IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2024-000025-V
[2024] UKUT 330 (AAC)

On appeal from a decision of the Disclosure and Barring Service

Between:	MFAG	Appellant
	and	
	The Disclosure and Barring Service	Respondent

Before: Upper Tribunal Judge Brunner KC, Michele Tynan and Elizabeth Stuart-Cole

Decided on 15 October 2024 following an oral hearing, held by consent by video, on 3 October 2024

Representation:
Appellant: Mr Bajwa KC
DBS: Mr Bayne

ANONYMITY ORDER

The Upper Tribunal makes the following order:

"1. Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I prohibit the disclosure or publication of—

(a) the applicant's name;
(b) any matter likely to lead members of the public to identify that name.

2. Any breach of the order at paragraph 1 above is liable to be treated as a contempt of court and punished accordingly (see section 25 of the Tribunals, Courts and Enforcement Act 2007)."

DECISION

The appeal is dismissed.

REASONS FOR DECISION

A. INTRODUCTION

1. The appellant appeals to the Upper Tribunal against the DBS's decision communicated in a letter dated 26 October 2023 to include him in the adults' barred list and the children's barred list. Permission to appeal was given on 26 April 2024 by Upper Tribunal Judge Brunner KC (the same judge who determines this full appeal, now sitting with specialist members).

2. An oral hearing was by consent held by video, on 3 October 2024. The appellant was represented by Mr Bajwa KC. The DBS was represented by Mr Bayne. We are grateful to both for their written and oral submissions.

3. The basis of the DBS's barring decision is the appellant's possession of indecent images of children in two separate periods, one of which led to a criminal conviction. The appeal focuses on whether that decision was proportionate, bearing in mind the interference with the appellant's life and the public interest in barring. We have found that it was proportionate, and that there are no other material errors of law or fact. As we heard submissions about the approach which we should take to proportionality, we have examined the case law and set out the approach which we have adopted.

B. FACTUAL AND PROCEDURAL BACKGROUND

The DBS decision

4. The appellant applied for enhanced disclosure when applying to work with children and adults as a pharmacist. The DBS sent the appellant a minded to bar letter dated 5 June 2023 in respect of both lists (p64), indicating that the DBS was relying on his conviction. The appellant made submissions (p69) in which he pointed out that he had received professional help and been allowed to practice as a pharmacist. The appellant sent various documents including his pre-sentence report, which included information which had not been known to DBS about MFAG's admission to previously viewing indecent images of children.

5. The DBS provided MFAG with documents from the police and set out additional provisional findings based on the further material (p321, p390). MFAG was given the opportunity to make further representations and did so. He was invited to provide information relating to insight, whether he had worked unsupervised and risk assessments from his employer or the General Pharmaceutical Council.

6. The DBS sent the appellant a "Final Decision" letter dated 26 October 2023 (p409). The letter told the appellant that the DBS had decided that it was appropriate and proportionate to include him in the adults' barred list and the children's barred list. The DBS set out the factual and legal bases as follows.

a. Inclusion on the children's list and adult's list on the basis of a relevant offence, after representations (Schedule 3, paragraphs 2 and 8). The DBS's decision letter said:

> 'You were convicted on 04/08/17 of two counts of 'Possessing an indecent photograph or pseudo-photograph of a child' contrary to the Criminal Justice Act 1988 section 160…The DBS is satisfied that the context of the offences is that between 17/02/16 and 20/07/16 you accessed and viewed material depicting the sexual abuse and exploitation of children from a peer to peer file sharing program. You entered specific terms including '10yo' and 'PTHC' in order to find material and, as a result, you were found to be in possession of 7 Category A videos and images and 1 Category C image or video. At least 4 of the files had not been deleted and were accessible.'

b. Inclusion on the children's list on the basis of relevant conduct in relation to children, being conduct involving sexual material relating to children (Schedule 3, paragraph 4(1)(c)). The DBS's decision letter set out its findings and identified the type of relevant conduct:

