AD v Disclosure & Barring Service
[2023] UKUT 280 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2021-000128-V

ON APPEAL FROM:
Appellant: AD
Respondent: Disclosure and Barring Service
DBS Ref No: DBS725
Customer ref: 00940324935
DBS ID Number: P0000381UC8

Between:

AD

Appellant

- v –

DISCLOSURE AND BARRING SERVICE

Respondent

Before: **Upper Tribunal Judge Jones**
Tribunal Member Heather Reid
Tribunal Member Dr Elizabeth Stuart-Cole

Hearing date: 27 September 2023
Decision date: 07 November 2023

Representation:
Appellant: Patrick Hill, instructed by BCL Copeland Solicitors
Respondent: Bronia Hartley, Counsel instructed on behalf of the DBS

DECISION

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

The decisions of the Disclosure and Barring Service taken on 20 May 2020 and 12 April 2021 to include and retain the Appellant's name on the Children's and Adults' Barred Lists did not involve any mistake on a point of law nor were they based upon material mistakes in findings of fact. The decisions of the DBS are confirmed.

The Upper Tribunal further directs 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 ('AD') appeals the decisions of the Respondent (the Disclosure and Barring Service or 'DBS') dated 28 May 2020 and 22 April 2021 to include and retain (not to remove) his name on the Children's Barred List ('CBL') and Adults' Barred List ("ABL") pursuant to paragraphs 3, 9 and 18A of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 ("the Act").

2. The Respondent originally included the Appellant on the Children's Barred List ('CBL') and Adults' Barred List ('ABL') on 28 May 2020 ('Final Decision Letter' or 'original decision') – see paragraphs 3 and 9 of Schedule 3 to the Act. The Respondent subsequently reviewed this decision on 22 April 2021 and determined that it was not appropriate to remove the Appellant from the CBL or ABL (Review Decision Letter) - see paragraph 18A of Schedule 3 to the Act.

3. Permission to appeal to the Upper Tribunal was granted by the Judge on 21 September 2022 in respect of the grounds raised by the Appellant in the perfected grounds of appeal.

4. We held an oral hearing of the appeal at the Rolls Building, London on 27 September 2023. The Appellant was represented by Mr Hill of counsel. The Respondent (the DBS) was represented by Ms Bronia Hartley of counsel. We are grateful to them both for the quality of their written and oral submissions.

The background

5. The Appellant, AD, is now aged 28 and was 27 at the time of the hearing. At the time of the relevant decisions in May 2020 and April 2021, he was 24 and 25 years old respectively.

6. In March 2020, in the Crown Court at [town], he was acquitted (unanimously) of alleged offences of a sexual nature in relation to the complainant contrary to provisions of the Sexual Offences Act 2003.

7. The material events leading to the allegations had occurred three years earlier between April and June 2017. The Appellant had, upon completing his A-levels, obtained employment as a teaching assistant (an *'Educational Technical Instructor' or 'TI'*) in the education department of St. A's Hospital. He began in that role on 21 September 2015 following a satisfactory DBS clearance and at the time was 19 years old (he was 21 years old by the time of the material events).

8. The Appellant had previously worked for three years (from February 2012 to August 2015) – without incident – as a *'Ward Host/Domestic'* on a hospital maternity award at [town] General Hospital. His line manager (Senior Housekeeper, Department of Obstetrics and Gynaecology) described him in a reference letter as '*an exemplary member of staff'* who was spoken of highly by all the midwives and nurses; who worked with *'great sensitivity to the [new] mothers regarding privacy and courtesy';* who throughout his employment had adhered to all relevant policies and procedures; who would offer to assist on other wards when the department was short-staffed; and who was a *'loyal, valuable asset'*.

9. The '*complainant*' in the criminal proceedings was RYH a male inpatient in the mental health facility of St. A's, who was 13 to 14 years old at the time of the allegations. Although he had made no complaint at the time, he would come to make various allegations.

10. The DBS no longer places any reliance upon many (and the most serious) of the complainant's allegations following the evidence and information arising from the criminal trial, and in light of the Appellant's representations.

11. On 19 June 2017, the Appellant was suspended from his role; on 8 July 2017, he was arrested. The Appellant was 21 years old at the time of his arrest. He was interviewed under caution and co-operated fully with the police investigation, answering all questions asked of him. He did not seek to suggest that there had been no failings in the performance of his duties at the hospital; indeed, he accepted candidly that he had allowed himself to become overly attached to the complainant, and that he had failed to maintain appropriate professional boundaries with him. He demonstrated some insight. He maintained, however, that he had not committed any criminal offence.

12. On 11 July 2017, a meeting was convened at St A's (a Local Authority Designated Officer Joint Evaluation Meeting - 'DO JEM meeting') at which the complainant's allegations were discussed. The notes were disclosed to the Appellant for the first time in connection with the DBS decision in these proceedings. It is clear from them that: (a) the meeting was conducted in the absence of the Appellant (b) the notes do not purport to be verbatim; and (c) the notes, such as they are, contain unattributed and some inaccurate comments and information. These include one note which erroneously recorded that the Appellant had admitted in police interview that he was *'obsessed'* with the complainant.

The procedural history

13. On 31 July 2017, the Appellant's case was referred to the DBS by the local authority which had employed him.

Minded to bar decision

14. On 6 November 2019, the DBS informed the Appellant that it was '*minded to'* place him on both the adults' barred list and the children's barred list. The Appellant had received an offer to study Medicine in September 2019. The findings made by the DBS in the *'minded to bar letter'* are not addressed but, following the

representations and evidence since made available to the DBS, the early findings have been superseded and are of background interest only.

15. The DBS invited the Appellant to make any representations he wished; however, in view of the fact that the criminal trial was to be heard in March 2020 – at which the evidence relating to the allegations would be tested (which in turn would inevitably result in the emergence of additional and relevant information and evidence) – the Appellant invited the DBS to allow an extension of time such that the trial would proceed with representations to follow.

16. The DBS having rejected that invitation on 20 December 2019, the Appellant submitted initial representations on 17 January 2020 renewing the invitation to postpone a decision until the outcome of the trial process, but also making clear (in summary): that a number of the allegations referred to in the *'minded to bar'* letter were not accepted (and could not be sustained on the balance of probabilities); that although the Appellant accepted certain failings in relation to the performance of his professional duties, his conduct did not amount to *'relevant conduct'* as defined in paragraph 4 of Schedule 3 of the 2006 Act; and that the transcripts of interview and other documents the DBS had relied upon in making its findings in the *'minded to bar'* letter were inaccurate.

17. The letter summarised the '*circumstances of [the] allegations'* and the Appellant's response and in particular emphasised his co-operation, insight and the positive steps he had voluntarily taken to understand and address the factors which may have contributed to the material events. The letter further invited attention to relevant mitigating features, including: the Appellant's young age, lack of maturity, and experience/naivety at the time of the material events, and the poor quality of supervision of the appellant at St A's.

18. On 1 May 2020, i.e. following his acquittal in the criminal proceedings, and DBS having made no decision, the Appellant made further representations against inclusion on the Barred Lists. The detailed 15-page letter is not summarised here in detail but in outline it addressed the available evidence and information allegation by allegation, and ultimately invited DBS to reflect that *'earlier factual findings'* could no longer be sustained on the balance of probabilities in the light of evidence and information that had emerged in the criminal investigation and proceedings. The letter also summarised examples of the complainant's propensity to make false allegations, particularly of a sexual nature, against staff and other patients. As the letter also made clear, the Appellant was anxious to assist the DBS in any way possible to access any information or material DBS required, or to clarify matters generally. The Appellant offered to obtain a transcript of the evidence of the complainant and/or himself if necessary.

The Respondent's decisions

<u>The barring decision to include the Appellant on both lists – 28 May 2020</u>

19. On 28 May 2020, the DBS communicated its *'final decision'* to include the Appellant on both Barred Lists. The decision expressed DBS to be satisfied on the balance of probabilities that the Appellant had engaged in the following behaviour

amounting to 'relevant conduct' for the purposes of the Act i.e. '*conduct which endanger[ed] a child [the complainant] or [wa]s likely to endanger [the complainant]'.*

20. It made the following five findings of 'relevant conduct' on the balance of probabilities:

a. The Appellant had (i) facilitated a meeting between the complainant and discharged patient on 16 June 2017; (ii) contravened policy by taking his mobile phone on the visit; (iii) failed to take the appropriate action when the complainant took his mobile phone; and (iv) failed, when he returned to the hospital, to report that the complainant had used his mobile phone to take a photograph of his (the complainant's) penis.

b. Following the meeting, the Appellant had (i) allowed the complainant to go onto his laptop where he accessed pornography via twitter; (ii) made a few jokes about the complainant getting turned on and becoming "stiff"; and (iii) subsequently failed, when he returned to the ward, to report the incident.

c. The Appellant had (i) prior to 16 June 2017 allowed the complainant to watch pornographic material and (ii) not reported it in an appropriate manner.

d. The Appellant had failed to maintain professional boundaries with the complainant and hugged him, held hands with him, touched his knee, stroked his head and called him *"little boy/little brother".*

e. The Appellant had touched the complainant on the thigh, on unspecified dates.

21. The DBS concluded the Appellant posed a risk of harm both to children and to vulnerable adults. The findings are addressed below under 'Grounds'. So far as the adult's barred list was concerned, DBS acknowledged that the Appellant's behaviour did not involve a vulnerable adult the Appellant had previously worked with vulnerable adults at [town] General Hospital *'without any apparent issues'*. Nonetheless, DBS were *'satisfied that it is appropriate'* to include him in the list for the following reasons:

a. The Appellant would have the '*opportunity to establish close working relationships with service users in [his] care'.*

b. *'[C]oncerns remain that [the appellant] might develop similar attachment issues, fail to act in a responsible manner and place vulnerable adults at risk of harm by not adhering to professional boundaries and/or failing to disclose problematic behaviour.'*

22. Finally, the DBS addressed proportionality and concluded that inclusion in the Barred Lists was not a disproportionate interference with the appellant's rights under Article 8 of the European Convention on Human Rights ('ECHR') – the right to private and family life.

