THE UPPER TRIBUNAL ORDERS that:

(1) No one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of him or any member of his family in connection with these proceedings. The decision itself may be made public, but not the cover sheet, which is not part of the decision and identifies the Appellant by name.

(2) The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. No matter relating to the complainant shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of a sexual offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: V/0565/2019
[2020] UKUT 256 (AAC)

PF V DISCLOSURE AND BARRING SERVICE

MRS JUSTICE FARBEY, CHAMBER PRESIDENT
UPPER TRIBUNAL JUDGE EDWARD JACOBS
UPPER TRIBUNAL MEMBER CAROLINE JOFFE

Decided following an oral hearing conducted by Skype for Business on 26 June 2020

Representatives

Appellant	Betsan Criddle and Ben Jones of counsel, instructed by Surjit Dubb of Hempsons Solicitors
Respondent	Ben Jaffey QC and Paul Skinner of counsel, instructed by

UPPER TRIBUNAL CASE NO: V/0565/2019
[2020] UKUT 256 (AAC)
PF V DISCLOSURE AND BARRING SERVICE

Laura Findlay of the Disclosure and Barring Service

DECISION OF THE UPPER TRIBUNAL ON THE PRELIMINARY ISSUE

Section 4(2)(b) of the Safeguarding Vulnerable Groups Act 2006 is to be interpreted and applied in accordance with the analysis in our reasons below.

REASONS FOR DECISION

A. Introduction

1. This case arises from an application by the appellant, who is a medical doctor, for an enhanced disclosure with barred lists check, as he wished to engage in regulated activity with children. This revealed that he had been accused of sexually assaulting a patient. He was charged with having caused a male to engage in sexual activity without consent, but was found not guilty by a jury on 9 December 2016. Nevertheless, on 28 November 2018, the Disclosure and Barring Service (DBS from now on) added him to the Adults' Barred List on these grounds:

> On 1 September 2015, you sexually abused a male patient … during an intimate examination by:-
>
> - conducting the examination whilst Mr … was naked unnecessarily;
>
> - directing Mr … to adopt a 'doggie position';
>
> - touching Mr …'s penis, testicles and back in a sexual manner;
>
> - by performing oral sex upon Mr …

2. Upper Tribunal Judge Jacobs gave permission to appeal to the Upper Tribunal and the case was listed for hearing on 28 February 2020. Shortly before the hearing, Farbey J, the Chamber President of the Administrative Appeals Chamber, identified an issue of interpretation that arose in this case and in a number of other cases before the Chamber. She directed that the issue be resolved as a preliminary issue by a special panel. This is the decision of that panel, following a hearing on 26 June 2020. We are grateful to counsel for their written and oral submissions that have assisted us in our analysis.

B. The preliminary issue

3. The preliminary issue is the proper approach for the Upper Tribunal to take to appeals on challenges under section 4(2)(b) of the Safeguarding Vulnerable Groups Act 2006 to findings of fact made by the DBS:

> **4 Appeals**
>
> (1) An individual who is included in a barred list may appeal to the Upper Tribunal against–

…

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

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

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

(a) on any point of law;

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

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

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

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

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

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

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

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

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

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

C. The arguments

4. The arguments put at the hearing were significantly different from those in the skeleton arguments and, inevitably, they developed under questioning. We set out the arguments as presented at the hearing. We have not included the parties' arguments on Articles 6 and 8 of the European Convention on Human Rights, as we have not needed to rely on those Articles in reaching our conclusions.

The argument for the appellant

5. Ms Betsan Criddle with Mr Ben Jones on behalf of the appellant submitted that the proper interpretation of section 4 depended on its language and context.

The Civil Procedure Rules did not apply, so the approach to appeals under CPR Part 52 was not relevant. Bespoke appeal provisions in other legislation did not assist. She emphasised both the stigma attached to being included on a list and that the effect was to prevent the appellant from following his profession. In this context, fairness demanded a full appeal on the facts before an independent and impartial tribunal.