> 'We have also considered all the information we hold and are satisfied of the following:
>
> - For an unspecified period of time, as a teenager and ceasing when you were 17, on multiple occasions you used specific terms to search for and view material depicting the sexual abuse and / or exploitation of pre-teen children.
> - On an unspecified occasion/s between 16/02/16 and 21/07/16 you used specific search terms to search for and view material depicting the sexual abuse and / or exploitation of pre-teen children.
>
> Having considered these additional findings, DBS is also satisfied you engaged in relevant conduct in relation to children. This is because you have engaged in conduct involving sexual material relating to children.'

c. Inclusion on the adult's list on the basis of relevant conduct in relation to vulnerable adults, said to be conduct which, if repeated against a vulnerable adult, would endanger that adult (Schedule 3, paragraph 10(1)(b). The relevant findings were the same as in b. The type of relevant conduct was identified by the DBS as follows:

> 'It is also considered that you have engaged in relevant conduct in relation to vulnerable adults, specifically conduct which, if repeated against or in relation to a vulnerable adult, would endanger that vulnerable adult or would be likely to endanger him or her.'

7. At the time that DBS made its decision, it had material from both police and the appellant, which included the following information:

a. In July 2016 when the appellant was 22 police found indecent images of children on his laptop.
b. The probation report (p309) and police report (p327) recorded that there were seven Category A images (the most serious category of indecent images of children, involving penetration) of which 5 were moving images which depicted abuse of females aged approximately 11-16. There was a category C (the least serious) image of a female child under 5. There was evidence of the use of known search terms for indecent images of children including PTHC (pre-teen hard core) and '10yo' on a peer-to-peer file sharing site.
c. The appellant was arrested and interviewed (p332-42). Details of particular videos which were previewed or downloaded were described in interview and include highly disturbing titles such as 'pTHC 10 YO Hard Holiday Sado rape

the best ever'. In that interview police summarised details from a report from an expert who had analysed the laptop. Some of the videos had been moved to the computer Recycle bin, but most had not been deleted. A video which had been downloaded was watched a fortnight after download. Accessible indecent images of children had been downloaded between 17 June 2016 and 17 July 2016. File access records showed access to files with indecent images of children file names for a longer period, between 17 February 2016 and 20 July 2016 (p354). MFAG said that he had not searched for those videos, had accidentally downloaded them, and was not familiar with the search terms used. He answered no comment in a further interview in November 2016.

d. MFAG was charged, initially with making images (we note that making images can relate to downloading images onto a new device: the allegation was not at any stage that MFAG had filmed any material). On 11 July 2017 he pleaded guilty to two less serious offences, being two counts of possession of indecent images of children.
e. MFAG was interviewed for a pre-sentence report. He changed his account and accepted that he deliberately saved and viewed images (p309). He admitted to searching for similar images when he was in his mid-teens, but then there was a gap in offending. He was deemed to be at a medium risk of reconviction for a sexual crime (p373) but he was assessed as presenting a low risk of general and violent offending.
f. MFAG was sentenced on 3 August 2017 to a 2 year Community Order, with requirements to attend a Sex Offenders Programme for 90 days and up to 15 days Rehabilitation Activity Requirement (p297). He was informed that the DBS may bar him from working with children or vulnerable adults (p295). A 5 year Sexual Harm Prevention Order was also imposed with controls on internet use (p283), and he was automatically required to notify his address and other details to the police for five years (p285).
g. Probation notes (p158 et seq) show that he completed a programme called Horizon 2 which appears to focus on healthy sexual relationships. He was recorded to have a positive attitude, and said he no longer uses peer to peer websites (p186).
h. MFAG had been studying a Master's degree in Pharmacy before his arrest. He was readmitted to the course on condition that he completed a course with the Lucy Faithful foundation (p365) and was supervised at any clinical placement. Information from the foundation (p78 et seq) shows that MFAG completed the 10 session course addressing education and advice, running for a two month period in 2018. MFAG's period on the Sex Offenders Register came to an end in August 2022.
i. On 1 April 2023, his professional regulator, the General Pharmaceutical Council ('GPhC') granted his registration. He worked as a pharmacist, which is a regulated activity in that it involves the giving of healthcare advice to both children and vulnerable adults. Inclusion on either of the barring lists effectively prevents him from working as a pharmacist.
j. MFAG had written various eloquent representations, explaining that he had improved his behaviour and was remorseful, that he had learned from the courses he had been on, and had strategies such as exercise and improved social connections. He had learned empathy for the victims of crimes (p403). He said that he had always been supervised or had a chaperone during consultations (p375).
k. MFAG had provided character references (p73-77) which confirm that the appellant has worked with a range of members of the public with no hint of

inappropriate behaviour, that he has become "a mature, reflective, professional and utterly reliable young man", that he has a caring nature and apparent insight into his behaviour.

