IN THE UPPER TRIBUNAL **Appeal No. UA-2022-000779-V**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

VM

Appellant

- v –

DISCLOSURE AND BARRING SERVICE

Respondent

Before: **Upper Tribunal Judge Jones**
Tribunal Member Roger Graham
Tribunal Member Matthew Turner

Hearing date: 13 May 2024
Decision date: 11 June 2024

Representation:
Appellant: The Appellant's brother appeared on her behalf
Respondent: Simon Lewis, 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 20 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.

The Upper Tribunal has already made an order on 17 July 2023 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.

This decision and direction are given under section 4(5) of the Safeguarding Vulnerable Groups Act 2006 and rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Introduction

1. The Appellant (also referred to as 'VM') appeals to the Upper Tribunal against the decision of the Respondent (the Disclosure and Barring Service or 'DBS') dated 20 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 25 September 2023 in respect of the grounds raised by the Appellant in the grounds of appeal and at the permission hearing. In summary, the grounds of appeal were that each of the 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 in regulated activity.

3. We held a hearing of the appeal in person at Field House, London on 13 May 2024. The Appellant appeared and participated in person by giving oral evidence. She was assisted and represented by her brother who made submissions on her behalf.

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

The Background

5. In broad summary, the background is as follows. At the material time, VM was the deputy manager of a residential care home ("the Home"), operated by her employer ("the Employer"), which provided care for 7 vulnerable adults with learning difficulties ("the Residents").

6. Various concerns were raised by colleagues about VM's conduct at work. The Employer investigated. VM resigned before the disciplinary procedure had completed. A disciplinary hearing took place in VM's absence. The Employer referred VM to DBS.

People

7. Relevant people include (and are referred to as follows):

AV Registered Manager / disciplinary manager
GC Service Manager / investigation manager
SB Manager
VM Deputy manager
DC Senior
SJR Support worker

GH Support worker
DH Support worker
LE Support worker
KC Administrator
KB Maintenance
EJ Housekeeper
DL Resident
LP Resident
YS Resident

8. The DBS submit that Residents DL and LP experienced particular vulnerability at material times:

   (a) DL [32] [75] (male) was in his late 40s. He had limited mobility. He used a wheelchair, operated by staff. He was unable to stand independently. He was meant to have 2:1 staffing for *all* transfers, with the use of a hoist and sling. He was at risk of and from falls. He should have been transferred into his chair for all activities and mealtimes.

   (b) LP [33] [79] (female) was in her mid-to-late 50s. She faced particular risks and issues relating to choking. She required supervision when eating and drinking. She was considered safer sat on a chair at the dining table, rather than in a wheelchair, but sometimes needed encouragement to make that transfer. She should remain upright, for at least 30 mins, after oral intake.

Chronology

9. References in square brackets [] are to page numbers of the 204 page bundle of evidence provided by the DBS.

10. In chronological order, the most notable events that took place were as follows:

Matters at the Home
31.03.20 VM started work at the Employer [30].
02.03.21 “Documented discussion” held by the Employer with VM [72].
16.03.21 Concerns raised, about VM, by colleagues SJR and GH [46].
22.03.21 Further concerns raised [46].
Various Statements produced by: DC [73], SJR [56], DH [63], GH [53].
25.03.21 Interviews conducted with: SJR [59], DH [65], GH [61], KC [67], LE [69], LC [70], KB [74].
TBD VM interviewed [80] (probably on 29.03.21).
29.03.21 VM suspended [32].
01.04.21 Investigation report completed [44], concluding that a disciplinary hearing should be held [48].
08.04.21 VM invited to disciplinary hearing [32], with documents attached.
08.04.21 VM resigned, with immediate effect [98].
12.04.21 Disciplinary hearing held (in VM’s absence) [32].

28.04.21 VM's email to the Employer [101].
30.04.21 Written outcome from disciplinary hearing [49]: several allegations "upheld; matter to be referred to DBS [52].
30.04.21 Referral to DBS [35].
05.05.21 VM's emails with the Employer, following outcome [102-106].

DBS procedure
24.05.21 DBS early warning letter [17].
17.06.21 DBS information request to local authority [127].
25.06.21 VM's email to the Employer [108].
30.06.21 The Employer's response [108].
Aug 2021 VM's initial responses to DBS [19-20].
03.09.21 Local authority's response to DBS request [129], attaching an initial assessment from 2012 [84], and requesting further information itself.
30.09.21 Further particulars supporting local authority's request [137].
09.02.22 DBS minded to bar letter [22], with documents attached [27].
11.02.22 Written representations on behalf of the Appellant in respect of the minded to bar letter ("the Representations") [92], with supporting documents.
20.04.22 DBS letter ("the Final Letter") [120] to VM setting out the Decision (to be read alongside the "Barring Decision Summary" [144], which collates the more detailed rationale of the DBS decision-maker).
28.04.22 VM's response to the Final Letter [125].
May 2022 Further correspondence between DBS and local authority, concluding with DBS decision not to share information about VM's status [143].

UT proceedings
16.05.22 VM's application received by UT [2], including appeal grounds [5].
21.06.22 UT directions (received on 06.08.22 [174]).
06.09.22 DBS letter to UT [174].
16.09.22 DBS filed/served submissions in response to the application [178].
05.10.22 DBS letter to UT [184].
17.07.23 UT directions [186].
25.09.23 UT directions [190]: permission to appeal granted.
29.11.23 Written observations provided by VM's new representative [196].
03.01.24 DBS email to UT [200] regarding further directions (following an apparent omission by VM to attempt to agree the same).
11.01.24 UT directions [201].

The Respondent's barring decision dated 20 April 2022

11. The Final Decision Letter from the Respondent dated 20 April 2022 notified the Appellant that it was including her on the Children's Barred List and vulnerable Adults' Barred List.

12. The findings of relevant conduct made by the DBS were that the Appellant (described as 'you'):

a. On more than one occasion you failed to support service users in line with their care and SALT guidelines when you
   (i) left LP in her bedroom to eat her meals
   (ii) left LP alone in her bedroom for most of the day
   (iii) took service users to their rooms at 3pm, placing them in the pyjamas and night pads
   (iv) instructed a staff member to leave YS on her bed despite being asked to assist in moving her to a wheelchair.
b. On unspecified dates you falsified daily notes when you wrote the notes prior to events taking place.
c. On an unspecified date you have promoted bad practice when you instructed EL to hoist service user DL alone despite the ceiling hoist requiring two people.
d. On unspecified dates you falsified MARS sheets when you signed for medication which had had yet to be administered.
e. On more than one occasion you have made inappropriate comments/a gesture in the presence of service users which included
   (i) talking about your menstrual cycle
   (ii) inferring that a staff member required 'Femfresh'
   (iii) complaining about your personal life
   (iv) using a hand gesture to swear at member of staff behind their back.

13. The DBS went on to conclude that the Appellant'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.

14. The Final Decision Letter stated as follows:

> The DBS is satisfied you have engaged in conduct which harmed or could harm children and vulnerable adults this is because in your role as Deputy Manager on more than one occasion you have failed to support service users in line with their care and SALT guidelines, promoted bad practice through instruction, falsified MARS sheets and daily notes and made inappropriate comments/a gesture in the presence of service users.
>
> In your representations you have denied any wrongdoing. Whilst it is acknowledged that you have addressed some of the findings you have stated that the allegations were malicious, concocted between two colleagues (GH and SJR) in retaliation to you being instructed to split them up on shift. Consideration has been given to your explanation, however it is recognised there are number of allegations which have been corroborated by other staff members when they have raised concerns of their own which appear seemingly independent of GH and SJR. Therefore your reasoning for the allegations does not appear credible.
>
> The DBS is satisfied that you have demonstrated a pattern of behaviour where, despite the implications that your actions may have, you have breached guidelines and procedures, placing service users at risk of physical and emotional harm. It has been established that you have failed to support a service user during mealtimes despite the service user being placed under SALT guidelines following a previous choking incident Despite being fully aware of the manual handling procedures in place you have been willing to place both service user

and your colleague at risk of harm and promote bad practice when you instructed your colleague to hoist alone rather than assist them when requested. This behaviour is deemed neglectful. Furthermore you have falsified MARS sheets and daily notes which you documented in advance. Your actions could have resulted in omission of medication and the service user's social needs not being met. These incidents show a lack of regard for your managerial and caring role and for those you were employed to care for.

