SV v DBS [2022] UKUT 55 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. V/877/2020

Between:

SV

Appellant

- v –

DBS

Respondent

Before: Upper Tribunal Judge Church, and Members Mr Hutchinson and Ms Reid

Decided following an oral hearing on 29 November 2021

Representation:
Appellant: Not represented
Respondent: Mr Ashley Serr (instructed by Elizabeth Eagles of DBS)

DECISION

On appeal from the Disclosure and Barring Service (**"DBS"**)
DBS Reference: 00900357370
Final Decision Letter: 17 January 2020

The decision of the Upper Tribunal is to allow the appeal. The decision of DBS made on 17 January 2020 was made in error of law. Pursuant to Section 4(6)(b) of the Safeguarding Vulnerable Groups Act 2006 (**"2006 Act"**) this case is remitted to DBS for a new decision.

REASONS FOR DECISION

What this appeal is about

1. This appeal is about SV, who had been working since 2004 as a health care assistant in nursing homes, and since 2010 for Lillian Faithful Care. It was alleged that on 21 August 2018, while working the night shift in the New Wing at Resthaven Nursing Home, SV sat in a chair in a room on the first floor where no residents were present

from 12:45am until 6:00am, thereby neglecting the residents on the ward for which he was responsible by failing to ensure all the required care and safety checks were done, and that he unplugged the call bell of a 93-year-old resident on the ground floor of the New Wing, leaving her unable to call for assistance (the **"2018 Incident"**).

2. SV's employer carried out an investigation into the 2018 Incident and found the allegations to be proved. SV was dismissed following a disciplinary procedure. His employer made a referral to DBS (see 'The law' below) in relation to the 2018 Incident.

3. A caseworker at DBS considered the material from the referral and decided that, even if the allegations in respect of SV were made out, it would not be appropriate to include him in any Barred List (see 'The law' below). On 17 January 2019 DBS informed SV of its "no barring action" decision.

4. However, on 29 August 2019 DBS wrote to SV to say that as part of its "commitment to safeguarding" its decisions were subject to "internal quality assurance and internal review processes", and that it was reconsidering its decision in relation to his case. On 24 January 2020 DBS informed SV it had decided that it was, after all, appropriate for him to be included in both Barred Lists (the **"Barring Decision"**).

5. This is SV's appeal against the Barring Decision.

The hearing of the appeal

6. The oral hearing of this appeal was conducted remotely via CVP. SV represented himself, while the Respondent was represented by Mr Serr of counsel, instructed by Elizabeth Eagles of DBS. We were assisted by an interpreter who translated as and where required given that, while SV has a good command of "everyday" English, he struggled to understand, or to express himself fully, when it came to more technical matters.

7. The case which SV argued at his hearing was very simple: he denied that he neglected residents and he insisted that the evidence did not support the Respondent's conclusion that he did: he denied that he failed to check on the residents on the first floor for whom he was responsible during the shift in question, he denied unplugging the call bell of the resident on the ground floor, and he denied that he had any supervisory responsibility in respect of the agency carer who was working on the ground floor. He maintained that the Respondent's investigation was unfair and that the Barring Decision should be set aside. He did not pursue the more technical arguments that had been made previously by his representative (who was no longer acting), and on which permission was granted, but we exercised our inquisitorial jurisdiction to explore those issues with Mr Serr nonetheless.

8. In his helpful oral submissions Mr Serr expanded on the arguments advanced by the Respondent in written submissions, addressing the grounds on which I had granted permission very clearly.

9. At the end of the hearing I made an oral direction for the Respondent to provide written submissions on the legal and factual basis for its power to reopen SV's case. This was duly provided.

The issues

10. In this appeal we must decide three main issues:

    (1) Having investigated the 2018 Incident and having informed SV that he would not be included in either of the Barred Lists:

a. did DBS have the power to reopen the case for placing SV on the Barred Lists for that same incident?

b. was it entitled to exercise that power to reopen SV's case?

We decided that the answer to both a. and b. was "yes", and we explain why below.

(2) Was the Barring Decision based on any material mistake on any point of law or in any finding of fact?

We decided that it was, and we explain why below.

(3) Should we exercise our discretion in favour of:

a. directing DBS to remove SV's name from the Barred Lists; or

b. remitting the matter back to DBS for a new decision?

We decided that it was appropriate in this case to remit the matter back to DBS for a new decision, and we explain why below.

The law

11. DBS was established by the Protection of Freedoms Act 2012, taking on the functions of the Criminal Records Bureau and the Independent Safeguarding Authority. One of its main functions is the maintenance of the children's barred list and the adults' barred list (the **"Barred Lists"**, and each a **"Barred List"**). Its power and duty to do so arises under the Safeguarding Vulnerable Groups Act 2006 (the **"2006 Act"**).

DBS's duty to maintain the Barred Lists

12. Section 2(1)(a) of the 2006 Act places a duty on the DBS to maintain the Barred Lists. Under Section 3(2)(a) of the 2006 Act a person is barred from "regulated activity" relating to children if they are included in the children's barred list. Under Section 3(3)(a) a person is barred from "regulated activity" relating to vulnerable adults if they are included in the adults' barred list.

Duty of specified bodies to provide information and DBS duty to consider relevant information

13. To assist DBS in fulfilling its statutory duty to maintain the Barred Lists Sections 37, 40, 42 and 46 of the 2006 Act impose duties on specified bodies to provide DBS with information. Paragraph 13 of Schedule 3 to the 2006 Act imposes a duty on DBS "to ensure that in respect of any information it receives from whatever source or of whatever nature it considers whether it is relevant to its consideration as to whether the individual should be included in each barred list."

14. Paragraph 18 of Schedule 8 to the Protection of Freedoms Act 2012 empowers DBS to do "such other things as DBS considers necessary or expedient" in connection with the exercise of its functions.

Criteria for inclusion in the Barred Lists

15. Schedule 3 to the 2006 Act applies for the purposes of DBS determining whether an individual is included in either or both Barred Lists.

Review of decisions to include persons in the Barred Lists

16. Paragraphs 18 and 18A of Schedule 3 to the 2006 Act include provision for DBS to review decisions to include persons in the Barred Lists, either on the application of

the person the decision relates to (paragraph 18) or at the instigation of DBS (paragraph 18A):

"18 (1) A person who is included in a barred list may apply to DBS for a review of his inclusion.

(2) An application for a review may be made only with permission of DBS.

(3) A person may apply for permission only if-

(a) the application is made after the end of the minimum barred period, and

(b) in the prescribed period ending with the time when he applies for permission he has made no other such application.

(4) DBS must not grant permission unless it thinks-

(a) that the person's circumstances have changed since he was included in the list or since he last applied for permission (as the case may be), and

(b) that the change is such that permission should be granted.

(5) On a review of a person's inclusion, if DBS is satisfied that it is no longer appropriate for him to be included in the list it must remove him from it, otherwise it must dismiss the application.