Further material

8. Some further documents have been provided since the DBS made its decision:
   a. A police report summarising analysis of MFAG's laptop (p465) was provided on 4 April 2024 to the Upper Tribunal. It was not available to DBS at the time of the decision which it took. There is very little further material in this report, because the police had quoted from it extensively in the appellant's police interview, which the DBS did have.
   b. Information about a different case considered by GPhC, in which a person with more serious convictions was not removed from the professional register. We do not find that matter of any assistance to us; it related to assessment of a different person's risk in a different context.

Permission to appeal decision

9. The appellant sought permission to appeal against that decision on 8 January 2024 (p15). Permission to appeal was given on 26 April 2024 limited to the following grounds:

- **Ground 1** which relates to whether DBS made a mistake of fact in finding that the span of offending was five months when some documents show it to be one month.
- **Grounds 2, 6, 7, 9, 10,11,12** which in summary assert that DBS was not entitled to draw the broad inferences which it did from the relatively narrow offending.
- **Ground 13** which asserts that the DBS has made a mistake in its finding of fact and/or a mistake of law by giving inadequate consideration of the proportionality of the decision.

C: LAW

Inclusion in the lists

10. The relevant legislation is in the Safeguarding Vulnerable Groups Act 2006 ('the Act'). Inclusion in the children's barred list is governed by section 2 and Part 1 of Schedule 3 to the Act. Inclusion in the adults' barred list is governed by section 2 and Part 2 of Schedule 3. There are three separate ways in which a person may be included in the barred lists under Schedule 3 to the Act. DBS took two parallel routes to barring in this case.

11. The first route which was followed here is referred to as 'autobar with representations', and relates to the conviction. A person can be included in the lists if they meet prescribed criteria. The person who is proposed to be barred has a right to make representations to the DBS under paragraphs 2 and 8 of Schedule 3 to the Act. The prescribed criteria include a conviction for specified criminal offences, among them possessing an indecent image of a child. It is agreed that this appellant was convicted of two such offences.

12. Where the DBS is satisfied that the prescribed criteria apply, the effect of paragraphs 2(6), (2)(8), 8(6) or 8(8) of Schedule 3 to the Act is that the DBS must include the person in the children's or adults' barred list if it:

a. 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
b. where, as here, the person has made representations regarding their inclusion, the DBS is satisfied that it is appropriate to include the person in the children's or adults' barred list.

13. The DBS barred the appellant under this route, having received his representations and determined that he had a conviction for a specified offence, was engaged in regulated activity as a pharmacist, and that it was appropriate to include him in both lists. Under this route the relevant conviction is a finding of fact, and there is no requirement to establish relevant conduct or risk of harm.

14. The third route, referred to as discretionary barring, was also followed here. 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
b. 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
c. it is satisfied that it is appropriate to include the person in the list.

15. 'Relevant conduct' is defined under paragraphs 4 and 10 of Schedule 3 to the Act which are set out below, paragraph 4 relating to the children's list and paragraph 10 relating to the adults' list:

> 4(1)For the purposes of paragraph 3 relevant conduct is—
>
> (a)conduct which endangers a child or is likely to endanger a child;
>
> (b)conduct which, if repeated against or in relation to a child, would endanger that child 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 child, if it appears to DBS that the conduct is inappropriate.
>
> 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.

16. Further definitions follow in those paragraphs. It should be noted that relevant conduct includes possession of sexual material relating to children, in relation to both the children's and adults' lists.

Upper Tribunal Powers on Appeal

17. Section 4(2) of the Safeguarding Vulnerable Groups Act 2006 set out the limited bases for an appeal to the Upper Tribunal against a barring decision:

> (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.

18. Thus a person included in either barred list may appeal to the Upper Tribunal on the grounds that the DBS has made a mistake of law or a mistake of fact on which the decision was based. Any mistake of fact or law, must be material to the ultimate decision i.e. it may have changed the outcome of the decision.