The DBS is satisfied that on more than one occasion you have deprived service users the right to choose, where you have instructed a colleague to leave a service user on her bed despite the service user not wanting to stay in her bedroom, left a service user in her room all day and put service users in their rooms, changed ready for bed at 3pm in the afternoon.

The evidence indicates there has a lack of recognition pertaining to the care needs of these service users. It has been established that you have made inappropriate comments about other colleagues, sworn and made rude hand gestures behind the back of a colleague and made comments about your own health and complained about your personal life. The incidents have all been in the presence of service users. You have shown lack of consideration for the feelings of your colleagues and the service users who were witness to your comments/gesturing as your behaviour had the potential to cause emotional harm.

Your conduct is wholly incongruent with the duty of care and the level of trust expected of an individual working with vulnerable adults. This raises significant concerns regarding your suitability to work with vulnerable adults in the future. As you have not admitted to any misconduct there has been no plausible explanation for your inappropriate behaviour.

It is recognised that you have provided a number of positive character references attesting to your caring nature, however the proven behaviour indicates that you have shown very little consideration for caring needs of the service users or the negative impact that your behaviour could have had on the individuals involved. Furthermore you have acted in way that you see fit regardless of consequence. In light of the above there remains significant concerns that you are likely to repeat the behaviour in the proven allegations and cause harm to vulnerable adults if you were to gain employment in regulated activity.

Therefore it is appropriate to include you in the Adults' Barred List.

Whilst there is no evidence to indicate that you have harmed a child in the past, the causal behaviours to the relevant conduct would present a risk of significant harm were they repeated against children (eg neglectful behaviour, breaching policies and procedures and removal of choice). The behaviours have occurred within your professional duty of care towards vulnerable people and it is reasonable to conclude that, were you to be tasked with a similar duty of care to children, concerns would remain about your inappropriate interactions. It is not unreasonable to conclude that, faced with the responsibility of caring for children, you would present similar risks and there would be a risk of repetition of this behaviour should you be tasked with providing care. Therefore it is also appropriate to include you in the Children's Barred List.

Consideration has been given to the interference of a bar in relation to your Human Rights, specifically your right to a private and family life. It is recognised

> that a decision to bar you would have a significant impact upon your future employment and volunteering opportunities within regulated activity. As a result there may be a detrimental impact upon your earning potential through the reduction of employment opportunities available to you. This could also impact upon your standard of living.
>
> It is also accepted that removing you from the entire workforce within regulated activity would prevent you from using the skills and experience you have gained from working in regulated activity in the future as well as preventing you from continuing with the path of your chosen career. Consideration is also given to the potential stigma you may feel due to inclusion. However, a safeguarding decision must take into account not only the rights of the referred individual but also those of the vulnerable groups who may be at risk of harm. Despite procedures and guidelines being in place you have acted how you see fit regardless of the negative…

Appellant's Grounds of Appeal

15. In her Grounds of Appeal (his "Reasons for Appealing" document) enclosed with her notice of appeal, the Appellant provided grounds of appeal. These were set out in the 'reasons for appealing' section (Section D) of her notice of appeal dated 10 May 2022. The Grounds make clear that the Appellant challenged the DBS's barring decision but did not make clear that she disputed each of the DBS's findings of relevant conduct. The Grounds stated:

> 'I feel the decision made did not take into account my 32 years previous experience where I have not had any complaints.
>
> Also that I have adopted my grandsons after fostering for over a year and have been commended for the work I have done with my grandson who has had severe anxiety issues.
>
> They also left investigation for over a year and a half with me not hearing anything from them and also working in care in that time and did not contact my current workplace for information on how I work and that I am extremely empathetic as always stated by previous homes I've worked for.
>
> They did not take into account that the two people that started the complaint are also very close to and have a lot of influence over other people that work there and are related to some staff.
>
> It feels like SS's reference wasn't taken into account or others.
>
> I feel that DBS should have at least spoken to me before making a judgement that affects the rest of my life.
>
> I feel that all the stuff that I did to improve the same home wasn't taken into account or my health at the time.

> I also feel that they could of spoken to social workers and my grandson's psychologist before putting me on the children's list.'

16. During the permission hearing in September 2023, the Appellant made clear that she did challenge each of these findings. She submits that each of the five findings was based on a mistake of fact.

17. She relied in part on the Representations she made in this regard to the DBS prior to the barring decision – in particular her email dated 11 February 2022 at page 92 of the bundle:

> …in response to why i shouldn't be put on the barring list i have worked in care for nearly 30 years and never had such complaints anywhere i have worked and even when on agency in past I have been requested also i was fostering my grandchildren at the time i would be stupid to risk their safety by doing these things.
>
> the person i am accused of lifting at the time is over 6ft and very heavy i never would of been able to do this without causing myself and him injury i have a history of sciatica also had just had covid and was still having trouble with my breathing i also had some medical issues where i was anaemic and lethargic due to these and also high blood pressure.
>
> since having covid the two people that concocted this were upset that they were being split on shifts also the manager at the time was not doing her job and passing a lot to me.
>
> the person that I am accused of leaving with food could not be as someone would of needed to be with her to assist her to eat so i would of sent someone with her as i was leading the shift.
>
> when i came back off from having covid i was told by manager to not do to much and to only undertake light duties as i was struggling to manage at the time as explained to my manager I was not in a great place mentally as also dealing with lots at home.
>
> i am the one that stopped staff leaving people in armchairs to eat and also changed a lot for the better in the home.
>
> the lady that i am accused of leaving in bed always asked to stay in bed before i started was left in bed on her own most days i am the one that encouraged her to get up most days.
>
> when the home had covid the residents had to stay in their rooms for isolation and at times were only left with two staff making it very difficult as manager said we cannot have agency.
>
> i have witnesses to everything that was happening and made complaints i have been senior and deputy in other homes and had no complaints.

I can give names and emails for the people that are willing to write me statements to back me up and attest to my character and how much i care for service users.

this situation upset me greatly as i have worked very hard over many years to build my reputation.

18. In addition, the Appellant stated and argued at the oral permission hearing ('OPH') on 25 September 2023 that:

a) There were no dates to the allegations.
b) She denies each of the findings – it was during Covid and if she required residents to be in or go back to their rooms then this is because it was necessary for health reasons.
c) LP would not be able to be in her room on her own as she could not manage and needed help and the Appellant would have to be there.
d) Many of the allegations depend on two former colleagues only – they were not happy with her and colluded to make false allegations against her because they were going to be split up from their shifts working together.
e) Four of the people named in the findings as witnesses were all related from the same family and the family relationship between them all was never revealed to the DBS.
f) She did not falsify any notes but helped staff write up their notes. In her role as deputy supervisory there had to be a clear hand over.
g) She never instructed staff to use the hoist on their own and nor did she.
h) She never falsified any of the MARS sheets and would have been picked up on this if she had – she may have made a mistake but she followed procedures.
i) There were only two people making allegations and the rest is hearsay – they are best friends and related to other members of staff.
j) She did not make any inappropriate comments or gestures in the presence of service users.
k) She may have discussed her own medical issues with the staff manager but they may have discussed it with other staff or it was overheard.
l) The Femfresh comment was not taken into account during the investigation.
m) There were no complaints made about her during her time and if these had been raised they would have been raised with her supervisor or home manager and investigated at the time but they were not. The home manager was not contacted and had since left.
n) There were never any issues or complaints raised with human resources ('HR') about her.
o) There was an inadequate disciplinary investigation by her former employer and she was not interviewed in relation to the allegations. She did not attend the disciplinary hearing as had already decided to resign.

p) The DBS upheld findings that were dismissed at the disciplinary investigation stage but also rejected findings that were upheld by the employer.
q) She had worked in care homes for 32 years with an unblemished record which should have been taken into account.
r) [RS] had been her supervisor in former employment and could attest to the quality of her work.
s) There would be a disproportionate impact if the barring were upheld as it may interfere with her ability to become a foster carer / special guardian for her third grandchild who may otherwise be taken into care.