(6) The minimum barred period is the prescribed period beginning with such of the following as may be prescribed-

(a) the date on which the person was first included in the list,

(b) the date on which any criterion prescribed for the purposes of paragraph 1, 2, 7 or 8 is first satisfied;

(c) where the person is included in the list on the grounds that he has been convicted of an offence in respect of which a custodial sentence (within the meaning of section 76 of the Powers of Criminal Courts (Sentencing) Act 200 (c. 6) or section 222 of the Sentencing Code) Was imposed, the date of his release;

(d) the date on which the person made any representations as to why he should not be included in the list.

18A (1) Sub-paragraph (2) applies if a person's inclusion in a barred list is not subject to-

(a) a review under paragraph 18, or

(b) an application under that paragraph,

which has not yet been determined.

(2) DBS may, at any time, review the person's inclusion in the list.

(3) On any such review, DBS may remove the person from the list if, and only if, it is satisfied that, in the light of-

(a) information which it did not have at the time of the person's inclusion in the list,

(b) any change of circumstances relating to the person concerned, or

(c) any error by DBS,

it is not appropriate for the person to be included in the list."

Appeals of decisions to include, or not to remove, persons in the Barred Lists

17. Section 4 of the 2006 Act provides for a right of appeal to the Upper Tribunal in limited circumstances:

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

Discussion

Question 1 a: Does DBS have the power to reopen "no barring action" cases?

18. The first issue that arises is whether DBS has the power to re-open closed cases.

19. It is well-established that public authorities must have a legal basis for their actions: "A public body can only do that which it is authorised to do by positive law" (per Buxton LJ in **R v Richmond LBC ex p. Watson** [2001] QB 370 (CA) at [385C). A public body's actions must fall within the relevant legal boundaries of that power, and its powers must be exercised in accordance with the principles of public law.

20. Unless DBS had the power to reopen the case for SV's inclusion in the Barred Lists, having previously considered the referral by his employer, Lillian Faithful Care, in respect of the 2018 Incident and made a "no barring action" decision, then its decision to include him in the Barred Lists was beyond its powers (or 'ultra vires' in the language of public law).

21. This question is clearly a matter within the jurisdiction of the Upper Tribunal, which is to determine whether DBS has, in a decision either to include an individual on a Barred List or not to remove him from a Barred List, made a mistake on any point of law or in any finding of fact on which the decision was made (see section 4 of the 2006 Act). A decision made beyond the boundaries of its powers would plainly be in error of law.

22. While the 2006 Act makes express provision for DBS to review decisions to include persons in the Barred Lists and for a (limited) right of appeal in respect of a decision to include a person in (or not to remove a person from) a Barred List, there is no express provision for review of a decision *not* to include a person in a Barred List, or otherwise to reopen, revisit or reconsider a "no barring action" decision. Neither is there any right of appeal against a decision by DBS not to include a person in a Barred List.

23. The absence of such an express power is not necessarily fatal:

> "The absence … of an express power to do anything that is calculated to facilitate or is incidental or conducive to the carrying out of the [statutory body's] functions is not fatal … because in appropriate circumstances powers may be implied. However, whether such implication is possible will depend on the particular circumstances of each statutory scheme, in particular the express functions conferred on the statutory body" (per Lord Lloyd-Jones in **Commissioner of the Independent Commission of Investigations v Police Federation** [2020] UKPC 11 at 15).

24. The statutory scheme requires DBS:

(a) to maintain Barred Lists for the purposes of safeguarding children and vulnerable adults (section 2(1)(a) of the 2006 Act);
(b) to consider any and all evidence it receives from whatever source if it is relevant to whether an individual should be included in the Barred Lists (paragraph 13 of Schedule 3 to the 2006 Act) (with no restriction as to when that can be received or considered); and
(c) to include an individual on a Barred List if it is satisfied that they have been, or may in the future be, engaged in regulated activity and that it is appropriate to include them on such list (Schedule 3 to the 2006 Act).

25. The 2006 Act does not disapply these requirements in respect of an individual who has been considered for inclusion before, but in respect of whom inclusion was not then considered to be appropriate. Therefore, to take the clearest type of case, if DBS were to receive a new referral with previously unconsidered evidence in relation to alleged acts or omissions of an individual who had been referred to DBS previously in respect of those same allegations, DBS would be obliged to consider that referral. If DBS were then to determine that it was appropriate (and provided it was satisfied that the individual has been, or may in the future be, engaged in regulated activity) it would be obliged to place that individual in the relevant Barred List (or lists). The power to reopen a previously closed case in such circumstances (we use this terminology in preference to the word "review" so as to avoid confusing it with the express power of review provided for in the 2006 Act) is implicit in the statutory scheme because it must have been intended that DBS should have the power to comply with its statutory duty.

26. If there is no new referral, but further information is received by DBS in relation to an individual which gives rise to a concern that it might, after all, be appropriate to include that individual in either or both Barred Lists, this too would require DBS to consider the information and decide whether, in the light of that information, the individual should be placed in the Barred Lists. A power to reopen a closed case in such circumstances is, again, necessarily implicit in the 2006 Act to allow it to comply with its statutory duty.

27. But what of a case such as SV's, where no new referral or new evidence has been received giving rise to the duty under paragraph 13 of Schedule 3 to the 2006

Act (and, therefore, the implicit power to reopen the case), but rather DBS's own internal processes identify that the decision it made not to include in the Barred Lists may have been incorrect?

28. To determine this question, we must consider the legislative intent behind the statutory scheme as a whole. This was to create an expert body which would exercise the protective function of maintaining the Barred Lists with the purpose of reducing the risk of harm to children and vulnerable adults in a proportionate manner by preventing those who meet the relevant criteria from engaging in activities that could be expected to give rise to an unacceptable risk of harm to children or vulnerable adults in the context of regulated activity.

29. There is a very considerable public interest in DBS getting its decisions right, both in terms of including those who should be in the Barred Lists and, equally, in leaving out anyone who shouldn't be in the Barred Lists. The consequences of either type of error are potentially very grave indeed: on the one hand the risk of harm to a vulnerable adult or child may be realised if an individual who should be barred is permitted to continue engaging in regulated activity. On the other hand, if a person is included in the Barred Lists in error this will involve both a serious and wrongful infringement of that individual's human rights and the loss to society of someone who may play a valuable and much-needed role working or volunteering with children or vulnerable adults, or both.

30. Given the strength of this public interest, given that there is an implicit power to reopen "no barring action" decisions so that DBS may carry out its duty under paragraph 13 of Schedule 3 to the 2006 Act, and given that the 2006 Act contains no express or necessarily implied prohibition on DBS reopening "no barring action" cases, we are satisfied that DBS does have a general power to reopen such closed files for the purpose of maintaining the integrity of the Barred Lists, even if no new referral is made and no new evidence has been forthcoming.

31. The answer to question 1 a. in paragraph 10 above is therefore "yes".

Question 1 b: Was DBS entitled to exercise the power to reopen its "no barring action" decision in SV's case?