6. She identified as common ground that: (a) the appeal was against the DBS's decision, so an appellant had to identify what was wrong with it; (b) *Wednesbury* grounds and perversity were matters of law so that there was no question but that they could be considered by the tribunal under section 4(2)(a); and (c) the tribunal was entitled to consider and make findings of fact in relation to evidence that had not been before DBS.

7. Section 4 does not limit the tribunal to asking whether the decision was wrong when it was made. She took us to decisions of the High Court and Court of Appeal that had referred to the specialism of the decision-makers under the 2006 Act, but submitted that they related to the appropriateness of including a person on the list, not whether there was a mistake of fact. Respect for the decision under appeal was appropriate from one judicial body to another, but not from a judicial body to an administrative decision-maker. She also referred to a number of Upper Tribunal appeals under section 4, largely to emphasise that they could be distinguished, although she relied on comments that ambiguity in the section should be resolved in favour of the appellant.

The argument for the DBS

8. On behalf of the DBS, Mr Ben Jaffey QC with Mr Paul Skinner began by setting out the essence of his submissions in ten propositions, which he derived from section 4. (i) Section 4(2)(a) provides for a mistake of law and permits the tribunal to consider the evidence to the extent that it may consider whether the DBS treatment of the evidence gives rise to an error of law, such as *Wednesbury* unreasonableness, perversity or a violation of a Convention right on the ground of proportionality. (ii) Section 4(2)(b) provides for a mistake of fact which must mean something more than what is already covered in section 4(2)(a). (iii) In order for section 4(2)(b) to be engaged, the appellant has to show a mistake. This must appear in the grounds of appeal, which may be supplemented in the course of the proceedings in the light of the evidence or in the exercise of the Upper Tribunal's inquisitorial role. (iv) The mistake is not limited to one that was apparent on the evidence available at the time of the decision. It may be an innocent mistake which comes to light when all the relevant evidence becomes available on appeal. (v) A fact may be an action or a state of mind. (vi) There are limits to what constitutes a finding of fact. It does not include predictive or evaluative assessment of risk relevant to the barring decision which is expressly a matter for DBS under section 4(3). (vii) Evidence and facts are different. Inferences are included as part of the tribunal's legitimate fact-finding process.

(viii) New evidence is allowed. (ix) A mistake must be material: it must (on the express wording of section 4(2)(b)) relate to the basis of the decision under appeal. (x) The tribunal will show respect for the DBS's analysis of the facts when appropriate (for example, in cases where the evidence before the tribunal adds nothing to what DBS considered in reaching its decision). The extent of the respect due to the DBS analysis of facts will depend on the circumstances.

9. Mr Jaffey largely relied on Ms Criddle's exposition of the authorities, merely adding some qualifications. Referring to his skeleton, Mr Jaffey accepted that he was not arguing for a test that the findings must be 'plainly wrong'.

Ms Criddle's reply

10. During the course of submissions, the ground between the parties narrowed. At the end of her reply, Ms Criddle was asked what in practical terms was the difference between the parties' position on the preliminary issue. She said that it came down to the starting point. Mr Jaffey had argued for the DBS's decision and reasoning to be the starting point, whereas she had argued for the question of whether there was a mistake to be at large as part of the analysis of the evidence.

D. The authorities

11. The relevant body under the 2006 Act was originally the Independent Safeguarding Authority (ISA). This later became the DBS. We have retained references to the ISA in quotations, but otherwise refer for convenience to the DBS. The different title makes no difference to the analysis of the preliminary issue.

Court cases

12. In *R (Royal College of Nursing) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin), [2011] 1 WLR 1193, Wyn Williams J was concerned with a challenge by way of judicial review to the lawfulness of some aspects of the scheme under the 2006 Act. This was not an appeal against a decision of the Upper Tribunal. The judge commented on section 4(2)(b):

> 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 subsection 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.

