IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001383-V**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

CNS

Appellant

- v –

DISCLOSURE AND BARRING SERVICE

Respondent

Before: **Upper Tribunal Judge Rupert Jones**
Tribunal Member Suzanna Jacoby
Tribunal Member John Hutchinson

Hearing date: 22 April 2024
Decision date: 11 June 2024

Representation:
Appellant: Appeared in person
Respondent: Simon Lewis, Counsel instructed on behalf of the DBS

DECISION

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

The decision of the Disclosure and Barring Service taken on 15 July 2022 to include the Appellant's name on the Children's Barred List did not involve any mistake on a point of law nor was it based upon material mistakes in findings of fact. The decision of the DBS is confirmed.

The Upper Tribunal has already made orders on 27 November 2023 and 18 January 2024 directing that there is to be no publication of any matter or disclosure of any documents likely to lead members of the public directly or indirectly to identify the Appellant, witnesses, complainants or any person who has been involved in the circumstances giving rise to this appeal.

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

Introduction

1. The Appellant (also referred to as 'C') appeals to the Upper Tribunal against the decision of the Respondent (the Disclosure and Barring Service or 'DBS') dated 15 July 2022 to include her name on the Children's Barred List ('CBL') pursuant to paragraph 3 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 ("the Act").

2. Permission to appeal to the Upper Tribunal ('UT') was granted by the Judge on 18 January 2024 in respect of the grounds raised by the Appellant in the grounds of appeal and at that permission hearing. In summary, the grounds of appeal were that each of the two findings that the Appellant committed relevant conduct were based on mistake of facts and there was a mistake of law– the DBS made a disproportionate decision to bar her from working with children.

3. We held a remote oral hearing of the appeal by CVP video on 22 April 2024. The Appellant appeared and participated in person by giving oral evidence and making submissions. At the start of the hearing, the Appellant chose not to turn her video camera on and only participated orally / auditorily. She relied on the suggestion that having the video turned on for any length of time would cause her anxiety or distress. However, when given the choice as to how she would like to proceed, she then indicated that she would like to turn her camera on. Thereafter, she then stated that she was unable to make the camera work. Finally, when given the further choice as to whether she would like time in order to enable her camera, she chose to proceed by audio only.

4. We are satisfied that the hearing was conducted in a manner that was procedurally fair and the Appellant was afforded natural justice. We are satisfied that she was fully able to participate throughout the hearing. It is apparent she heard everything – not only did she not suggest there was any problem, but this was evidenced by the fact that she spoke in relation to all questions and interventions from counsel and the Tribunal. She was able to make full submissions and give evidence uninterruptedly and at some length. All other participants were made visible to her throughout.

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

The Background

6. In broad summary, the background is as follows:

   (a) C, born in 1993, was employed as a "midday supervisor", for 1½ hours (or so) a day, at a primary school ["the School"]. C has 2 children ["the Children"]

of her own: a boy (born 2010) ["the Son"]; and a girl (born 2014) ["the Daughter"]. The Children both attended the School. At the material time, C had recently separated from the Children's father and C's long-term partner ["the Father"] and C was in a relationship with a new boyfriend ["the Boyfriend"].

(b) Concerns were raised regarding C's conduct – domestically – towards the Children. Among other things, it was alleged that C physically assaulted the Son ["the Assault"] in 2021 when he was aged 11. The local authority ["the LA"] became involved: various plans, assessments, and/or processes were put in place. The School conducted a workplace investigation into C's alleged misconduct (towards the Son and in not being sufficiently open with the School about the involvement/ intervention of the LA). C was dismissed from her role at the School ["the Dismissal"]. The School referred C's case to DBS.

Chronology

7. References in square brackets [] are to page numbers of the 222 page bundle of evidence provided by the DBS.

8. In chronological order, the most notable events that have taken place are as follows:

Before DBS's involvement

Early 2019 Previous investigation into C's workplace conduct (in relation to a different matter) at the School [126-133].
04.02.21 The alleged Assault.
05.02.21 Referral via NSPCC [150] [92].
05.02.21 The LA began an investigation in relation to the Assault and related matters [153]. The Children were to remain in the Father's care with no unsupervised contact with C until further notice from social care [151].
07.02.21 The LA held a "strategy discussion" and "section 47 enquiries" were initiated [149-152].
08.02.21 Child protection medical examination, arranged by the LA, carried out on the Son, by a doctor specialised in community paediatrics [156-158] ["the Medical Examination"]: it concluded, among other things, that the Son sustained "non-accidental inflicted injuries" [158].
09.02.21 The School suspended C [65].
15.02.21 Outcome of section 47 enquiries [162]: concerns remain in relation to the wellbeing of the Children and a child protection conference planned [160].
19.02.21 Referral to an intervention team [163].
25.03.21 Further "strategy meeting" led by the LA [89].
31.03.21 The School extended C's suspension and initiated a disciplinary investigation [67], setting out allegations in relation to:
(1) safeguarding concerns regarding the Children, including the Assault; and
(2) a failure to notify the School of related concerns/interventions.
07.04.21 Child in need plan [163].
23.04.21 The School's investigation meeting with C [69].
29.04.21 The School's investigation report [75].

May 2021 Initial child protection conference [164]: child protection plan for the Children [96].
25.05.21 The School's disciplinary hearing [72].
26.05.21 Dismissal [72] (C did not appeal that decision [40]).
June 2021 Further meeting by the LA [99].
02.07.21 Referral to DBS [34-42].

After DBS's involvement

19.07.21 DBS "important information" letter [18].
Summer 2021 Further meeting/consideration by the LA [139]: "further time" on child protection plan "needed" [144].
15.09.21 DBS "important information" letter "reissued" [24].
05.10.21 Child protection review [163].
11.05.22 DBS "minded to bar" letter [27-32], along with various attachments [33-168].
Thereafter No written representations provided by C to DBS in response to the minded to bar letter.

Final Decision Letter and UT procedural history

15.07.22 DBS letter communicating the Decision to C ["the Final Letter"] [169-174] (to be considered alongside the DBS Barring Decision Summary document, which set out more fully the rationale of the DBS decisionmaker ["the Rationale Document"] [175-187].
15.08.22 C's Notice of Appeal to the UT
04.10.22 C's application to appeal received by the UT [2], including the grounds of appeal ["the Grounds"] [5].
18.10.22 UT directions [15] (but not sent out before 18.11.22).
02.01.23 DBS submissions in response to C's application for permission to proceed with the Appeal [190-206].
10.02.23 UT directions [207-210].
27.07.23 UT directions (issued on 24.08.23) [211-213].
27.11.23 UT directions (including an adjournment) (issued on 07.12.23) [214-215].
18.01.24 permission to appeal hearing and the issue of UT directions for the appeal (with the UT granting C permission to appeal) (issued on 26.01.24) [216-291].
N/A No statement or further documents provided by C.
22.04.24 The hearing of the substantive appeal by video.