32. When a public body exercises its public law powers it must do so in accordance with public law principles. This is where the doctrine of 'legitimate expectation' becomes relevant. Whether DBS was entitled to exercise its power to reopen a "no barring action" decision requires consideration of the particular circumstances of SV's case and of whether he had a 'legitimate expectation' that he would not be placed on the Barred Lists absent further information coming to light.

The doctrine of 'legitimate expectation'

33. In **R (on the application of Wood) v Secretary of State for Education** [2011] EWHC 3256 (Admin) (**"Wood"**), which was a judicial review of a decision of the Secretary of State for Education under the predecessor scheme to that under the 2006 Act to bar the claimant from working with children, Singh J (now Singh LJ) considered whether a decision to reopen a barring decision following a decision to take 'no further action' was contrary to the public law doctrine of 'legitimate expectation'.

34. The facts of Wood, insofar as relevant to the principles set out by the Court, were: In 2000 Mr Wood, a teacher, accepted cautions in respect of two offences of common assault against two children at the school at which he was then teaching. In 2002 he was accused of sexually assaulting his partner's son, who was a pupil at the school at

which he was then teaching. In relation to these allegations Mr Wood was charged with indecent assault on a boy under the age of 14 contrary to section 15 of the Sexual Offences Act 1956 and committed for trial. However, the trial was stayed in 2003 when the judge found that a fair trial was no longer possible due to passage of time since the alleged offence.

35. An investigation by the Education Department in relation to the allegations followed, but it was decided that no barring action would be taken against Mr Wood. On 15 April 2005 the Department for Education wrote to him, stating:

> "… the Secretary of State has decided that she will not, on this occasion, take any further action under section 142 of the Education Act 2002, which empowers her to bar or restrict a person's employment as a teacher or worker with children and young persons on grounds of misconduct.
> Although the Secretary of State has decided that she will not take any further action, your details will remain on record and may be taken into account in the event of any further misconduct coming to the department's attention."

36. In 2006, in the context of growing concern that the system for safeguarding children in educational settings was insufficiently robust, the Secretary of State for Education initiated a 'Historical Cases Review' to review "high risk" cases where there had been a decision not to place an individual on 'List 99' (the equivalent of the Children's Barred List under the current scheme).

37. On 19 December 2008 the Secretary of State decided to reconsider Mr Wood's case and on 6 October 2009 the Secretary of State directed that Mr Wood should be placed on List 99.

38. At that time such a decision brought a right of appeal the First-tier Tribunal (Health, Education and Social Care Chamber) which had a full merits jurisdiction. Mr Wood appealed, but his appeal was stayed pending resolution of a judicial review challenge which Mr Wood had made in the Administrative Court. The judicial review was heard by Singh J.

39. It was common ground between the parties to the judicial review proceedings that there had been no evidence or allegation of any misconduct between the 2005 decision not to take any further action to bar him and the 2009 decision to place him on List 99 following the 'Historical Cases Review.'

40. Mr Wood's main argument was that the 2009 decision to place him on List 99 was so unfair as to amount to an abuse of power, and was therefore unlawful, because it breached the doctrine of substantive legitimate expectation. He also challenged the decision as breaching his Article 6 and Article 8 rights under the Human Rights Act 2008.

41. In §[37] to §[50] of his judgment in Wood Singh J provides a thorough review of the authorities and academic commentary on the principles applicable to legitimate expectation. He cites with approval Bingham LJ's statement in **R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd.** [1990] 1 WLR 1545 at §[1569] of the proper test to be applied: to give rise to a legitimate expectation the statement must be "clear, unambiguous and devoid of relevant qualification", a matter which Sir John Dyson JSC said in **Privy Council in Paponette v Attorney General of Trinidad and Tobago** [2011] 3 WLR 219 at §[30] depends on "how on a fair reading of the promise it would have been reasonably understood by those to whom it was made". At §[48] of Wood Singh J cites Sir John Dyson JSC's statement in that case (at

§[37]) of the shifting burden of proof in establishing matters relevant to legitimate expectation:

> "while the initial burden lies on an applicant to prove the legitimacy of his expectation, in particular that it was clear, unambiguous and devoid of relevant qualification, and that in order to support the legitimacy of that expectation he may be able to show that he relied on the promise to his detriment, once those elements have been proved by the applicant the onus shifts to the public authority concerned to justify the frustration of the legitimate expectation."

42. Whether this test is satisfied is a matter for the court to decide, and the court is not confined to a review on the ground of irrationality only (see Wood at §[40]).

43. Applying the law to Mr Wood's case Singh J accepted that the 15 April 2005 letter to Mr Wood (quoted at §[31] above) contained a representation that:

a. was "clear, unambiguous and devoid of relevant qualification";

b. which would reasonably have been understood by Mr Wood to mean that "he would not have further action taken against him unless further misconduct came to the department's attention", and

c. that this established a legitimate expectation that this would be the case (§[51]).

We refer to this issue as the **"stage 1 question"** on legitimate expectation.

44. Singh J went on to consider whether the Secretary of State had acted lawfully when acting in a way which was inconsistent with Mr Wood's substantive legitimate expectation. This required him to be satisfied of two matters (see Wood at §[51]), which we will call the **"stage 2 questions"** on legitimate expectation:

a. First, that there was a legitimate aim in the public interest in doing so; and

b. Second, that to do so was proportionate.

45. As to the first matter, he found that the "public interest in protecting children, in particular in protecting them from the risk of sexual abuse, is manifest and pressing" and was clearly a legitimate aim.

46. As to the second matter, Singh J drew a distinction (at §[55]) between the decision to reconsider Mr Wood's case on the one hand (which we'll call a **"reopening decision"**), and the decision to include him in List 99 on the other (which we'll call a **"barring decision"**). Important reasons for drawing that distinction were:

a. the existence of appeal rights in relation to the barring decision (but not the reopening decision) (§[56]),

b. the fact that such an appeal was to an independent judicial body (§[56]), and

c. the fact that the appeal rights permitted a challenge to the barring decision on its merits (§[56]).

47. Singh J said these factors militated in favour of the appeal before the tribunal being the better forum for challenging the barring decision, and the Administrative Court should be "slow to stop a case being considered on its merits" by the tribunal (see Wood at §[65]), not least because otherwise "there is a real risk that the case may be one where, although the reasoning process which led to the decision to bar an

individual may be criticised in some way, the Tribunal would have upheld the barring order on its merits. If that were to be the case, the public interest would be undermined." (§[65]).

48. Factors relevant to the proportionality assessment of the reopening decision included:

a. the fact that the Secretary of State sought to devise fair procedures to be followed before making a barring order (including the right to make representations, the involvement of an expert panel with independent members, and the opportunity for face to face assessments) (§[57]); and

b. the fact that the Secretary of State only reconsidered cases where it was thought that a person might pose a current risk, and not all old cases (§[56]).