19. 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).

20. On 25 September 2023 the Appellant was granted permission to appeal in respect of her grounds of appeal.

The evidence in the appeal

21. The DBS relied on written evidence from witnesses and transcripts of interviews contained in the bundle of evidence it filed and served which contained 204 pages. It contained the evidence relied upon by the DBS in making the barring decision and in defending the appeal.

22. The evidence on behalf of the DBS included transcripts of interviews with those witnesses from the Home and the Employer and correspondence from the local authority. The material also included the record of interview with VM at the Investigatory Meeting ('IM') with the Employer.

23. As we note, none of the DBS's witnesses made formal witness statements, gave oral evidence or were cross examined – their evidence was untested hearsay. This is a matter to take into account when considering the weight it is to be given and its reliability.

24. The relevant evidence [with page numbers in square brackets] is referred to in the discussion section below and we make findings of fact and draw conclusions based upon it and the Appellant's evidence.

The Appellant's evidence

25. The Appellant relied upon her notice of appeal and the submissions of fact she made at the OPH together with that she gave at the hearing.

26. The initial grounds of appeal ("the Grounds") were supplemented by those presented at the permission hearing [190] ('the Additional Grounds'). The Additional Grounds were then, in effect, reiterated, with some further content, in a document called "observations" from VM's new representative [196]. The UT had

indicated [201] that it was minded to take the content of the latter as VM's evidence in chief.

27. However, at the hearing, with the UT's permission, the Appellant supplemented her Grounds and Additional Grounds with evidence of fact given orally at the appeal hearing.

28. Despite our findings that the evidence given denying the allegations is not reliable nor credible in relation to most of the key issues in dispute, we summarise the Appellant's oral evidence. In summary she stated as follows.

Evidence in Chief

29. The Appellant disagreed with the barring decision and the findings of relevant conduct – she believed that the accusations were false. She had been in the care sector for a long time and not had any issues. She did not understand why she had been barred when no previous complaints had been made against her in the same place. Following the HR meeting she had had with her Employer (probably the documented discussion on 2 March 2021) she had nothing but good supervisions coming up to and before going on annual leave. Then she found out this was happening.

30. She thought some of the accusations were made up because she went in as a deputy manager and had done things to upset some of the staff and then they decided to make false accusations against her.

31. She had not left LP out in the bedroom to eat by herself – she had sent staff to assist LP while she (VM) would stay in the dining room. As a deputy manager she was needed to monitor the dining room and staff. She understood why LP could not eat in her room by herself as there was a choking hazard and potential that she would choke or die in hospital. The risk assessment stated someone was to assist her with special equipment as she could not hold a spoon or knife herself. She sent DH to assist her to eat – and as far as she knows, DH went and she took the tray up and took it in the dining room. She (VM) could not leave the dining room as other residents were there and eating. She (VM) was not responsible for taking charge of feeding LP.

32. PW was taken from her room and supported out of her bed. She (VM) did not take service users to their rooms and put them in pyjamas at 3pm. The only time she did that was when PW called her district nurse who was worried about bed sores, so she (PW) needed to get her in bed for a couple of hours in the afternoon then get up from there. This was on advice from district nurses. PW came back out for tea time at about at 5pm and that was to manage any risk of bed sores.

33. She (VM) also instructed a member of staff to put YS in bed despite being asked to assist. When she (VM) went into her room, YS was screaming at staff to assist and trying to scratch staff and she (VM) asked staff to leave her alone to calm down. She did an incident form and debrief because there was a risk of physical harm. She (VM) then went back 10 minutes later and spoke to YS and she agreed that she would get up for lunch at 12pm and this meant she got up at 12pm.

34. On any unspecified date she did not falsify MARS sheets nor say that medication had been administered when it had not been administered. She did not pre-sign the records. She knew the consequences of doing so and that there was a second checker - there was a second person coming in to check it had been done properly. They would have noticed any false record and she would have been in trouble. The consequences of falsified medication records were that one could give the wrong medication to a resident or not give them anything and the person could end up in hospital or even die.

35. On any unspecified date she did not falsify daily notes or record events prior to the events taking place. She would not know what was going to happen and she would not have done that. Also, there were no specific dates to the allegations so could not answer to what was written and when.

36. She had some issues with the staff and relationship breakdowns. Four of the staff were related to each other and she had split some staff up due to previous bullying of new staff and that did not go down well.

37. She did not make inappropriate comments and gestures nor mention menstrual cycles nor fem fresh. She did not complain about her personal life, make hand gestures nor swear about staff behind their backs. She had not done any of those things nor did accept the complaint about personal life and her talking about it in front of residents. As far as she was aware, there was no policy or law forbidding her from talking about her personal life (with staff). There were no occasions on which she made hand gestures behind people's back. She did not know the 'tosser' gesture but it could have been her waving.

38. The allegations took place during Covid when the Home was understaffed. It should have been 4 staff during the day and two at night but typically there were only 2-3 staff during the day.

39. She believed that the core allegations of relevant conduct and the barring had impacted on her life. She had been working in the care sector since she was 15 years old and it was the only job she had ever done. She was good at what she did and this enabled her to get where she did as deputy manager. She was an advocate for service users right and the barring had damaged her reputation. She was quite a caring person. It had impacted upon her and impacted upon her children and her grandchildren.

40. She has a Special Guardianship Order in relation to her two grandsons and they are doing ok. Her daughter has recently had another baby and was in a mother and baby unit. The baby would need to be placed with someone else if the outcome of the assessment goes against her daughter. She has care of the baby's other two siblings. She would not want her baby grandchild to end up in care, the baby should be with her and her other grandchildren (under a Special Guardianship Order). If that does not happen, she does not know where the baby would be placed and this would impact on her (VM) for all her life.

41. Following barring, she has since found alternative work as a room attendant at a hotel and that is what she is doing at the moment.

Cross examination

42. The Appellant was cross examined during the hearing and denied the allegations of relevant conduct. Mr Lewis suggested that each of the findings of relevant conduct was accurate and VM had committed them. He put each of the relevant pieces of written evidence to her which was contained in the bundle and suggested her account was neither reliable nor truthful. She denied all the allegations put to her in cross examination. The Appellant was also cross examined by Mr Lewis in relation to all other evidence.

Proportionality

43. In relation to the proportionality of the barring decision, the Appellant gave evidence agreeing with everything she had written in the notice of appeal, Grounds and Additional Grounds. She believed that her appeal should be allowed so that she could engage in regulated activity with children and removed from the barred list.

44. We address the proportionality of the decision to include her on the CBL and ABL in the discussion section below.

45. It goes without saying that all written and oral evidence given subsequent to the barring decision was not available to the DBS when making its barring decision.

46. Again, we make findings of fact in relation to this evidence in the discussion section below and give our reasons therefor. 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. We found her denials of committing the relevant conduct to be largely unreliable and lacking credibility for the reasons we give in the discussion section below.

Law

47. 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.

48. 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.

49. 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 paragraph 3 of Schedule 3 to the Act applies.

50. Paragraphs 3 and 9 of Schedule 3 to the Act, sets out the provisions in relation to "relevant conduct". 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 (or vulnerable adults)"; and (iii) it is satisfied that it is "appropriate" to include them.

51. Under paragraph 3(3) of Schedule 3 the DBS must include the person in the children's 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, and
> (b) it is satisfied that it is appropriate to include the person in the list.

52. 'Relevant conduct' is defined under paragraphs 4 and 10 of Schedule 3 to the Act as set out in the Appendix. Paragraph 4(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". Paragraph 4(2)/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".

53. 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".

The Upper Tribunal's jurisdiction on appeal

54. 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.

55. As underlined above, the Applicant 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).

56. 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))

57. 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.

58. 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."

59. 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."

60. 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.

61. 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.'

62. 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.

63. 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.'*

64. *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.'

65. 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.

66. 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.

67. 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.

68. 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.

