he began to speak about GR • This conversation had started as we have been talking about adults and the home and how he feels the and this then naturally lead on to the staff who have recently left. I explained that I was curious about his and GR and how they got on considering the recent information that N disclosed that GR had taken N to her home. N. said he could describe her home and told me the following:

• Lounge on the right

• Kitchen on the left - the garden is there and there is a shed and a wall in the garden

• Stairs right in front when you go in

N described on the occasion when he has been there and he had gone for a drive and they had gone to her house and they had smoked cannabis, this was with GR and Dani, N then said in the house was her daughter and what at first, he thought was GR signed but it turned out it was her daughter's boyfriend. N said he smoked this in the garden.

N. said that they had been out some time and that on the away back GR said to him that if PS (the other team member) asked to say they had "been out for a long drive" N said this what. he did do

N did not discuss any other times but he did state he had been there before and said and had waited outside, that was the only reference he made.'

112. We are not satisfied that the fact N's account is untested hearsay means it is unreliable. We are not satisfied that it lacks credibility – we are not satisfied N had any substantial motive to make up his account or lie. There is no independent evidence to support the suggestion that he was upset by GR's resignation without notice.

113. There was nothing in N's care plan to suggest that he had previously made false allegations or required 2:1 supervision. There were also contemporaneous notes to say that N and GR had got on well.

114. GR had already left the Home and N was not likely to have any further contact with her, so this is likely to reduce any motive to make up false allegations against her. This is reflected in the fact that he did not raise the issue until a minimum of 6 days after GR resigned. The assertion that N or the employer X has fabricated an allegation against GR [210] is unlikely. There was no need for N or X to do this - GR was in the currency of her notice period and was leaving her employment when the allegation arose.

115. We have also taken account N's age and vulnerability (due to his conditions) but consider that the fact that he stated he did not want to get GR into trouble and was reluctant to be thought a 'snitch' supports the reliability of his account. N's account also involved making damaging admissions as to his own use of prohibited drugs – again this reduces the likelihood it was fabricated.

116. The level of detail contained in the second account given by N to HOP and description of the interior of GR's house are unlikely to be fabricated. The note was taken on 19 April 2021 by HP, the deputy manager, of a discussion between her and N [52 / 56]. N described GR's home (lounge on the right, kitchen on the left, garden with shed and a wall, stairs in front of the entrance). N confirmed he smoked cannabis after GR had driven him. GR's daughter and daughter's boyfriend was present. He smoked the drugs in the garden. On the way back GR asked him to tell PS if he asked that they had been out for a long drive.

117. In respect of 'N' there is therefore a clear and detailed account given by him (repeated to two different managers PS and HP [56-57]). N's ability to recall the layout of GR's house (something which could be independently verified), supports his account. The internal part of GR's home could not have been obtained from a view from the street.

118. The previous written warning received by GR which included consideration of an unproved allegation that GR took J to her house also provides some corroboration for the allegation. As does the record of trips taken with N in GR's car and the lack of likely motive for N to lie.

119. There followed a disciplinary interview of GR with CV and LS on 20 April 2021 in which GR denied the allegations and which was recorded as follows [53]-[55]:

'Purpose of the meeting: To discuss the following concerns:
• Alleged purchase and supply of an illegal substance (cannabis) specifically, supply to a young person in your care
• Alleged taking a young person in your care to your home address

LS started the meeting by confirming GR was entitled to bring representation in form of a fellow employee or union representation however, GR confirmed that she did not bring anyone but was aware she was entitled to this. The only person GR would ask is HP (Deputy Manager of but felt it was unfair. LS asked if GR had approached HP, GR confirmed no.

LS proceeded to read out the above allegations and passed the meeting over to CV.

CV started with point 2, CV advised that there has been an allegation of a young person (N) saying that he had been to GR's home.

GR stated that she had heard nothing like this before and asked when this was supposed to have happened? GR mentioned she is currently dealing with a lot of personal issues so cannot believe this level of allegation.

CV stated that there is evidence in the journey logs with N that he has been out on regular car journeys with GR.

GR explains that she does not understand where this is coming from. As she is from B[] herself, GR knows people, when she takes out the young people, she does not go into B[]. There was one time where she stopped off at a shop in S[] H[] for a Mars drink but did not go into B[]. GR repeated that she did not understand why he has alleged this.

GR continued to advise CV/LS that N handed in his grinder to GR when he first arrived and has not spoken about cannabis until H (young person) arrived?

LS asked what do you mean when H arrived? How has he mentioned anything after H arrived?

GR explained that she could smell cannabis on H when H arrived. GR explained that she had spoken to N about cannabis and how this is not good plus completed key work around his baby.

CV expresses concern over the allegation and how this could affect her own children if it went to a criminal investigation.

GR states that all she has done is go to work, do her best and these allegations can ruin someone's life.

CV reminds GR that the reports from N include a description of the layout of GR's house. In addition, to this N was in the car with another care worker when you got dropped off near the bus stop near your home.

LS asked GR to explain exactly where the bus stop is in accordance with GR's front door. Can you see your front door?

GR confirms that you cannot fully see the front door but can see the side of her house.

LS asked GR to confirm, is your house is behind the bus stop? GR stated yes.

CV asks GR if she has ever talked to others or has any young people met your family?