19. The appropriateness of a person's inclusion on either barred list is not within the Upper Tribunal's jurisdiction on an appeal. The Upper Tribunal does, however, have jurisdiction to determine whether DBS's decision to bar is irrational or disproportionate, because that would be an error of law.

Proportionality: Case Law

20. This case concerns proportionality, and we have heard submissions about what approach we should take to determining that issue. We set out the central case law, and then the approach which we take. Barring is plainly a matter which can affect people's private lives, and so it may engage Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Article 8 provides a qualified right. A public authority must not interfere with a citizen's private life unless that interference is proportionate, which means it is necessary to achieve one or more of identified objectives, which include protecting public safety, and protecting the rights and freedoms of others. The DBS must therefore act in a proportionate way when barring.

21. There are a number of different limbs to proportionality, identified by the courts in cases such as *R (Quila) v Secretary of State for the Home Department [2011] 3 WLR* and *Huang v Secretary of State for the Home Department [2007] 2 AC 167.* Proportionality in the context of this case, and many DBS appeals, focuses on one of those limbs: consideration of whether the DBS's decision struck a fair balance between the rights of the individual and the interests of the community.

22. The approach which the Upper Tribunal should take to assessing proportionality was considered by the Court of Appeal in *Independent Safeguarding Authority v SB*

[2012] EWCA Civ 977 (‘*ISA v SB*’), the Independent Safeguarding Authority being the forerunner of the DBS. The Court of Appeal described the ‘requisite approach’ by citing with approval extracts from previous authorities, saying as follows:

> 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?"*
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> 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.’

23. The Court in *ISA v SB* disapproved of the approach taken by the Upper Tribunal in the case before it, saying '*it seems to me that the UT did not accord any particular weight to the decision of the ISA but proceeded to a de novo consideration of its own'* and '*I find it difficult to escape the conclusion that the UT was simply carrying out its own assessment of the material before it'*. The Court concluded *'I consider that the complaint that the UT did not accord* "appropriate weight" *to the decision of the ISA is justified*' (Maurice Kay LJ at [18-23]).

24. The central principles to be derived from *ISA v SB* appear to us to be that on a proportionality challenge the Upper Tribunal should objectively judge whether DBS's decision to bar was proportionate, undertaking the ordinary judicial task of weighing up the competing considerations on each side, but giving appropriate weight to DBS's views. The court did not say that the Upper Tribunal should avoid its own consideration or assessment of the material, and plainly without any such consideration it would be impossible for the Upper Tribunal to make an objective judgment. However, the Upper Tribunal's consideration should not be 'de novo', as such consideration should give appropriate weight to ISA's decision, rather than starting from scratch.

25. *ISA v SB* was followed in *DBS v Harvey [2013] EWCA Civ 180* . That case did not create any new legal principles in our view; the Court of Appeal found that the Upper Tribunal when considering proportionality had not given appropriate weight to the DBS's conclusions (at [45]), and had made errors when drawing conclusions from the evidence including misconceived reliance on certain parts of the evidence (at [40]).

26. Some of the authorities cited with approval in *ISA v SB* related to courts which were operating within different jurisdictions to the jurisdiction of the Upper Tribunal in a DBS appeal. Nevertheless, the Court of Appeal in *ISA v SB* plainly found that the principles espoused in those cases were of application to the Upper Tribunal safeguarding jurisdiction. Those principles of general application have recently been restated by the Court of Appeal in *Dalston Projects and others v Secretary of State for Transport [2024] EWCA Civ 172* ('*Dalston Projects'*). The Court of Appeal described the role of the first-instance court when assessing proportionality in this way (the Upper Tribunal is a first-instance tribunal in the safeguarding context):

> *11. It is well-established that the question whether an act is incompatible with a Convention right is a question of substance for the court itself to decide; the court's function is not the conventional one in public law of reviewing the process by which a public authority reached its decision: see e.g. Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19; [2007] 1 WLR 1420, at paras 13-15 (Lord Hoffmann). As Lord Hoffmann put it at the end of para 15: "… the question is … whether there has actually been a violation of the applicant's Convention rights and not whether the decision-maker properly considered the question of whether his rights would be violated or not."*
> *…..*
>
> *13… So long as it is understood that the court's function is still to decide for itself whether there has been compliance with the principle of proportionality, and not simply to apply a standard of rationality, the first instance court will not fall into error.*