69. 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 Appellant's submissions on the grounds of appeal

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

71. The Appellant's brother, as her representative, made submissions as to why the appeal should be allowed. He relied on the Grounds and Additional Grounds as set out above, together with her oral evidence. He submitted that her evidence was reliable and credible. She had an unblemished and long standing career working in the care sector and her character references attested to her good character. He also contrasted this with the evidence relied upon by the DBS which was written hearsay, from untested witnesses which was hearsay. This was in contrast to the direct and tested evidence the Appellant had given. He argued that the DBS witnesses had reasons to make up their accounts as the Appellant had managed them and put them on performance review.

72. Mr Lewis 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

73. We have examined all the evidence in the case, both that which was before the DBS and that submitted by the Appellant as part of her appeal (which was not available to the DBS at the time it made its Decision).

74. The evidence that was before the DBS when it made its Decision included the factual Representations made on behalf of the Appellant together with some character references. The factual evidence given during the hearing, denying the allegations, were in similar terms to the Grounds and Additional Grounds of appeal on which permission was granted. We have summarised all of this above, including the Appellant's evidence in chief.

75. We make findings of fact on the balance of probabilities as set out below.

76. In light of these findings, we will 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 DBS's witnesses who did not. Their evidence was written and untested, it consisted of handwritten or typewritten notes of answers given to questions 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 in respect of most of the findings of relevant conduct. We set out our reasoning for this in the section below before addressing the specific grounds of appeal

(particularly the mistake of fact grounds in relation to the findings of relevant conduct).

81. In essence, we are satisfied that the Appellant's evidence was inconsistent with the contemporaneous evidence and a number of witnesses who gave evidence against her (primarily colleagues - staff at the Home and the Employer). Her written and oral evidence to the Tribunal was also internally inconsistent and contradicted the earlier more contemporaneous accounts given to the Home / her Employer and in her Representations to the DBS.

82. We found that the Appellant's answers in cross examination tended towards a bare or flat denial and the assertion that all the witnesses the DBS relied upon were wrong. She maintained that her behaviour was satisfactory at all times. In light of our findings, this demonstrated a lack of insight or an inability to make any reasonable concessions – particularly when the nature of the denials was implausible.

83. We acknowledge the stresses the Appellant was working under in the care sector and particularly under the circumstances and conditions of Covid – the Home and staff were under real pressure, in part as a result of short staffing.

84. Nonetheless, we are satisfied that the core findings of relevant conduct are made out given: the number of witnesses, the consistency, detail and corroboration they provide and the number of allegations of relevant conduct, all undermine the Appellant's account. Many of the witnesses (the Appellant's colleagues) directly observed events rather than simply relying on hearsay reports from residents. For the reasons the DBS, submitted, we are satisfied that the witnesses upon which it relied were not in conspiracy together. Some of the witnesses were not even alleged by the Appellant to be in conspiracy against her but were accepted to be 'independent'. The essential and central findings of relevant conduct that the Appellant had pre-written entries on the MARS sheet and daily notes were established and supported by additional evidence to that of the two witnesses whom the Appellant particularly impugned.

85. There was a cluster of allegations of misconduct against the Appellant, their nature varied but there were some core consistencies. There were many examples of the Appellant's neglectful or harmful attitudes in her conduct and expressions towards vulnerable residents. These actions placed the residents at real risk of harm and unnecessary restriction of their liberties.

86. It was not a matter of all witnesses saying the same thing but there was credibility in the breadth and detail of their evidence and the slight variations between it. This was extremely unlikely to have come about due to a conspiracy or false or malicious allegations inspired by a grudge based on the Appellant being an unpopular manager whose performance management of staff made her enemies. We specifically reject the general claim by VM of a malicious conspiracy orchestrated against her by some of the witnesses as improbable as considered further below.

False allegations – malicious conspiracy – by 2 workers only

87. The allegation of a conspiracy by two co-workers was an argument raised, in general, by VM. It was essentially levelled against GH and SJR. However, we are satisfied on the balance of probabilities that there has been no intentionally false evidence given by the two witnesses, whether as a result of a conspiracy or otherwise:

    (a) It is improbable, on the face of it. If VM had put in place a measure to separate GH and SJR on a rota (or similar), and if they were unhappy with it, there would have been other much more obvious routes to challenge it. It would, in addition, be difficult to see how they would have coordinated or controlled the acts/omissions of others.
    (b) There is no or no sufficient/persuasive evidence to support it.
    (c) The accounts of GH and SJR are, objectively viewed, credible, irrespective of any (alleged) close friendship between them (or with others).
    (d) While it seems that SJR and GH did raise concerns about VM, together, to SB on 16.03.21. The evidence indicates – entirely plausibly – that they did so for mutual support [59]. The evidence indicates they had approached DC separately earlier in the month [73].
    (e) The accounts of GH and SJR are, in fact, supported, in various respects, by accounts from other members of staff (e.g DH).

88. We are entitled to consider all relevant evidence, including evidence which VM may be referring to as "hearsay" and have considered its weight carefully. We are satisfied that the DBS was entitled to prefer the accounts of others over VM's account.

False allegations / conspiracy that 4 people were related

89. A similar argument was raised, in relation to four members of staff who are said to be related. VM does not make it clear which people are being referred to but two appeared to be co-workers caring for residents and one of the others being a chef who described themselves as related or as a 'cousin'.

90. There was also a reference, in VM's email to DBS *after* the Decision was communicated to "the admin" being a "cousin" of SJR. It is unclear what the other family relationship is purported to be.

91. Again:
    (a) There is no or no sufficient/persuasive evidence to support it.
    (b) It is not uncommon for individuals within a workforce to be related.
    (c) The accounts of SJR and GH – and others – remain credible.
    (d) The DBS was entitled to prefer the accounts of others over VM's.
    (e) The onus would, in practice, be on VM to have "disclosed" such a matter, if she considered it to be a relevant factor, to DBS.

Grounds of appeal relating to mistake of fact in findings of relevant conduct

Relevant conduct a. (i) and (ii): denial of allegations relating to LP

92. The DBS found that VM failed to support LP, in line with the relevant plan/guidance, in that VM left LP in her bedroom to eat meals and left her alone there for most of the day [120]. The DBS maintains that it made no mistake of material fact. Its findings were supported by the balance of the evidence.

93. VM denies the allegations/findings relating to LP. In particular, VM states [196] that LP would not have been left in her room, alone, as she could not manage and needed help – VM would, she asserts, have had to be there. However, in an earlier communication [92], VM relied on a different point: that she would have sent someone else to be with LP (as VM would have been leading the shift and told by management to not overdo it after a return to work). In the Additional Grounds, VM also seems to contend that if the Residents were left (by her) in their rooms for long periods, it would have been for necessary reasons relating to Covid.

94. We are satisfied that there was no mistake of fact in this finding of relevant conduct and it is established on the balance of probabilities for a number of reasons.

95. First, there is the record of the account provided by DH:

> (a) In her statement [63], DH said VM told her to bring breakfast up to LP and that LP was thereafter given all her meals upstairs that day and spent the day up in her room.
> (b) According to the record of her investigation meeting ("IM") with the Employer [65], DH repeated the above, adding some details, and clarified that VM told DH that LP can stay in her bed and have her meals there.
> (c) DH was a credible witness. Among other things, DH did not claim to have witnessed various other misconduct by VM (e.g. lifting residents without a hoist, discussing information inappropriately) [65].
> (d) Further, VM herself suggested that DH had felt VM was the only person DH could talk to [125], making it yet more difficult to see why DH would make false allegations.

96. Second, there is the record of the account provided by GH:
> (a) In her statement [53], GH stated that, after providing personal care to LP, VM "then left her in her room for breakfast"; that VM had left LP with an apron on and with her bowl and cup; that GH later heard LP "shouting" and asked VM to bring her down but VM did not do so, leaving LP in her room until GH went back up again at 3pm (to bring LP down as she didn't agree with LP being upstairs on her own all day).
> (b) According to the note of her IM [62], GH provided a similar account, adding details, referring to LP as "screaming" and to GH saying to DC that VM's treatment (leaving LP alone in her room etc) amounted to "abuse".