GR states that at 10:15pm once, her partner picked her up from and the boys chased the car out.
…
LS asks GR how has N been able to describe your home?

GR does not know. CV asked if GR ever discussed openly about her home to staff or young people? GR confirms she did not.

GR explained that she was not in the right frame of mind to be thinking. PS dropped GR off with N in the car and PS was going to go down her road but GR asked him to drop off at the bus stop.

CV asked GR about the length of the drives. Where did you go?

GR confirms that she has before come out of S[], up the hill towards R[].
LS asked how long in minutes were the drives? GR confirmed approximately 30 – 45 minutes.

LS explains if you share things with the staff team/young people, they can pick up on your lifestyle.

LS asked GR again, have you supplied an illegal substance to a young person in your care? GR confirms no she has not.

LS asked if there was anything else that she would like to add? GR advised she needs to sort herself out and prioritise her own children. LS closed the meeting by explaining that an outcome to this will be sent in writing.'

120. There was an investigation report dated 20 April 201 prepared by KH with a summary of findings at [50]-[51]. She concluded as follows:

'In respect of the allegation that GR took N to her home address reviews of the day books were undertaken and although I can see that on various occasions staff member GR did take N out in the car, whilst on shift, there is minimal detail within reports about the destination and reason for such trips from the home. This lack of detail suggests that there is little evidence to uphold the allegation that GR took N to visit her home address at this stage.

However further detail has been disclosed by N and can be viewed in Appendix B and Clear Care ID 594675. Within this evidence N has been able to explain further detail in respect of GRs home but without knowledge of the interior of GRs home address again there is little evidence to confirm this allegation at this stage. The [county] LADO has been notified of the latest information disclosed by N and has advised that the process can continue to be managed through the internal investigation process. (22.4.2021)

Following an initial discussion with LS, Human resources Manager, GR had stated that on one occasion she was dropped off at a bus stop close to her home by an ex-staff member JC and N was present in the car. JC was called and was able to confirm this event took place-see Appendix C.

In respect of the allegation that GR has provided N with Cannabis, a full bedroom search was completed of N s bedroom on the 15.04.2021, by two staff members to ascertain if there was any evidence of drug paraphernalia within his room. No evidence of drug use was found in N 's bedroom during this room search. Reviews of daybooks have been carried out. No staff suspicions have been noted or raised in these records regarding N being under the influence of cannabis or any other substance on return from time away from the home trips.

The Registered Manager for the home has provided an overview statement in relation to Safeguarding at in which she states no concerns relating to GR's practice at... (Appendix D)

Further to the above and as a direct result following the review of records there are several actions which are recommended to improve practice and reduce the possibility of such allegation arising in the future. These recommendations are detailed below and will be fed back to the Registered Manager to action and monitor.

A disciplinary meeting was held with GR on Tuesday 20.4.2021 at 3.30pm led by CV (Registered Manager at and note taker- LS, Human Resources Manager. (Appendix E)

Recommendations:
• LADO to be updated following investigation and further details of disclosures that suggest N has details and description on the property.
• Allegation report and outcome to be shared with Ofsted.
• to ensure daily logs are completed with clear and full detail ie who, where, when and why. - additional training to be provided to all team members regarding reporting and recording.
• To ensure drives away from the home are completed for a necessary and proportionate reason and such reason stated within daily logs.
• Ensure all staff repeat safeguarding training and reread safeguarding policy.
• To ensure the Registered Manager completes appropriate and planned upskilling team meetings with a clear focus on safeguarding and boundaries.
• To ensure all staff members not in attendance at team meetings read minutes from meeting.
• To ensure Supervisions are completed to an appropriate standard and safeguarding is covered in depth relating to young people and additional learning.
• GR had previously resigned from her post due to personal reasons and health matters. While the resignation was accepted this investigation will be held on record and shared with the [county] LADO and disclosed to potential future employers for reference requests.
• The allegation cannot be founded by evidence, but the probability determines a potential risk. Therefore, a referral will be made to the DBS to determine the outcome of the disclosure.'
[emphasis added]

121. As set out above, the disciplinary investigation report was produced on behalf of X services dated 20 April 2021 by a KH [48-55]. Various pieces of evidence were considered including the logs that showed that GR did take N out on trips in the car although there is no detail as to what the purpose of the trips was for. Further an ex-staff member confirmed that on one occasion GR was dropped off at a bus stop close to her home by an ex-staff member and N was present in the car.

122. There is no documentary evidence within the interview that GR asked anyone to check the dashcam/data from the car which would have proved that N did not attend at GR's house [62]. Nor is there any evidence of a co-worker stating that N admitted to fabricating the allegation as GR asserted during the OPH [210]. We have considered whether N might have a motive

to lie or the account might be unreliable as untested hearsay but rejected this for reasons given above.

123. We have considered a number of matters that might be seen to support GR's credibility. She has consistently denied the allegation regarding N since it was first put to her and contemporaneously. She has not changed her account on any material matter. Nonetheless, the allegations in relation to Finding 2 are more serious than in relation to Finding 1 so there is a greater motive to conceal the truth.

124. We accept that GR did make reasonable concessions in cross examination in relation to Finding 1 during the hearing, albeit that she only did so after giving an inconsistent account in evidence in chief and after being directed to the contemporaneous documents where she had originally made admissions.