The Respondent's barring decision dated 15 July 2022

9. The Final Decision Letter from the Respondent dated 15 July 2022 notified the Appellant that it was including her on the Children's Barred List and stated the following:

> 'We are satisfied that you meet the criteria for regulated activity. This is because you worked as a Midday Supervisor with [] PRIMARY AND NURSERY SCHOOL.
>
> We have considered all the information we hold and are satisfied of the following:
> - in April 2021, you abused your son, H, by causing bruising and scratches to his face;

- you failed to inform your employer that you were subject to a Social Services Plan.

Having considered this, DBS is satisfied you engaged in relevant conduct in relation to children. This is because you have engaged in conduct which endangered a child or was likely to endanger a child.

We are satisfied a barring decision is appropriate. This is because it is clear from the case material that you have assaulted your son. You stated that you were going through a difficult time at home with your son H who was getting violent at home. When asked about the allegation of assaulting H, you alleged that it was H being violent to you and in stopping him punching and kicking you he sustained a bruise and scratch to the right hand side of his face. Clearly this is concerning. You have demonstrated no regard for your son and the physical and emotional harm that you have caused him. There is no evidence to suggest an understanding from you of the impact of your actions. As a result, there is also no evidence of remorse being shown towards your son.

It is also clear from the case material that you have attempted to cover up your actions, failing to notify your employer, [] Primary and Nursery School. It was stated by Social Services that the case went into Section 47 on 07/02/2021 which ended on 15/02/2021 however you failed to notify the school this despite being aware that this was a requirement of your contract of employment.

It is acknowledged that these issues arose within the domestic setting and your actions were against your own child. There is no evidence to suggest that these actions have been carried out whilst you were working within regulated activity and nothing similar has been reported. However, you have failed to demonstrate any understanding of the harm that you have caused your child both physically or emotionally. You believe that physical chastisement is acceptable and that you are justified to carry this out. There is a risk that, if presented with challenging behaviour in regulated activity from a child, you would react in a similar manner. There are also concerns that you would fail to report any similar behaviours by others or intervene as you are of the belief that these behaviours are a justifiable way to treat children.

It is recognised that a decision to place you on the Children's Barred List will interfere with your Article 8 rights and have a significant impact on your future employment opportunities given that you have previously worked as a Midday Supervisor at [] Primary and Nursery School. As a result, there may be a detrimental impact on your earning potential through the reduction in employment opportunities which may have an adverse impact on your standard of living. It is also accepted that inclusion in the Children's Barred List will limit the opportunities for you to be involved in voluntary work and may restrict the types of hobbies and pastimes you can be involved in as well as potentially having a negative stigma associated with it. A safeguarding decision however must take into account not only the rights of the referred individual but also those of the vulnerable groups who may be at risk of harm. Given the potential risk of physical and emotional harm that you pose, it is both appropriate and proportionate to place you in the Children's Barred List.'

10. The two findings of relevant conduct made by the DBS were as set out above and as:
'(i) in April 2021, you abused your son, H, by causing bruising and scratches to his face;
(ii) you failed to inform your employer that you were subject to a Social Services Plan.'

11. Although the first finding of relevant conduct referred to April 2021, it appears clear that the Assault was alleged and understood at all times to have occurred in February 2021. No point was taken at the hearing about the timing – while it was a mistake of fact it was not material to the decision and caused the Appellant no unfairness in her ability to understand the decision or pursue her appeal.

12. As far as appears relevant (in light of the grounds of appeal), the DBS came to the following related/additional conclusions on the balance of probabilities:

    (a) C had "assaulted" the Son.
    (b) C had "demonstrated no regard for [the Son] and the physical and emotional harm that [she had] caused him". There was no evidence to suggest "understanding" from C of the impact of her actions in relation to the Son or of "remorse" regarding the same.
    (c) C "attempted to cover up" her actions, failing to notify the School that the case had gone "into Section 47" despite being aware that such notification was required under C's contract of employment.

13. DBS went on to conclude C's conduct amounted to Relevant Conduct within the meaning of the Act, and that, in all the circumstances, it was appropriate and proportionate to include her on the Children's Barred List.

Appellant's Grounds of Appeal

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

15. 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).

16. On 18 January 2024 the Appellant was granted permission to appeal in respect of her grounds of appeal dated 15 August 2022 which were as follows:

    'I consider the Disclosure and Barring Service have made an error as my children remain in my care.

    At the time of the incident relating to my son I was employed at his school as a midday supervisor therefore they were notified of the incident and suspended me from my role before dismissing me. My children have remained in my care and there has been no further incidents regarding physical harm and non-prior, this is an isolated incident.

    I do not feel that full information has been shared with yourselves as I restrained my son whilst he became physically challenging towards me, I did this to prevent him hurting himself and myself further. My younger daughter was also present and I felt I

needed to act to safeguard her also. I dispute the findings of the medical advisor relating to non-accidental injuries to my son.

I am passionate about working with young people and this is an area in which I want to continue to work in and request I am able to continue to work with children and young people.'

17. The Upper Tribunal refined the grounds in relation to the alleged mistakes of fact when granting permission to appeal at the oral permission hearing (OPH) on 18 January 2024.

18. In relation to the first finding of relevant conduct - Assault/abuse of C's son - the UT took the view that it was arguable that DBS made a mistake of fact [218]. At the OPH, C maintained/ developed her position that she had acted in self-defence and/or was merely seeking to restrain the Son [217]. The Son, according to C, had been distressed, angry, aggressive; he had, in effect, been in the process of assaulting her, at the material time, and harming himself by hitting himself against the wall and TV. C had, she claimed, been restraining the Son only by holding his arms and one leg and that the injuries to his face were self-inflicted by the Son in his distressed state.

19. In relation to the second finding of relevant conduct – a failure to inform the School about being subject to a social services plan – the UT also took the view that it was arguable that DBS made a mistake of fact [218]. At the OPH, C maintained/developed her position that C had not failed to disclose or inform the School (as her employer) that there had been a social services intervention [217]. C maintained that she knew that the School was well-aware of that intervention and that the School had been the body which had made the reference to social services in the first place. The School itself had not found this allegation proved in the context of its own disciplinary procedure (it had dismissed her for other reasons).

The evidence in the appeal

20. The DBS relied on written evidence from witnesses and transcripts of interviews contained in the bundle of evidence it filed and served which contained 222 pages. It contained the evidence relied upon in making the barring decision and in defending the appeal.