49. Singh J said (at §[66]) that not every reopening decision would always be proportionate: this would depend on the facts of each case, and there may be cases in which the individual concerned should not have to go through the trouble and anxiety of an appeal. However, he was satisfied that in Mr Wood's case the impact on him, including mental stress, was insufficient to outweigh the "overriding public interest" which justified the decision to reopen his case, and that it was therefore proportionate (§[67]).

50. The High Court is a court of co-ordinate jurisdiction to the Upper Tribunal, and therefore *Wood* is not, as a matter of precedent, binding on the Upper Tribunal. It might also be distinguished from this case on two grounds:

a. it was made in the context of a judicial review rather than an appeal;

b. the appeal rights, the existence of which appeared to be so persuasive to Singh J, differed materially from the appeal rights under the 2006 Act because the appeal to the First-tier Tribunal under the regime which Singh J considered in Wood was for a full merits review, while the right of appeal under the 2006 Act can best be described as a hybrid appeal right, allowing some consideration of the merits but only once the hurdle of establishing that the decision under appeal involved a mistake on any point of law or in any finding of fact on which it was based, and on the basis that the question of whether or not it is appropriate for an individual to be included in a barred list is not to be considered a question of law or fact (section 4(3) of the 2006 Act).

51. However, we agree with the principles set out by Singh J and we have decided to follow them, albeit that we come to a different conclusion on the stage 1 question on legitimate expectation (see §[59] below).

52. The reopening of barring cases by DBS was considered by the Upper Tribunal for the first time recently in **JT v Disclosure and Barring Service** [2022] UKUT 29 (AAC) (**"JT v DBS"**). This was an appeal against a decision of DBS to place a domiciliary home care support worker on the Adults' Barred List notwithstanding that she had previously been told that she would not be included on any barred list.

53. In JT v DBS the Upper Tribunal used the term "revisiting" instead of "reopening", but in doing so it referred to the same thing. It explained the extent of the relevance in

the appeal before it of the question whether DBS had been entitled to "revisit" (or reopen) its previous "no barring action" decision:

> "18. We need to make clear how and why it is relevant on appeal to establish that DBS was entitled to revisit its initial view that JT should not be included in a barred list. If it was not entitled to do so, that would be a mistake of law for the purposes of section 4(2)(a) SVGA, as Mr Wilkinson conceded. That is the limit to its relevance. The proportionality exercise involved in revisiting the barring issue is entirely separate from the proportionality exercise undertaken by DBS as part of the appropriateness to bar assessment. In other words, the question whether DBS was entitled to revisit JT's case was a threshold one. Once the threshold was crossed, the normal rules under SVGA applied."

54. The same applies to this appeal.

55. The Upper Tribunal considered whether the appellant had shown that, on a fair reading of DBS's original letter telling her that she would not be included in any barred list, she would reasonably have understood it to contain a clear, unambiguous and unqualified representation that she would not be included in a list in the absence of further evidence, and it bore in mind what Singh J had said in Wood:

> "20. If it had not been for *Wood*, we would have decided that, on an objective view, anyone who received the letter sent in this case should not have taken it as a promise that DBS would not revisit her case unless it received further information. The letter should be read as dealing with two separate issues. First, it reported that JT was not to be included in a list. That involved no commitment. Nowadays it is reasonable to expect decisions to be subject to some form of quality control, leaving DBS free to look at the case again. Second, the letter stated the fact that the information held would be retained and used again if further information came to light. This was a separate matter, dealing with the possibility that further information might become available, and only with that possibility. It was not limiting its use of the retained information to that possibility.
> 21. We need to be cautious about this. The language of the letter in *Wood* was similar to the letter sent to JT. We are not bound as a matter of law by Singh J's analysis, but it deserves respect. Allowing for the possibility that we might be wrong, we go on to consider whether DBS was entitled to revisit the barring issue."

The wording of the "no barring action" letter in this case

56. DBS's "no barring action" letter to SV (which is at pages 11-12 of the appeal bundle) read, so far as relevant:

> "**Why we are writing to you**
> We wrote to you on 11/10/2018 and explained that we were considering including you in the Children's Barred List and /or the Adults' Barred List.
> It appears on the information currently available to the DBS that you are, have been or might in the future work in regulated activity relating to children/vulnerable adults. The definition of Regulated Activity is found within schedule 4 of Safeguarding Vulnerable Groups Act 2006 and your previous role as a Care Assistant appears to satisfy this criteria (sic).
> However, having considered the full circumstances we have decided that it is **not** appropriate to include you in the Children's Barred List or the Adults' Barred List.

> …
> **Sharing this information**
> We will keep any relevant information we hold in accordance with our Data Retention Policy. We may take it into account if we receive any further information in the future."

The stage 1 question on legitimate expectation: did SV have a legitimate expectation that he would not be added to any barred list in the absence of further evidence?

57. The last two paragraphs reproduced above are nearly identical to the equivalent paragraphs of the letter DBS sent to the appellant in JT v DBS and discussed in §[55] above, and therefore also *similar* to those in the Secretary of State's letter to the claimant in Wood.

58. We share the doubt expressed by the Upper Tribunal in JT v DBS as to whether this wording passes the test (set out in §[41] above) for establishing a legitimate expectation.

59. On balance, and for the same reasons given by the Upper Tribunal at §[20] of JT v DBS, we are not persuaded that it does, so we answer "no" to this question. However, like the panel that decided JT v DBS, we nonetheless consider it prudent to analyse the "stage 2" legitimate expectation issues identified by Singh J in Wood, in case we are wrong on this point.

The first stage 2 question on legitimate expectation: did DBS have a legitimate aim in the public interest in revisiting the "no barring action" decision?

60. As discussed above in §[29], we are satisfied that there is a strong public interest in the Barring Lists including those they should include and excluding those they should not and that DBS has the power under the statutory scheme to revisit "no barring action" decisions. In Wood the legitimate interest identified by Singh J was the protection of children from sexual abuse by teachers. Clearly that public interest is not applicable in this case, but that is only one example of a legitimate public interest. We are satisfied that the protection of vulnerable adults from neglect by those entrusted with their care is equally to be considered a legitimate aim in the public interest, and that applied in this case.

61. We therefore answer the first stage 2 question on legitimate expectation "yes".

The second stage 2 question on legitimate expectation: was the decision to reopen the "no barring action" decision proportionate?

62. In JT v DBS the Upper Tribunal considered the factors that influenced Singh J in concluding that the decision to revisit Mr Wood's case was proportionate, and could identify no differences between the appeal in Wood and that before them that justify a different conclusion on proportionality:

> "26. First, Singh J was influenced by the existence of an appeal. We need to compare the appeal that was made in *Wood* and the appeal in this case. In *Wood*, the appeal lay under section 144(1) of the Education Act 2002, which provided for an appeal against a decision to give a direction. That was what might be called a full merits appeal; indeed Singh J referred to the appeal considering the case on its merits ([65]). In this case, in contrast, the grounds of appeal are limited to those in section 4(2), subject to the qualification in section 4(3). Our jurisdiction is more limited than the appeal under section 144(1).