The review process under paragraph 18A of schedule 3

23. Although a barring decision under paragraphs 3 and 9 is *'final'* of schedule 3 to Act, paragraph 18 also provides that a review may be requested by a person after the minimum barring period (in this case 5 years) has elapsed. Further, paragraph 18A provides that the DBS may review a person's inclusion in a barred list at any time if that person provides information the DBS did not have at the time of their inclusion in the barred list.

24. Accordingly, on 2 November 2020, the Appellant made further representations inviting the DBS to conduct a review of his inclusion in the barred lists in light of a report prepared on behalf of the appellant by an independent Forensic Psychosexual Therapist, Ms Appleyard dated 31 August 2020.

25. As the letter dated 2 November 2020 explains, Ms Appleyard is an independent Forensic Psychosexual Therapist in private practice with responsibility for managing the assessment and treatment of sex offenders. She holds a Post-Graduate Diploma in the Assessment and Treatment of Sex Offenders (Leicester University) and has sixteen years' experience in the treatment of sex offenders and survivors of sexual abuse.

26. The Appellant having been acquitted following trial, was not the subject of any court-imposed requirement to seek any ongoing assistance (e.g. to engage with the Probation Service or to satisfy any requirement attached to a sentence – such that he could not provide the DBS a probation report).

27. The Appellant nonetheless voluntarily sought to engage with appropriate professionals (his GP; NHS CBT sessions; private therapy sessions): (a) to understand and address any underlying issues that might have contributed to his conduct; and (b) had striven – in Ms Appleyard's opinion, successfully – to ensure that he developed the necessary skills/coping mechanisms to enable him to deal in future with any similar situation that he might encounter with appropriate professionalism.

28. In the light of the report's findings and conclusions, the DBS was invited to reconsider whether it was necessary and proportionate to retain the Appellant on either of the Barred Lists. The report is considered in more detail below.

The review decision to retain (not to remove) the Appellant on the barred lists – April 2021

29. On 22 April 2021, the DBS informed the Appellant that, having conducted its review, under paragraph 18A, Schedule 3 of the Act, it had decided against the removal of his name from either of the Barred Lists, *'because of concerns as to the*

future risk of harm you represent to vulnerable groups'. The review decision in summary observed:

a. Although Ms Appleyard's report confirms that the Appellant does '*not represent a future risk of sexual offending*' and that his behaviour '*does not indicate that a pattern of deviant sexual interests exist*', '*the emotional attachment and dependence [the appellant] developed on very vulnerable children whilst employed at St A's Healthcare, more so the admitted 'unhealthy' interest in 14 year old [complainant] and the proclivity to become obsessed with and emotionally dependent upon vulnerable children, could be repeated in regulated activity in the future with either vulnerable group.*'

b. The Appellant '*demonstrated a need to maintain contact with [the complainant] for*

[the appellant's] personal emotional gratification/need'. That '*resulted in'* the Appellant '*failing to comply with policy and procedure and failing to report [the appellant's] concerning behaviour, particularly that of a sexual nature'*. In turn that *'jeopardised his treatment and exposed the child to further significant emotional and psychological harm*'.

c. Although Ms Appleyard's report confirms the Appellant has *'no further treatment needs…it also highlights that [the appellant] continue[s] to engage with therapy to develop…self-awareness; a lack of which was a contributory factor to the conduct demonstrated towards [the complainant]'*.

30. Ultimately, the review decision concluded that the *'whilst the content of the psychosexual report has been taken into account, the DBS are of the view that there needs to be a sustained period of time to demonstrate an overall modification of behaviour. Presently, an insufficient period of time has passed in order to reassure of a modification of behaviour such as to circumvent the minimum barring period of five years'.*

31. On 17 May 2021, the DBS wrote a further letter confirming the decision; noting that '*one of the factors considered by DBS was the passage of time since the behaviour in question took place. DBS did not consider that there has been sufficient time without further incident/behaviour so as to remove the need for protective safeguarding mechanism';* and providing details of statutory right of appeal to the Upper Tribunal.

32. The Appellant is now 28 years old and the material events occurred more than 6 years ago. By the time the minimum 5 year period barring would elapse on 27 May 2025, eight years will have passed since the incidents in 2017 and the Appellant would be 29 years old.

Appellant's Grounds of Appeal

33. In his Grounds of Appeal (his "Reasons for Appealing" document) enclosed with his notice of appeal, the Appellant provided grounds of appeal drafted his solicitors.

34. The Appellant submits 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).

35. The Appellant has been granted permission to appeal in respect of his perfected grounds of appeal dated 16 June 2022 (Perfected Grounds of Appeal) which are as follows:

(1) whether the DBS *erred in law* in finding that the Appellant should continue to be included on the Children's Barred List in all the circumstances of his case; alternatively, whether the continued inclusion was *disproportionate*; (Ground 1)

(2) whether the DBS *erred in law* in finding that the Appellant should continue to be included on the Adult's Barred List in all the circumstances of his case; alternatively, whether the continued inclusion was *disproportionate*; (Ground 2)

(3) whether the respondent made material errors of fact in its review decision in finding:

that the applicant had '*admitted*' an '*unhealthy*' interest in the complainant;
that the appellant had '*developed*' a '*dependence*' on '*very vulnerable* children';
that the appellant had a '*proclivity to become obsessed with and emotionally dependent upon vulnerable children*';
that the applicant '*jeopardised [the complainant's] treatment and exposed [him] to further significant emotional and psychological harm ';* and
that the applicant acted '*out of fear that [his] contact with the [complainant] would be stopped*'*.*

36. The Appellant relied on these three grounds of appeal at the hearing of the appeal before us on 27 September 2023.

The evidence in the appeal

37. The DBS relied on written evidence from witnesses and transcripts of interview contained in the bundle of evidence it filed and served. The witnesses included former colleagues of the Appellant who were employed by the hospital at the relevant time. The Appellant likewise relied upon a bundle of evidence including Ms Appleyard's reports, witness statement and transcripts of his interviews with the police. He also relied on other evidence he had supplied to the DBS such as character references and the submissions and representations made on his behalf to the DBS by his solicitors prior to his barring. This was the evidence relied upon in making the barring decision and in defending the appeal.

38. The Appellant did not give evidence during the hearing but we do not draw any inferences against him, the matters of primary fact were largely not in dispute and the questions were primarily ones of evaluative judgments, inferences to be drawn, risk assessment and issues of law. These were dealt with in oral submissions.

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

Law

40. 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.

41. Section 4 of the Act provides relevantly:

> (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.
> …

42. The next most relevant statutory provisions to address are paragraphs 9 and 10 of Schedule 3 to the Act on the definition of relevant conduct in respect of vulnerable adults:

> (a) Paragraph 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 vulnerable adults"; and (iii) it is satisfied that it is "appropriate" to include them.
>
> (b) Paragraph 10(1) of the same, sets out the meaning of "relevant conduct". It includes: (i) "conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult"; (ii) "conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him".

(c) Paragraph 10(2) of the same, provides that conduct "endangers a vulnerable adult if" among other things it: (i) "harms" a vulnerable adult; or (ii) puts a vulnerable adult "at risk of harm".

43. Paragraphs 3 and 4 of Schedule 3 to the Act mirror paragraphs 9 and 10 but in relation to children.

44. A relevant authority to address within the body of the decision is the extent of the jurisdiction of the Upper Tribunal to determine whether the DBS had made mistakes of fact in its decision and its power to make its own findings of fact. This 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.'

45. The decision on whether it is "appropriate" to bar is neither a question of law nor a question of fact (see section 4(3)), and so is not appealable under section 4(2). Accordingly, a simple difference of opinion as to the issue of appropriateness on the basis of undisputed facts is non-appealable. However, the DBS's decision as to the appropriateness of barring may include an assessment as to the future risk that an Appellant poses of causing harm to vulnerable and adults.

46. As regards the assessment of risk, the Court of Appeal in *DBS v AB [2021] EWCA Civ 1575* at [43] considered that this was almost exclusively a matter for the DBS

and should not be within the Tribunal's jurisdiction under section 4 of the Act given the Respondent's expertise in making risk assessments and responsibility as the expert decision-maker in relation to barring:

> *'43. …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.'*

47. 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.

The Appellant's submissions on the grounds of appeal

48. Mr Hill made detailed submissions on behalf of the Appellant which we consider below.

49. Ms Hartley made submissions in reply, many of which we have accepted and adopted.

Discussion and Decision

Ground 1

Errors of Law

(1) The DBS final decision included conduct which does not amount to 'relevant conduct' as it was not conduct which 'endangered a child' or was 'likely to endanger a child, e.g., facilitating a meeting between the complainant and a discharged patient, contravened policy by taking his mobile phone on a visit

50. First, Mr Hill for the Appellant submitted that, properly analysed, the conduct relied upon by DBS in the final decision does not amount to '*relevant conduct'*, as it is not conduct which '*endanger[ed] a child [the complainant] or [wa]s likely to endanger [the complainant]'*.

51. By way of illustration (only), he argued that the first two particulars relied upon in the final decision are first, that the appellant had facilitated a meeting between the complainant and a discharged patient on 16 June 2017; and second that the Appellant had contravened policy by taking his mobile phone on the visit.

52. He argued that such conduct is not '*relevant conduct'*. Without enumerating every example, he submitted that the DBS's Final (original) decision is generally flawed in its identification of relevant conduct. This amounts to a mistake of law.

53. We reject these submissions.

54. We are satisfied that the five findings that the DBS relied upon in its Final Decision (set out at paragraph xx above) did constitute relevant conduct as defined under the Act (conduct that *endangered a child' or was 'likely to endanger a child*) and there was no material error of law. The two particulars of conduct (or sub-findings) challenged by the Appellant (facilitating a meeting with a discharged patient and taking a mobile phone on a visit) were capable of amounting to relevant conduct which was likely to endanger the children under the Appellant's care. These instances risked emotional or psychological harm being caused to the complainant or other children (even if they did not in fact do so). In any event, to the extent that some particulars (or sub-findings) of the facts found may not have constituted relevant conduct, these were not material to the five overarching findings (which are not essentially challenged), so any error would not be material.

55. The allegations found proved by the Respondent must be read as a whole; taking elements of the same out of context does not enable the Appellant to establish that his behaviour overall did not amount to relevant conduct.