That is an unexceptional statement of what the legislation says. Like the judge, we see no justification for restricting the natural interpretation of the language of section 4(2)(b) in its context.

13. The judge went on to comment on the mistake of law jurisdiction and, in doing so, on the expertise of what is now the DBS:

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

This passage recognises the ways in which the mistake of law jurisdiction allows the Upper Tribunal to find that the decision under appeal was unreasonable, irrational or disproportionate. In doing so, it restricted the scope of section 4(3) as a limitation on the Upper Tribunal's jurisdiction. The judge's comments on the quality of the DBS's expertise related to assessing the appropriateness of including the appellant on a list within the scope of section 4(3) as the judge interpreted it. Mr Jaffey argued that it had wider relevance. We do not agree. The judge's comments do not relate to the exercise of the tribunal's mistake of fact jurisdiction and cannot be directly related to that jurisdiction. Indeed, the remarks were based on the assumption that the DBS's decision was otherwise soundly based in law and fact. We do, though, accept that there may be circumstances in which the DBS's decision on matters which engage its expertise may have a relevance to the evaluation of the evidence in a particular case.

14. In *B v Independent Safeguarding Authority (Royal College of Nursing intervening)* [2012] EWCA Civ 977, [2013] 1 WLR 308, the Court of Appeal was concerned with the Upper Tribunal's exercise of its mistake of law jurisdiction. The tribunal decided that there was no mistake of fact and went on to consider whether there had been a mistake of law. The issue it had to decide was whether

the decision to include the appellant on both the Adults' and Children's Barred Lists had been disproportionate. This presented the tribunal with a unique difficulty. As Maurice Kay LJ recognised in the Court of Appeal:

> 27. Finally, I acknowledge the difficulty faced by the Upper Tribunal in a case such as this. I can think of no other statutory regime in which a tribunal is expressly prohibited from revisiting 'appropriateness' but is obliged to address proportionality.

The Court decided that the Upper Tribunal had gone wrong in law. Maurice Kay LJ gave the lead judgment. He noted at [16] that, in assessing proportionality, the Upper Tribunal had 'to give appropriate weight to the decision of a body charged by statute with a task of expert evaluation.' He concluded at [19] that 'I find it difficult to escape the conclusion that the Upper Tribunal was simply carrying out its own assessment of the material before it' rather than deciding whether the decision to list had been disproportionate. For Sir Scott Baker in his short judgment at [30], one of the determining factors was that 'the Upper Tribunal did not give weight to the decision of the ISA (a body with particular expertise)'.

15. Maurice Kay LJ commented on the relative specialism of the Upper Tribunal and what is now the DBS. Counsel for the Royal College had argued that the Upper Tribunal was a specialist tribunal. The judge said:

> 21. Whilst there is truth in this submission, it has its limitations for the following reasons: (1) unlike its predecessor, the Care Standards Tribunal, it is statutorily disabled from revisiting the appropriateness of an individual being included in a Barred List, *simpliciter*; and (2) whereas the Upper Tribunal judge is flanked by non-legal members who themselves come from a variety of relevant professions, they are or may be less specialised than the ISA decision-makers who, by paragraph 1(2) of schedule 1 to the 2006 Act 'must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults'. I intend no disrespect to the judicial or non-legal members of the Upper Tribunal in the present or any other case when I say that, by necessary statutory qualification, the ISA is particularly equipped to make safeguarding decisions of this kind, whereas the Upper Tribunal is designed not to consider the appropriateness of listing but more to adjudicate upon 'mistakes' on points of law or findings of fact (section 4(3)).