> 27. Despite our more limited jurisdiction, we can see no difference in principle to distinguish the two appeals. Section 4(3) makes clear the limit to our jurisdiction inherent in section 4(2). Even within the scope of mistake of law, this tribunal is not entitled to undertake its own fresh consideration of the appropriateness of including someone on a list: *B v Independent Safeguarding Authority* [2013] 1 WLR 308 at [19]. In contrast, the tribunal that heard Mr Wood's appeal was entitled to reconsider all issues. That is a clear difference in jurisdiction, but it is important to understand how the different forms of jurisdiction work in practice. Even if this tribunal had a full merits jurisdiction, it would be expected to show appropriate respect for the DBS's judgment, for the reasons explained in a different context by the Supreme Court in *R (Begum) v Special Immigration Appeals Commission* [2021] AC 765 at §[70]. That reduces considerably the significance in practical terms of the difference in jurisdiction.
>
> 28. Second, the judge was influenced by the right to make representations. JT had that right when her case was revisited by the DBS. Before the Upper Tribunal, she had the right to present grounds of appeal before giving evidence and making representations at the hearing. That is equivalent to the position in *Wood*.
>
> 29. Finally, the judge was influenced by the access to expertise. DBS has its specialist decision-making. The Upper Tribunal has its specialist members, whose qualifications for the role were set out in *CM v Disclosure and Barring Service* [2015] UKUT 707 (AAC) at §[59] to §[64]. Again, we find no significant difference between this case and *Wood*."

63. These observations apply equally to this appeal. We therefore examined the applicability of the factors identified by Judge LJ in R (M) v London Borough of Barnet [2002] 2 FLR 802 at §[42] to §45], (cited with approval by Singh J in Wood). We found that DBS's decision to reopen SV's case was not motivated by spite or malice and did not involve bad faith and, while we have some concerns about the rigour and fairness of DBS's processes leading to the barring decision on SV's case, it can't properly be said that there was "not a scintilla of evidence" to support the case for his inclusion on the Adults' Barred List.

64. We also considered the list of factors suggested by the Upper Tribunal as potentially relevant to the issue of proportionality in JT v DBS at §[30]:

> "(a) the passage of time may mean that evidence or witnesses are no longer available; (b) the person concerned may have relied on the expectation to such an extent or for so long that it would be wrong to allow the DBS to revisit the case; or (c) the procedure followed by DBS in deciding to revisit may be so flawed or unfair or prejudicial that the decision to revisit would be quashed on judicial review."

65. We acknowledge that none of the lists of factors set out in Wood, R(M) v London Borough of Barnet and JT v DBS is exhaustive, but we couldn't identify any other reason to suggest that the decision to revisit SV's case was disproportionate.

66. We therefore answer the second stage 2 question on legitimate expectation "yes".

67. Having concluded that DBS had a legitimate aim in the public interest in revisiting the "no barring action" decision, and having concluded that it was proportionate to do so, we have cleared the threshold identified in §[53] above, which means that we move on to consider the Barring Decision, and whether DBS made a mistake on any point of

law or in any finding of fact on which the Barring Decision was based in accordance with the usual rules under the 2006 Act (i.e. question 2 identified in §[10] above).

Question 2: did DBS make a mistake on a point of law or a finding of fact on which the Barring Decision was made?

68. DBS explained its decision in its Final Decision Letter dated 24 January 2020, in which it sets out its findings of fact (see page 22 of the appeal bundle):

> "On 21 August 2018, between approximately 12:45am and 6am, you neglected an unknown number of residents in the New Wing at Resthaven Nursing Home, when you were working as a Care Assistant by:
>
> - Going into the Poppy Room at approximately 12:45am, where no residents were present, sitting in a chair and not coming out until 6am.
> - Failing to ensure all the required health and safety checks were completed for residents during this time period.
> - Unplugging the call bell of JY, a 93 year old female resident, who does not have full capacity, so that she was unable to call for assistance as required.
>
> This resulted in JY not receiving the personal care she required during this time period, as her call bell was unplugged and no staff member carried out any care or safety checks on her. JY was found at approximately 7am on 21 August 2018 by day staff, where she was lying on a mattress without bed linen, in a pool of urine, with soaked incontinence pads, her nightdress saturated in urine, and she was cold."

69. Given the limited jurisdiction of the Upper Tribunal under the 2006 Act, we need to consider not whether we would have made the same findings ourselves if conducting a full merits review, but rather whether DBS was entitled to make those findings on the evidence before it, or whether its decision was based on a mistake of fact or a mistake on a point of law.

70. We will examine in turn the sub-findings on which DBS's overall finding of neglect was based, the evidence on which those findings were made, and DBS's explanations of its decision making (in the 'Barring Decision Process' document, in the Final Decision letter, and in the submissions made by Mr Serr in the appeal).

Finding 1: Going into the Poppy Room at approximately 12:45am, where no residents were present, sitting in a chair and not coming out until 6am.

71. The evidence on which this finding was based is set out in the section of the 'Barring Decision Process' document headed 'Establish Relevant Conduct or Risk of Harm and Regulated Activity' (see pages 65-72 of the appeal bundle):

> "Ms Jo Goode (Ms Goode) Home Manager and Investigating Officer has provided a clear and detailed description of the CCTV footage that was captured between midnight and 7am on 21 August 2018. Whilst the DBS has not been provided a copy of this CCTV footage to review as it is no longer available, there is no reason to doubt the credibility of the statement that has been provided by Ms Goode. This description is clear that at 12:35am SV and Ms K are on the New Wing making checks along the corridor, SV then goes to the top corridor and into the Poppy Room and not (sic) seen again until 6:00am when he walks down to the conservatory"

72. What DBS describes as Ms Goode's "clear and detailed description" of the CCTV footage is at page 38 of the appeal bundle. The account is in note form and we reproduce it as it is written:

> "Follow the allegation of neglect of a resident on the night of the 20th August 2018. Myself and Suzanne Booker watch the CCTV from 12 midnight to 07.30am on the morning of 21st august 2018. The member of staff on the old wing was relatively busy throughout the night making regular checks on the Residents.
> At 00.35 the two care staff on the new wing made checks along the corridors, the TK returned to the Conservatory and SV went to the top corridor and went to poppy room.
> SV was not seen again until 6.00 when he walked along the corridor and then went downstairs to the Conservatory.
> TK was seen at 02.40 after a Resident who had been walking the corridors for 30 minutes goes into the conservatory and appears to wake TK, she then takes the resident back to her room. She then returns to the Conservatory and doesn't reappear until SV goes into the conservatory at 6.05.
> RR is seen at 00.30 making room checks and helping the Carer on old wing provide care to a Resident. She then returns to the Nurses station a few minutes later she is seen taking the armchair from the corridor and putting it to the office then turns out the lights. RR is seen again at 02.30 when she hears a Resident walking in the corridor, she looks to see who it is then returns to the office. She is not seen again until 05.45 when she pulls the armchair out of the office and returns it to the corridor. She then checks three rooms, and returns to the office and a few minutes later reappears and start undertaking normal morning duties for RGN.
> Therefore, no Resident checks were undertaken in the new wing from any staff from 00.45 – 06.00."