125. We have also taken into account that her former employer, X Services, found the allegation insufficiently evidenced (the 'allegation cannot be founded on the evidence') in the investigation report and pointed to some potentially exculpatory material (which we have underlined). Nonetheless, the former employer X did then go on to find the allegations 'substantiated' in its 'dismissal' letter dated 22 April 2021. In any event, it is for us to assess all the evidence afresh.

126. Sadly, we have decided that it is more likely than not that the account that GR gave us in oral evidence was neither reliable nor credible. GR never previously suggested to her employer that the description of the layout of her house given by N was inaccurate. She had that opportunity over a long time and could have given a sketch, photos or videos of her house layout to the employer, the DBS or to us if she wanted to confirm that the layout described by N was inaccurate.

127. In oral evidence she accepted she did once have a shed in the garden but now it was removed. She never volunteered a description of the layout until asked by the Tribunal. The description of the internal layout of the house that GR then gave to the Tribunal on questioning towards of her evidence was largely consistent with the description that N gave.

128. Ultimately, the allegation of bringing N back to her house was consistent with the previous allegations that she had done so with at least one other child (J). Our finding is also consistent with the fact that she crossed boundaries in relation to child J and did so again in respect of N.

129. There was no drug paraphernalia found on a search of N's room and the account N gave of others being at GR's house – such as Dani – accords with other references to there being a person called Danny who was in a relationship with GR. We consider it unlikely that N was so angry with GR at her leaving that he made a serious and false allegation against her.

130. Ultimately, on balance, we have found that the Appellant did not tell us the truth about taking N back to her house. We also find that once there, N did smoke cannabis at her house under her supervision and with her permission – GR allowed him to do so and they smoked cannabis together. Whether GR supplied the drug to N or not is not material to the decision to bar and we have come to no conclusion on this point, given the seriousness of the main finding. It is inevitable that the DBS would have come to the same decision to bar GR on the basis that she brought N, a 16 year old vulnerable youth in her care, back to her house, permitted him to smoke cannabis (a prohibited drug) under her supervision and they smoked cannabis together.

131. There was no material mistake of fact by DBS in making Finding 2.

132. We are sorry to make these findings because GR was undoubtedly under a huge deal of stress at the time. We accept her evidence about her family difficulties, the health of her own two children and her own mental health difficulties. We also note that the period November 2020 to April 2021 during the time of Covid restrictions, would have been a stressful time to work in children's Homes and there may have been staff shortages and reduced support. GR was also playing an important caring role for others as a professional and a friend and that is all to her credit. She had a long and unblemished career in doing so. She appears to have been well intentioned and motivated to care for J and N, and we are satisfied that she did not intend to cause either of them any harm and even sought to 'befriend' them'. Nevertheless, even though she did not intend it, her conduct was misguided, breached professional guidelines and boundaries and exposed vulnerable children to a risk of harm.

133. We therefore dismiss this ground of appeal – there was no mistake of fact in Finding 2.

Mistake of Law - Proportionality

134. We are satisfied that both findings made by the DBS, are established on the balance of probabilities, do not contain material mistakes of fact and amount to Relevant Conduct within the broad definition permitted by the Act.

135. Given the findings of relevant conduct, it was not a "perverse" decision by DBS to have included the Appellant on the CBL and the ABL. There is a high bar for perversity/irrationality challenges to barring decisions and we are satisfied that the decision to bar was neither perverse nor irrational but one the DBS was entitled to reach.

136. The decision that it was "appropriate" in all the circumstances to bar GR is outside our jurisdiction to examine but we will always need to consider the proportionality of any barring decision.

137. We next consider if there was any mistake of law in the barring decisions on the grounds or proportionality.

138. In summary, the proportionality of DBS's decisions to include individuals on the barred lists should be examined applying the tests laid down by Lord Wilson in *R (Aguilar Quila) v Secretary of Stage for the Home Department* [2012] 1 AC 621 at para 45:

> …But was it "necessary in a democratic society"? It is within this question that an assessment of the amendment's proportionality must be undertaken. In *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, Lord Bingham suggested, at para 19, that in such a context four questions generally arise, namely:
>
> a) is the legislative objective sufficiently important to justify limiting a fundamental right?
>
> b) are the measures which have been designed to meet it rationally connected to it?
>
> c) are they no more than are necessary to accomplish it?
>
> d) do they strike a fair balance between the rights of the individual and the interests of the community?

139. In assessing proportionality, the Upper Tribunal has '*…to give appropriate weight to the decision of a body charged by statute with a task of expert evaluation*' (see *Independent Safeguarding Authority v SB* [2012] EWCA Civ 977 at [17] as set out above).

140. We are satisfied that each of questions a)-d) should be answered in favour of the barring decisions being proportionate. There is no real question that the legislative objective of safeguarding vulnerable groups is sufficiently important to justify barring and that barring is rationally connected to protecting those groups.

141. On a reasonable and objective view, we are satisfied that the DBS was entitled to conclude that it was appropriate and reasonably necessary to bar GR in order to achieve its (important and) legitimate safeguarding aims.