21. The witnesses included those from the LA, the School and the relevant medical examiner together with the record of interviews with C, her Son, her daughter and their father. As we note, none of these witnesses gave formal witness statements, oral evidence or were cross examined – their evidence was untested hearsay. This is a matter to take into account when considering the weight it is to be given and its reliability.

22. 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.

23. This was the evidence relied upon by the DBS in making the barring decision and in defending the appeal. The relevant evidence is referred to in the discussion section below and we make findings of fact based upon it and the Appellant's evidence.

The Appellant's oral evidence

24. The Appellant likewise relied upon her notice of appeal and the submissions of fact she made at the OPH. She supplemented this with her evidence of fact given orally at the appeal hearing.

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

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

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

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

Assault allegation – first finding of relevant conduct

29. In her oral evidence in chief, the Appellant stated as follows.

30. She accepted there may have been scratches and bruises on her Son after the traumatic events of the incident. He was having a difficult time after her break up with his Father. The Son was being aggressive and violent and he was trying to break items in the house and break items to throw at her. She wanted to make it stop and did not know what to do with his behaviour. He was just unhappy and struggling with the terms of his mother and father splitting up.

31. During the incident her Son was running to her and punching her and kicking her. She tried stopping him by putting his hands and legs to his side. He tried grabbing ornaments and tried to throw and smash things up. She grabbed him and put his hands to his side. She went to close the door shut away from his sister, grab hold of him and tell him to calm down.

32. She stated she touched her Son's arms, wrists and legs at the bottom and top and maybe his shoulders. She was holding him to restrain him – she was trying to get him to calm down. She held him down to stop him being violent and hurting his sister and stop him making things worse. It was not enough -

her Son kept getting up and going again and did it a few times more. She was talking to him more and more, telling him to stop and calm down.

33. Her Son was around 11 years old at the time and as tall as her - quite a big boy - 5ft 5 inches and weighing 9 stone. She was around 5ft 6 inches tall and weighing 10 stone. She cannot remember when she saw scratches and bruises on her Son - she did not see them at the time of the incident.

Failure to disclose to employer – the second finding of relevant conduct

34. In her oral evidence in chief, the Appellant stated as follows.

35. At the time everything happened so quickly (the incident and social services involvement) and she had not been given opportunity to digest what was going on and before she knew anything the workplace and school got rid of her. It was all new to her and there was so much stuff she had to deal with.

36. She felt like it was unfair and she was in a challenging and difficult situation and did not hide anything. It landed on her and she dealt with it. At the time she was suspended from employment at the School she can remember being dismissed and never being given a chance to speak to someone.

37. By the time of the interview in April 2021, the School already knew about Social Services involvement and she was not working there by the time. They knew information from Social Services before she knew about it. They had the relevant information and it was awful to speak about and awful to experience. She had to deal with it which was mentally exhausting and depressing.

38. She was on her own and asking for help and her Son's behaviour was difficult and nobody wanted to listen. As soon as the incident happened it was her Son's word against hers and she lost her job and potentially could have lost resident care of her children. There was a lot going on.

39. She denied the allegation of failure to disclose information or misleading the school. She could not remember it all but she never hid anything intentionally, whether or not she did get things wrong. It upset and angers her that she had so much to deal with.

Cross examination

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

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

Proportionality

42. In relation to the proportionality of the barring decision, the Appellant gave the following evidence.

43. In barring her, the DBS acted unfairly. She loved her job and loved the children in that School and the children were asking when she was coming back and requesting her back. She was absolutely devastated and she never had her own children taken off her. They remained with her in her care to this day.

44. There was a devastating impact of being barred – mentally – and by not being able to go back to work with the children. It was not a nice feeling and impacts upon children's lives. It was a hard job teaching but she loved to do it.

45. It was disproportionate and unreasonable for the DBS to rely upon a child's story and that was the only evidence against her. Nobody spoke to her and the DBS had no background before making the decision to bar.

46. The DBS did not speak to her – they had not done right – they should have spoken to her. At the time of the incident, her son was around 11 years old and daughter around 6 years old. She had done nothing wrong - there was an ongoing marital break-up which resulted in her Son's behaviour. This was understandable due to his distress.

47. She agreed with everything she had written in the notice of appeal and believed that her appeal should be allowed so that she could engage in regulated activity with children and removed from the barred list.

48. We address the proportionality of the decision to include the Appellant on the CBL in the discussion section below.

Law

49. 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.

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

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

52. Paragraph 3 of Schedule 3 to the Act, sets out the provisions in relation to "relevant conduct". It provides that, following an opportunity for and consideration of representations, DBS "must" include a person on the List if: (i)

it is satisfied that they have "engaged in relevant conduct"; (ii) it has reason to believe that they have been (or might in future) be "engaged in regulated activity relating to children"; and (iii) it is satisfied that it is "appropriate" to include them. Under paragraph 3(3) of Schedule 3 the DBS must include the person in the children's barred list if:

(a) it is satisfied that the person has engaged in relevant conduct, and
(aa) it has reason to believe that the person is or has been or might in future be, engaged in regulated activity relating to children, and
(b) it is satisfied that it is appropriate to include the person in the list.

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

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

55. Section 4 of the Act provides:

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

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

56. As underlined above, the Applicant may appeal against the barring on the ground that the DBS has made a mistake:

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

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

58. The only issue in this appeal therefore is whether there was a material mistake of law or fact in including the Applicant on the CBL.

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

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

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

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

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

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

> 'We therefore reject the argument that our jurisdiction is limited to what is often termed *Wednesbury* unreasonableness – that the actions of ISA are so

unreasonable that no reasonable body of a similar nature could have reached that decision. The Upper Tribunal will have in all cases the duty to ensure that proper findings of fact are made. This will include both considering any alleged factual errors in the ISA decision and also whether ISA has both identified all relevant evidence and given an appellant a chance to make representations on all relevant evidence. Conversely ISA must ignore irrelevant evidence. In cases of dispute it will be for the Upper Tribunal (and of course the courts on further appeal) to indicate what is relevant.'