73. DBS also had a transcript of SV's disciplinary hearing of 30 August 2018. It is clear from that transcript that while SV accepted that he went to the Poppy Room and sat in a chair, and that there were no residents to care for in the Poppy Room, he did not accept that he did not check on residents between 12:45am and 6am. References to "HBJ" are to the employer's Disciplinary Manager and "SV" are to SV:

> "HBJ: You were in the room from 12:35pm (sic) – 6am
> SV: I'm sure I checked residents in between
> HBJ: You didn't on CCTV no images of anyone moving other than a moth and a cat, why were you in there that long?
> SV: I feel like I did go out and do checks, I have no answer for that
> HBJ: No explanation? (HBJ read appendix 9 again paragraphs 2, 3, 4 and 5, how could you of (sic) checked in there are no images on the CCTV showing this?
> SV: I was sitting there waiting for the bell.
> HBJ: Is that what you normally do?
> SV: Yes
> HBJ: Why were you not seen between 12:35pm (sic) – 6am?
> SV: I want to see the video"

74. DBS was, or course, entitled to consider the evidence provided to it by Lillian Faithful Care, including the disciplinary file. However, it was required to make its own assessment of the evidence. It had to assess each piece of evidence before it critically

and to decide what weight to give it. Where there was a conflict of evidence it had to decide what was most likely in the light of all the evidence and resolve the conflict accordingly. It was not entitled simply to adopt the referring employer's assessment of the evidence, findings or conclusions uncritically. That would be to abdicate its statutory function.

75. DBS explained its assessment of the CCTV evidence in its Final Decision Letter relating to the Barring Decision as follows (see page 22 of the appeal bundle):

> "Within your representations, you have alleged that the description of the CCTV footage is not reliable, that the investigation was a "farce", and that the internal politics and contract negotiations that were ongoing at the time had a direct effect on your dismissal. However, you have presented no evidence to corroborate the alleged politics and issues within your organisation and during the investigation and disciplinary process you admitted to being sat on a chair in Poppy Room during this time period, as detailed within the CCTV footage description provided by Ms Goode. You were further unable to explain during the employer's investigation how you were able to remain in the Poppy room where no residents were present, if the shift had been as busy as you had indicated. Therefore, the DBS has no evidence to suggest that the CCTV footage description is not accurate or to question the credibility of the investigation as a whole."

76. In the 'Barring Decision Process' document DBS acknowledges that it has not viewed the CCTV footage but says there was "no reason to doubt the credibility of the statement that has been provided by Ms Goode" (page 65 of the appeal bundle) and finds that, "given the credible account of the CCTV footage and the inconsistent accounts provided by SV and Ms K, it appears on the balance of probabilities that on 21 August 2018 between approximately 12:45 and 6:00am SV did not carry out any care or safety checks on the residents of Resthaven Nursing Home.

77. While DBS was entitled to find Ms Goode's evidence to be "credible" as far as it went, it was wrong to characterise her description of the CCTV evidence as "clear and detailed". This is because it did not explain what CCTV evidence was reviewed, or what methodology was used. Where were the cameras situated? What area did they show? Were there any "blind spots"? How many feeds were reviewed? Were the feeds watched concurrently or consecutively? At what speed was the footage played? What was the quality of the images? Did Ms Goode watch all the feeds herself, or did she and Ms Booker each review one or more feeds alone and tell each other what they showed? Did they take regular breaks or watch the entire five and a quarter hours in relation to each camera feed in one go? Where did they view the footage (in a quiet office or e.g. at a nurses station? Were they uninterrupted while they performed this task? Did they carry out other duties while they reviewed the footage?

78. Another reason DBS gave for assessing Ms Goode's account of the CCTV evidence as reliable is set out at page 68 of its Barring Decision Process document:

> "Also, Mrs R has not disputed the content of the CCTV footage in her case, which indicates that there are no obvious concerns with the statement provided by Ms Goode regarding the description of the CCTV footage of the night in question."

79. This was not a permissible inference for DBS to draw because Mrs R was working on the Old Wing that night, while SV and Ms K were working on the New Wing. Since she wasn't on the New Wing that night she couldn't have known, without viewing the

footage herself, whether Ms Goode's description of the footage of the New Wing was accurate. We were pointed to no evidence that indicated that Mrs R viewed the CCTV footage of the New Wing. As such DBS was wrong to consider that her failure to challenge this evidence tended to demonstrate its reliability.

80. SV was aware there were cameras on the ward and he was informed of the existence of CCTV footage, and what it was said to show, yet he maintained his position that he did check on residents during the time in question and he asked to see the CCTV. In his representations he questioned the reliability of the description of the CCTV footage and alleged that political issues may have influenced the investigation.

81. One of the reasons DBS gave for dismissing this allegation was that SV had "presented no evidence to corroborate the alleged politics and issues within your organisation". Given that SV was dismissed from his job on 30 August 2018, had not appealed that dismissal or commenced proceedings in relation to it, and had been informed on 17 January 2019 that DBS would take "no barring action" SV cannot reasonably have been expected to retain, or have had access to, any evidence of political tensions in his former workplace, so DBS was wrong to find that this lack of corroboration undermined his evidence.

82. Given the clear dispute about this piece of evidence that was so crucial to DBS's findings of neglect, DBS took a remarkably uncritical approach to it. It may well be that DBS did not think it practicable to obtain further evidence from Ms Goode or Ms Booker to shed further light on these matters. However, if that were the case DBS should at the very least have acknowledged the deficiencies in Ms Goode's account, and it should have taken those deficiencies into account when assessing what weight to give her evidence. They did this neither in the Final Decision Letter, nor in the 'Barring Decision Process' document, nor in its submissions before the Upper Tribunal.

83. We are satisfied that DBS failed to approach the evidence of what the CCTV footage supposedly showed, and on which it based finding 1, in a duly critical way, and this amounted a mistake on a point of law.

Finding 2: Failing to ensure all the required health and safety checks were completed for residents during this time period

84. This finding was founded on DBS's acceptance that Ms Goode's note amounted to a "clear and detailed description" of the CCTV footage, so the same points raised above in relation to Finding 1 apply.

85. The only other reason given for this finding was that SV had "admitted to being sat on a chair in the Poppy Room during this time period, as detailed within the CCTV footage description provided by Ms Goode" (see page 22 of the appeal bundle). This reasoning is flawed because, while SV did accept that he sat on a chair in the Poppy Room, he did not accept that he was there for the entire period as Ms Goode claims. His case was that he sat in the Poppy Room listening for the call bells but performed checks during the shift, and he challenged the evidence as to what the CCTV footage showed quite vigorously.