142. On the fact of this case, having heard all the evidence, we are satisfied that barring is necessary and strikes a fair balance between GR's right to a private life and the interests of the community. The DBS expressly carried out the "balancing act" exercise required and we have done the same. We are satisfied that the DBS was entitled to consider that the Appellant presented a risk of harm to children at the time of the decision. Her lack of reliability, insight and acceptance at the appeal hearing regarding the incident in Finding 2 confirmed that the Appellant posed a risk of repeating similar acts remained ongoing at the time of the barring decision in April 2022.

143. We also accept that, taken together with Finding 1 in respect of J in November 2020: (a) they show an escalation in misconduct and a failure to adhere to a warning; (b) the earlier sub-findings are similar in nature to the later conduct in that they are a failure to adhere to professional boundaries;

and (c) there was already an allegation, albeit not one that was substantiated at the time, that GR had previously allowed J to visit her house.

144. Allowing N, a vulnerable 16-year-old in her care who was looked after and had been the victim of abuse or neglect, to smoke cannabis at her house under her supervision may have been capable of constituting a criminal offence (if proved to the requisite standard). More importantly, GR's actions were likely to expose N to a real risk of physical, emotional or psychological harm. The fact that GR told N to lie to conceal the drug taking by asking him to tell PS, if he asked, that they had been out for a long drive is also concerning.

145. While the conduct was directed to children it was not 'child specific'. GR has demonstrated a repeated failure to follow rules designed for safeguarding. She has encouraged or permitted N to break the law by smoking prohibited drugs together, conduct which if repeated towards a vulnerable adult (N was 16) would put them at risk of obvious harm. Her inclusion in the ABL contains no mistake of fact or law.

146. The DBS also expressly had regard to the adverse impact that a barring decision would or may have on GR's Article 8 rights to private and family life– in particular the impact on her employment opportunities to work with children. GR has highlighted her long history in care and the impact of the barring on her [211]. We do not seek to underplay the impact of the barring upon her and upset it has caused her, particularly given GR's previously long and unblemished professional history and the references that speak well of her. Thankfully she has been able to obtain alternative employment outside the care sector or other regulated activity. We accept that barring has significantly disrupted GR's life.

147. In upholding the finding of fact that GR smoked cannabis in her own home with N, a vulnerable young person whom she was supposed to care for and asked N to lie about it if challenged, we are not satisfied that the decision is disproportionate.

148. As GR continues to deny Finding 2 (as well as initially seeking to unpick Finding 1 during evidence in chief which she had previously admitted to), she has demonstrated insufficient insight or self-reflection to establish that she does not pose a risk of repeating similar conduct. She has taken no other corrective actions to establish a reduced risk of causing harm and the passage of three years since the second incident (two years since barring) is not sufficient in itself to demonstrate a reduced risk.

149. While it might in principle be possible for GR to demonstrate a change of attitude/ approach, and/or insight and self-reflection, to the extent that she might be regarded at some point in the future as a tolerably low risk, GR had/has not demonstrated that she had the necessary insight or tools to do so at the time of the barring decision or now. Paragraphs 18 and 18A of Schedule 3 to the Act allow for reviews of the barring decision to be conducted

if fresh evidence comes to light and is presented by the Appellant or on the expiry of the minimum barring period in this case.

150. Therefore, we are satisfied that when making the barring decisions, the DBS correctly concluded that no other measures were in place sufficient to adequately safeguard children or vulnerable adults from GR participating in regulated activity and committing further acts of misconduct/neglect etc.

151. We consider that barring was no more than necessary and struck a fair balance between GR's rights and that of protecting the public interest in safeguarding vulnerable groups – it was therefore a proportionate decision having regard to the relevant conduct the Appellant had committed and the future risk she posed as at April 2022.

152. We are satisfied that the DBS was entitled to conclude that GR, on the evidence available at the time and now heard, should be barred from working with children or vulnerable adults in regulated activity. There was no mistake of law in the barring decisions.

153. As noted above, the issue of whether it was "appropriate", in such circumstances, to place GR on the CBL and ABL is beyond the jurisdiction of the UT, unless the same was either irrational or disproportionate. We are satisfied that the Appellant has not established that barring was either irrational nor disproportionate for the reasons we set out above.

154. We are therefore satisfied that the DBS did not make material mistakes of fact or mistakes of law when making the barring decision on 29 April 2022 to include the Appellant on the CBL and ABL.

Conclusion and Disposal

155. For the reasons set out above, the Appellant's appeal should be dismissed.

156. We conclude for the purposes of section 4(5) of the Act that there were no material mistakes of fact nor mistakes of law in the ultimate DBS decision to include the Appellant on the CBL and ABL.

157. The decisions of the DBS to include the Appellant on the CBL and ABL are confirmed.

Authorised for release:
Judge Rupert Jones
Judge of the Upper Tribunal **Dated: 5 August 2024**

Appendix

The lists and listing under the 2006 Act

1. The Safeguarding Vulnerable Groups Act 2006 ('the Act') established an Independent Barring Board which was renamed the Independent Safeguarding Authority ('ISA') before it merged with the Criminal Records Bureau ('CRB') to form the Disclosure and Barring Service ("DBS").

2. So far as is relevant, section 2 of the Act, as amended, provides as follows:

'2(1) DBS must establish and maintain—

(a) the children's barred list;

(b) the adults' barred list.