56. We are satisfied that there was no mistake of law in the DBS conclusion that the Appellant committed relevant conduct in the five overarching ways found relying upon the following facts, matters and evidence.

57. The findings of relevant conduct concern RYH who was a vulnerable child (aged 13-14 at the time) under the care of the Appellant. It is important to note the evidence before the DBS that the complainant [RYH] has had a troubled upbringing, he was placed in the care of the Local Authority when he was 7 and his mother committed suicide when [RYH] was 8. [RYH] is diagnosed with attention deficit disorder, attachment disorders and autistic spectrum disorder. He has previously been in residential establishments and displays difficult and disturbing behaviours including violence, self-harm and sexual assault. He can make close attachments to staff and staff attach to him easily due to his endearing nature. Therefore, clear boundaries are needed with anyone who works with him' (Record of DO JEM Meeting – [p.66 of the bundle]).

58. The DBS properly considered the reliability and credibility of RYH as a witness (given the most serious and sexual allegations he made were not found prove to the criminal standard in a jury trial) but also the admissions that the Appellant himself made in interview with the police.

59. There is no error of law in the following findings, relied upon by the DBS against the Appellant, that he endangered RYH or was likely to endanger him by causing him or risk causing him emotional, psychological or physical harm.

60. The DBS were entitled to rely on its findings that the Appellant:

i) did not maintain clear boundaries with RYH;

ii) permitted the development of an inappropriate attachment as between him and RYH;

iii) told RYH about his own self-harming behaviour;

iv) permitted RYH to watch pornography for approximately 7 minutes (see further below) and did not report/make any record in RYH's RIO notes about this occurrence;

v) did not report the fact that RYH used his mobile 'phone to take a photograph of his genitalia;

vi) gave RYH a condom.

61. These findings unmistakeably constituted relevant conduct. The DBS weas entitled to rely on the following sources of evidence as to relevant conduct – conduct which endangered or likely to endanger RYH by causing him emotional, psychological or physical harm or risk of harm caused to RYH:

a) '[RYH] said that T.I. (Technical Instructor - the Appellant) referred to him as a "brother" which, to him, "felt weird, it was wrong". He went on to say that "He let me do too much" (Record of DO JEM Meeting – **[p.67]**).

b) '[RYH] detailed that he [the Appellant] started to hug him and he just went with it because he thought it was normal. He detailed that he did become scared and didn't really know what to do. He said that he didn't say anything because he was in a mental hospital and thought no-one would believe him. He mentioned that on one occasion kissed him on the head' (Letter from police – **[p72]**).

c) '97. Patients can be very emotive and being that many, such as RYH have had difficult and abusive early years, they have attachment difficulties and continue to search for that one person who can act as a "good parent" to them (caring, supportive, providing, gifting and setting boundaries). I believe that RYH's behaviour felt appealing to AD and he was complimented that he could be that "good parent" to RYH…101… gained emotional gratification from his interactions with RYH without considering the detrimental effects on him or others' (Forensic Psychosexual Assessment (Victoria Appleyard) – **[para 97, p.89]**).

d) '…Mobile phones aren't allowed and patients aren't allowed any access to the internet…Um because obviously there's a lot of damaging stuff online, and then, obviously, a lot of patients might have addiction problems or things where they can contact people, or…and the glass of the phone and everything, so it's just not allowed full stop. So…' (Transcript of police interview with another vulnerable resident and former patient, RS – **[p.128]**).

e) '[RYH] reported to [KB – a member of statff] that he was concerned that if worries he might self harm as he has done in the past. then hung his head in his hands and said "IT'S FUCKED UP MAN I CAN'T TELL YOU". [RYH] said always says there (sic for 'they are') like brothers. [RYH] is concerned about what is going to happen to' (Witness statement of NC – **[p.137]**).

f) ‘ : …do you know the rules with contact with ex-patients at St As? Cherry Lou: The rules are not to have contact I believe’ (Conversation with CL – **[p.139]**.

g) ‘ : …HUGE CONFESSION I gave him the condom yesterday…I don’t see why they’re contraband’ (AD conversation with KB – **[p.141]**).

h) ‘“Q: Do you think you have gone against this position of trust in any way?” A: “Yeah, in hindsight, yeah”’ (Transcript of police interview with the Appellant – **[p.214]**).

62. The Appellant has not established any or any material error of law in this regard.

(2) Even if ‘relevant conduct’, DBS made factual findings that were not reasonably open
to it, e.g., ‘allowed’ the complainant to watch pornographic material, failed to maintain professional boundaries and made inappropriate physical contact with him

63. Second, Mr Hill argues that even if the conduct identified by the respondent *does* amount to *‘relevant conduct*’, the DBS’s final decision contains factual findings which were not reasonably open to DBS (to the civil standard, alternatively at all) in the light of the available information/evidence. This is argued to be either a mistake of law or fact.

64. By way of example:

a. The final decision concludes the Appellant had, prior to 16 June 2017, ‘*allowed’* the complainant to watch pornographic material. That was an unreasonable finding in circumstances in which the available evidence was, as summarised in the letter of 1 May 2021 at page 7, entirely consistent with the complainant’s account. In short, *‘[the complainant] and would build skateboards in the classroom and [the complainant] would use ’ laptop to look at skating, clothing websites and Twitter. When saw that [the complainant] had accessed a pornographic website, he gave verbal prompts and asked him to turn it off which he did. The second time [the complainant] accessed pornography on ’s laptop, another member of staff, KB, was present and they both prompted [the complainant] to stop. The third time it happened, (‘RS’), was present; when realised that [the complainant] had accessed it, he prompted him and tried to close the window. never incited nor encouraged [the complainant] to look at pornography.’* Thus, the available evidence does not support the finding that the complainant ‘*allowed’* the Appellant to watch such material.

b. The final decision concludes the Appellant had failed to maintain professional boundaries with the complainant and hugged him, held hands with him, touched his knee, stroked his head, and had touched the complainant on the thigh, on unspecified dates. That was an unreasonable finding in circumstances in which (as summarised in the letter of 1 May 2021) the Appellant’s evidence was that he had hugged the Appellant in times of distress and to provide comfort, as indeed had other members of staff. The Appellant relies upon the matters set out at page

9 of the 20 May 2021 letter. Any contact with the complainant was non-sexual and was not inappropriate.

65. We reject these submissions.

66. We are satisfied that the following factual findings were reasonably open to the DBS on the evidence and the Appellant has not established any or any material mistake of law or fact having regard to the following facts, matters and evidence.

'Allowed' [RYH] to watch pornography:

67. The evidence available to the DBS included the following:

i) '[RYH] said he was going to look at "more porn" suggesting to me this really wasn't the first time he had been allowed to do so… made little attempt to stop him and made a few jokes about RYH becoming turned on and getting "stiff"… allowed this to continue for almost five minutes before RYH stopped looking at the explicit pornographic material' (complaint letter – **[p.57]**).

ii) '[AD] explained that his method of disciplining was not very proactive and normally he'd let [RYH] work out his mood for himself, and would just as him not to do what he was doing and eventually he'd stop, however he said this was probably not the best approach to take letting him to make (sic) his own decisions' (Appellant's police interview – **[p.201]**).

iii) 'He [AD] said he could remember two or three times that [RYH] had accessed pornography previously and he was supposed to monitor it, which was a lapse on his part' (Appellant's police interview – **[pp.203-204]**).

iv) 'Q: "…how is that appropriate that you've allowed him to watch pornography, given your job?"
A: "It's not, it's not"' (Appellant's police interview – **[p.215]**).

v) 'Q: "Yes or no, did [RYH] say he was going to look at porn?"
A: "Um, probably, I can't remember the exact conversation"' (Appellant's police interview – **[p.235]**).

vi) 'Q: "How long was it that you realised he was looking at porn?"
A: "…probably a minute tops"
…DC [redacted] noted that a work computer from St As had been examined
"And they have examined it and they have found, just from the 16th of June, pornographic material on the computer, okay, so there were searches from this date…from the point that the first search was put in to the point that the search was ended is a 7 minute timeframe"…"[RYH] in your care, in your position of trust has been watching pornography and you've allowed him to do it"
A:"Yeah"
Q: "Is that a fair comment?"
A: Yeah, it's factual isn't it"' (Police interview with the Appellant – pp. **[235]**; **[236]**; **[237]**).

Failed to maintain professional boundaries:

68. The evidence available to the DBS included:

i) The Appellant accepts in his own application for permission to appeal that he 'allowed himself to become overly attached to [RYH]' and that he 'failed to maintain appropriate professional boundaries with him' (Application for permission to appeal – **[p.9]**).

ii) '[RYH] expressed some concern for the safety of T.I. [AD] as he had been told by him in the past that he cuts himself at the top of his arms and that "he told me but not even his mum knows"' (Record of DO JEM Meeting – **[p.67]**).

iii) '18. explained the situation and circumstances where the allegations were made and under his own admission (sic) stated that he cared about RYH and that the boundaries between professionalism and personnel (sic) had become blurred' (Forensic Psychosexual Assessment (Victoria Appleyard) – para 18, **[p.78]**).

iv) ' said that in hindsight since being suspended he realised that his relationship with [RYH] had turned unhealthily into something that it shouldn't be. Discussion about [RYH]'s clinical care, during which confirmed that he definitely recognised that the things he was doing for [RYH] weren't healthy' (Police interview with Appellant – **[p.220]**).

v) ' confirmed that he had searched for some of [RYH]'s friends and family on Facebook, which he said was just out of curiosity' (Police interview with Appellant – **[p.222]**).

vi) '…said he'd bought Christmas presents for them all before…he did get told politely by a supervisor that he shouldn't do that.
Q: "But you still suggested getting a birthday present?"
A: "Yes". Confirmed that he'd mentioned about getting [RYH] a Nuts magazine…' (Police interview with Appellant – **[p.223]**).

vii) 'Q: "Is it part of your role or is it appropriate to give a 14 year old a condom to almost practice on?"
A: "It wasn't appropriate, but again could see" (Police interview with Appellant – **[p.239]**).

viii) '"…just simple as that, like a total lack of boundaries, lack of backbone, I've always been crap at saying no, um, yeah"' (Police interview with Appellant – **[p.247]**).