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

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

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

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

> "The Upper Tribunal is entitled to make a finding that an appellant's denial of wrongdoing is credible, such that it is a mistake of fact to find that she did the impugned act. In so doing, the Upper Tribunal is entitled to hear oral evidence from an appellant and to assess it against the documentary evidence on which the DBS based its decision. That is different from merely reviewing the

> evidence that was before the DBS and coming to different conclusions (which is not open to the Upper Tribunal)."
>
> 29. That is in my view an accurate description of the mistake of fact jurisdiction and corresponds with the guidance given by the Presidential Panel of the Upper Tribunal in *PF,* approved by this court in *Kihembo.'*

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

> '43. By way of preliminary observation, the role of the Upper Tribunal on considering an appeal needs to be borne in mind. The Act is intended to ensure the protection of children and vulnerable adults. It does so by providing that the DBS may include people within a list of persons who are barred from engaging in certain activities with children or vulnerable adults. The DBS must decide whether or not the criteria for inclusion of a person within the relevant barred list are satisfied, or, as here, if it is satisfied that it is no longer appropriate to continue to include a person's name in the list. The role of the Upper Tribunal on an appeal is to consider if the DBS has made a mistake on any point of law or in any finding of fact. It cannot consider the appropriateness of listing (see section 4(3) of the Act). That is, unless the decision of the DBS is legally or factually flawed, the assessment of the risk presented by the person concerned, and the appropriateness of including him in a list barring him from regulated activity with children or vulnerable adults, is a matter for the DBS.
>
> 55. Section 4(7) of the Act provides that where the Upper Tribunal remits a matter to the DBS it "may set out any findings of fact which it has made (on which DBS must base its new decision)". It is neither necessary nor feasible to set out precisely the limits on that power. The following should, however, be borne in mind. First, the Upper Tribunal may set out findings of fact. It will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter. By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to a marriage being a "strong" marriage or a "mutually-supportive one" may be more of a value judgment rather than a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third "finding" would certainly not involve a finding of fact.
> Secondly, an Upper Tribunal will need to consider carefully whether it is appropriate for it to set out particular facts on which the DBS must base its decision when remitting a matter to the DBS for a new decision. For example, an Upper Tribunal would have to have sufficient evidence to find a fact. Further, given that the primary responsibility for assessing the appropriateness of including a person in the children's barred list (or the adults' barred list) is for the DBS, the Upper Tribunal will have to consider whether, in context, it is appropriate for it to find facts on which the DBS must base its new decision.'

66. Therefore, the UT has a full jurisdiction to identify and make findings on the evidence heard as to whether there has been a mistake of fact. An assessment of risk however is generally speaking for the DBS, as the expert assessor of risk, and what is and is not a fact should be considered with care.

67. 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.

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

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

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

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

The Appellant's submissions on the grounds of appeal

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

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

Discussion: Findings of Fact and Analysis of grounds of appeal

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

74. The evidence that was before the DBS when it made its Decision did not include any factual and legal representations made on behalf of the Appellant. The factual representations made during the hearing, denying the allegations, were in similar terms to the notice of appeal dated August 2022 (but more detailed).

75. In light of these, we consider whether the DBS made mistakes of fact in accordance with the approach set out in *PF v DBS*. The burden of proof remained on the DBS when establishing the facts and making its findings of relevant conduct in its barring decision. Thereafter on the appeal to the UT, the burden was on the Appellant to establish a mistake of fact (see *PF* at [51]):

> 'The starting point for the tribunal's consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not

determine the outcome of the appeal. The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker.'

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

77. We note that the Appellant attended the hearing of the appeal, gave evidence and was cross examined. This is in contrast to the DBS's witnesses who did not. Their evidence was written and untested, it consisted of typewritten notes of answers given to question in interview.

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

79. We are not satisfied that the Appellant was a reliable and credible witness. We set out our reasoning for this in the section below when addressing Grounds 1 and 2 (mistake of fact in relation to the findings of relevant conduct).

80. In essence, we are satisfied that the Appellant's evidence is inconsistent with the contemporaneous evidence and a number of witnesses who gave evidence against her. Her written and oral evidence to the Tribunal was also internally inconsistent and contradicted the earlier accounts given to the school, her employer and the LA.

81. Finally, we found that the Appellant's answers in cross examination tended towards a bare denial and the assertion that all the witnesses the DBS relied upon were wrong. The Appellant maintained her behaviour was satisfactory at all times - this demonstrated a lack of insight or an inability to make any reasonable concessions. The Appellant's explanation for the injuries sustained by her son, which she has relied on since August 2022, was implausible and inherently unlikely – it also deviated and was inconsistent with the more contemporaneous accounts she gave to the School and LA.

Ground 1

<u>Material mistake of fact: first finding of relevant conduct - the Assault on the son</u>

82. The finding that the Appellant Assaulted / abused her son physically was the first finding of relevant conduct by the DBS.

83. The key point, advanced by C, it would seem, is that C did not, in fact, "assault" the Son: all she did was take steps which were no-more-than-reasonable) to restrain him, in light of his own aggressive behaviour towards her. Any relevant injury caused to the Son, by her, was not caused by any intentional assault.

84. We are not satisfied that DBS made a mistake in finding that C had indeed carried out an assault on the Son. We, like the DBS are satisfied "on the balance of probabilities" that the Appellant assaulted the son in February 2021 causing him the injuries as alleged.

85. The fact that there was no action by the police and no criminal proceedings were instituted reflects the markedly higher standard of proof in those proceedings and the criminal prosecution is not (or not sufficiently) relevant.

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

87. First, there was/is the important evidence relating to the Medical Examination of the son [158], carried out, just a few days after the Assault, by a suitably-qualified medical practitioner. The following injuries were noted and recorded, following the Medical Examination [158]:

(a) Bruising to the right side of the face, between the ear and eye [where the Son had said C had slapped him].
(b) Bruising to the left side of the neck [where the Son had said that C had placed her thumb and hand on with some force].
(c) Bruising (x2) to the left pectoral area [where the Son had said that C had punched him in the chest].
(d) Scratch mark to the right ankle [where the Son had said that C had scratched him with her fingernail].
(e) Bruising to the right shin [which, in contrast to other injuries, the Son said was caused by a fall at the School and therefore not by C].
(f) Bruising to the back [the Son said he was not sure how that was caused but said that C had kicked him in that area].

88. The conclusion of the Medical Examiner was clear:

(a) The injuries were in "areas which do not usually get bruised accidentally".
(b) The injury marks were "consistent" with the account provided by the Son [which would appear, on any reasonable view, to be an account of an assault, rather than any reasonable restraint] and of C physically "hitting" the Son.
(c) The injuries were "non-accidental inflicted injuries".
(d) Moreover: there were "additional concerns around medical neglect and emotional harm" in relation to the Son.

89. Second, there was/is the relatively detailed account of the Assault given by the Son himself given to the LA [150]-[151], taken at or close to the time, which appears to be materially consistent with the evidence of injury to his body. Related to that, there was/is evidence that the Son was generally relatively well-behaved at the School and described as "fairly placid" [76] [93]. We are not satisfied that the son was mistaken or lying or that he made up his account.