97. Third, there is the record, from LE's IM [69], that the Residents are "in their rooms" on VM's weekend shifts.

98. Fourth, according to the note of VM's IM, when it was (in a broad sense) put that she had not followed guidelines and left residents to eat in their bedrooms alone, VM made only a less-than-emphatic denial [80]: "not as far as I am aware".

99. Fifth, there is the timing/nature of VM's resignation before the disciplinary hearing [98]. We consider it is mildly supportive of a conclusion that VM had indeed committed misconduct alleged but did not want to attend the disciplinary hearing because she recognised her evidence on her denying the allegations was not accurate. No medical evidence has been provided to support her case. There was less incentive for her to attend the internal disciplinary hearing and challenge the allegations when she could resign and find another job instead. This is in contrast to appealing the barring decision which would prevent her working in any regulated activity – there was greater incentive to give evidence on the appeal before us.

100. Sixth, the assertion in the Additional Grounds about VM having always been present with LP is similarly improbable, in all the circumstances and against the wider body of evidence.

101. Seventh, in an email to the Employer on 05.05.21, VM alleged that SB (and others) had left LP in her chair, "when [LP] doesn't have capacity" [105]; that claim, that LP lacked capacity, would tend to undermine any argument by VM, when made, that LP had, in fact, expressed a desire to remain in her room.

102. Eighth, VM did not deal directly (and/or did not deal persuasively/sufficiently) with this allegation in her Representations.

103. Ninth, the assertion in the hearing before us and in the Additional Grounds about Covid appears to be new. If it was a true and adequate explanation of what happened, VM would have raised it in her IM and/or during various other times when she set out her position (to the Employer and/or to DBS). It is not accepted as a reason for her misconduct in all the circumstances but in any event, the undoubtedly stressful situation during Covid and understaffing at the Home, would provide mitigation for the conduct and not a defence.

104. We reject the Appellant's Representations, Additional Grounds and oral evidence denying these findings for the reasons set out above.

105. For all these reasons, we reject this ground of appeal. We are satisfied that there was no mistake of fact in the Respondent's findings of relevant conduct and they are established on the balance of probabilities for the number of reasons set out above. The DBS made no material mistake of fact and was entitled to arrive at the factual conclusions it did.

Mistake of fact grounds
Relevant Conduct, Ground a.(iii) & (iv): denial of each of the findings

106. VM, challenges the two other sub-findings DBS relied on in concluding VM failed to support service users in line with plans/guidelines: (iii) taking service users to their rooms at 3pm and putting them in pyjamas and night pads; and (iv) instructing a staff member [DH] to leave a service user [YS] on her bed, despite being asked by DH to assist in moving YS to a wheelchair.

107. In relation to (iii), the evidence in support of DBS's finding included:

(a) There is SJF's account. According to the records, SJF raised concerns about this on 08.03.21 [73].
(b) There is DH's account. In her statement [63], DH said that: DH had supported two of the Residents ("P", "T") to watch Songs of Praise on TV, between 1.15pm-1.45pm; VM, once the programme ended, said she was taking P and T upstairs so they could listen to music in their rooms; once P and T had been taken up, VM took another Resident ("DL") up to his room; DH found them in their pyjamas, and with night pads/slips on, by 3pm; VM had, after taking them up, been back in the office. According to the record of her IM [65], DH gave a similar account there.
(c) There is, in addition, that comment from LE referenced at para 25 above; and other wider evidence (for example, from GH) that VM would only do the bare minimum [54] and never took service users out [55] [57].
(d) There was also a lack of any specific/sufficient response in the Representations [92].

108. In relation to (iv), the evidence included, in addition to the above, the following:
(a) In her statement [63], DH said that – in response to DH asking VM to help transfer YS via a hoist to her wheelchair – VM told DH to leave YS on her bed where YS can stay. DH added: "YS did not ask to stay in bed".
(b) DH gave a similar account in her IM [55], according to the note, adding some details (e.g. that YS had all of her meals in bed throughout the day).

109. We reject the Appellant's Representations, Additional Grounds and oral evidence denying these findings for the reasons set out above.

110. For all these reasons, we reject this ground of appeal. We are satisfied that there was no mistake of fact in these findings of relevant conduct and they are established on the balance of probabilities for the number of reasons set out above. The DBS made no material mistake of fact and was entitled to arrive at the factual conclusions it did.

Mistake of fact Grounds:
Relevant Conduct Findings b. and d.: denial of allegations relating to falsification of records

111. The DBS (and the Employer [50]) concluded that VM had completed both (b) daily notes and (d) medication administration records ("MAR Sheets") *before* the relevant actions would have actually been taken.

112. It is common ground that neither should be done prior to the relevant tasks having been completed and that such conduct would be inappropriate. It would, among other things, inject risk that medication (or treatment/activity) is recorded as having occurred when, in fact, it had not (where things did not, for one foreseeable reason or other, transpire as anticipated). That, in turn, would place the individual at risk of harm.

113. The evidence in support of the finding that VM, more than once, completed the daily notes prematurely and inappropriately included:

(a) First, there is the record of SJR's account. In her statement [58], SJR stated that VM would write her daily notes "in the morning" (at about 11am) but fill in the whole of the daily notes "for the afternoon and the evening". The record of her IM indicates that SJR maintained that position [59].
(b) Second, there is the record of GH's account. In her statement [54], GH said "VM writes all of the daily notes for the day before they have even done anything". According to the record of her IM [61], GH added that VM "will sit there at around 11 or just after and will write the whole book even when she had not done their activities".
(c) Third, and importantly given VM's counter-allegations about a conspiracy led by GH and SJR, LE is also recorded as having stated in his IM [69]: (i) "I am aware that [VM] will prewrite [the] daily notes"; and, moreover, (ii) "I have challenged [VM] about this".
(d) Fourth, while VM made a general denial to the Employer in her IM [81], there was little or nothing in the Representations about this allegation. To the Employer, VM later denied it on the basis she could not have done it "unless she was psychic", and argued that, if it were true, SJR/GH ought to be in trouble for not raising the concern at the time [102].

114. The evidence in support of the finding that VM, on more than one occasion, completed the MAR Sheets prematurely and inappropriately included:

(a) First, there is the record of SJR's account. In her statement [56], SJR said: "on different occasions VM has gone upstairs and signed the mars sheets at 5[pm] (but signed for all of the 8[pm] medication) so she can have a headstart". The record of her IM indicates SJR stated she has "witnessed" VM doing the same [59].
(b) Second, there is the record of GH's account. In her statement [54], GH said "VM would sign all the Marr Sheets and stock sheets at 5pm for 8pm meds". According to the record of her IM [61], GH added VM had told her directly that VM would do this "when 1 person was doing medication".
(c) Third, the record of VM's denial in her IM [80] is, again, far from persuasive, stating she would have "only done that by accident"; claiming to have "signed over the back" after such an accident (but not completing an error form or Datix).
(d) Fourth, the point in the Grounds that, had the alleged conduct occurred it would have been reported or picked up on, is unpersuasive. It *was* picked up on and reported: the concerns were raised. There could be all sorts of other (and more likely) reasons for any potential delay in it being reported.

115. The evidence supported and continues to support its conclusion (and was not limited to GH and SJR). We reject the Appellant's Representations, Additional Grounds and oral evidence denying these findings for the reasons set out above.

116. For all these reasons, we reject this ground of appeal. We are satisfied that the DBS made no material mistake of fact in these findings and they are established on the balance of probabilities.

Mistake of fact Grounds:
Relevant conduct Finding c. - allegation about the hoist denied

117. The DBS made only a limited finding in relation to the use of a hoist in relation to DL. It gave VM the benefit of the doubt in relation to VM using it inappropriately (i.e. on her own) but it considered it likely VM had instructed LE to use the hoist, on his own, with DL.