Made inappropriate physical contact with [RYH]:

69. The evidence available to the DBS included:

i)'Q: "Have you ever touched his upper thigh?"

A: I assume so, yeah, but not in a, not like deemed to be in a sexual manner…but I imagine I probably have, yeah, definitely given him a hug and stuff, so"' (Police interview with Appellant – **[p.201]**).

ii) 'Q: "He'd mentioned the touching on the thigh…"
A: "The only time, when I said earlier, that I touched him it was more like, say, it's
the end of the lesson, like come on back to the ward, you know sort of tapped him on the (unclear) and off we go".
Q: "Do you think that's appropriate though?"
A: "Um, not really, no" (Police interview with Appellant – **[p.216]**).

(*3) The review decision contains findings of fact beyond those contained in the final decision and findings that were not reasonably open to the DBS (eg. jeopardised the complainant's treatment and exposed him to 'further significant emotional and psychological harm'; the Appellant's behaviour was driven by admitted 'unhealthy level of caring'/'obsession'; colleagues raised concerns regarding over-attachment to another child, as a result of which he received 1:1 supervision)*

70. Mr Hill argues that insofar as the review decision of April 2021 contains findings of fact beyond those contained in the final decision. Mr Hill also contends that the original decision also contains findings that were not reasonably open to DBS:

71. He submits that the original decision concludes that the appellant's conduct '*jeopardised [the complainant's] treatment and exposed the child to further significant emotional and psychological harm.'* No basis in evidence/fact is identified to explain that finding, which is *ex facie* inconsistent with the finding in the final decision that *'the case information indicates that it did cause [the complainant] some degree of emotional harm'*. The case information is not further particularised, and it is not possible further to address the finding of harm (whether some, or significant) in these grounds. He argued that the reasons are inadequate.

72. Mr Hill contends that the original decision observes that whilst the Appellant's behaviour may not have been sexually motivated, the DBS '*still have concerns that [the appellant's] behaviour was driven by what [he] admitted was an "unhealthy level of caring" and obsession*' with the complainant. This appears to have been taken from the DO JEM meeting notes and does not accurately state the effect of the Appellant's answers in police interview: first, neither the prosecution produced transcript nor the transcript produced by the Appellant's solicitors discloses any admission of obsession, as suggested; and second, the reference to an *'unhealthy level of caring'* was in fact introduced by the interviewing officer and acknowledged by the appellant as *unhealthy for the appellant* (in the sense that it caused the appellant *'a lot of upset at times'*). In similar vein, the decision refers to a *'proclivity'* which was unjustified.

73. He relies on the fact that the original decision observes: '*Your colleagues had previously raised concerns about your over-attachment to another boy in your case and as a result of these concerns you had received 1:1 supervision with a St As psychologist. Despite the advice that you received from colleagues about maintaining appropriate boundaries however you chose to bend the rules because*

you felt that you knew what was in [the complainant's] best interests.' In fact, the supervision the Appellant received followed from his discovery of the complainant with a ligature on 20 March 2017. The Appellant requested supervision following the incident, which did not relate to any concerns about another child.

74. We reject these submissions.

75. We are satisfied that the Appellant has not established any or any material mistake of fact or law and the DBS was reasonably entitled to make the following findings having regard to the following facts, matters and evidence:

Jeopardised [RYH]'s treatment:

76. The evidence available to the DBS included:

i) '[RYH] has had a troubled upbringing, he was placed in the care of the Local Authority when he was 7 and his mother committed suicide when [RYH] was 8. [RYH] is diagnosed with attention deficit disorder, attachment disorders and autistic spectrum disorder. He has previously been in residential establishments and displays difficult and disturbing behaviours including violence, self-harm and sexual assault. He can make close attachments to staff and staff attach to him easily due to his endearing nature. Therefore, clear boundaries are needed with anyone who works with him' (Record of DO JEM Meeting – **[66]**).

ii) '97. Patients can be very emotive and being that many, such as RYH have had difficult and abusive early years, they have attachment difficulties and continue to search for that one person who can act as a "good parent" to them (caring, supportive, providing, gifting and setting boundaries). I believe that RYH's behaviour felt appealing to and he was complimented that he could be that "good parent" to RYH…101… gained emotional gratification from his interactions with RYH without considering the detrimental effects on him or others' (Forensic Psychosexual Assessment (Victoria Appleyard) – **[p.89]**).

iii) '[AD] said he didn't tell anybody about the incident at the pond on the Friday when it happened and he had intended to mention it to the supervisors on Monday or Tuesday, but felt in the end it wasn't in the best interests of [RYH] to say anything' (Police interview with the Appellant – **[p.204]**).

iv) 'Discussion about [RYH]'s clinical care, during which [AD] confirmed that he definitely recognised that the things he was doing for [RYH] weren't healthy' (Police interview with the Appellant – **[p.220]**).

Exposed [RYH] to 'further significant emotional and psychological harm':

77. When read holistically, it is clear that the review decision letter is talking about exposing a vulnerable child to further significant emotional and psychological harm up and over the significant emotional and psychological harm already experienced by them as a result of past life experiences. In any event, semantic differences between the final decision letter and review decision letter (whether the harm was

categorised as significant or not) do not enable the Appellant to establish any material error of fact.

Behaviour driven by admitted 'unhealthy level of caring'/'obsession':

95. The evidence available to the DBS included:

i) The Appellant accepts in his own application for permission to appeal that he 'allowed himself to become overly attached to [RYH]' and that he 'failed to maintain appropriate professional boundaries with him' (Application for permission to appeal – **[p.9]**).

ii) ' "…I do genuinely care for him, I still do".
Q: "Do you think it's an unhealthy level of caring for him?"
A: "For him or for me? As in caring, yes it is, it is unhealthy, it has caused me a lot of upsets sort of times, yeah".
Q: "Why has it caused you upset at time (sic)?"
A: "(Unclear) attachment issues on both sides mainly" (Police interview with the Appellant – **[p.219]**).

iii) ' said that in hindsight since being suspended he realised that his relationship with [RYH] had turned unhealthily into something that it shouldn't be. Discussion about [RYH]'s clinical care, during which confirmed that he definitely recognised that the things he was doing for [RYH] weren't healthy' (Police interview with the Appellant – **[p.220]**).

iv) 'Q: "What regrets have you got?"
A: "Pretty much all of it…I just perhaps care too much about all of them but I invested the most time in this one, it's really, really bad (unclear)" (Police interview with the Appellant – **[pp.246-247]**).

v) 'confirmed that he had searched for some of [RYH]'s friends and family on Facebook, which he said was just out of curiosity' (Police interview with the Appellant – **[222]**).

96. The Appellant did admit to an unhealthy level of caring for RYH and by reference to the foregoing, it is clear that the Appellant was preoccupied by [RYH], impacting his behaviour towards him. Again, semantics do not enable the Appellant to establish a material mistake of fact or law in this regard.

Colleagues raised concerns regarding over-attachment to another child, as a result of which he received 1:1 supervision:

97. The evidence available to the DBS included:

i) 'In respect of any previous concerns raised, there had been concerns raised in the past regarding him over-attaching to pupils, particularly the former patient who initially raised the concern that we are discussing today (RS). It was found that he was on the ward where this young person was a patient for extended

periods of time. As a result of this concern being raised, received 1:1 supervision with a St A's Psychologist' (Record of DO JEM Meeting – **[p.66]**).

ii) 'During my handover period there had been some concerns regarding a attachment (sic) between [AD &], [RYH]. I have been told he had been spoken to by a psychologist' (Witness statement NC – **[p.135]**).

iii) '…his ex-employer has confirmed that prior to the concerns highlighted above coming to light, concerns had previously been raised regarding him [AD] over-attaching to pupils, particularly and that as a result of these concerns had received 1:1 supervision with a St As psychologist' (DBS Barring Decision Making Document – **[p.264]**).

Reliance on continued engagement with therapy to develop self-awareness despite Ms Appleyard identifying 'no further treatment needs'

98. Fourth, Mr Hill submits that in the light of Ms Appleyard's primary finding in her report, which is not disputed, the fact that the Appellant has continued voluntarily to engage with therapy is not a matter that could or reasonably should have been relied upon as consideration supporting his continuing inclusion in the Barred Lists: there is no sound basis to consider that the Appellant's self-awareness is underdeveloped, and the fact that the Appellant has striven conscientiously to continue to take all possible steps to address a variety of matters including the impact of the police investigation upon him cannot fairly be inverted in the way the decision has done.

99. Mr Hill also submits that the review decision, as communicated, concludes that although (a) Ms Appleyard's report *'identifies that you have no further treatment needs'*, *'you continue to engage with therapy to develop your self-awareness; a lack of which was a contributory factor to the conduct demonstrated towards [the complainant'].*

100. Mr Hill argues that the DBS has acted irrationally by holding against the Appellant the positive step that he took voluntarily to undergo therapy and develop and reduce any risk he posed. It was Ms Appleyard's report and the therapy he undertook that confirm that the Appellant has no further treatment needs in relation to inappropriate or unprofessional behaviour and fully addressed the issues which had given rise to this behaviour.

101. In order to address this submission, we need to consider the Appleyard report in detail together with the manner in which it was considered by the DBS in its review decision in April 2021.

Ms Appleyard's report

78. Ms Appleyard's report, dated 31 August 2020, was produced following several hours of interviews/expert assessment of the Appellant, concluded *inter alia* that:

a. Ms Appleyard observed that given the appellant's age, it would be '*ill-conceived'* to look at the appellant's risk assessment only in an adult context. Appleyard, (paras [20]-[22]).

b. Ms Appleyard's assessment was that *'any concerning behaviours [the appellant] engaged in towards [the complainant] occurred as a result of [the appellant's] own youth, his naivety, compassion, and lack of self-awareness.'* Appleyard, (para [57]).

c. At [82-85] she stated:

'82. Risk is regarded as an essential developmental component in adolescence, and whilst it is normally perceived by adults as a bad thing, for adolescents risk behaviours can carry a number of rewards. I would consider that the professional infractions that occurred contained a manageable level of risk and that AD felt was and his behaviour assisted in securing some positive recognition.