(2) Part 1 of Schedule 3 applies for the purpose of determining whether an individual is included in the children's barred list.

(3) Part 2 of that Schedule applies for the purpose of determining whether an individual is included in the adults' barred list.

(4) Part 3 of that Schedule contains supplementary provision.

(5) In respect of an individual who is included in a barred list, DBS must keep other information of such description as is prescribed.'

Children's barred list

3. The relevant provisions (paragraphs 1 to 4) of Part 2 of Schedule 3 to the Act, on the children's barred list, mirror those in paragraph 8 to 11 for vulnerable adults which are provided below.

Vulnerable adults' barred list

4. The relevant provisions (paragraphs 8 to 11) of Part 2 of Schedule 3 to the Act, on the vulnerable adults' barred list, provide as follows:

8(1) This paragraph applies to a person if any of the criteria prescribed for the purposes of this paragraph is satisfied in relation to the person.

(2) Sub-paragraph (4) applies if it appears to DBS that—

(a) this paragraph applies to a person, and

(b) the person is or has been, or might in future be, engaged in regulated activity relating

to vulnerable adults.

……

(4) [DBS] must give the person the opportunity to make representations as to why the person should not be included in the adults' barred list.

(5) Sub-paragraph (6) applies if—

(a) the person does not make representations before the end of any time prescribed for the

purpose, or

(b) the duty in sub-paragraph (4) does not apply by virtue of paragraph 16(2).

(6) If [DBS] —

(a) is satisfied that this paragraph applies to the per p 0son, and

(b) has reason to believe that the person is or has been, or might in future be, engaged in

regulated activity relating to vulnerable adults, it must include the person in the list.

(7) Sub-paragraph (8) applies if the person makes representations before the end of any time

prescribed for the purpose.

(8) If [DBS] —

(a) is satisfied that this paragraph applies to the person,

(b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and

(c) is satisfied that it is appropriate to include the person in the adults' barred list, it must include the person in the list.

9 (1) This paragraph applies to a person if–

(a) it appears to [DBS] that the person [—]

[(i) has (at any time) engaged in relevant conduct, and

(ii) is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and]

(b) [DBS] proposes to include him in the adults' barred list.

(2) [DBS] must give the person the opportunity to make representations as to why he should not be included in the adults' barred list.

(3) [DBS] must include the person in the adults' barred list if–

(a) it is satisfied that the person has engaged in relevant conduct, […]

[(aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and]

(b) it [is satisfied] that it is appropriate to include the person in the list.

[Emphasis added]

10 (1) For the purposes of paragraph 9 relevant conduct is–

(a) conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult;

(b) conduct which, if repeated against or in relation to a vulnerable adult, would endanger

that adult 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 vulnerable adult, if it appears to [DBS] that the conduct is inappropriate.

(2) A person's conduct endangers a vulnerable adult if he–

(a) harms a vulnerable adult,

(b) causes a vulnerable adult to be harmed,

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

(d) attempts to harm a vulnerable adult, or

(e) incites another to harm a vulnerable adult.

(3) “Sexual material relating to children” means–

(a) indecent images of children, or

(b) material (in whatever form) which portrays children involved in sexual activity and which is produced for the purposes of giving sexual gratification.

(4) “Image” means an image produced by any means, whether of a real or imaginary subject.

(5) A person does not engage in relevant conduct merely by committing an offence prescribed for the purposes of this sub-paragraph.

(6) For the purposes of sub-paragraph (1)(d) and (e), [DBS] must have regard to guidance issued by the Secretary of State as to conduct which is inappropriate.

11 (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 vulnerable adults, and]

(b) [DBS] proposes to include him in the adults' barred list.

(2) [DBS] must give the person the opportunity to make representations as to why he should not be included in the adults' barred list.

(3) [DBS] must include the person in the adults' barred list if–

(a) it is satisfied that the person 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 vulnerable adults, 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 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.

5. There are three separate ways in which a person may be included in the barred lists under Schedule 3 to the Act.

6. The first category is under paragraphs 1 and 7 of Schedule 3 to the Act, where a person will be automatically included in the lists without any right to make representations ('autobar'). This is where they have been convicted of certain specified criminal offences or made subject to specified orders set out within Regulations 3 and 5 and paragraphs 1 and 3 of the Schedule to The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 ('The Regulations').

7. The second category is under paragraphs 2 and 8 of Schedule 3 to the Act, where a person will be included in the lists if they meet the prescribed criteria. The person who is proposed to be barred has a right to make representations to the DBS ('autobar with representations'). There are prescribed criteria where a person has been convicted of certain specified criminal offences or made subject to specified orders but nonetheless is entitled to make representations as to inclusion on the list. The prescribed criteria are set out within Regulations 4 and 6 and paragraphs 2 and 4 of the Schedule to The Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009.

8. If a person falls within the prescribed criteria under the Regulations, they satisfy subparagraph (1) of the following paragraphs and therefore under paragraphs 2(6), (2)(8), 8(6) or 8(8) of Schedule 3 to the Act, the DBS will include the person in the children's or adults' barred list if it:

a) is satisfied that this paragraph applies to the person,

b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to [children or adults], and [so long as the person has made representations regarding their inclusion]

c) is satisfied that it is appropriate to include the person in the children's barred list, it must include the person in the list.