The Court of Appeal in *Dalston Projects* thus reaffirmed that the first-instance court determines proportionality for itself, giving appropriate respect and weight to the initial decision-maker. The first-instance court should not confine itself to considering whether the initial decision-maker gave proper consideration to the question of proportionality, but must determine whether the decision was proportionate or not. The

central principles in *ISA v SB* remain untouched by the *Dalston Projects* decision, in our view, and the authorities come full circle; *Dalston Projects* reaffirms the approach taken in *Belfast CC v Miss Behavin' ('Miss Behavin")*, which was quoted from with approval in *ISA v SB*.

27. The Court of Appeal in *ISA v SB* also confirmed that consideration of public confidence in the statutory scheme and the barring list is implicit in the consideration of fair balance between the rights of the individual and the interests of the community (Maurice Kay LJ at [25]).

Proportionality: DBS submissions and our approach

28. The DBS submitted that the following approach should be taken when considering a proportionality challenge:

a. to ask ourselves whether the DBS's decision was unlawfully irrational or unreasonable; if so then we should substitute our own decision; and if not,
b. to ask ourselves whether the DBS had properly addressed its mind to the question of proportionality i.e. followed lawful process; if not then we should find a mistake of law and remit to DBS; and if so,
c. to ask ourselves whether there was anything unusual such that even though the DBS had rationally and properly considered proportionality the decision was nevertheless disproportionate. If so then we should find a mistake of law, and if not then the decision of DBS should be confirmed.

29. The appellant invited us to take an objective approach to determining proportionality.

30. We do not take the approach suggested by the DBS. Based on the approach in *ISA v SB* our approach is to objectively judge whether the DBS's decision to bar was proportionate, undertaking the ordinary judicial task of weighing up the competing considerations on each side, but giving appropriate weight to the DBS's views. We consider that the appropriate weight in this case is significant weight, because the central feature in this appeal is about assessment of level of risk and prediction of future risk, which particularly engages the specialist expertise of the DBS. We are not starting afresh, or making a decision de novo; we do not ignore the DBS's decision and start again as if DBS had never determined the matter.

31. The approach which the DBS invited us to take is a more complex, three-stepped approach, and our reasons for not adopting that approach follow in the same three-stepped order.

a. Importing a test of irrationality into the test of proportionality, as the DBS invites us to do as a first step, risks complicating rather than simplifying the task of the Upper Tribunal when considering proportionality. Irrationality or unreasonableness is a different concept to proportionality, as emphasised in *Dalston Projects*. A decision can theoretically be irrational but proportionate, or, conversely, rational but disproportionate. If the DBS considers proportionality, and reaches a decision in a way which is not unlawfully irrational then it is highly likely that the Upper Tribunal, giving significant weight to that conclusion as it must, will agree with the DBS - but that is not necessarily so (as expounded in *Miss Behavin'*.) Plainly in the course of determining

proportionality and giving weight to the DBS's decision, the Upper Tribunal will closely examine the DBS's conclusions, rationale and reasoning. However, we do not agree with DBS's submission that a formal determination about unlawful irrationality should be a step in our process for determining proportionality.

b. Similarly, in our view, importing a question of whether the DBS has properly addressed its mind to proportionality, as the DBS invites us to do as a second step, also risks complicating the Upper Tribunal's task. There is a distinction to be drawn between challenges about Convention rights ('the decision-maker made an error of law because it made a decision which did not balance my rights against community interests') and procedural challenges ('the decision-maker made an error of law because it did not take into account relevant material, or took into account irrelevant material' etc), a distinction emphasised in *Miss Behavin'* and repeated in *Dalston Projects*. That is not to say that consideration of the DBS's procedures are irrelevant to challenges about proportionality. In *Miss Behavin'*, in the context of a challenge about Convention rights, it was observed that the views of the local authority would be bound to carry less weight where they had made no attempt to address the question of proportionality (at [37]). It may be useful, therefore, for the Upper Tribunal, when considering proportionality to have regard to DBS's decision-making process as that may affect the degree of weight which the Upper Tribunal places on the DBS's decision. We do not agree with DBS's submission that a formal determination about whether DBS's procedures was so flawed as to be unlawful should be a requisite step in the decision-making process.