83. AD's case reflects impulsivity only being a problem for him in his emotional attachment to a patient. Since his arrest AD has entered into therapy to address his issues with self-awareness. This should reduce his risk of problematic behaviour as well as improve his mental health and mood in the future.
…
85. AD's age and stage of life suggest he is able to employ self-control better than a younger man and this will assist in managing any unhelpful behaviour if he so chooses in the future.'
[Emphasis Added]

d. The Appellant did not, at the time that he was placed in the role of 'Educational Technical Instructor' have the '*maturity or life experience to be able to cope with the*
demands of the role and the patients' behaviours and needs… ' closeness in age to the patients meant that he could empathise with their circumstances and had a strong desire to make a difference in their live[s].' Appleyard, [96]. As noted, he was 20 years old at the time of the material events. He was 24 years and 10 months old at the time of the report.

e. Within her role, Ms Appleyard completes risk assessments on sexual offenders with a view to determining treatment pathways. She used the following assessments on the Appellant which were primarily sexual offences assessments:

STATIC-99 Risk Assessment,
STABLE-2007/ACUTE-2007: Sex Offender Needs Assessment and
SOAP 108: Sex Offender Case Planning,
RSVP (Risk of Sexual Violence Protocol),
SAPROF (Structured Assessment of Protective Factors) and
PROFESOR (Protective & Risk Observations For Eliminating Sexual Offense Recidivism).

The Assessments conducted on the Appellant were summarised at [86] to [93] of her report:

'86. AD's PROFESOR score places him in Category 1, more protective than risk and therefore the requirement being low intensity of intervention in regards to sexual offending.

87. STATIC-2002R considers that AD is at an average risk of offending and this is due only to the static factor of his younger age.

88. Stable-2007 scores AD as having low treatment needs which focus on his capacity for relationship stability and loneliness.

89. RSVP highlights the factors related to AD' alleged offending which encompassed problems with self-awareness and problems with intimate relationships.

90. SAPROF highlights the moderate-high protective factors that are present in AD' life.

91. AD's ACUTE-2007 score indicates a low level of risk of immediate sexual and/or general offending at his point in time.

92. AD was scored as low on the STABLE-2007 and average risk on the STATIC 2002R. When these measures are combined, his composite assessment places him in the low priority category for supervision and intervention in comparison to other sexual offenders assessed using these measures.

93. When AD's low ACUTE score is taken into consideration, he currently scores as low as a current priority for intervention and supervision.'

79. Ms Appleyard's expert opinion therefore was that the DBS's conclusion was '*unwarranted'*- that there was *'no indication'* that the Appellant had *'fully addressed the issues which drove his behaviour or developed the necessary skills which would enable him to deal with similar situations in a more responsible and professional manner'* Appleyard, [104]. She also concluded that the Appellant did not have *'treatment needs in relation to his unprofessional behaviour'* disclosed by the material events. Appleyard, [105] and there were not '*situations or events that would raise the risk of [the appellant] acting inappropriately or offending either sexually or generally in the future.'* Appleyard, [107].

80. The relevant paragraphs from the report's conclusion, [102]-[108], state in full:

'102. AD is remorseful for the damage his behaviour may have caused to RHY and continues to engage in therapy to develop his self-awareness which will reduce the possibility of further harm.

103. AD has been assessed as having low treatment needs. The areas which require being addressed focus on his relationship capacity and low mood. Ironically these two areas would have been exacerbated during the three years that he was under investigation.

104. I think it is unwarranted that the DBS has stated there is "no indication that he has fully addressed the issues which drove his behaviour or developed the necessary skills which would enable him to deal with similar situation in a more responsible and professional manner".

105. AD was found not guilty of the alleged offences but did show unprofessional behaviour in his interactions with RYH. AD does not have treatment needs in relation to his unprofessional behaviour and these areas would need to be addressed by an employer if they were to occur in the future.

5. How Risk Might Change

106. The identifications below that may reduce risk or raise risk should inform professionals working with AD in the future.

5.1 Situations or events that might reduce risk.
• AD continuing and/or accessing therapy when required.
• AD seeking out and maintaining a romantic relationship.
• AD "coming out" to his family, colleagues and wider community.
• AD seeking out hobbies and interests which provide social contact with his peers and preferably within the LGBQTi community.
• AD continuing to be supported by friends and family

5.2 Situations or events that might raise risk.

107. At the point of this assessment I do not consider that there are situations or events that would raise the risk of AD acting inappropriately or offending either sexually or generally in the future.

108. It is my opinion that AD is likely to suffer psychologically from the impact of being included on the DBS Barring List and this may lead to experiencing employment difficulties and financial hardship but I do not consider this would increase his risk of inappropriate behaviour or offending.
[Emphasis Added]

The Review decision

96. The DBS, before communicating its review decision dated 22 April 2021, addressed Ms Appleyard's report in its internal review document dated 16 March 2021 [pp.314-319] in the following terms:

'…
The psychosexual report commissioned by [AD] post-bar concludes that he does not represent a future risk of sexual offending and his behaviour does not indicate that a pattern of deviant sexual interests exists and the content of this report has been taken into consideration when reviewing [AD]' inclusion in the barred lists.

However having reviewed the case material in full and having taken the above report into consideration, the DBS continue to have significant concerns about the potential future risk of harm [AD] poses for the following reasons:

The emotional attachment and dependence AD developed on very vulnerable children whilst he was employed by St A's Healthcare, more so the admitted "unhealthy" interest in 14 year old RYH and the proclivity to become obsessed with and emotionally dependent upon vulnerable children could be repeated in regulated activity in the future with either vulnerable group and the need to maintain contact with RYH for his personal emotional gratification/need which has resulted in him failing to comply with policy and procedure and failing to report RYH's concerning behaviour; particularly that of an

inappropriate sexual nature. In failing to report RYH's conduct to the trained professionals he has jeopardised his treatment and exposed the child to further significant emotional and psychological harm.

It also remains reasonable to conclude that the extent of [AD's] willingness to conceal RYH's sexualised behaviour was out of fear that his contact with him would be stopped and/or discouraged and he let RYH do things he should not have because he liked him and cared for him, a factor which RYH acknowledged in describing AD has being too permissive of him.

Regardless of whether AD's interest in the 14 year old boy was sexual and/or emotional, the behaviour could be repeated in the future and has the potential to cause significant harm.

There is information that despite his lack of training and experience, [AD] believed he knew what was best for RYH compared with the qualified mental health nursing staff on the unit. There is also information that he has confided in RYH in terms of his own self-injurious behaviours which has caused the boy to be concerned for [AD's] emotional wellbeing and safety.

The fact that [AD] was acquitted of all charges against him was taken into account in reaching the original barring decision and as such offers no relevance in terms of considering whether his name is to be removed from the barred lists currently.

Concerns about the future risk of repetition and/or risk of emotional harm are compounded not only by the extent of [AD's] attachment towards RYH but evidence that similar concerns had been previously raised about his conduct towards RS when he was a patient on the ward, which warranted [AD] undergoing 1:1 supervision with a St As psychologist which was still ongoing at the time of his suspension.

A lack of intent to harm RYH has been acknowledged. Nonetheless this does not detract from any emotional harm that was caused or that which may be caused if the behaviour was to be repeated in the future.

The unhealthy attachment demonstrated towards a 14 year old boy and failure to adhere with correct procedures in managing this child remains entirely transferrable to regulated activity with vulnerable adults. [AD] could become equally emotionally dependent and/or attached to a vulnerable adult of any age and/or vulnerability for his own gratification which could be harmful to the person in his care should he be allowed to re-enter regulated activity.

The psychosexual report identifies that [AD] has no further treatment needs. However it is also highlighted that he continues to engage with therapy to develop his self awareness; a lack of which was a contributory factor to the conduct demonstrated towards RYH.

It is pointed out by [AD]'s legal representative that he has matured considerably since his employment at St As Healthcare and the experience he has been subjected to will serve as a lasting reminder to him not to repeat the same mistakes again. However, the DBS cannot rely on these statements alone in terms of being an adequate safeguarding measure. Whilst the risk may be reducing, any repetition of the behaviour may be harmful to a child and/or vulnerable adult and is a risk that, as a safeguarding organisation, the DBS are unable to take.

> The DBS therefore remain of the view that [AD] repeatedly failed to follow correct procedures and failed to maintain appropriate boundaries when it came to his involvement with a 14 year old boy who was described as being very vulnerable, having an attachment disorder and being a very high risk of suicide. He subsequently developed an inappropriately close attachment to the boy and breached his position of trust by failing to maintain appropriate boundaries and failing to report incidents of concerning sexualised behaviour. By his own admission this was because of his "unhealthy" interest in RYH; which initially saw him barred from the unit RYH was on until he moved wards and his subsequent dismissal from his position of employment with St As Healthcare. [AD] has also been subject to fortnightly sessions with a St As psychologist due to his attachment to another male patient, RS prior to his discharge when he was 18 years old. The evidence that [AD]'s emotional feelings and attachment to RYH overrode anything he learned in the intervening period during these sessions remains of significant concern to the DBS and highlights his inability to recognise the impact of his conduct on the vulnerable children in his care and to modify his behaviour accordingly. The evidence indicates an overwhelming need to prioritise his own needs over those of very vulnerable children at high risk of suicide and self-harm.
>
> As highlighted above, whilst the content of the psychosexual report has been taken into account, the DBS are of the view that there needs to be a sustained period of time to demonstrate an overall modification of behaviour. It is only recently that [AD] has been acquitted at Court and included in the barred lists. As such an insufficient period of time has passed in order to reassure of a modification of behaviour such as to circumvent the minimum barring period of five years.
> …'
> [Emphasis Added]

Discussion and analysis

97. The question that has most concerned us is whether the DBS properly and rationally considered Ms Appleyard's report and gave sufficient and rational reasons for distinguishing it as part of its review decision.

98. We have ultimately, and by a fine margin, come to the conclusion that there was no material mistake of fact or law by the DBS in its consideration of Miss Appleyard's report within its review decision.