118. DBS submits that it made no material mistake of fact. The evidence in support of its conclusion included:

> (a) First, there is the record of the account provided in his IM by LE [69]. According to it, LE said: he had, on the Saturday, specifically asked VM to help him use the hoist to transfer DL; VM told him he could (under the manual handling policy) use the hoist on his own; with LE being left to have to go and seek support from another colleague.
> (b) Second, according to the record of her IM [81], VM had accepted, close to the material time, that the hoist indeed required 2:1 staff support.
> (c) Third, there appears to, subsequently, have been a change in position from VM. VM alleged, on 28.04.22, following the Decision, that a "moving and handling trainer" had recently said that, under the Home's policy, tracking hoists could be used by 1 person; and VM claimed to have been following that when talking to LE. The timing and nature of that excuse is suspicious. One would have expected LE to have raised it with the Employer earlier. In any event, a general policy would not override the specific requirement to have 2 staff on a hoist when transferring DL (with his particular needs and vulnerabilities).

119. Notwithstanding this evidence and the DBS, we are satisfied that there is a mistake of fact in this finding, having heard all the evidence.

120. On the balance of probabilities, we accept the Appellant's oral evidence given at the hearing that she had attended recent training at the home where it was confirmed that only 1:1 support was required for using the tracking hoist. We are satisfied on the balance of probabilities that she believed it was appropriate for herself and other staff to use the tracking hoist on their own. Even though this defence was not raised at the time in 2021, the Appellant had relied upon this account consistently since April 2022 and there was only one witness to countermand her word on this. There was no evidence presented to rebut the fact of the training taking place at the Home.

121. We find this finding of relevant conduct does contain a material mistake of fact – in the sense that we accept the Appellant believed that staff had been authorised to use the tracking hoist alone. We accept she believed it was permitted by the Home or Employer, and at least the Appellant had reasonable grounds for this belief. Therefore, we accept she did not promote bad practice in others or use the hoist herself in way contrary to requirements by using it without 2:1 staff support.

122. Having found in favour of this ground of appeal, we are not satisfied that this finding of relevant conduct was material to the ultimate barring decisions. We are satisfied that the DBS would inevitably made the same barring decisions even if it had not made this mistake of fact. We return to this below.

Mistake of Fact Grounds
Relevant Conduct Findings e. (i)-(iv): allegations about inappropriate comments/gestures denied

123. The DBS made a finding of relevant conduct at that VM made inappropriate comments/gestures and that, at least some of those, had been done in front of Residents.

124. There were a number of sub-findings that the Appellant's specific comments/ gestures included: (i) talking about her menstrual cycle/ (iii) complaining about her personal life; (ii) implying that a colleague [DH] needed "femfresh" (i.e. a well-known brand of intimate skin care products for women) because she smelled; and (iv) using a hand gesture in relation to a colleague [NB] behind her back.

125. In relation to the findings that the Appellant had talked about her menstrual cycle and comments/personal problems:

(a) VM denied the allegation in her IM [81]; claiming she would only talk about it with "the right people and that is [SB]". It seems common ground that VM had been having issues relating to bleeding/periods. In the Grounds, VM suggests (at (k) [196]) that she may have been "overheard" talking about such matters with SB.

(b) In her statement, SJR said [56] that, "over the last few weeks", VM would "constantly talk about her bleeding and periods in front of residents"; "all day on and off".

(c) In her statement, GH said [53] VM "constantly moans about her personal life all day everyday in front of the [service users], constantly tells staff about her periods". GH is recorded as having added in her IM [62] that VM would "talk about her personal issue with her monthly cycle in front of residents and staff when you are eating".

126. In relation to the femfresh comment:

(a) In her statement [54], GH said: "VM was telling staff that if she was [DH's] secret santa she would get [DH] femfresh because she stinks" and had "said this in front of" service users. According to the note, GH repeated the same in her IM [61], adding that VM had, around Christmas time, been "telling" it to "everyone who would listen".
(b) SJR is recorded as having said in her IM [59] that VM had said DH needed femfresh.
(c) KC is recorded as having said in her IM [68] that she "witnessed" VM talking about confidential information regarding staff including DH. KC was not, however, asked about (and didn't refer to) the femfresh allegation.
(d) SB had cause to hold a "documented discussion" with VM, in part about this allegation. Although VM denied saying it herself, one of the actions was that VM would work in a professional manner [72].
(e) VM is recorded as having denied the femfresh comment in her IM [81]. She claimed it was said by another colleague. She denied speaking about staff in

a "derogative manner" generally [80] (which falls to be considered against the wider evidence that she did, frequently).

In the Additional Grounds, VM (at (l)) states that the femfresh comment was "not taken into account during the investigation" [196], the meaning of which is not clear (but the Employer does appear, in fact, to have upheld the allegation [51]).

127. In relation to the hand gesture:

(a) In her statement, SJR [56] said "on numerous occasions VM has said she would love to punch NB in the face and has done the 'tosser' sign behind [NB's] back while residents were in the room". She was recorded as maintaining in her IM [59] that VM would make hand gestures towards NB.

(b) GH is recorded as stating in her IM [61] that she heard VM refer to NB as a "cunt".

128. We are satisfied that there was no mistake of fact in relation to these findings and, on the balance of probabilities, that the Appellant's evidence (both written and oral) was unreliable on these points. She did make the comments and gestures.

129. We are satisfied that there was sufficient evidence to support the overarching finding and sub-findings on the balance of probabilities and there was no mistake of fact. We reject the Appellant's Representations, Additional Grounds and oral evidence denying the findings for the reasons set out above.

130. Nonetheless, a question arises as to whether any or all of these factual findings do constitute relevant conduct as a matter of law – causing harm or a risk of harm to vulnerable adults.

131. The DBS submits that they do because if the words were spoken or gestures made in the presence of vulnerable adults the comments and gestures would or might cause them emotional harm.

132. However, most of these allegations were not said to have taken place in front of residents. To the extent that they occurred in front of residents rather than staff alone, we are not satisfied that they in fact caused harm or a risk of harm to vulnerable adults (or if repeated in front of them, to children). Although they were clearly inappropriate comments, that does not render them relevant conduct. We accept that, to the extent that the Appellant made the comments or gestures in front of residents, rather than staff, they might be capable of constituting relevant conduct. However, there was no evidence from the residents or staff that the residents were in fact upset by any of the comments or gestures (to the extent they witnessed any). In summary, there is insufficient evidence from which to infer that these types of comments or gestures would in fact cause a risk of harm to adults or children and there is no evidence they did in fact do so.

133. We therefore find there was a mistake of law in this finding. Nonetheless, again, we find that this mistake of law is not material to the barring decision. It is inevitable

that the DBS would have made the same barring decisions based on the relevant conduct findings in a. b. and d. and the inappropriate conduct (even if not relevant conduct) in relation to this finding (e.). The error of law is not material to the barring decisions made.

Other Grounds of appeal: Mistakes of fact and law

134. We reject the following further grounds of appeal as raised by the Appellant in her Representations, Grounds and Additional Grounds. We are satisfied that they do not give rise to any mistakes of fact or law in the DBS's barring decision.

Absence of previous complaints / HR issues

135. There *were* complaints raised about VM by colleagues. There was, at least, the one raised with SB [80-81].

136. The fact that a "documented discussion" took place about previous concerns might be considered to be analogous to an HR-type intervention. To the extent VM is meaning to refer to external complaints (raised by service users or their families etc), or to other HR issues previously in VM's career, there is little information in relation to such things in the Bundle but DBS made no material mistake of fact. There would appear to be nothing to indicate DBS proceeded on the basis there were previous conduct-at-work issues which were held against VM. For example, the allegations relating to a theft of morphine at work, years earlier, were expressly not considered by DBS (i.e. they were not held against VM) [158] and they were not proved.

137. We reject this ground of appeal because it demonstrates no mistake of fact or law.

Inadequate disciplinary investigation by the Employer

138. We are satisfied that it cannot, fairly/sustainably, be said that the investigation conducted by the Employer was inadequate: the Employer did not complete its procedure as fully as it might ordinarily have done, because of VM's resignation in April 2021. VM resigned on 8 April 2021 before the process completed and did not attend the disciplinary hearing. Nor, as a result, was there any appeal process. Nor was there a claim/hearing in an employment tribunal (despite apparently being advised by solicitors [109] and ACAS [102]). The Appellant did not allege constructive dismissal or unfair dismissal based upon the procedure followed by the Employer or pursue any claim of discrimination against the Employer.