16. The only issue for the Court was the way the Upper Tribunal had exercised its mistake of law jurisdiction. It was not concerned with its mistake of fact jurisdiction. The comments on specialism and respect do not relate to mistake of fact. Indeed, the final sentence of [21], which we have quoted, appears to recognise that the comments do not relate to decisions on mistakes of fact. The judges' comments do not translate to the exercise of the tribunal's mistake of fact jurisdiction, except to the extent that the DBS's expertise may have a relevance

to the evaluation of the evidence in a particular case. As with the comments in the *Royal College of Nursing* case, we accept that there may be circumstances in which the DBS's decision on matters which engage its expertise may make a contribution to the tribunal's mistake of fact jurisdiction.

Upper Tribunal cases

17. We were principally referred to three decisions, although there were references in them to other decisions.

18. *XY v Independent Safeguarding Authority* [2011] UKUT 289 (AAC), [2012] AACR 13. This was the first appeal decided by the Upper Tribunal and contains a detailed account of the procedures followed by the DBS and a wide-ranging discussion of legal issues arising on the tribunal's jurisdiction and its application. The appellant's challenges to the decision were on matters of law, so the tribunal's jurisdiction on mistakes of fact did not arise. The principal statement that is worth recording is the remark at [53] that a finding that was 'plainly wrong' might form the basis of a successful appeal. That was in the course of a discussion about the relevance of the decision in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 in the context of the Upper Tribunal's jurisdiction under the 2006 Act.

19. *VT v Independent Safeguarding Authority* [2011] UKUT 427 (AAC). In this case, the appellant had accepted a caution for possessing indecent images of children. The tribunal decided there was a mistake of law in the decision on account of a flaw in the procedure followed by the DBS. It made a number of comments, all of them in the exercise of its powers of disposal under section 4(6). The tribunal's jurisdiction was inquisitorial and not adversarial: see [43]. Section 4(3) only applies to the mistake provisions: see [44]. Any ambiguity in section 4 as a whole should be resolved in favour of the appellant: see [45]. A specialist tribunal sitting with expert members stands in the shoes of the decision-maker: see [47].

20. *CM v Disclosure and Barring Service* [2015] UKUT 707 (AAC). The issue for the tribunal was whether the decision to include CM on the Children's Barred List was irrational or perverse. There was no issue on the facts of the incidents that led to him being barred: see [31]. The issue was whether the decision was irrational or perverse. The tribunal decided that it was because the DBS's reasoning: (a) ignored a relevant fact; and (b) made a flawed assessment of CM's behaviour. The tribunal referred to the evidence and to facts, but they were all made and have to be read in the context of its mistake of law jurisdiction.

E. Our analysis of section 4(2)(b)

Some preliminary points

21. This is our analysis of section 4. It is largely derived from a consideration of the language of the section read in its context. We have not referred much to

previous decisions, because none dealt with the issue we have to decide, which is why it was identified as a preliminary issue to be heard by a special panel. We do not consider that the section is ambiguous. We note that *VT* at [45] merely said 'insofar as there is any ambiguity in the drafting of section 4'; it did not actually say that there was any.

22. The function of the DBS is to enquire and decide whether or not a person should be included on the Adults' Barred List or the Children's Barred List. Section 4 provides for an appeal against some, but not all, aspects of the decision to include a person on a list.

23. There is no end to the infinite variation of the terms in which a right of appeal may be conferred. The parties were invited to identify any other rights of appeal that might help us to interpret section 4 and we are grateful for their researches and argument. In the event, we have decided that none of those other rights of appeal help us to decide the present preliminary issue. Some were framed in very different terms and, although others have some similar features to section 4, their contexts were significantly different.

The Upper Tribunal's authority

24. Section 4 provides for an appeal from the DBS's decision to the Upper Tribunal. This is an unusual jurisdiction for the Upper Tribunal, which normally hears appeals on points of law from the First-tier Tribunal or equivalent devolved tribunals.

25. The tribunal's jurisdiction derives from and is governed by section 4. Section 4(2) says what authority the tribunal has. Section 4(3) says what authority it does not have. Both subsections are jurisdictional; together they define the scope of the tribunal's authority.