99. We accept Mr Hill's point that the DBS, in its review decision, could not reasonably rely on the fact that the Appellant had engaged in therapy against him when forming a view as to the future risk of harm he presented to children or vulnerable adults. It would be irrational to use against the Appellant his voluntary engagement in therapy when this should be to his credit – his treatment reduced the future risk he posed. However, that part of the DBS's reasoning needs to be read in context of the later part of the sentence that says that *'you continue to engage with therapy to develop your self-awareness; a lack of which was a contributory factor to the conduct demonstrated towards [the complainant]'.* That was not an irrational conclusion.

100. The wording used by the DBS also needs to be read in the context of all the reasons that the DBS relies upon in its review for distinguishing the Appleyard report as set out above. Ultimately, the DBS was entitled to form a view that the Appellant presented a greater risk of (emotional or psychological)

harm (through inappropriate or unboundaried attachment or behaviour) to vulnerable adults or children than Ms Appleyard had concluded in her report and this was such as to make it appropriate and proportionate not to remove him from the Barred lists.

101. We have had regard to the following facts, matters and evidence in arriving at the conclusion that the DBS did not err in law or fact in considering and addressing Ms Appleyard's report:

a) Ms Appleyard's report does not state that the Appellant has 'no further treatment needs' generally. It states that in Ms Appleyard's assessment, the Appellant had 'low treatment needs' and no treatment needs 'in relation to his unprofessional behaviour' (Forensic Psychosexual Report (Victoria Appleyard – [103] & [105]). For completeness, Ms Appleyard identifies that the Appellant's relationship capacity and low mood were areas that still needed to be addressed (**[**103**]**).
b) Further, a lack of treatment needs in relation to unprofessional behaviour is not the same thing as presenting a lack of risk of the same (some types of behaviour may be untreatable for example or one cannot engage in useful treatment). There is no determination that the Appellant presented no or a low risk of inappropriate, problematic or unprofessional behaviour. The closest the report comes to this is at [104] which implies the Appellant has fully addressed the issues that gave rise to the previous inappropriate behaviour or at [107] where there are no situations or events that would raise the risk. Again, that is not a clear statement regarding a lack of future risk of the same.
c) At no point does Ms Appleyard state that there is no possibility of future harm or problematic behaviour on the part of the Appellant. Whilst might one expect no reputable expert to say that a person presents no future risk of inappropriate behaviour, she does not go as far as to say that the risk posed by the Appellant is very low so as to be negligible or has reduced to that of the 'general population', or reduced to the same as someone without any history of offending or inappropriate behaviour.
d) The review decision letter is correct when it says that Ms Appleyard's report highlighted that the Appellant was 'continu[ing] to engage in therapy to develop his self-awareness' ([102**]**). Moreover, Ms Appleyard opines that this therapy 'will reduce the possibility of further harm' ([102**]**) and 'should reduce his risk of problematic behaviour' ([83**]**).
a) Most of the assessment tools that Appleyard applied to the Appellant concerned sexual behaviour or offences rather than emotional attachment or inappropriate behaviour – albeit that she did also express an expert opinion on his risk of the latter. The Appellant is identified at low risk in the report at [86]-[93] – but this primarily concerns sexual offending rather than low risk of inappropriate or unprofessional behaviour. It also refers to category 1 on the risk scale (the lowest risk) but then the narrative description equates to category 2 – which is still a low risk but not the lowest.
e) It is clear from the review decision letter that consideration has been given by the DBS to Ms Appleyard's report – see the underlined passages highlighted above. After all it was this report that prompted the paragraph 18A review in the first place.

f) The DBS considered the Appleyard report as against a full range of evidence it had available to it and gave sufficient reasons for not accepting that the report's conclusions meant that the Appellant presented an acceptably low risk of committing further inappropriate behaviour (relevant conduct). The DBS ultimately formed the view that:

i.'[w]hilst the risk may be reducing, any repetition of behaviour may be harmful to a child or vulnerable adult and is a risk that, as a safeguarding organisation, the DBS are unable to take' (Review decision letter – **[p.181]**);
ii. insufficient time without further incident/behaviour had passed 'so as to remove the need for a protective safeguarding mechanism' (DBS letter regarding review outcome – **[p.188]**);
iii) 'there needs to be a sustained period of time to demonstrate overall modification of behaviour' such as to justify circumvention of the minimum barring period (Review decision letter – **[p.181]**).

102. The DBS was reasonably entitled to form the view that it did in the sense that it was within a range of reasonable evaluations that a decision maker could make. Even if we may have come to a different conclusion, that would not give rise to any error of law in the DBS's approach.

103. Therefore, even if the DBS maybe should not have relied on the Appellant's ongoing therapy against him any error would not be material.

104. We have also taken into account the fact that the DBS is not required to accept the findings of any expert report or opinion relied on by a barred person – it is entitled to disagree with it so long as it gives sufficient and reasonable reasons for its conclusion. The DBS does not have to instruct its own expert in response to such a report. It does not have to assess risk by means of clinical evaluation tools (assessments with percentages or categories of risk) or by reliance on experts such as psychologists or probation officers. It is deemed to have institutional expertise on the future risk posed by an individual and appropriateness when making its barring decision.

105. Therefore, in coming to our conclusion, we have given appropriate weight to the decision of an expert body charged by statute with the task of evaluating risk (see *DBS v AB* and other authorities). The Appellant has not established any or any material mistake of fact or law in disagreeing with Ms Appleyard's assessment of the risk of harmful behaviour that AD posed. While it might have been preferable if the DBS had addressed the expert report in more detail in its review decision, engaged more extensively and given fuller reasons for distinguishing it, the reasons it relied upon were rational and sufficient.

106. We are therefore satisfied on balance, that the DBS gave sufficient and rational reasons for distinguishing the Appleyard report and finding that the Appellant posed an unacceptable risk of committing further relevant conduct at that time (in 2021). The DBS was entitled to disagree with the expert opinion of Ms Appleyard to the extent it presented any conclusive view on the low risk of the Appellant behaving inappropriately or unprofessionally. Furthermore, the

fact that Ms Appleyard concluded that '*AD does not have treatment needs in relation to his unprofessional behaviour*' (at [105]) or that he had addressed the issues that gave rise to such behaviour (at [104] does not mean, even on her view, that he presents no or very little or acceptably low risk of committing such behaviour in the future.

107. There was no material mistake of fact or law at the time of the review decision in the DBS consideration of the Appleyard report.

The addendum report from Ms Appleyard and Appellant's position in 2023

108. Two and a half years have now passed since the review decision. Our task in this appeal was not to consider whether the Appellant should have been removed from the list at the time of the hearing in September 2023. Our jurisdiction was only to consider the appeal in relation to the decision and review decision in May 2020 and April 2021 and decide whether there were mistakes of fact or law therein.

109. Nonetheless, for the purposes of this appeal, the Appellant presented an Addendum report from Ms Appleyard dated November 2022 further to her original report. It was based on 18 hours of further contact between her and AD between 2020 and 2022 and prepared at a time when AD was 27 years old.

110. Relevant paragraphs include:

'5.AD no longer lacks self-awareness in regards to his sexual orientation and the loneliness that ensued from it. AD has now fully embraced his sexual orientation and is "out" in all areas of his life (with friends and family, at university, at his places of employment, and in recreational and sporting environments). For example he is a member of Villa and Proudwhich is Aston Villa's official LGBTQi supporters group and attended the club's end of season awards last year as one of the Villa and Proud representatives. AD is also President of the men's football society (biggest sports society at the university) having been re-elected for the second year.

…

11.I refer to section 5.1 of my original report, Situations or events that might reduce risk,

and have commented on these areas.

• AD continuing and/or accessing therapy when required. AD has attended 18 sessions since the last report was completed.

• AD seeking out and maintaining a romantic relationship. This has been the case.

• AD "coming out" to his family, colleagues and wider community. This has been achieved.

• AD seeking out hobbies and interests which provide social contact with his peers and preferably within the LGBQTi community. AD is engaged with organisations and events.

• AD continuing to be supported by friends and family. AD reports this to be the case.

Summary

12. AD has persevered to re-engage in life and trusts that he can form friendships and work with people without being at risk of false allegations being made against him.

13. AD has hugely benefitted from "coming out" and finding a group of people who are supportive, caring and compassionate towards him…'

111. The Appellant is to be commended on the progress he has made. It appears to us by that September 2023 he has addressed all the issues relating to inappropriate or unprofessional behaviour he could realistically expect to have done in the time since 2017.

112. If the question of risk had been a matter within our jurisdiction to decide afresh on a full merits basis at this time, we may have come to a different view than the DBS did in 2021. Not only has the Appellant matured by two years and entered into his late twenties but six years have passed since the relevant conduct in 2017 without the Appellant committing any further inappropriate behaviour and during which time the Appellant has engaged with further psychological support and demonstrated a sustained change in behaviour.

113. Furthermore, if the review decision had been conducted as of September 2023 and the DBS not removed AD from the list following such a review, we may have come to a different view on the rationality or proportionality of such a decision in light of this fresh evidence. However, in conducting such an exercise we would have to undertake a very different task and consider whether there would be an error in retaining the Appellant on the lists taking account of the risk that the Appellant currently poses and the rationality and proportionality of including him in the barred lists.

114. Those are not questions we are required or permitted to decide on this appeal.

115. Nonetheless we express the view that if the DBS is invited to conduct a further review as to removing the Appellant from the lists, either following the issue of this decision under paragraph 18A of Schedule 3 to the Act or on expiration of the minimum barring period in May 2025 under paragraph 18(3) of Schedule 3 to the Act, it should take into account the following matters.

116. We would expect the DBS to consider in conducting any further review of this case: the positive nature of Ms Appleyard's further report dated 2022; the positive changes in the Appellant's circumstances; the reaffirmed expert risk assessment; the extensive passage of time without further incident since 2017, which is now longer than 6 years; and the expert's view as to the current risk that the Appellant poses expressed above. By the end of the minimum barring period in May 2025 the Appellant will be 29 years old, nearing 30, and hopefully have finished tertiary education (studying law).

117. Unless the Appellant has committed any further inappropriate or relevant conduct ahead of such a review, we would expect there to be a decision removing him from both lists. This is for all the reasons which we have set out above and the same reasons that Mr Hill relies upon in respect of the 2021 review decision.