90. Third, there was/is the record of the general account by C [150], provided close to the time, and the views about that account from those (trained professionals on behalf of the LA) who heard it along with associated observations. Relevant matters include:

    (a) C appeared to be engaged in an argument with the Father (shouting at him), and to an extent with the Son, on the arrival of the professional, such that the latter had to ask them to calm down.
    (b) C was initially "hostile and sarcastic" and "did not cooperate" with the professional.
    (c) C provided no response, initially, when the professional clarified the reason for her visit and that an allegation had been made that C had hit the Son and caused him injuries.
    (d) C raised her "self-defence" argument, claiming to have pushed the Son away and "caught" him with her hand, denying any "intentional" hitting. (It is noted that C does not appear to have relied on this account – of accidentally catching the Son with her hand or "pushing" – in her account at the OPH to the UT [217].)
    (e) C was less than open and candid, when questioned about the Boyfriend and matters relating to her relationships generally. Initially, she had said that only she and the Children were present at the time of the Assault. After some inconsistencies between C's account and the Son's account had been highlighted to her, however, C "admitted" that she "had not been telling the truth" in relation to the Boyfriend being present during the relevant incident. C sought to explain that she was "used to hiding things" about the Boyfriend. Additionally, she claimed (implausibly) not to know the Boyfriend's surname when the professional asked for it (despite having been in a relationship with him for many months).

91. In addition, it was recorded that C (unlike the Son) was not observed to have had any injuries [151]. This undermines any account that she was acting in self-defence in restraining him or to protect him or any person from harm.

92. Fourth, there was/is the fact that the LA, having considered all the material before it, decided that it was necessary to put in place a safety plan, a child in need plan, and a child protection plan (and/or similar plans), for both of the Children, and, in the case of the Son, specifically due to the risk of physical harm from C [135]. Further, the evidence is that the police had (at least initially) logged the Assault as an "assault" [92].

93. Fifth, we note the evidence about C's apparent general approach to disciplining children, from the earlier set of disciplinary proceedings brought by the School against C (for which C was suspended but not, in the end, subjected to any serious sanction). In the investigation meeting, C is recorded as having [127]: (a) complained that "School do not discipline naughty children"; and (b) moreover, said (with emphasis added): "I have told [the Son] that he needs to hit back where a child hits him and it's not an accident".

94. We are satisfied on the balance of probabilities that – hitting a child when confronted with some form of attack from them – is exactly what C would go on to do with her own 11 year old son, a couple of years later in the privacy of her own home.

95. Sixth, we reject the oral evidence the Appellant gave during the hearing as unreliable and not credible. There has always been a lack of detail and a lack of plausibility in the account put forward by C. Even now, in the context of the Appeal, C has provided relatively few details (and little persuasive or supporting evidence).

96. During her evidence C was less than open and candid, at best, in a number of situations, about other (but related) significant matters: e.g. in relation to the Boyfriend and her relationship with him during the initial visit; and in relation to her representations to the School about there being no or no significant ongoing concerns/matters relating to the involvement of social services etc [69]). Further, there is the simple fact that C did not take the Son into school the day after the Assault (and a lack of evidence of an alternative/ innocent reason for that non-attendance, along with the Son's account that "he wasn't allowed to go in to school even though he wanted to") [107, 105].

97. Seventh: any account by the Daughter that C did not assault the Son because she was only acting in self-defence (which is said to support C's account of the Assault) needed and needs to be considered with due caution. Apart from anything else, she would, it seems, have been only 6 years old at the time of the incident. There has also been an allegation that C had sought to pressurise the Daughter (and the Son), in relation to other matters, to act in ways that assist C and were not open and honest [154, 158, 107].

98. In all the circumstances, we are satisfied that:

(a) the DBS made no "mistake" in concluding that C had carried out an assault on the Son, causing him physical injury (i.e. that there was more to the relevant incident than C merely seeking to restrain the Son and, in doing so, causing some accidental injury).

(b) On the balance of probabilities, having reviewed the evidence, we consider that C and the Son got into (another) argument arising out of unresolved issues relating to the breakdown of C's relationship with the Father and/or C's new relationship with the Boyfriend; that it became heated; and that C ultimately resorted to physically assaulting the Son in that context and causing him injuries.

(c) DBS can be said to have made an administrative mistake in relation to the actual date of the Assault. The Final Letter referred to April 2021, when the incident occurred in early February (it was the School's investigation meeting which occurred in April 2021). But that was/is not, in all the circumstances, a "material" mistake.

(d) The Assault caused harm. DBS made no mistake in finding that. There was "physical" harm: that is clear from the Medical Examination alone. There was "emotional harm": that is clear from (among other things) the Medical Examination, the LA's assessments, and the Son's account.

99. We are also satisfied that the associated absence of insight, remorse, understanding by C supports a finding that she remains at risk of causing harm to children.

100. There was no mistake of fact by DBS in relation to such an assessment of risk; particularly in the context where C had not provided any representations prior to barring (which is where such matters would generally be set out). Moreover, C denied any assault and/or refused to accept any culpability (and has continued to do so). No evidence was provided that C had any meaningful regard, insight, understanding, remorse, etc, into the harmful impact of the Assault on the Son. A similar conclusion was reached, in relation C lacking "insight", by the chair of the LA's meeting [93].

101. We note the persistent concerns (well into summer of 2021) regarding C's insight/remediation: that C does "not appear to be taking on board the concerns around [the Children's] emotional well being" [141]; that C "does not appear to be working to the safety plan" [142]. It is also noteworthy that C was recorded to have refused to undertake a course in "non-violent resistance" [143]; and that the professional view was there "remains a significant risk of further physical abuse" [143].

102. We dismiss ground 1. There was no material mistake of fact in the DBS's first finding of relevant conduct – the assault is established on the balance of probabilities.

<u>Mistake of fact: second finding of relevant conduct; the failure to disclose/inform etc</u>

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

> 'you failed to inform your employer that you were subject to a Social Services Plan.
> …
>
> It is also clear from the case material that you have attempted to cover up your actions, failing to notify your employer, [] Primary and Nursery School. It was stated by Social Services that the case went into Section 47 on 07/02/2021 which ended on 15/02/2021 however you failed to notify the school of this despite being aware that this was a requirement of your contract of employment.'

104. Taken in the round: Mr Lewis submitted there was no material mistake of fact by DBS in respect of this conclusion.

105. The key evidence is the investigatory interview with the School on 23 April 2021 (as recorded by signed notes [69-71]). We accept the notes are a reliable record of the interview as signed by C herself contemporaneously.

106. We consider that C presented a picture to the School (as her employer, and in the serious and formal context of a disciplinary investigation into highly-

relevant matters), about the involvement of social services and related matters, which was inaccurate and misleading.