26. The Upper Tribunal has no power to act outside the authority conferred on it by that section. The scope of that authority has to be found in the proper interpretation of the section, derived from its language and context. As we have said, we did not need to rely on an appellant's Convention rights under Articles 6 and 8 of the European Convention on Human Rights to make our decision.

27. An appeal right may provide for a challenge to all or any of the three elements of a decision: the law, the facts, and the judgments (such as discretions). The main element of judgment in the work of the DBS is the appropriateness of including someone on a list. Section 4(3) deals with that judgment.

The structure of section 4

28. Once permission to appeal has been given, the Upper Tribunal's authority under section 4 consists potentially of two phases: the mistake phase and, if there was a mistake, the disposal phase. The mistake phase raises the question whether or not the tribunal must confirm the decision under appeal. The answer depends on whether there was a mistake of law or fact. This is governed by the

grounds of appeal. To this extent, the starting point for the tribunal's consideration of the appeal is the DBS decision.

29. The disposal phase raises the question whether to direct removal from the lists or remit the matter to the DBS for a new decision. It is important to keep them separate, because by its terms section 4(3) qualifies section 4(2) and therefore applies only to the mistake phase. We say as little as possible on the disposal phase, which was not part of the preliminary issue and, so Mr Jaffey told us, might come before the Court of Appeal in the near future.

Grounds of appeal

30. Section 4(2) and (3) refers to the grounds of appeal. This cannot mean the grounds as initially submitted in support of an application for permission, because at that stage the appellant has not seen either the evidence on which the DBS based its decision or its detailed reasoning. When an application for permission to appeal is received, it is put before a judge. It is a regular practice within the Administrative Appeals Chamber for the judge to direct the DBS to provide its documentation at that stage. When it is received, it is sent to the appellant, who is able to alter the grounds of appeal before the judge decides the application. The grounds of appeal to which section 4 refers must at least include the grounds as altered in light of the DBS documentation.

31. It is possible that, once permission has been given, other grounds may be identified by the appellant on closer examination of the evidence, perhaps when the appellant obtains representation on appeal, or by the tribunal if it considers it appropriate to exercise its inquisitorial function recognised in *VT* at [43]. The parties agreed that the tribunal could take account of those grounds also.

32. The result in effect is that the grounds of appeal refer to the grounds on which an appellant may rely but also control the basis on which the Upper Tribunal must decide whether or not to confirm the decision under appeal.

33. The grounds, however identified, may mean that the issue for the Upper Tribunal is narrower than that before the DBS. This is not unusual on appeal. Even if the right of appeal is framed in the widest possible terms, it is usual for an appellant to challenge only certain aspects of a decision.

34. Mr Jaffey was right to say that the appellant's criticisms of the decision will be the focus of the appeal. But it may not be possible for the tribunal to limit itself to the evidence on that one point. It has to assess the evidence before it as a whole and that must include evidence that may be relevant to that point in particular or to the reliability of the appellant's evidence generally. Take this hypothetical example. If the appellant accepts that he sent text messages to a young child, but denies having had intercourse with her, the nature of the text messages may be relevant to the tribunal's assessment of the credibility of his denial.

35. We were told that section 4(3) is often called the 'carve out' provision. It is no such thing. It does not carve something out of what would otherwise have been given. What it does is to make clear what section 4(2) does not give.

36. We have more to say about section 4(3) when we deal with respect.

The mistake

37. Section 4(2)(b) refers to a 'mistake' in the findings of fact made by the DBS and on which the decision was based. There is no avoiding that condition. The issue at the mistake phase is defined by reference to the existence or otherwise of a mistake. If the Upper Tribunal cannot identify a mistake, section 4(5) provides that it must confirm the DBS's decision. That decision stands unless and until the tribunal has decided that there has been a mistake.