(*5) Review decision that an insufficient period of time has passed for DBS to be assured*
of modification of behaviour

118. Fifth, Mr Hill submits that there has been an error of law because the review decision concludes that: '*DBS are of the view that there needs to be a sustained period of time to demonstrate an overall modification of behaviour. Presently, an insufficient period of time has passed in order to reassure of a modification of behaviour such as to circumvent the minimum barring period of five years.'* It is submitted that whilst the review decision purports to have taken into consideration Ms Appleyard's report in relation to *'modification of behaviour'*, the conclusion that an '*insufficient period of time has passed in order to reassure of a modification of behaviour'* was not a conclusion reasonably open to DBS in the face of Ms Appleyard's report, which provides the necessary reassurance as to the appellant's behaviour.

119. We have addressed and rejected this submission in relation to Ms Appleyard's report as of 2021 for the reasons given above and in relation to the passage of time generally. In essence, we have decided that there was no mistake of law or fact in this assessment.

120. Likewise, we have decided that there was no mistake of law or fact in the conclusion that there had been an insufficient passage time since the relevant conduct. The DBS was entitled to come to this view on risk based on the original relevant conduct as found and the passage of time since the original decision. By the time of the review in 2021 it was only 4 years after the 2017 relevant conduct and one year after the original barring decision and the Appellant was only aged 25 (24 years old at time of decision).

121. Concluding that insufficient time had passed was a rational decision open to the DBS at the time of the original decision in May 2020 (when only three years had passed since the relevant conduct and the Appellant remained 24 years old) and at the time of the Review decision in April 2021 (when he was 25 years old). While the DBS must take into account the specific facts and individual circumstances relating to the Appellant, which it did, it was also entitled to take into account the minimum barring period of 5 years when making this assessment – it was not an irrelevant matter.

122. There was no error of law or fact on the part of the DBS in its original decision or review decision.

123. However, that is not to say that the same decision - that insufficient time had passed - would necessarily be rational if considering a review conducted following our decision in November 2023 or in May 2025 when the minimum barring period expires. We have addressed these matters above.

(6) Neither the final decision nor the review decision take into consideration the Appellant's positive conduct in relation to other children

124. Sixth, Mr Hill argued that neither the original decision nor the review decision takes into consideration the available positive evidence of the Appellant's conduct in relation to other children. The witness statements of Rachel Wills, Dale Johnson, Stuart Maddison, Simon Haywood, Alan Dawson, Dawn Parfitt contain highly relevant material but have not been addressed at all.

125. We are not satisfied that this gives rise to any mistake of fact or law in the original decision or the review decision. The Respondent's original and review decisions concern the Appellant's behaviour in relation to RYH. The Appellant's positive conduct in relation to other children does not nullify his conduct in relation to RYH. Any omission to reference the witness statements detailing the Appellant's interactions with other children does not amount to an error of law in the case of a decision based on his inappropriate preoccupation with one particular child.

126. There was no mistake of law in relation to this.

The Appellant's continued inclusion in the CBL is disproportionate and irrational

127. Mr Hill contends that DBS' decision was disproportionate; it failed, objectively, to strike a fair balance between the between the rights of the Appellant and the interests of the community. The Appellant was at the time of the material events a young and inexperienced teaching assistant who had assumed responsibilities which were beyond his training, his maturity, and for which he received very limited supervision. He cared and felt empathy and compassion for the complainant and became too attached. However, in assessing that conduct, Ms Appleyard has observed that given the Appellant's age, it would be '*ill-conceived'* to look at the Appellant's risk assessment only in an adult context. There is no evidence that his behaviour is entrenched, and indeed there is evidence that he has previously worked with other children (see the character references) and with vulnerable adults (for a period of three years), without incident (and indeed his conduct and contribution has been described as exemplary).

128. Mr Hill relies on the fact that following the Appellant's suspension and arrest in 2017 and in the four years that passed (at the time of the review), he has engaged fully and openly with professionals, and the police, and has demonstrated considerable insight. Even following his acquittal, his determination to ensure that there is no prospect of a repeat of his behaviour has been reflected in his continuation of therapy. The expert opinion of Ms Appleyard is that he presents a low risk of sexual (or any) offending (Appleyard, [91]); that he does not have *'treatment needs in relation to his unprofessional behaviour'* (Appleyard, [105]).disclosed by the material events; and that there were not '*situations or events that would raise the risk of [the appellant] acting inappropriately or offending either sexually or generally in the future'* (Appleyard, [107]).

129. He noted that the minimum barring period for a person of the Appellant's age is 5 years. In this case, the material events occurred in 2017. The final

decision was made only in 2020, three years later and only following the appellant's acquittal. The minimum period would therefore elapse in 2025 (27 May 2025), eight years after the allegations and at a time that the Appellant would be 29 years old. In all the circumstances, he submitted that the necessary reassurance as to his behaviour is available to DBS and that his continued inclusion is not proportionate.

130. Against that backdrop, Mr Hill also submits that it was not reasonably open to DBS to retain the appellant on the Children's Barred List, that its review decision was flawed by its failure to take into account (or attach adequate weight to) relevant considerations, and in any event that continuing inclusion in the list was disproportionate in all the circumstances of the case. Therefore, the Tribunal should find that there was a mistake of law in the decision to retain the Appellant on the CBL.

131. We reject the submissions.

132. We are not satisfied that the decision and review decision to include and retain the Appellant on the lists were disproportionate nor irrational, therefore there was no mistake of law in them. This is for the reasons we have already set out above – the DBS's decision that there was a continuing and unacceptable risk as of 2020 and 2021 were rational and there was no mistake of fact nor law in them.

133. In light of this risk assessment, and the DBS continuing statutory duty and objective to protect vulnerable groups from harm, it follows that the decision to include the Appellant on the barred lists was not disproportionate at the time of the review decision. Per Lord Hoffman at [16] in *Belfast City Council v Miss Behavin' Limited (Northern Ireland) [2007] UKHL 19* '[i]f [a] local authority exercises [a] 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'. We accept that there was an interference with the Applicant's Article 8 rights and a restriction on his ability to gain employment in regulated activity but this interference was properly considered by the DBS in its original and review decisions and the interference was not disproportionate.

134. In its barring decision process document at the time of the original decision the DBS properly concluded:

> With regards to the issue of proportionality and Article 8 rights:
>
> Consideration has been given to Article 8 rights in making our decision to include him in the barred lists and it is acknowledged that his inclusion will significantly impact on his future employment and volunteering opportunities and prevent him from being a Tutor and/or Technical Instructor.
>
> It is also acknowledged that his inclusion may impact on his earning capacity and lifestyle and could impact on his plan to go to University and do a degree course (dependant on what that degree course was). Furthermore it might also carry some degree of personal stigma for

However, any interference with human rights must be balanced against the rights of vulnerable groups and, as it is believed that he poses a risk of causing psychological and emotional harm, it appears that his inclusion in the Children's List and the Adults' List is both a necessary and proportionate safeguarding measure.

There are currently no other safeguarding measures in place that the DBS are aware of and whilst details of the allegations which were made against may be disclosed to a potential employer seeking to recruit him into regulated activity by way of an enhanced disclosure, this in itself cannot be relied upon to prevent him obtaining employment/volunteering with children and vulnerable adults.

135. At the time of the decision and review decision in 2020 and 2021, the DBS was entitled not to be yet sufficiently assured that the Appellant no longer posed a risk to children or vulnerable adults. The DBS was required to strike a balance between the rights of the individual and the interests of the community. It did so lawfully. It cannot be said that the Respondent's decision to retain the Appellant's name in the CBL/ABL was disproportionate, nor irrational. There was no mistake of law in this regard.

136. As is noted above, that does not mean, that it would be proportionate to retain the Appellant on the list following any review conducted following this decision or at the expiration of the minimum barring period in March 2025.

137. Ground 1 is dismissed for all the reasons given above - there were no material mistakes of law in the DBS decisions to include and retain the Appellant on the CBL in 2020 and 2021.

Ground 2

Ground 2(B): Errors of Law

Ground 2: the DBS *erred in law* in finding that the appellant should continue to be included on the Adult's Barred List in all the circumstances of his case; further or alternatively, continuing his inclusion was *disproportionate*

(1) Review decision failed to take into consideration the fact that the Appellant was employed in regulated activity at [town] General Hospital for over three years without issue

138. Mr Hill noted that the DBS review decision concluded that: *'The unhealthy attachment demonstrated towards a 14 year old boy and failure to adhere to correct procedures in management of this child remains entirely transferrable to regulated activity with vulnerable adults. You could become emotionally dependent and/or attached to a vulnerable adult of any age and/or vulnerability for your own gratification which could be harmful to the person in your care should you be allowed to re-enter regulated activity.'*

139. First, he submitted that the review decision failed to take into consideration the material fact that for a period of more than three years, the Appellant had been employed at [town] General Hospital in regulated activity

with vulnerable adults and that there had been no issue of the kind DBS refers to. Insofar as the DBS may place reliance on the *final decision letter*, which noted that the Appellant's behaviour did not involve a vulnerable adult and the appellant had previously worked with vulnerable adults *'without any apparent issues'*, he submitted that neither the final decision nor the review decision took into consideration (or if it did, which is not evident, attached due weight) to the *positive* significance of the available evidence/information of the appellant's record; this was significant evidence not least because there was no other evidence of the appellant's conduct vis-à-vis vulnerable adults.

140. Mr Hill argued that the true position was not merely that there were no '*apparent issues'* (per DBS' decision) but that the Appellant was regarded as '*an exemplary member of staff*' who was spoken of highly by all the midwives and nurses; who worked with *'great sensitivity to the [new] mothers regarding privacy and courtesy';* who throughout his employment over more than three years had adhered to all relevant policies and procedures; who would offer to assist on other wards when the department was short-staffed; and who was a *'loyal, valuable asset'*. He submitted that was highly relevant to the assessment of the Appellant, and of any risk he presented.

141. We reject the submissions.

142. The paragraph 18A, Schedule 3 review was conducted following provision of 'new information' in the form of the report of Ms Appleyard. The question for the review was whether the DBS was satisfied in light of this *new* information that it was no longer appropriate to include the Appellant in either list.

143. The Appellant's employment at [town] General Hospital was taken into consideration at the time of the Respondent's original decision (pp. **[170]** and **[302]**), however the Respondent was entitled to balance this against the transferability of its concerns regarding the Appellant's ability to maintain appropriate relationships with individuals with whom he may feel an affinity to regulated activity with vulnerable adults (who could be as young as 18).