c. Finally, importing consideration of 'unusualness' into proportionality, as the DBS invites us to do as a third step, also risks complicating the Upper Tribunal's task. DBS relied on a passage in *Miss Behavin'*, quoted in *ISA v SB* : *'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'*. That observation was plainly not intended to create any sort of route map for reaching a decision on proportionality. Indeed, in *ISA v SB* passages from *Miss Behavin'* including this one were said to be *'illustrative of the need to give appropriate weight to the decision of a body charge by statute with a task of expert evaluation*'. It is a useful illustration to bear in mind, but we do not elevate it into a formal step in the decision-making process.

32. In short, although the DBS's proposed framework helpfully identifies matters which are likely to be relevant to the Upper Tribunal's approach it is overly complicated and rigid and we find it more helpful to focus on the principles set out with clarity in *ISA v SB*.

33. DBS also made this further submission about the law (at p500):

> 'Where, as here, the DBS has carefully and thoughtfully sought to strike a fair balance between the rights of the individual and the rights of the community; its decision should not be interfered with by the UT, even if the UT would have come to a different view (DBS v Harvey [2013] EWCA Civ 180, per Treacy LJ @ paras 37 to 39).'

34. We do not accept that interpretation. That is not what *DBS v Harvey* says, either at the paragraphs referred to or at all. The paragraphs quoted do not refer to interference. The ratio of the case is discussed at paragraph 25 above.

D. THE HEARING

35. The appellant has made various submissions as set out in the index to the consolidated bundle. The most comprehensive are the 'perfected grounds of appeal' of 4 March 2024 (p462) and a skeleton argument dated 26 September 2024 drafted by Mr Bajwa KC. The DBS supplied a written submission dated 28 June 2024, drafted by counsel Mr Bayne, in response to the appeal (p489).

36. The case was heard on 3 October 2024 by remote video link by agreement. No evidence was called by either party. Both counsel made helpful oral submissions amplifying their written submissions. Mr Bajwa KC, having considered the DBS's submissions, made a number of eminently sensible concessions about some of the grounds of appeal, which are referred to in our analysis below.

37. Shortly before the hearing Mr Bayne provided a further bundle of authorities relating to proportionality, bringing to our attention that the Upper Tribunal has recently described the proportionality test in a number of different ways. We are aware that a three-judge panel is to be convened to determine a case which involves proportionality (three-judge panels are convened where a case raises a question of law or special difficulty or an important point of principle or practice). Neither party invited me to adjourn the hearing to await the outcome of that case. Both were content that we should proceed to hear the case, and that if in our deliberations we were of the view that the outcome of the three-judge panel case may materially affect our ruling we would contemplate adjourning to await that case. In the event, and considering the overriding objective, we do not await that ruling. The legal approach appears clear from authorities as set out above, but our decision would not change if we had approached the decision de novo, or in the way urged upon us by DBS, or with an emphasis on irrationality. Further delay would not be in anybody's interests.

E. ANALYSIS AND CONCLUSIONS

Ground 13: Proportionality

38. Mr Bajwa KC understandably focussed his submissions on the proportionality argument. Ground 13 of the applicant's Grounds of Appeal asserted that *'the DBS has made a mistake in its finding of fact and/or a mistake of law by giving an inadequate consideration of the proportionality of the decision*'. Although the ground was framed in terms of a challenge to process, in reality it is apparent from submissions that the appellant's central challenge was that the DBS had overstated risk, and the decision was not proportionate. Complaints such as failure to have regard to relevant considerations or not giving appropriate weight to points was in essence an argument that the DBS's decision to bar was disproportionate and thus in error of law. The DBS have not argued that the appellant's arguments should be restricted to procedural issues, and we do not do so . Mr Bajwa KC invited us to approach grounds 6,7,9,10,11 and 12 as submissions which should be factored into the consideration of the proportionality ground. Having considered the DBS's submissions, Mr Bajwa no longer asserted that those grounds could amount to stand-alone material errors of law and we concur.