38. 'Mistake' is the word used and there is no reason to qualify it. The courts operate a test of whether a decision was 'wrong'. This has in the past been qualified by words like 'plainly'. Nowadays, that has to be understood in the way explained by the Supreme Court in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600:

> 62. Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that the trial judge has gone 'plainly wrong', and considered that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion.

That draws attention to the need to identify an error or, in the language of section 4, a mistake. It is not enough that the Upper Tribunal would have made different findings. The word 'plainly' has not yet taken root in the Upper Tribunal's cases. The phrase was used in *XY* at [53], but the tribunal was merely giving a general description of the tribunal's jurisdiction on mistake of facts and not dealing with its interpretation. In order to avoid any doubt or confusion about what it means, it is better to use only the statutory language and avoid any qualifiers.

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

40. Mr Jaffey argued that facts did not include the factors relevant to the assessment of the risk and the need for protection that was the focus of the

appropriateness to include a person on a list. He criticised some statements in some of the Upper Tribunal's decisions he cited for trespassing over that boundary. He is right that that the tribunal's jurisdiction at the mistake phase has to be limited to finding a mistake of law or fact. He is also right that labelling something as a finding of fact does not of itself make it one. But we are sceptical whether the line between findings of fact and factors relevant to assessing risk is so clear in principle or so easy to draw in practice as his argument suggested. A simple example makes the point. Suppose the tribunal comes to the conclusion – a deliberately neutral expression - that the appellant has a propensity for risky behaviour. That is a finding of fact about character, personality and behaviour, which relates to the present and to the future. It is also a factor that is relevant to the assessment of risk, again present and future. In neither case is it likely to be decisive. As both a finding and a risk factor, it will have to be assessed in the context of the other findings or factors as a whole. There is no reason why it has to be classified as one or the other; findings and risk factors are not mutually exclusive categories. Nor is it necessary to split it into parts, consisting of a finding about the present, separated from the element of future risk. At the best, such an exercise is artificial; at the worst, it is unworkable. The reality is that the conclusion is both a finding and a risk factor. It is pointless to require a tribunal to draw a distinction that does not exist.

41. The mistake may be in a primary fact or in an inference. There was a discussion at the hearing about primary and secondary facts and about inferences. It became clear that these terms were used in different senses, so we need to make clear what we mean. A primary fact is one found from direct evidence. An inference is a fact found by a process of rational reasoning from the primary facts as a fact likely to accompany those facts.

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

43. When the Court of Appeal deals with a challenge to a judge's findings of fact on appeal, it largely limits itself to the evidence that was before the court below and only allows fresh evidence if it satisfies the conditions set out in *Ladd v Marshall* [1954] 1 WLR 1489. Laws LJ explained the basis of that approach in *Subesh v Secretary of State for the Home Department* [2004] EWCA Civ 56, [2004] Imm. A.R. 112:

> 44. The answer is, we think, ultimately to be found in the reason why (as we have put it) the appeal process is not merely a re-run second time around of the first instance trial. It is because of the law's acknowledgement of an important public interest, namely that of finality in litigation.

In *Edwards v Bairstow* [1956] AC 14 at 38, Lord Radcliffe referred to the efficient administration of justice. Those reasons make eminent sense in an appeal from a

court or tribunal. They are not appropriate to an appeal from an administrative decision-maker and do not apply under section 4.

44. Whether or not the Upper Tribunal hears further evidence, it will have before it the reasoning of the DBS when it makes its assessment of the evidence. The respect to be shown to that reasoning was the only surviving area of disagreement by the end of the oral hearing.

Respect

45. We heard much discussion of the respect which is shown on appeal to the decision under appeal. Appellate courts and tribunals have given a variety of reasons for this respect. Essentially they involve two factors. Both reflect the need to ensure that the decision under appeal was wrong or, in the language of section 4(2), involved a mistake. They are both factors that limit the ability of an appellate body to be satisfied that the decision under appeal did involve an error or mistake. One is that the appeal court may not have before it all the information on which the decision was based, especially (but not exclusively) the value that can be provided by observing at first hand the dynamics of the trial process, which Waller LJ explained in *Manning v Stylianou* [2006] EWCA Civ 1655 at [19]. The other is that the specialism of the body makes it better placed to make a decision than the appeal court.