107. Among other things, C is recorded as having stated/indicated:

(a) "Obviously Social Services got involved and obviously [the Son] went for a medical and nothing came of it." [69]
(b) When asked again about the outcome of the Medical Examination: "No, nothing came of it. It was a case of being down to me and [the Son] having differences and that was it really. Nothing else was further [sic]." [69]
(c) When asked if, following the Medical Examination, any professionals had fed back to her: "Social Worker, who said not a lot really… She was happy with everything and to be quite honest Social's not been involved all that much… No one has done anything… I think I am the professional here." [69-70]
(d) When asked specifically about whether the Children "have been subject to a child protection plan or section 47": "No they are not" [70].
(e) When asked whether at any point a social worker had "suggested" the Children are being subject to a child protection plan: "No" [70].
(f) When asked if there was anything else C wished to say in relation to "allegation 2": "No, not really" [71].

108. At the time of that meeting on 23 April 2021, we are satisfied that it is likely C knew that the picture she painted, about social services involvement (past, current, or future) in particular, was inaccurate and misleading, even if there is/was some scope for confusion regarding the precise terms involved (e.g. about particular types of plans, assessments, interventions, etc).

109. Among other things, there is evidence of the following having all occurred in the run up to the investigation meeting:

(a) There was the visit on 05.02.21 by agents of the LA [150]. Following which, the Children went to live with the Father and C was not allowed unsupervised contact with the Children (at least initially), as part of a "safety plan" made on the same day [151].
(b) The Son appears to have been living with the father (and grandparents) for a period of time - at least for a week after the incident in February 2021 [113-114, 107].
(c) Section 47 enquiries commenced on or around 07.02.21, with the Medical Examination on 08.02.21 [162].
(c) There was the LA "strategy meeting" on 07/08.02.21 [149, 151].
(d) A social worker visited C on 23.03.21, to investigate an additional allegation that C had hit the Son on the back [92]; and it "didn't go well" [113].
(e) There was the LADO/strategy meeting on 25.03.21 [89-94]; and assessment completed on 07.04.21 [94] [163].
(g) There was a further strategy meeting on 20.04.21 [163].

110. The referral to social services, according to the evidence, came via NSPCC [150] [92].

111. If nothing else, we are satisfied that it must have been clear to C, at that time of the interview on 23 April 2021, that there was an ongoing interest and involvement from social services in relation to the children and C's role as their parent. We consider that C was under an obligation to convey that, in some reasonably accurate and fair way, to her employer at the interview on 23 April 2021; that she failed to do so. That was a culpable omission, designed to "cover up" the seriousness of the situation and its ongoing nature, in order to try to protect (as she saw it) her own interests in avoiding a sanction and/or keeping her job.

112. Nonetheless, we do find that there was a material mistake of fact in relation in to the second finding of relevant conduct. We are not satisfied of the specific finding on the balance of probabilities that:

> 'you failed to inform your employer that you were subject to a Social Services Plan.
>
> …
>
> It is also clear from the case material that you have attempted to cover up your actions, failing to notify your employer, [] Primary and Nursery School. It was stated by Social Services that the case went into Section 47 on 07/02/2021 which ended on 15/02/2021 however you failed to notify the school this despite being aware that this was a requirement of your contract of employment.'

113. We are not satisfied that there was a failure to inform the school prior to the interview in the particular manner alleged in the decision letter relating to the period 7 to 15 February 2021. Rather we are satisfied that she misled her employer about the general extent of social services involvement with her children when specifically asked about it on 23 April 2021.

114. We accept that the reason that the Appellant did not inform the school of the intervention in February 2021 as alleged was because she believed they were already aware of this involvement of social services following the intervention in February 2021. Indeed, the School did not uphold "allegation 2" in a decision letter dated 26 May 2021. The School accepted that it was already aware of the Social Services intervention and the Appellant reasonably did not believe she needed to do anything more to inform it of this.

115. Allegation 2 relied upon by the School was a decision looking backwards at what C had (or had not) disclosed previously to the School by the time of the disciplinary hearing on 25 May 2021– see [73]:

> Allegation Two - You failed to follow, the keeping children safe in education declaration, by not notifying the school that your children are subject to a child protection plan
>
> At the hearing [GF] outlined that concerns were initially raised by the [X City] Social Care Team and following an investigation you acknowledged the injuries to your son and that a medical had taken place, but you believed nothing came of it. The markings on your son were due to you trying to manage his violence

> and restrain him. In terms of allegation two, [GF] outlined, that you felt that as the school were proactive in contacting you, you didn't feel you needed to do anymore.
>
> You stated that the school were fully aware of the situation and that you do not feel you, or your son have had the right support from the school, or other external agencies.
>
> You felt allegation one had been blown out of proportion, you and his dad had split up,
> which had affected him, his behaviour changed a lot and his violence got out of control. You were trying to restrain him and did not hit him.
>
> The Committee have concluded that allegation two is not upheld, as it was reasonable that the school were aware…

116. The DBS finding of relevant conduct fails to make clear that it is focused on the failures to disclose matters properly, to the School as C's employer, within the Investigation Meeting on 23 April 2021 itself as opposed to at any time before or after. The finding instead focuses on the specific intervention in February of which the School were already aware and for which it was reasonable for the Appellant not to need to inform them. The section 47 enquiries started on 7 February 2021 and the Appellant was suspended from school on 9 February 2021.

117. The specific finding in the DBS barring decision also involves mistakes of fact because it is unclear what level of intervention from Social Services the Appellant or the children were subject to at the time of the interview on 23 April 2021 or before. It is clear that the Appellant herself was not subject to any plan (the allegation is that 'you were subject to a social services plan') and this is a mistake of fact.

118. The extent of social services intervention is not clear but it appears that the children were subject to a section 47 proceedings for eight days between 7 and 15 February 2021, which was then downgraded to a child in need plan from 7 April 2021. It only became a child protection plan in May 2021, after the interview on 23 April 2021. The result is that there was no child in need or protection plan in place in February that the Appellant could have failed to disclose and no child protection plan in place at the time of interview in April 2021.

119. Nonetheless: even though there was a mistake of fact in relation to the specific finding of relevant conduct relied upon by the DBS, we have still found that C failed to inform/disclose to the School as to the extent of social services involvement with her children and the developments thereafter and misled the School at the interview on 23 April 2021.

120. There is no need to go on to consider whether the finding of fact we have made, if had it been relied upon by the DBS - rather than the second finding of relevant conduct as actually made – would amount to 'relevant conduct' as a matter of law for the purposes of para 4 of Schedule 3 to the Act. We make no determinative finding as to whether the conduct as found by us amounts to

conduct which endangered a child or was likely to endanger a child or if repeated, would endanger a child (harm a child or put them at a risk of harm). However, we can see the argument that failing to inform and misleading an employer of school as to the extent of social services' involvement with one's own child or any person's child might, if repeated, put a child (whether one's child or any child under one's care at school) at risk of harm. On one view, it might be seen as a standard safeguarding requirement.