86. Given the flaws in its approach to Ms Goode's evidence about the CCTV footage, and given that one reason for its making this finding was based on SV having accepted something which he clearly disputed both at the time of his disciplinary hearing and consistently in his representations to DBS, we are satisfied that DBS's decision making in this respect involved a mistake on a point of law.

Finding 3: Unplugging the call bell of JY, a 93-year-old female resident, who does not have full capacity, so that she was unable to call for assistance as required

87. Finding 3 does not rely on Ms Goode's evidence of what the deleted CCTV footage showed. Rather, it relies on the statements made by Ms K (the agency carer working with SV in the New Wing on the relevant night, see page 44 of the appeal bundle), Ms Merrick and Ms Patrick (the two day staff who attended to JY when they came on shift in the morning, see pages 39-40 and page 41 of the appeal bundle, respectively), as well as the notes of the investigation interviews with Ms R (the Registered Nurse working the relevant shift, see pages 49-54 of the appeal bundle) and the notes of SV's own investigation interview (see pages 55-58 of the appeal bundle).

88. The statements made by Ms Merrick and Ms Patrick are shocking and emotive. They describe the distressing state in which they discovered JY. DBS found their evidence to be compelling, and it explained why. DBS was entitled to accept their evidence as it did. Indeed, their evidence was not contradicted to any significant extent by SV or the other witnesses. It hardly needs saying that DBS was also entitled, based on this evidence, to find that JY, a vulnerable adult, had suffered neglect which had caused her harm. However, the statements of Ms Merrick and Ms Patrick are relevant to the Barring Decision in respect of SV only if he was responsible, whether wholly or partly, for that neglect.

89. Ms Patrick's statement casts no light on this whatsoever and it makes no reference either to SV or to the call bell. Ms Merrick's statement does appear to refer to SV:

> "a gentleman member of staff came into [JY]'s room I informed him of how I had found [JY] and he replied "poor [J]" and proceeded to plug in [JY]'s call bell and then left the room".

90. DBS refers to this part of the statement in its analysis in its 'Barring Decision Process' document of the evidence relating to the call bell. However, DBS puts its own gloss on Ms Merrick's account: "Ms Merrick has provided the account that SV went straight to the call bell and plugged it back in when he entered the room" (see page 66 of the appeal bundle).

91. DBS's assessment of the evidence of SV plugging in the call bell is flawed in several ways.

92. First, SV's evidence on whether he plugged the bell in is not inconsistent: he never denied plugging it in, he only denied *un*plugging it. There is some inconsistency in SV's evidence as to when he noticed that the call bell was not plugged in, but this doesn't seem particularly sinister. DBS appears to rely on Ms Merrick's evidence that he went "straight to the call bell" to plug it in to draw an inference that he already knew it was unplugged, and a secondary inference that he knew this because he had unplugged it. However, the statement made by the witness did not say what DBS says she said: there is no mention of him going "straight to the call bell", so any inferences drawn from this supposed evidence are invalid. In any event, the inferences drawn are by no means necessary ones and may be considered unlikely. We find that on a proper analysis the statements of Ms Merrick and Ms Patrick are incapable of supporting a finding that SV unplugged the call bell.

93. So, what of DBS's assessment of the evidence of SV *un*plugging the call bell? DBS relied upon Ms K's statement (at page 44 of the appeal bundle) that:

> "the other carer who was working with me had removed the bed alarm as [JY] was pulling it towards her face and neck … "

94. This statement does tend to support a finding that it was SV who removed the call bell (albeit that he is not named), but the witness in question is the carer who spent the night working on the ground floor of the New Wing where [JY] was located, while SV was working on the first floor from about 12:45am and so she may be regarded as a witness who is not entirely impartial. Further, Ms K gave evidence that she had checked on JY several times in the night, while DBS made a clear finding that "this did not take place", bringing the reliability of her evidence into question. Of course, witnesses can lie for any number of reasons, and they may lie about one matter but be truthful about another, or they can be truthful but mistaken. Just because DBS didn't accept Ms K's evidence that she had checked on JY several times during the night doesn't meant that it couldn't accept her evidence that it was "the other carer who was working with me" who unplugged the call bell, but given the circumstances outlined above DBS should have treated her evidence with some caution. However, DBS doesn't appear to have assessed this piece of evidence critically or in a balanced way.

95. Turning to the supposed inconsistencies in SV's accounts relating to the unplugging of the call bell, SV addressed the unplugged call bell on three occasions.

96. In his statement made on 21 August 2018 (at page 86 of the appeal bundle) he mentions "bell was near to her on the foot table" but he doesn't say how it got there.

97. In his investigation interview with Jo Goode (referred to in the notes of interview as JG) on 23 August 2018 (at page 89 of the appeal bundle) there was an exchange about the call bell in these terms:

> "JG: Please can you explain the reasoning for the call bell being taken off, the jack taken out and the bed being unplugged?
> SV: I didn't see that the bed had been unplugged. At times JY unplugs it themselves (sic).
> JG: Why didn't you take the call bell off the wall and place it on the table, if you know they may play with it?
> SV: I put the jack back onto the call bell as I noticed it had been unplugged."

98. Here SV was asked to "explain the reasoning" for the call bell being unplugged. He obliges by providing a possible explanation of what *might* have happened, based on his knowledge and experience ("At times JY unplugs it themselves"). He is not saying that he removed the call bell, or that he knows what happened.

99. In his disciplinary interview with Haden Bodin-Jones (referred to as "HBJ") on 30 August 2018 he was again asked about the call bell (see page 56 of the appeal bundle):

> "SV: When JY sits on her chair the call bell won't reach to her chair, we will give the call bell to her so she can reach, the bell was on the table, if she wanted she could ring, Sometimes the cable wraps round her neck, that's maybe why staff unplugged it, there's only 1 bell in this room.
> HBJ: Can you explain why during the investigation process you state, you did not notice the call bell was unplugged, however you then state you plugged the call bell back in? For clarity can you please confirm which of these statements is correct?
> SV: When I went there at 7am I saw the plug on the table, I thought it would be better to keep it on the floor, I'm not sure who put it there.
> HBJ: Did you notice it was unplugged or not?

> SV: The jack was removed but the bell would still ring, the cable wouldn't reach her maybe that's why it was removed it was kept on the side table, when I walked in that's where it was, I then plugged it back into the wall."

100. Again, SV is offering a possible rationalisation for the call bell being on the table. He is not saying that he unplugged it and put it on the table because he thought that it might wrap around her neck. He consistently attributes the unplugging to an unknown other: "that's maybe why staff unplugged it"; "maybe that's why it was removed".

101. DBS's evaluation of the evidence on the call bell is summarised in its Barring Decision Process document (at page 69 of the appeal bundle) as follows:

> "Given that SV has been inconsistent in his account, that he has provided a reason for it being unplugged that is not supported by the appropriate risk assessment, that Ms K alleged that SV unplugged the call bell, and that Ms Merrick witnessed SV go straight to the call bell and plug it back in the next morning, it appears to the DBS on the balance of probabilities that SV unplugged [JY]'s call bell."