46. Section 4(3) is not about respect in either of those ways. It does not require the Upper Tribunal to show respect to or for the DBS; it cannot be lessened or displaced in the circumstances of an individual case. The provision is jurisdictional; it makes clear the limits of the tribunal's authority. Mistakes in assessing the appropriateness of the decision to include a person on a list are outside its jurisdiction in the mistake phase unless they amount to a mistake on a point of law, as Wyn Williams J recognised in *R (Royal College of Nursing) v Secretary of State for the Home Department*, above, at [104]. We come back to the importance of an appeal being statutory: no court or tribunal has power to act beyond the scope of the authority given to it by the statute. That is why the Upper Tribunal went wrong and its decision was set aside by the Court of Appeal in *B v Independent Safeguarding Authority*, above.

47. This does not mean that respect is not relevant within the tribunal's jurisdiction. The DBS's experience at assessing the appropriateness of including someone on a list will be relevant if the tribunal is considering whether to exercise its power of disposal under section 4(6)(a). As we have said, that is beyond our consideration on the preliminary issue which we are deciding.

48. The DBS's experience may also be relevant to assessing whether it made a mistake in its findings of fact. In his skeleton, Mr Jaffey wrote:

> The DBS has particular expertise in the assessment and weighing of disputed hearsay evidence, the assessment of the credibility of alleged

> victims and perpetrators of abuse, the identification of patterns of behaviour and the appropriate inferences to draw from findings of primary fact.

We doubt that the DBS has much to teach judges about assessing hearsay evidence or about drawing inferences, both of which are well within the range of skills deployed by judges in all courts and tribunals at all levels. It may, though, be that some aspect of the DBS's reasoning will assist the tribunal in making its own assessment of the evidence before it.

49. We prefer to avoid talking in terms of respect, or in terms of the starting point for the tribunal's consideration beyond saying that an appellant must demonstrate a mistake of law or fact. We put it like this. The DBS's reasoning will be before the Upper Tribunal and the tribunal will take account of it for what it is worth in the context of the evidence as a whole. At one extreme, it may be of little assistance. If the tribunal has received significant further evidence (such as oral evidence that would not have been available to the DBS), it is likely that its evaluation of the evidence that was before it will have been overtaken so that the only appropriate approach will be for the Upper Tribunal to begin afresh. At the opposite extreme, it may play a significant role. If there is no further evidence put to the Upper Tribunal, the DBS's reasoning may well form the basis of the case that the appellant has to meet. Between these extremes, its relevance and significance will depend on the circumstances of the case. There may, for example, be some feature of the case - assessing victim's evidence, perhaps - on which the DBS's reasons disclose a special understanding of the evidence on which its findings were based and on which the tribunal's specialist members may have some insights to contribute. 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.

The Upper Tribunal's rules of procedure

50. The Upper Tribunal's procedure is governed by the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698). We were referred to the overriding objective in rule 2 to deal with cases fairly and justly, to the tribunal's power in rule 5 to regulate its own procedure, and its powers in rule 15 to control issues and evidence, including admitting or excluding evidence. Those are all duties and powers conferred on the tribunal and available to it in exercise of its jurisdiction under section 4. But they are rules of procedure, and procedure can only be exercised within a tribunal's jurisdiction. The rules cannot, and do not purport to, confer jurisdiction. They show what the tribunal can do within its jurisdiction. They do not assist in showing what the extent of that jurisdiction is.

Summary

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.

Authorised for issue
on: 27 August 2020

The Hon Mrs Justice Farbey
Chamber President

Edward Jacobs
Upper Tribunal Judge

Caroline Joffe
Tribunal Member