121. Furthermore, the Appellant's failure to disclose relevant information to the school in interview on 23 April 2021 and attempt to mislead them was a matter that the DBS could and should have taken into account and further informed the decision to bar.

122. However, and in any event, while we are satisfied that there was a material mistake of fact in relation to the second finding of relevant conduct made by the DBS, we are satisfied that it is inevitable that the same outcome would have been reached to include the Appellant on the CBL purely based on the Assault (the first finding of relevant conduct) and the concerns associated with it.

123. While there were material mistakes of fact in relation to the second finding of relevant conduct, these were not material to the ultimate barring decision – it is inevitable that the DBS would have made the same decision in light of the factual findings we have made.

C's other Grounds of appeal in her notice of appeal – mistake of fact

124. We now address the written grounds of appeal set out in the Appellant's notice of appeal.

125. The DBS did not make any material error in barring the Appellant despite the fact that the Children had "remained" in C's care. In fact, there were times when they, or the Son, had not in been in her direct care, being with the Father and/or Grandparents for a week in February 2021. And there is ample evidence that professionals have been markedly concerned about C's ability to safely care for the Children. In any event, the law relating to whether parents can have unsupervised contact ("private law proceedings"), or indeed whether children should be taken into local authority care ("public law proceedings"), has a different purpose and procedures to the relevant law relating to safeguarding vulnerable groups in society under the Act.

126. The School was notified of "the incident", at the time (and suspended C, before going on to dismiss). The School was made aware of various concerns (because, mainly it would seem, the Children happened to attend the School as pupils and/or the School employed C) – by others mainly. Nonetheless that is to miss the point of the relevant failure by C at the interview in April 2021 to disclose Social Services' involvement with the Children (as set out above).

127. Although the Assault was, in a literal sense, a single act, it was not, when considered fairly in context, an "isolated incident". There were/are a number of

relevant concerns/incidents, spanning a wider period of time (and including emotional harm to both the Children). It appears that there has, on the evidence (including the evidence of an admission by C herself), and despite a claim to the contrary in the Grounds [5], been at least one further relevant incident regarding physical harm. This was a hit to the Son's back which he reported on 23 March 2021 which C initially denied and then appears to have admitted – see [110]-[113].

128. The DBS did not make a finding about whether C was or is "passionate" about working with young people or children.

'I do not feel that full information has been shared with you'

129. There is nothing in this ground of appeal. While it is always possible for decision-making bodies such as DBS to have more information, it had sufficient material/information to make the decision(s) it was required to make. In particular: the DBS had ample information before it, at the time of the Decision, that C's position, in response to the allegation she had assaulted the Son, had been that any injury caused to the Son by her was the result of her taking steps to "restrain" him (in light of his aggression) and/or "protect" others from harm. That had been C's position and the DBS decision-maker would have been aware of that claim/assertion/ defence.

130. Further, the DBS cannot properly be blamed for C having not provided any representations for it to consider in response to its "minded to bar" letter and the information attached to it. That was C's opportunity to set out her case "fully", provide any additional relevant documentary material, and emphasise any particular matters. Moreover, only limited information would appear to have been provided by C in the Appeal; notwithstanding the efforts of the UT to provide opportunities (both before and after the OPH). It was unhelpful, for example, that C did not provide a witness statement, despite being strongly encouraged by the UT to do so in the directions [218 (e.g. para 7-8)] following the OPH – although we draw no adverse inference against her, given she is not legally represented.

<u>Mistake of Law - Proportionality</u>

131. We are satisfied that the first finding of fact by the DBS, the assault, is established and amounted to Relevant Conduct within the broad definition permitted by the Act.

132. Even, taking into account the mistakes of fact in relation to the second finding of relevant conduct, it was not a "perverse" decision by DBS to have included the Appellant on the CBL. There is a high bar for perversity/irrationality challenges to barring decisions and we are satisfied that the decision to bar was neither perverse nor irrational but one the DBS was entitled to reach. Further, we are satisfied it was inevitable that the same decision would have been reached based upon the first finding of relevant conduct alone. It is also supported by the findings we have made about C

misleading her former employer about social services' intervention concerning her children.

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

134. 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?

135. 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).

136. We are satisfied that each of questions a)-d) should be answered in favour of barring.

137. On a reasonable and objective view, we are satisfied that the DBS was entitled to conclude that it was appropriate and reasonably necessary to bar C in order to achieve its (important and) legitimate safeguarding aims. The DBS expressly carried out the "balancing act" exercise required. We are satisfied that the DBS was entitled to consider that the Appellant presented a risk of harm to children at the time of the decision. Her lack of reliability, insight and acceptance at the appeal hearing regarding the incident with her son confirmed that the risk she posed of repeating similar acts remained ongoing at the time of the barring decision. Barring was therefore a proportionate decision with regard to that risk.

138. We are satisfied that the DBS was entitled to conclude that C, on the evidence available at the time and now heard, was an individual unsuited, at the time of the Decision, to be trusted to work with children in regulated activity.

139. The DBS also expressly had regard to the adverse impact that a barring decision would or may have on C's Article 8 rights to private and family life– in particular the impact on her employment opportunities to work with children. It correctly concluded that no other measures were in place sufficient to adequately safeguard children from C participating in regulated activity and committing further acts of misconduct/neglect etc.

140. While it might in principle be possible for C to change her attitude/ approach, and/or to control her emotions/impulses, etc, to the extent that she might be regarded at some point in the future as a tolerably low risk, C had/has not demonstrated that she has the necessary insight or tools to do so at the time of the barring decision. Paragraphs 18 and 18A of Schedule 3 to the Act allow for reviews of the barring decision to be conducted if fresh evidence comes to light and is presented by the Appellant or on the expiry of the minimum barring period in this case.

Conclusion

Materiality

141. Although, we have found that there were material mistakes of fact in relation to the second finding of relevant conduct, given the seriousness of the first finding that has been proved not to contain any mistake, it is inevitable that the DBS would have made the same decision to bar the Appellant from working with children. The mistaken finding was not material to the ultimate decision – it is inevitable that the DBS would have decided it appropriate and proportionate to bar the Appellant based on the established finding of relevant conduct.

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

143. We are therefore satisfied that the DBS did not make mistakes of fact or mistakes of law material to the barring decision on 15 July 2022 to include the Appellant on the CBL.

Disposal

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

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

146. The Decision of the DBS to include the Appellant on the CBL is confirmed.

Authorised for release:
Judge Rupert Jones
Judge of the Upper Tribunal **Dated: 21 June 2024**

Appendix

The lists and listing under the 2006 Act

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

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

'2(1) DBS must establish and maintain—

(a) the children's barred list;

(b) the adults' barred list.