9. In contrast, this appeal concerns the third category ('discretionary barring') where a person does not meet the prescribed criteria (has not been convicted of specified criminal offences nor made subject to specified orders as set out within the Regulations and the Schedule thereto), and therefore paragraphs 3 and 9 of Schedule 3 to the Act apply.

10. It is the third category under which the DBS made the decision to bar the Appellant.

11. Under paragraphs 3(3) and 9(3) of Schedule 3 the DBS must include the person in the children's and adults' barred list if:

(a) it is satisfied that the person has engaged in relevant conduct, and

(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 or vulnerable adults, and

(b) it is satisfied that it is appropriate to include the person in the list.

12. 'Relevant conduct' is defined under paragraphs 4 and 10 of Schedule 3 to the Act as set out above.

13. The difference between the sets of criteria in the second and third categories is where a person meets the prescribed criteria for automatic inclusion with representations (has been convicted of a specified offence or made subject of a specified order), the DBS is not required to decide if the person has been engaged in relevant conduct. This is because the statutory scheme appears designed so that a specified criminal conviction which satisfies the prescribed criteria, renders the need to make any findings about a person's conduct otiose.

The Right of Appeal and jurisdiction of the Upper Tribunal

14. Appeal rights against decisions made by the Respondent (DBS) are governed by section 4 of the Act. Section 4(1) provides for a right of appeal to the Upper Tribunal against a decision to include a person in a barred list or not to remove them from the list. Section 4 states:

'4(1) An individual who is included in a barred list may appeal to the [Upper] Tribunal against—

(a) . . .

(b) a decision under paragraph [2,] 3, 5, [8,] 9 or 11 of [Schedule 3] to include him in the list;

(c) a decision under paragraph 17[, 18 or 18A] of that Schedule not to remove him from the list.

(2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake —

(a) on any point of law;

(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.

(3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.

(4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.

(5) Unless the Upper Tribunal finds that [the DBS] has made a mistake of law or fact, it must confirm the decision of DBS.

(6) If the Upper Tribunal finds that DBS has made such a mistake it must—

(a) direct DBS to remove the person from the list, or

(b) remit the matter to DBS for a new decision.

(7) If the Upper Tribunal remits a matter to [the DBS] under subsection (6)(b)—

(a) the Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and

(b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.'

[Emphasis added]

15. Thus section 4(2) of the Act provides that a person included in (or not removed from) either barred list may appeal to the Upper Tribunal on the grounds that the DBS has made a mistake of law (including the making of an irrational or disproportionate decision) or a mistake of fact on which the decision was based. Although not provided for by statute, the common law requires that any mistake of fact or law, normally referred to as 'errors', must be material to the ultimate decision ie. that they may have changed the outcome of the decision – see [102]-[103] of the judgment in *R v (Royal College of Nursing and Others) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin) ('*RCN')*:

'102.During oral submissions there was some debate about the meaning to be attributed to the phrase "a mistake ….in any finding of fact within section 4(2)(b) of the Act". I can see no reason why the sub-section should be interpreted restrictively. In my judgment the Upper Tribunal has jurisdiction to investigate any arguable alleged wrong finding of fact provided the finding is material to the ultimate decision.

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 Interested Party 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 Interested Party is permissible under the statutory scheme and there is no reason to suppose that in an appropriate case the Interested Party would not hold such a hearing as Ms Hunter asserts would be the case. I do not accept that this possibility is illusory as suggested on behalf of the Claimants. 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 Interested Party can be put right on an appeal which, itself, may be conducted by way of oral hearing in an appropriate case.'

16. It flows from this that an appeal to the Upper Tribunal can only succeed if the DBS made a mistake in fact in making a finding upon which the decision is based or made a mistake in law in any way in making its decision – see section 4(5) of the Act.

Mistake or error of fact

17. Some mistakes of fact will amount to errors of law, for example, if it is demonstrated that the DBS took into account evidence that was irrelevant, or failed to take into account evidence that was relevant or made a finding that was unreasonable – no reasonable tribunal could have arrived at upon the evidence before it. These are all errors of law that might be committed in relation to a factual finding.

18. However, by virtue of section 4(2), mistakes of fact which are not also errors of law may also constitute a ground upon which the Upper Tribunal may interfere with a DBS finding upon which a decision is based. This type of mistake of fact might arise if the DBS recorded or interpreted evidence before it inaccurately or incorrectly or relied upon evidence which was inaccurate or incorrect as a matter of fact.

19. So long as the DBS takes account of the relevant evidence, provides rational reasons and makes no errors in the facts relied upon for rejecting a barred person's account on the balance of probabilities, this is unlikely to give rise to an arguable mistake of fact. In other words, an appeal before the Upper Tribunal is not a full merits appeal on the facts – see [104] of the *RCN* judgment below.

20. The Upper Tribunal must begin by examining the DBS decision and deciding whether it made any mistakes when finding the facts (such findings will have been made based on the documentary material available to it). However, the Upper Tribunal may also make its own fresh findings of fact having heard all potentially relevant evidence and witnesses during the appeal process by which it may determine whether the DBS made a mistake of fact which was material to the making of its decision.