139. It appears that VM has given different and inconsistent positions in relation to the resignation: in an email to the Employer on 05.05.21, VM, having just received the outcome of the disciplinary hearing, she claimed to have not received a date for the hearing and argued that ("protocol says") she should have been invited "a second time" [102]; but more recently, in the Additional Grounds, VM states that she "did not attend the disciplinary hearing as she had already decided to resign" [193].

140. In any event, the same would not, in itself, be sufficient to render DBS's subsequent decision unlawful. The DBS made its own independent decision, as a statutory decision-maker, and came to a different conclusion to the Employer in relation to some specific matters.

141. We reject this ground of appeal because it demonstrates no mistake of fact or law.

DBS came to inconsistent findings to the Employer

142. The Employer's findings are contained in its letter dated 30 April 2021. The letter included the following:

> 'Following your failure to attend the disciplinary hearing arranged for Monday 12th April 2021 to be held in the presence of AV, Registered Manager and NJ, Deputy Manager
>
> In my letter I informed you that, should you not attend the hearing, a decision could be made in your absence based on the evidence available to us. As you failed to attend the disciplinary hearing, as you offered your resignation 08/04/2021 effective immediately, I now write to inform you of my decision.
>
> The allegations considered at the disciplinary were:-
>
> 1. Failing to use Moving and Handling Equipment in line with the Policy and Procedures.
> • 3 staff have stated during interview or statements that VM has disclosed to them or others that she has lifted DL on her own and given this as a reason her arms are sore. VM did not attend the hearing therefore did not offer an explanation however during investigation she denied all allegations against her.
> No mitigation offered as VM did not attend the hearing. VM denied all allegations against her and felt that the staff had conspired against her.
> • The behaviour in questions contravenes Manual Handling H&S26 policy, Health and Safety at Work Act 1974, Manual Handling Operations Regulations 1992 and Safeguarding Adults, OP08
> • The conduct contravenes the training that VM has completed which is People Handling on 11/04/2021. VM also holds a NVQ 3 and is in a management position. VM also completing safeguarding Adults ELearning 29/05/2020 and Face to Face Safeguarding 23/04/2021
> • DL support plan (SP03) Mobility 8t Transport under control measures that DL is 2:1 for all transfers. This support plan was written by VM.
> • The concerns raised are that VM failed to use people handling correctly - the action that should have been taken is to follow the support plan and training in place to lift DL correctly. The way in which DL was lifted amounts to neglect.
> • The conduct in question would have put not only VM at risk of injury but also DL, lifting independently could result in serious injury which would constitute a safeguarding concern, it is also a breach of Manual Handling regulations and company policy.
> • I would uphold this allegation on the balance of probability the evidence shows that VM has breached Policies & Procedures in relation to using moving & Handling equipment. She has also put DL at risk under the safeguarding adults policy as lifting independently is unsafe and neglect of a service users needs.
>
> 2. Falsifying Medication Documents.

• The evidence shows that 2 staff have witnessed or been on shift when VM has signed the MAR sheets for medication prior to the medication being given.
• VM did not attend the hearing therefore did not offer an explanation however during investigation she denied all allegations against her.
• No mitigation offered as VM did not attend the hearing. VM denied all allegations against her and felt that the staff had conspired against her.
• The conduct in question contravenes the Management of Medications in Sites/Homes with No Nursing Services AC(SR)07 policy and Safeguarding Adults OP08. VM also holds a NVQ 3 and is in a management position.
• VM has completed her Care of Medicines Boots on 11/06/2020 and also a medication competency assessment on 19/06/2020. The conduct in question breaches the training provided, at no point during this training are we trained to complete MAR sheets in advance of medication being administered.
• During training we are trained to ensure all medication has been administered and accepted before signing the MAR sheet. Signing the MAR sheet in advance could have led to the service user missing their medication and putting their health and well being at risk.
• The conduct in question was wrong as this could have led to service users medication being omitted (missed) if there were a reason for VM to be called away. This could have had an impact on the service users mental and physical well being.
• On the balance of probability I am upholding this allegation there are 2 staff members who have witnessed this occurring.

3. Falsifying Daily Notes.
• The evidence from the investigation shows that there are 3 staff that states during interview they have witnessed VM write daily notes prior to events taking place.
• VM did not attend the hearing therefore did not offer an explanation however during investigation she denied all allegations against her.
• No mitigation offered as VM. did not attend the hearing. VM denied all allegations against her and felt that the staff had conspired against her.
• VM holds an NVQ 3 and is in a management position. A Completion of progress notes competency assessment was completed on 20/03/2020.
• As VM is in a management position the expectation is that she should lead by example.
• The conduct in question is considered as fraudulent, this can have an impact on company reputation, is reportable to CQC.
• During the investigation VM denied the allegation against her, however on the balance of probability I conclude that this allegation is upheld.
…
5. Breaching Professional Boundaries.
• There are 4 staff that state they have heard VM talk about staff and how she feels about them i.e. "if it was that easy to get rid of her id have put her on nights a long time ago", "if you lie to me I'll punch you in the face" and "I would buy her femfresh because she stinks" The statements provided by staff shows that VM has on more than one accession talked about how she feels about the staff.
• VM did not attend the hearing therefore did not offer an explanation however during investigation she denied all allegations against her.
• No mitigation offered as VM did not attend the hearing. VM denied all allegations against her and felt that the staff had conspired against her.
• The conduct in question contravenes Professional Relationship Boundaries OP41
• There appears to be a culture of management discussing or saying things in front of staff that should not be disclosed.
• On the balance of probability I conclude that this allegation is upheld.

…

> As the concerns that have been raised are being treated as a safeguarding issue and may amount to gross misconduct, we would be duty-bound to refer our findings to the DBS who may contact you further in relation to this matter, and' a decision may be taken by them in relation to any impact these findings may have on your ability to work with vulnerable groups in the future. Any future reference response would confirm that you resigned during a safeguarding investigation.
>
> As you resigned there is no right of appeal.'

143. There is no obligation on DBS to accept the findings arrived at by an employer in the course of internal workplace disciplinary proceedings. On the contrary, the obligation on DBS is to consider the matter independently and arrive at its own judgment on the relevant facts and evidence. That is what DBS did.

144. The DBS findings were very largely consistent with the Employer's findings. Where it departed from the Employer's findings, it did so by recording adequate reasons. DBS came to different findings which assisted VM, as well as those which did not.

145. We reject this ground of appeal because it demonstrates no mistake of fact or law.

Unblemished record ought to have been taken into account

146. We are satisfied that DBS was aware of and did take into account the information relating to VM's previous career record; that DBS considered, and had due regard, to the "positive character references" [172] [122] provided with the Appellant's Representations, including those referring to parts of that career background (and, necessarily, including the one from SS).

147. We have considered the same career record and character references when making our own findings of fact.

148. We reject this ground of appeal because it demonstrates no mistake of fact or law.

No dates to the allegations

149. This is not a sustainable ground. The allegations/findings were sufficiently clear and understood, without express reference in the framing of allegations by DBS to specific dates. Standing back, and considering the whole matter objectively, there was no or no sufficient procedural or other unfairness resulting.

150. The Appellant was obviously able to fully answer all the allegations in her Representations, Grounds, Additional Grounds and oral evidence. There was no suggestion that she was unable to understand the nature of the allegations nor be able to answer them.

151. We reject this ground of appeal because it demonstrates no mistake of fact or law.

Including the Appellant on both the CBL and ABL was irrational or disproportionate

Mistake of Law – Irrationality or Proportionality

152. Even, taking into account the mistake of fact in relation to the third finding of relevant conduct (c.) and mistake of law in relation to the fifth (e.), it was not a "perverse" decision by DBS in all the circumstances to bar VM from working with vulnerable adults or children.

153. There is a high bar for perversity/irrationality challenges and we are satisfied it was inevitable that the same decision would have been reached based upon the other three findings of relevant conduct.