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

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

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

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

Children's barred list

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

Vulnerable adults' barred list

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

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

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

(a) this paragraph applies to a person, and

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

to vulnerable adults.

……

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

(5) Sub-paragraph (6) applies if—

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

purpose, or

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

(6) If [DBS] —

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

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

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

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

prescribed for the purpose.

(8) If [DBS] —

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added]

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

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

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

that adult or would be likely to endanger him;

(c) conduct involving sexual material relating to children (including possession of such

material);

(d) conduct involving sexually explicit images depicting violence against human beings

(including possession of such images), if it appears to [DBS] that the conduct is

inappropriate;

(e) conduct of a sexual nature involving a vulnerable adult, if it appears to [DBS] that the conduct is inappropriate.

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

(a) harms a vulnerable adult,

(b) causes a vulnerable adult to be harmed,

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

(d) attempts to harm a vulnerable adult, or

(e) incites another to harm a vulnerable adult.

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

(a) indecent images of children, or

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

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

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

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

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

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

[(i) falls within sub-paragraph (4), and

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

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

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

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

(a) it is satisfied that the person falls within sub-paragraph (4), […]

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

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

(4) A person falls within this sub-paragraph if he may–

(a) harm a vulnerable adult,

(b) cause a vulnerable adult to be harmed,

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

(d) attempt to harm a vulnerable adult, or

(e) incite another to harm a vulnerable adult.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Right of Appeal and jurisdiction of the Upper Tribunal

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

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

(a) . . .

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

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

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

(a) on any point of law;

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

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

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

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

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

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

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

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

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

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

[Emphasis added]

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

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

103.In light of the fact that the Upper Tribunal can put right any errors of law and any material errors of fact and, further, can do so at an oral hearing if that is necessary for the fair and just disposition of the appeal I have reached the conclusion that the absence of a right to an oral hearing before the Interested Party and the absence of a full merits based appeal to the Upper Tribunal does not infringe Article 6 EHCR. To repeat, an oral hearing before the Interested Party is permissible under the statutory scheme and there is no reason to suppose that in an appropriate case the Interested Party would not hold such a hearing as Ms Hunter asserts would be the case. I do not accept that this possibility is illusory as suggested on behalf of the Claimants. Indeed, a failure or refusal to conduct an oral hearing in circumstances which would allow of an argument that the failure or refusal was unreasonable or irrational would itself raise the prospect of an appeal to the Upper Tribunal on a point of law. Further, any other error of law and relevant errors of fact made by the Interested Party can be put right on an appeal which, itself, may be conducted by way of oral hearing in an appropriate case.'

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

Mistake or error of fact

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

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

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

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

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

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

a) In those narrow but well-established circumstances in which an error of fact may give rise to an error of law, the tribunal has jurisdiction to interfere with a decision of the DBS under section 4(2)(a).
b) In relation to factual mistakes, the tribunal may only interfere with the DBS decision if the decision was based on the mistaken finding of fact. This means that the mistake of fact must be material to the decision: it must have made a material contribution to the overall decision.

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

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

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

Appropriateness

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

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

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

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

> '67. The context, and the nature of the statutory scheme, is that it creates a system for the protection of children and vulnerable adults. It provides for an independent body, the DBS, to determine whether specified criteria are met and, in the case of paragraph 3 of Schedule 3 to the Act, that it is appropriate to include a person's name in the children's barred list or the adults' barred list. There is a safeguard for individuals in that they may appeal to the Upper Tribunal on the basis that the DBS has made an error of law or fact. The Upper Tribunal cannot consider the appropriateness of the decision to include or retain the person's name in a barred list when deciding if the DBS had made such an error. If the DBS has not made an error of law or fact, the Upper Tribunal must confirm the decision of the DBS (section 4(5) of the Act). Only if

> the DBS has made an error of law or fact, can the Upper Tribunal determine whether to remit or direct removal of the person's name from the list (section 4(6) of the Act).
>
> 68. The scheme as a whole appears, therefore, to contemplate that the DBS is the body charged with decisions on the appropriateness of inclusion of a person within a barred list. The power in section 4(6) of the Act needs to be read in that context. The context would not readily indicate that the Upper Tribunal is intended to be free to decide for itself questions concerning the appropriateness of inclusion of a person in a barred list. It is unlikely, therefore, that section 4(6) of the Act was intended to give the Upper Tribunal the power to direct removal because it, the Upper Tribunal, thinks inclusion on the list is no longer appropriate. It is more consistent with the statutory scheme that the power is to be exercised when the only decision that the DBS could lawfully make would be to remove the person from the barred list.'

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

Mistake or error of law

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

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

Proportionality

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

30. Maintenance of public confidence, in the regulatory scheme and the barred lists, will "always" be a material factor when seeking to balance the rights of the individual and the interests of the community (e.g. B). Where it is alleged that the decision to include a person in a barred list is disproportionate to the

relevant conduct or risk of harm relied on by the DBS, the Tribunal must, in determining that issue, give proper weight to the view of the DBS as it is enabled by statute to decide appropriateness - see the Court of Appeal's judgment in B at paragraphs [16]-[22] (ISA formerly assuming the role of the DBS):

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

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

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

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

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

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

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

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

Lady Hale added (at paragraph 37):

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

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

…….

22. This brings me to two particular points. First, there is the fact that, unlike the ISA, the UT saw and heard SB giving evidence. However, it cannot be suggested that it was unlawful for the ISA not to do so. It had had at its disposal a wealth of material, not least the material upon which the criminal conviction had been founded and which had informed the sentencing process. The objective facts were not in dispute. Secondly, Mr Ian Wise QC, on behalf of the Royal College of Nursing, emphasises the fact that the UT is not a non-specialist court reviewing the decision of a specialist decision-maker, which would necessitate the according of considerable weight to the original decision. It is itself a specialist tribunal. Whilst there is truth in this submission, it has its limitations for the following reasons: (1) unlike its predecessor, the Care Standards Tribunal, it is statutorily disabled from revisiting the appropriateness of an individual being included in a Barred List, *simpliciter*; and (2) whereas the UT judge is flanked by non-legal members who themselves come from a variety of relevant professions, they are or may be less specialised than the ISA decision-makers who, by paragraph 1(2) of schedule 1 to the 2006 Act "must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults". I intend no disrespect to the judicial or non-legal members of the UT in the present or any other case when I say that, by necessary statutory qualification, the ISA is particularly equipped to make safeguarding decisions of this kind, whereas the UT is designed not to consider the appropriateness of listing but more to adjudicate upon "mistakes" on points of law or findings of fact (section 4(3)).'

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

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

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

Burden and Standard of proof

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