39. The appellant's submissions point to various facts relating to his behaviour and rehabilitation, and invite the conclusion (at [10]) that '*objectively the risk that the appellant currently presents to a child and/or a vulnerable adult must be considered to be low, arguably very low*'. The appellant drew our attention (at [11]) to matters including those italicised below. We do not find any point to be compelling individually or collectively for the reasons given after each point.

a. *The appellant said that his conviction would have to be disclosed during the application process for any role within regulated activity, which would offer a significant degree of safeguarding for a child and/or vulnerable adult.* We agree with the DBS's observation that there is no control over what an employer would do in response to that information.
b. *The automatic notification requirement under the Sex Offenders' Register has expired showing that Parliament did not consider continued notification to be proportionate.* There is an automatic period set by Parliament, depending on the nature and length of sentence imposed. That tells us nothing about the way in which Parliament intended the DBS to deal with this kind of situation.
c. *The term of the Sexual Harm Prevention Order expired in 2022.* That is correct, but has little bearing on this decision. The sentencing judge's assessment about the length of time for which it would be proportionate for the police to have access to the appellant's internet search history does not provide evidence which can assist in this barring proportionality exercise. They are entirely separate constraints on the appellant's behaviour which may or may not overlap, and indeed at the time of sentence the appellant was given warning that he may be barred in the future.
d. *The GPhC granted him registration and subsequently did not refer him to an investigation committee even after he was barred.* It is well understood that it must be frustrating and distressing for the appellant to be deemed fit to practice by his regulatory body, but barred by the DBS. However, we accept the DBS's submissions on this point. The processes of GPhC and the DBS run in parallel and will not necessarily reach the same conclusions, even on the same facts. We note that the latter GPhC decision relates to whether MFAG was in breach of professional standards, and it explicitly acknowledges that the barring process provides a separate restriction, saying '*MFAG should be notified that although it has been decided his case does not meet the threshold for referral to the Investigation Committee, he is still obliged to work only within the limitations of what is permitted by the DBS barring decision*' (p57c). There is limited material within the GPhC documentation which relates to risk; there is, for example, no risk assessment or psychological assessment which might otherwise have provided independent evidence of reduced risk. The DBS considers a wider framework than the regulator, as the DBS's conclusions apply to all regulated activity rather than pharmaceutical work. For all of those reasons we do not find the GPhC decisions to be of any significant assistance.
e. *The DBS's findings do not rise above a level of risk 'that cannot be ruled out/is theoretically/speculatively possible'*. These points were previously separated as grounds 6,7,9,10,11 and 12. Each complains about specific wording by the DBS such as *'the DBS is unable to conclude that you would have ceased your offending behaviour if it had not been identified at the time it was' and 'you could derive sexual gratification from such a disclosure'*. In the context of the DBSs full Structured Judgment Process documentation, these are not points which we can accept. The DBS is not limited to considering risk which it thinks

is likely to manifest, and is entitled to consider risk in the round when making its determination.

40. The appellant set out careful submissions pointing to the ways in which his rights were being infringed, and invited us to conclude that the barring was disproportionate.

41. The DBS submitted that it had carried out an appropriateness and proportionality assessment in which it reminded itself of the various counter-indicators highlighted by MFAG alongside its risk concerns; and sought to balance the risks to the community against the personal impact of a barring decision on MFAG, as it was required to do.

42. We have been assisted by examining how the DBS reached its conclusions. The DBS's conclusions are to be found in its final decision letter (p409) and Structured Judgment Process document (p427) . DBS generally uses a standardised framework called the 'Structured Judgement for Evaluation of Risk of Harm' to assess risk, and that framework was used in this case. The structure requires a caseworker to consider pre-dispositional factors, cognitive factors, emotional factors and behavioural factors.

43. The DBS properly noted many points in the appellant's favour, as do we, including the following:

a. The appellant's conviction was in 2016 with no indication that the behaviour had been repeated since.
b. The appellant had previously ceased his behaviour when a teenager on his own.
c. The appellant fully complied with probation requirements.
d. The appellant was open about his conviction, expressed remorse and described measures taken to avoid repetition.
e. There is no evidence of contact offending i.e. no evidence of the appellant sexually assaulting children.
f. The appellant's university's fitness to practice committee had cleared him to complete the university course.
g. The appellant had been successfully registered with the GPhC; his suitability to be a pharmacist had been checked and approved by a fitness to practice panel both.
h. The appellant's references showed good conduct.