154. We have also considered proportionality of the barring decision. 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?

155. 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).

156. We are satisfied that each of questions a)-d) should be answered in favour of the barring not being disproportionate.

157. 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 VM in order to achieve its (important and) legitimate safeguarding aims. The DBS expressly carried out the "balancing act" exercise required in question d).

158. Further, on the factual findings made and upheld by us (on the basis that the conduct amounted to "relevant conduct" under the Act) the DBS was entitled to include VM's name in the ABL and CBL. This remains the case irrespective of her

private rights/interests in general and in relation to matters regarding her grandchildren. DBS's legitimate aims, and those of the wider safeguarding regime, remain in the public interest. The need to protect vulnerable groups adequately, outweighed VM's private rights. In the absence of any other (sufficient) protection, there was no less-restrictive option available to DBS which would have achieved its legitimate aim(s).

159. We are satisfied that the DBS was entitled to consider that the Appellant presented a risk of harm to vulnerable adults (and a risk of harm if repeated in respect of children) at the time of the decision. Her lack of reliability, insight and acceptance at the appeal hearing regarding the incidents confirmed that it was not irrational for the DBS to decide that she posed a risk of repeating similar acts within regulated activity and such a risk existed at the time of the barring decision. Barring was therefore a proportionate decision with regard to that risk.

160. We are satisfied that the DBS was entitled to conclude that VM, on the evidence available at the time and now heard, was an individual unsuited, at the time of the Decision, to be trusted to work with vulnerable adults and children in regulated activity. While it may be possible for VM to change her attitude/ approach, and/or to control her emotions/impulses, etc, to the extent that she might be regarded at some point in the future as a tolerably low risk, the DBS was entitled to conclude that VM had/has not demonstrated that she had the necessary insight or tools to do so at the time of the barring decision.

161. The DBS also expressly had regard to the adverse impact that a barring decision would or may have on VM's Article 8 rights to private and family right – in particular the impact on her employment opportunities to work with vulnerable adults or children.

162. We reject this ground of appeal – there was no error of law - it was not irrational nor disproportionate to place VM on the ABL and CBL.

163. Paragraphs 18 and 18A of Schedule 3 allow for reviews of the barring decision to be conducted if fresh evidence comes to light and is presented by the Appellant or upon the expiry of the minimum barring period in this case.

<u>Special Guardianship Order in relation to third grandchild</u>

164. VM relies, specifically, on the contention that the Decision placing her on the CBL "may interfere" with her ability to become a special guardian for her third grandchild (who, it is said, may be taken into care if she is not permitted to remain under her mother's care). Special guardianship is a family court order that places a child or young person in long-term care with someone other than their parent(s). The person(s) with whom the child lives with will become the child's special guardian.

165. At the hearing, VM explained that she was already a special guardian for two of her grandchildren. It was originally unclear but is now established that the reference to a third grandchild is to a different grandchild of VM, than the two she has already attained such positions in relation to. If this third grandchild does not

remain placed with VM's daughter, then it is understandable that VM very much wishes that she becomes the baby's special guardian.

166. We accept that Appellant's evidence that she has had the care of two of her grandchildren under SGO with the support of the local authority ('LA') for a number of years. We have not been told of any difficulties in that arrangement nor that there is any sign and or indication of the need for further intervention or that it may come to an end.

167. The evidence in the Bundle indicates that, in fact, DBS refused to share the relevant barring information with the local authority [143], despite express requests. This was on the basis that special guardianships and similar arrangements are, not included as regulated activity under the Act. As such, it is difficult to argue that the Decision has had – or is likely to have – any adverse impact on such matters.

168. Further, even if DBS had shared information in relation to the barring Decision with the local authority, the outcome would not necessarily prevent VM from achieving her aims regarding of remaining or becoming a special guardian to her grandchildren.

169. We note that section 53 of the Act and paragraph 1(5) of Schedule 4 to the Act include fostering as regulated activity relating to children. However, the same does not apply to Special Guardians ('SGs') under a Special Guardianship Order ('SGO'). Acting as a SGO is not a regulated activity. It remains activity carried out within family and personal relationships that is not regulated activity by virtue of section 58 of the Act. Therefore, notwithstanding our decision confirming the DBS' barring decisions, this does not prevent the Appellant remaining a SG in relation to the first two grandchildren and becoming a SG in relation to the third grandchild.

170. The local authority (and family courts), in making any relevant decision regarding VM's special guardianship roles in relation to her grandchildren, would have very different aims, priorities, and procedures, etc, than that of the DBS. Matters relevant to the DBS may not be to the local authority (and vice versa). The DBS is concerned with risk to vulnerable groups in the course of regulated activity; the local authority would be interested in private and other family matters. Special Guardianship operates under an entirely different statutory framework.

171. We are acutely aware that whether or not the Applicant is or becomes a SG is not a matter for us - the Local Authority and Family Courts are ultimately the decision makers. Our jurisdiction is confined to the barring decision and risks to children and adults in regulated activity (not activity in family and personal relationship under section 58 of the Act). Therefore, we would not want our confirmation of the barring decision in respect of children to be seen in any way as support for any interference with or prohibition on the Applicant remaining or becoming a SG.

172. We have had regard to different evidence and statutory tests. We are also required by law to respect the expert assessing role of the DBS as to whether the Appellant poses a risk in relation to regulated activity with children (which does not include the role of a SG) and cannot examine the appropriateness of inclusion of

the Appellant on the children's barred list. We note that the relevant conduct by the Appellant that we have upheld was committed against vulnerable adults and not in relation to children (however we have accepted the Appellant's inclusion on the CBL on the basis of the risk of repetition and harm caused to children in the course of regulated activity).

173. If asked to decide whether the Appellant may act as the SG for the third grandchild, the Local Authority and Family Courts, to the extent they see or take into account this decision, will be guided by very different considerations in making their decisions. These may include the Appellant's availability and conduct when caring for the first two grandchildren. We emphasise that our decision-making context and jurisdiction is very fundamentally different and solely in relation to of regulated activity. The starting point is recognising that the barring decisions do not prevent VM acting under an SGO but an independent decision will be made by others.

CONCLUSIONS

174. In relation to the statutory tests:

(a) The tests for "regulated activity" were met.

(b) There was "relevant conduct" in relation to findings and sub-findings a, b and d. We have found that there was a mistake of fact in relation to finding c. and mistake of law in finding e. but the mistakes were not material – because the DBS would inevitably have come to the same decision to place the Appellant on both barred lists.

(c) The DBS's decision that it was "appropriate" to bar VM, in all the circumstances, having due regard to the importance of DBS's legitimate aims was outside our jurisdiction. Nonetheless, the barring decisions were neither "irrational" nor "disproportionate.

175. We have found that there were material mistakes of fact in relation to the third finding of relevant conduct (c.) and mistakes of law in relation to the fifth finding of relevant conduct (e.). Nonetheless, given the seriousness of the other three findings that have been proved not to contain any mistake (a., b. & d.), it is inevitable that the DBS would have made the same decision to bar the Appellant. The mistaken findings are not material to the ultimate decision – it is inevitable that the DBS would have decided it appropriate and proportionate to bar the Appellant based on the established findings of relevant conduct.

176. The issue of whether it was "appropriate", in such circumstances to place VM on the List is outside the jurisdiction of the UT. We are satisfied that the Appellant has not established that barring was either irrational nor disproportionate for the reasons we set out above.

177. We are satisfied while there were some material mistakes of fact and law in the findings of relevant conduct. However, we are satisfied there was no material mistake of fact or law in the barring decisions. The DBS would inevitably made the same decisions irrespective of the mistakes. We are therefore satisfied that the DBS did not make mistakes of fact or mistakes of law which were material to the

ultimate barring decisions on 20 April 2022 to include the Appellant on the CBL and ABL.

178. We therefore dismiss the appeal:

Disposal

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

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

181. The Decision of the DBS in April 2022 to include the Appellant on the CBL and ABL is confirmed.

Authorised for release:
Judge Rupert Jones
Judge of the Upper Tribunal **Dated: 21 June 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).