102. SV gave different explanations for the unplugging of the call bell, but it is wrong to say he gave inconsistent accounts, so DBS was wrong to rely on any inconsistency in SV's evidence. If SV did unplug the call bell then the fact that he didn't record a risk assessment is another factor that could have been considered in DBS's assessment of appropriateness and risk, but the lack of recorded risk assessment is not evidence that SV unplugged the call bell, and it was wrong of DBS to rely on it as such. We have explained why its belief that SV went "straight to the call bell" was erroneous and incapable of supporting a finding that SV unplugged the call bell. For these reasons we are persuaded that DBS's finding that SV unplugged JY's call bell is not supported by the evidence it relied upon and its reasons for making that finding are flawed and in error of law.

103. In his skeleton argument and in his oral submissions at the hearing Mr Serr advanced another basis on which SV could be found to have neglected JY: Mr Serr argued that SV was responsible for the provision of care on the New Wing not only by him but also by Ms K, the agency carer, who was working on the ground floor where JY's bed was. This was on the basis that SV was the only permanent member of staff working on the New Wing that night, Ms K being agency staff, and SV being an experienced care worker with many years under his belt.

104. If DBS made its decision on this basis it is far from clear either from its Final Decision Letter or from its Barring Decision Process document. We note that in the referral form with which DBS was provided (see pages 29-35 of the appeal bundle) SV's role title is listed as "Care Assistant" and his duties are described as being "To support the home manager and management team in all aspects of the care of residents. To work in partnership with residents encouraging choice participation and motivation adhering at all times to the values of the charity. Ensure that all policies & procedures are adhered to." There is no mention of management or supervisory duties. SV accepted at the hearing that he gave Ms K a briefing at the beginning of the shift, but this doesn't mean that he was operating in a supervisory capacity.

105. While Mr Kerr suggested that Ms K was inexperienced there was no evidence to support this assumption, which appeared to have been made solely on the basis that she was agency staff, when it is common for people with a great deal of experience to choose to work as agency staff for reasons of flexibility and better pay. Ms K was clearly new to the care home and needed to be 'shown the ropes' by SV, but for all we

know she may have had more experience than SV. In the absence of any supervisory or management role, and if SV did not unplug the call bell, there is insufficient evidence to support a finding that SV was responsible for JY's care while he was assigned to the top floor and Ms K to the ground floor, unless and until he was called to assist.

106. We find that DBS took a flawed approach to its assessment of the evidence of what the CCTV footage showed and to its assessment of the evidence relating to the unplugging of JY's call bell. These amount to errors of law. We find that there was insufficient evidence before the DBS to support a finding that SV had supervisory duties in respect of Ms K. In any event DBS did not rely on the existence of such a duty either in its Minded to Bar letter, its Barring Process Decision document or its Final Decision Letter. Given that the key findings made by DBS were infected by errors of law it is by no means clear that DBS would have arrived at the same decision to bar SV had those mistakes not been made. It was entitled to find that SV failed to report the unplugged call bell, but such a failing would have been unlikely of itself to result in DBS deciding to place SV on the Barred Lists.

107. At the permission stage the judge explained his reasons for granting permission to appeal to the Upper Tribunal:

> "9. Having conducted a thorough review of the papers I have significant concerns about the fairness of the process conducted by the Respondent in this case. It appears that the Respondent may have been overly reliant on the referee's investigation and have failed adequately to assess the evidence for itself."

108. The concerns described by the judge are shared by this panel. We consider that DBS's investigation was lacking in rigour and its approach to the evidence showed a remarkable lack of curiosity. DBS failed to carry out an adequate assessment of the evidence for itself, relying far too readily not only on the evidence provided by the referee (which was permissible) but also on the referee's assessment of the evidence and its findings (which was not permissible). It also failed to ensure fairness in the process, including failing to provide SV with a full copy of the referee employer's disciplinary file, so denying him the opportunity to make representations on them. Mr Kerr argued that this failure was not in error of law because it could be presumed that SV had the statements as part of the disciplinary pack sent to him in advance of his disciplinary hearing, but this completely fails to acknowledge that SV had been dismissed from his job and had, almost a year before the Barring Decision was made, been given a "no barring action" letter. In these circumstances, an assumption that SV would have retained all the papers from his disciplinary hearing is completely unrealistic.

109. For the reasons given above we are satisfied on the balance of probabilities that DBS has in its Barring Decision made mistakes on points of law which are material.

Disposal

110. Having decided that DBS has made such mistakes Section 4(6) of the 2006 Act requires us either to direct DBS to remove SV from the Barred Lists or to remit the matter to DBS for a new decision.

111. In DBS v AB [2021] EWCA Civ 1575 (**"DBS v AB"**) at §[73] the Court of Appeal said that the Upper Tribunal's power to direct removal from the barred list should be used sparingly and on an error being identified the usual order will be remission back. Section 4(6) of the Act permits the Upper Tribunal to direct removal of the name of a

person from a barred list where that is the only decision that the DBS could lawfully reach in the light of the law and the facts found by the Upper Tribunal. While this is a case in which DBS has made serious errors of law it is not a case in which the only decision DBS could lawfully reach is removal from the Barred Lists. We therefore order that the case is remitted to DBS for a new decision.

112. Where the Upper Tribunal remits an appeal to DBS for redetermination it may set out findings of fact which it has made on which DBS must base its new decision. We have considered what the Court of Appeal said in DBS v AB at §[55]:

> "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, the 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 DBS must base its decision."

113. In his evidence at the hearing SV made various arguments about how the call bell system worked. He indicated that a call bell being "unplugged" did not necessarily mean that it was not effective: they were designed to be capable of being removed from the wall and placed in a convenient place, such as on a table, and would still raise an alarm when pressed. He claimed that if a call bell was disconnected in such a way that it was ineffective then this would be recorded on the system. We note that in his disciplinary meeting on 30 August 2018 SV made the point that the disconnection of a call bell was something that was recorded on the system: "That's why I said if the cable came out you can check the print out" (see page 56 of the appeal bundle). If the system will have recorded whatever action resulted in the deactivation of JY's call bell, and if SV pointed that out during the employer's investigation, it is puzzling that the record wasn't checked. If that record were available it would presumably have been important evidence, especially if it showed that the call bell was removed between 12:45am and 6am, when it was not disputed that SV was on the upper floor.

114. We do not consider it appropriate to make any findings on this evidence, but these are clearly issues which DBS will wish to get to the bottom of when it redetermines SV's case on remittal.

115. Section 4(7)(b) of the 2006 Act provides that if the Upper Tribunal remits a matter to DBS under Section 4(6) of the 2006 Act the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise. We do not consider that there are compelling reasons to depart from the default position under Section 4(7)(b) and we therefore do not make such a contrary direction.

Thomas Church
Judge of the Upper Tribunal

Mr John Hutchinson
Ms Heather Reid
Members

Authorised for issue on 21 February 2022