21. The extent of the jurisdiction for the Upper Tribunal to determine mistakes of fact by the DBS and make its own findings of fact was outlined in *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC) at [51]:

‘Drawing the various strands together, we conclude as follows:

a) In those narrow but well-established circumstances in which an error of fact may give rise to an error of law, the tribunal has jurisdiction to interfere with a decision of the DBS under section 4(2)(a).
b) In relation to factual mistakes, the tribunal may only interfere with the DBS decision if the decision was based on the mistaken finding of fact. This means that the mistake of fact must be material to the decision: it must have made a material contribution to the overall decision.
c) In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose.
d) The tribunal has the power to consider all factual matters other than those relating only to whether or not it is appropriate for an individual to be included in a barred list, which is a matter for the DBS (section 4(3)).
e) In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it.
f) The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS’s factual findings in matters that engage its expertise. Matters of specialist judgment relating to the risk to the public which an appellant may pose are likely to engage the DBS’s expertise and will therefore in general be accorded weight.
g) The starting point for the tribunal’s consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker.’

22. The more recent judgment of the Court of Appeal in *Disclosure and Barring Service v AB* [2021] EWCA Civ 1575 (‘AB’), addressed the Tribunal’s fact-finding jurisdiction when remitting cases to the DBS having allowed an appeal:

‘55. The Upper Tribunal also made findings of fact and made comments on other matters. Section 4(7) of the Act provides that where the Upper Tribunal remits a matter to the DBS it "may set out any findings of fact which it has made (on which DBS must base its new decision)". It is neither necessary nor feasible to set out precisely the limits on that power. The following should, however, be borne in mind.

First, the Upper Tribunal may set out findings of fact. It will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter. By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to a marriage being a "strong" marriage or a "mutually-supportive one" may be more of a value judgment rather than

a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third "finding" would certainly not involve a finding of fact.

Secondly, an Upper Tribunal will need to consider carefully whether it is appropriate for it to set out particular facts on which the DBS must base its decision when remitting a matter to the DBS for a new decision. For example, Upper Tribunal would have to have sufficient evidence to find a fact. Further, given that the primary responsibility for assessing the appropriateness of including a person in the children's barred list (or the adults' barred list) is for the DBS, the Upper Tribunal will have to consider whether, in context, it is appropriate for it to find facts on which the DBS must base its new decision.'

Appropriateness

23. On an appeal, the Upper Tribunal ('UT') must confirm the DBS's decision unless it finds a material mistake of law or fact. If the UT finds such a mistake, it must remit the matter to the DBS for a new decision or direct the DBS to remove the person from the list.

24. Under section 4(3) of the Act, the decision whether or not it is "appropriate" for an individual to be included in a barred list is "not a question of law or fact". Section 4(3) of the Act therefore provides that the appropriateness of a person's inclusion on either barred list is not within the Upper Tribunal's jurisdiction on an appeal. Unless the DBS has made a material error of law or fact the Upper Tribunal may not interfere with the decision - *RCN* at [104]:

'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 Interested Party 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 Interested Party 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 Interested Party would have any realistic prospect of success.

Second, if the Interested Party 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, as Mr. Grodzinski submits, 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.'

25. The fact that the appropriateness of barring is not to be examined as an error of fact in the light of section 4(3) of the Act was recently reiterated in *DBS v AB [2021] EWCA Civ 1575*. The Court of Appeal explained the nature of the Upper Tribunal's jurisdiction at [67]-[68]:

> '67. The context, and the nature of the statutory scheme, is that it creates a system for the protection of children and vulnerable adults. It provides for an independent body, the DBS, to determine whether specified criteria are met and, in the case of paragraph 3 of Schedule 3 to the Act, that it is appropriate to include a person's name in the children's barred list or the adults' barred list. There is a safeguard for individuals in that they may appeal to the Upper Tribunal on the basis that the DBS has made an error of law or fact. The Upper Tribunal cannot consider the appropriateness of the decision to include or retain the person's name in a barred list when deciding if the DBS had made such an error. If the DBS has not made an error of law or fact, the Upper Tribunal must confirm the decision of the DBS (section 4(5) of the Act). Only if the DBS has made an error of law or fact, can the Upper Tribunal determine whether to remit or direct removal of the person's name from the list (section 4(6) of the Act).
>
> 68. The scheme as a whole appears, therefore, to contemplate that the DBS is the body charged with decisions on the appropriateness of inclusion of a person within a barred list. The power in section 4(6) of the Act needs to be read in that context. The context would not readily indicate that the Upper Tribunal is intended to be free to decide for itself questions concerning the appropriateness of inclusion of a person in a barred list. It is unlikely, therefore, that section 4(6) of the Act was intended to give the Upper Tribunal the power to direct removal because it, the Upper Tribunal, thinks inclusion on the list is no longer appropriate. It is more consistent with the statutory scheme that the power is to be exercised when the only decision that the DBS could lawfully make would be to remove the person from the barred list.'

26. Therefore, the DBS is empowered and required to make a judgement as the expert body appointed by Parliament, whether the relevant conduct is such that, in all the circumstances, makes it "appropriate" to include the individual in the CBL. In so doing it will normally take into account a risk assessment, that it performs in relation to the individual it proposes to bar. However, the DBS concedes that the rationality and proportionality of any risk assessment it conducts can be challenged as having been made in error of law.