144. In the circumstances the Appellant has not established any mistake of law in this regard.

(2) The review decision failed to articulate any or any proper or cogent reasoned basis for its conclusion that the Appellant presented an enduring risk to vulnerable adults

145. Second, Mr Hill argued that the review decision failed to articulate any proper or cogent reasoned basis for its conclusion that the Appellant presented an enduring risk to vulnerable adults.

146. We reject the submission.

147. The DBS did articulate cogent reasons for the Appellant's inclusion in the ABL in its review decision letter: '…the emotional attachment and

dependence you developed on very vulnerable children whilst employed at St A's Healthcare, more so the "unhealthy" interest in 14 year old RYH and the proclivity to become obsessed with and emotionally dependent upon vulnerable children, could be repeated in regulated activity with either vulnerable group…The unhealthy attachment demonstrated towards a 14 year old boy and failure to adhere to correct procedures in management of this child remains entirely transferable to regulated activity with vulnerable adults' (Review decision letter – pp. **[180]**; **[181]**).

148. Moreover, the Respondent had already articulated cogent reasons for the Appellant's inclusion in the ABL in its original decision:

a) 'Having considered all of the information available to it, the DBS is also satisfied that you have engaged in relevant conduct in relation to vulnerable adults, specifically conduct which, if repeated against or in relation to a vulnerable adult, would endanger the vulnerable adult or would be likely to endanger him or her' (Final decision letter – **[p.168]**).
b) 'The situation with [RYM] is not 'highly fact specific' (as your solicitors have argued) and it is believed that working in regulated activity would afford you similar opportunities to develop close working relationships with children and vulnerable adults and that you may not act in a responsible manner to prevent further issues of over-attachment' (Final decision letter – **[p.169]**).
c) 'Whilst it is acknowledged that your behaviour did not involve a vulnerable adult, you have previously worked with vulnerable adults at [town] General Hospital without any apparent issues, we are satisfied that it is appropriate to include your name in the Adults' Barred List. As highlighted at the Minded to Bar stage, working in regulated activity with vulnerable adults would afford you the opportunity to establish close working relationships with service users in your care and concerns remain that you might develop similar attachment issues, fail to act in a responsible manner and place vulnerable adults at risk of harm by not adhering to professional boundaries and/or failing to disclose problematic behaviour' (Final decision letter – **[p.170]**).

149. In the circumstances the Appellant has not established a mistake of law in this respect.

***(**3) Significance attached in the review decision to the Appellant's failure to adhere to correct procedures failed to consider/give due weight to his time at [town] General Hospital, the fact that he has proactively sought help, demonstration of appropriate insight and increased maturity*

150. Third, Mr Hill contended that insofar as the review decision attached significance to a *'failure to adhere to correct procedures'* the review decision failed to consider (or attach due weight) to the evidence – in addition to his positive record of three years of adherence to correct procedures and exemplary conduct in working with vulnerable adults: see above – that the Appellant had, since the material events in 2017, proactively sought appropriate help, demonstrated appropriate insight, and had matured. Whatever might have been said of him as a 19 or 20 year old emerging adult, there was every reason to consider that – following an internal disciplinary process, criminal trial, and

barring process in which he acted responsibly and conscientiously as he faced up to the consequences of these events – the Appellant was now acutely aware of the need to maintain appropriate professional boundaries.

151. We reject this submission.

152. Given that the DBS had regard to each and every one of the matters cited in its original and review decisions, it properly undertook the balancing exercise undertaken by the Respondent when determining the appropriateness of the Appellant's inclusion in the CBL/ABL as of 2021, which is of course a matter for the DBS alone and accordingly outside the scope of this appeal.

153. In the circumstances the Appellant has not established a mistake of law in this respect.

(4) The conclusion in the review decision regarding transferability to vulnerable adults fails to consider the 'particular circumstances' of the close attachment between the Appellant and complainant in 2017 or the fact that he has not development such attachments to vulnerable adults or other children

154. Fourth, Mr Hill contended that although the review decision concludes that the attachment the Appellant demonstrated towards the complainant remains '*entirely transferrable'* to adults, the review decision fails to consider (or attach due weight to) the *particular* circumstances of the close attachment that had developed between the Appellant and the complainant in 2017; or the fact that such closeness had not developed in relation to the vulnerable adults or other children with whom the Appellant has worked. There was reason to consider that the situation was highly fact specific, and that the closeness of the attachment arose as a result of: the complainant seeking a parent/older brother figure; the proximity in age ('*closeness in age to the patients',* per Ms Appleyard) and common interests; and the particular circumstances which pertained to the appellant at the time as addressed in Ms Appleyard's report. A senior member of staff at St A's, GH, described the complainant as one of the most difficult cases she had ever seen.

155. We reject the submission.

156. There is nothing 'particular' about developing a close attachment to a person with whom you feel an affinity but with whom it is nevertheless necessary to maintain clear professional boundaries.

157. As regards transferability to vulnerable adults, we have addressed this above. As regards other children, we have also addressed this above.

158. In the circumstances the Appellant has not established a mistake of law in this respect.

(5) Even if the Appellant's continued inclusion on the CBL is 'justified', his inclusion on the ABL is not on the basis that there is no relevant/enduring risk to vulnerable adults

159. Fifth, Mr Hill submitted that even if the DBS decision in relation to the Appellant's continued inclusion in the Children's Barred List were justified (which, is not accepted), there was insufficient to justify the additional step of including the Appellant also in the Adults' Barred List. Any order or decision must be tailored to meet the harm or risk that the individual represents, and in the present case it is submitted there is no relevant and no enduring risk vis-à-vis vulnerable adults.

160. We reject this submission. We have addressed 'relevant' risk and 'enduring' risk, above. There was no mistake of law in this regard.

Ground 2(A): The Appellant's inclusion in the ABL is disproportionate

161. Finally, Mr Hill argued that his submissions made as to proportionality in relation to the CBL, considered above, apply with additional force – given the absence of any equivalent conduct in relation to vulnerable adults to weigh in the scales – to the Appellant's continued inclusion in the Adult Barred List. Against that backdrop, he submits that it was not reasonably open to DBS to retain the Appellant on the Adult's Barred List, that its decision was flawed by its failure to take into account (or attach adequate weight to) relevant considerations, and in any event that continuing inclusion in the list was disproportionate in all the circumstances of the case, and the Appellant. Therefore, the Tribunal should find that there was a mistake of law in the decision to retain the Appellant on the ABL.

162. We reject this submission. We have addressed proportionality of inclusion on both lists above and found there to be no mistake of law as of the time of the original decision nor review decision in 2020 and 2021.

163. We dismiss Ground 2 for all the reasons given above – there were no material mistakes of law in the DBS decisions to include and retain the Appellant on the ABL in 2020 and 2021.

Ground 3

Ground 3: the DBS made material errors of fact in its final and review decisions.

164. Mr Hill submitted that *inter alia* the following material errors of fact are contained in the relevant decisions:

(1) that the Appellant had *'admitted'* an *'unhealthy'* interest and *'obsession'* in the complainant; that the appellant had *'developed'* a *'dependence'* on *'very vulnerable children'*;
(2) that the Appellant had a '*proclivity to become obsessed with and emotionally dependent upon vulnerable children'*;
(3) that the Appellant *'jeopardised [the complainant's] treatment and exposed [him] to further significant emotional and psychological harm'*; and
(4) that the Appellant acted *'out of fear that [his] contact with the [complainant] would be stopped'.*

165. He submitted that there is no proper basis in evidence for those factual assertions/findings and there were mistakes of fact in the DBS's findings / reasons.

(1) 'Admitted' an' unhealthy interest' in and 'obsession' with the complainant

166. We have addressed this finding above in relation to an error of law and find no mistake of fact in this regard.

(2) Developed a 'dependence' on 'very vulnerable children'

167. The Appellant cannot establish any or any material mistake in this finding having regard to the following facts, matters and evidence:

a) '97. Patients can be very emotive and being that many, such as RYH have had difficult and abusive early years, they have attachment difficulties and continue to search for that one person who can act as a "good parent" to them (caring, supportive, providing, gifting and setting boundaries). I believe that RYH's behaviour felt appealing to [AD] and he was complimented that he could be that "good parent" to RYH' (Forensic Psychosexual Assessment (Victoria Appleyard) – **[para 97]**).
b) b) '101… [AD] gained emotional gratification from his interactions with RYH without considering the detrimental effects on him or others' (Forensic Psychosexual Assessment (Victoria Appleyard) – **[para 101]**).
c) In so far as the Appellant takes issue with the term 'dependence', this is a matter of semantics which is immaterial to the Respondent's overall decision.

(3) 'Jeopardised [the complaint's] treatment and exposed [him] to further significant emotional and psychological harm'

168. We have addressed this finding above in relation to an error of law and find no mistake of fact in this regard.

(4) Acted 'out of fear that [his] contact with [the complaint] would be stopped'

169. The Appellant's precise motivation(s) for not reporting significant safeguarding incidents is not material to the Respondent's overall decision and accordingly the Appellant has not established a material mistake of fact in this regard.

170. We dismiss Ground 3 – there were no material mistakes of fact in the DBS original decision and review decision to include and retain the Appellant on the CBL and ABL in 2020 and 2021.

Conclusion

171. We are satisfied that the DBS did not make mistakes in fact or law in its original decision and review decisions of 2020 and 2021 to include and retain the Appellant on the ABL and CBL.

172. However, we draw the DBS's attention to the paragraphs 108-117 above concerning what matters should be considered on any future review as to whether the Appellant should be removed from the lists and our view as to the outcome.

Disposal

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

174. We conclude for the purposes of section 4(5) of the Act that there were no mistakes of law in the DBS Decisions to include and not to remove the Appellant on the CBL & ABL. There were no material mistakes of fact upon which the Decisions were based.

175. The Decisions of the DBS in 2020 and 2021 to include and retain the Appellant on the CBL and ABL are confirmed.

Authorised for release: Judge Rupert Jones
Judge of the Upper Tribunal **Dated: 7 November 2023**

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).