Mistake or error of law

27. A mistake or error of law includes instances where the DBS have got the particular legal test or tests wrong (applied or interpreted the law incorrectly), or failed to consider all the relevant evidence or made a perverse, unreasonable or irrational finding of fact, or failed to explain the decision properly by giving sufficient or accurate reasons, or breached the rules of natural justice by failing to provide a fair procedure or hearing (in the rare circumstances where it considers oral representations).

28. A mistake of law will also include instances where the decision to bar was disproportionate.

Proportionality

29. The UT is not permitted to carry out a full merits reconsideration of, or to revisit, the appropriateness of R's decision to bar; but it does have jurisdiction to determine proportionality and rationality in relation to the DBS's judgment as to the risk that a barred person poses and whether they should be included on the list, according appropriate weight (in so doing) to the DBS's decision as the body particularly equipped, and expressly enabled by statute, to make safeguarding decisions of this specific kind (e.g. B v Independent Safeguarding Authority (CA) [2012] EWCA Civ 977, [2013] 1 WLR 308 ; *Independent Safeguarding Authority v SB (Royal College of Nurses intervening)* [2012] EWCA Civ 977; [2013] 1WLR 308 ('B').

30. Maintenance of public confidence, in the regulatory scheme and the barred lists, will "always" be a material factor when seeking to balance the rights of the individual and the interests of the community (e.g. B). Where it is alleged that the decision to include a person in a barred list is disproportionate to the relevant conduct or risk of harm relied on by the DBS, the Tribunal must, in determining that issue, give proper weight to the view of the DBS as it is enabled by statute to decide appropriateness - see the Court of Appeal's judgment in B at paragraphs [16]-[22] (ISA formerly assuming the role of the DBS):

'16. The ISA is an independent statutory body charged with the primary decision making tasks as to whether an individual should be listed or not. Listing is plainly a matter which may engage Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Article 8 provides a qualified right which will require, among other things, consideration of whether listing is "necessary in a democratic society" or, in other words, proportionate. In *R (Quila) v Secretary of State for the Home Department* [2011] 3 WLR 836, Lord Wilson summarised the approach to proportionality in such a context which had been expounded by Lord Bingham in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 (at paragraph 19). Lord Wilson said (at paragraph 45) that:

> "… in such a context four questions generally arise, namely: (a) is the legislative object sufficiently important to justify limiting a fundamental right?; (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?"

There, as here, the main focus is on questions (c) and (d). In *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 Lord Bingham explained the difference between such a proportionality exercise and traditional judicial review in the following passage (at paragraph 30):

> "There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test … The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time … Proportionality must be judged objectively by the court …"

17. All that is now well established. The next question – and the one upon which Ms Lieven focuses – is how the court, or in this case the UT, should approach the decision of the primary decision-maker, in this case the ISA. Whilst it is apparent from authorities such as *Huang* and *Quila* that it is wrong to approach the decision in question with "deference", the requisite approach requires

> "… the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice."

Per Lord Bingham in *Huang* (at paragraph 16) and, to like effect, Lord Wilson in *Quila* (at paragraph 46). There is, in my judgment, no tension between those passages and the approach seen in *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19 which was concerned with a challenge to the decision of the City Council to refuse a licensing application for a sex shop on the grounds that the decision was a disproportionate interference with the claimant's Convention rights. Lord Hoffmann said (at paragraph 16):

> "If the local authority exercises that power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights."

Lady Hale added (at paragraph 37):

> "Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, the court would find it hard to upset the balance which the local authority had struck."

These passages are illustrative of the need to give appropriate weight to the decision of a body charged by statute with a task of expert evaluation.

…….

22. This brings me to two particular points. First, there is the fact that, unlike the ISA, the UT 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 UT 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 UT 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 UT 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 UT 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)).'

31. In summary, questions of the proportionality of DBS's decisions to include individuals on the barred lists should be examined applying the tests laid down by Lord Wilson in *R (Aguilar Quila) v Secretary of Stage for the Home Department* [2012] 1 AC 621 at para 45:

    …But was it "necessary in a democratic society"? It is within this question that an assessment of the amendment's proportionality must be undertaken. In *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, Lord Bingham suggested, at para 19, that in such a context four questions generally arise, namely:

    a) is the legislative objective sufficiently important to justify limiting a fundamental right?

    b) are the measures which have been designed to meet it rationally connected to it?

    c) are they no more than are necessary to accomplish it?

    d) do they strike a fair balance between the rights of the individual and the interests of the community?

32. In assessing proportionality, the Upper Tribunal has '*…to give appropriate weight to the decision of a body charged by statute with a task of expert evaluation*' (see *Independent Safeguarding Authority v SB* [2012] EWCA Civ 977 at [17] as set out above).

Burden and Standard of proof

33. The burden of proof is upon the DBS to establish the facts when making its findings of relevant conduct in its barring decision. Thereafter on the appeal to the UT, the burden is on the Appellant to establish a mistake of fact. The standard of proof to which the DBS and the Upper Tribunal must make findings of fact is on the balance of probabilities, ie. what is more likely than not. This is a lower threshold than the standard of proof in criminal proceedings (being satisfied so that one is sure or beyond reasonable doubt).