44. In relation to the level of risk, the DBS's observations included the following:

a. The conviction does not reflect a single incident; material which had been accessed between 17/02/2016 and 20/07/2016. The appellant had entered specific search terms to find material showing sexual abuse of children, some of which was downloaded, saved and viewed at a later date. Material was still accessible when he was arrested and had been viewed a week before, so the behaviour may not have ceased.
b. The material depicted penetrative abuse of children, which was likely to have caused significant physical and psychological harm to the children involved. Accessing such material contributes to the ongoing abuse of children.
c. The appellant had previously acted in a similar manner when a teenager for an unspecified time ending when he was 17, and stopped that behaviour of his own volition. However, he re-engaged after a significant period of time, so the passage of time does not indicate he will not re-offend.

d. Although his representations set out remorse and empathy, when offending he prioritised his own needs without empathy for the victims and demonstrated a tolerance of the suffering of others.
e. The appellant did not take any action to report the abuse which he witnessed to relevant authorities.
f. The appellant had a sexual interest in the material which he was watching and in the children themselves.
g. Although the appellant was 22, he was an adult and undertaking training/qualifications to be a pharmacist (and so, it is implied, could be expected to moderate his behaviour).
h. The appellant had not given an explanation for the offending behaviour when a teenager. He had explained that the latest offending behaviour happened when he was stressed and had too much spare time. The DBS had not seen evidence that his resilience to stress had been testes since, and so the DBS concluded that he may in future resort to accessing further indecent material when stressed.
i. The appellant had not been open and honest when interviewed by police, and may be similarly evasive in future.
j. The appellant had been supervised at work, and references relate to his behaviour when supervised.

45. We agree with those central observations, and agree that they demonstrate the presence of risk factors, as identified by the DBS.

46. In this case DBS identified definite concerns in three areas: 'Sexual preference for children' risk factor ; 'Callousness/lack of empathy' risk factor and Poor problem solving/coping skills' risk factor. A 'definite concern' is described in DBS's decision-making process guide in this way: 'The case material indicates that relevant risk factor(s) are present and that there is a causal link to the relevant conduct (i.e. without the presence of the risk factor(s), the relevant conduct would probably not have occurred).'

47. DBS also identified some concerns under the 'Excessive/obsessive interest in sex' risk factor and 'Exploitative attitudes' risk factor. 'Some concerns' means that 'The case material indicates some indications that relevant risk factor(s) are present. However, there is no clear causal link to the relevant conduct or there is a significant amount of material that would reduce these concerns.'

48. In relation to the risk to children, the DBS concluded that the appellant '*may not report appropriately any child who discloses that they have been subjected to sexual and/or physical harm'*, and may derive sexual gratification from disclosure from a child about sexual abuse or exploitation, and that his behaviour may escalate into contact offences against children. In relation to the risk to vulnerable adults, the DBS noted that some vulnerable adults can present with the physical and mental attributes of children. The DBS concluded that as the appellant had demonstrated a tolerance for the suffering of children, who were vulnerable, he may have the same tolerance to the suffering of a vulnerable adult. If a vulnerable adult disclosed that they were the victim of sexual or physical abuse, the DBS found that he may '*fail to take the appropriate measures to safeguard by reporting their disclosure'* and may derive sexual gratification from disclosure.

49. Having considered the DBS's approach, which we found to be thorough, rational and fair, taking account of all central relevant points raised by the appellant and all central material, we remain of the view that the DBS's conclusions as to risk should be given significant weight. We agree with the DBS's conclusions and the rationale for them given by the DBS in its decision-making documents. We agree with the DBS's assessment of risk levels as set out above, having considered the points in the appellant's favour and observations from both parties about risk. We are satisfied that the appellant does pose a material risk to the safety of children and vulnerable adults for the reasons that the DBS sets out.

50. The DBS do not say that the appellant is sexually attracted to vulnerable adults and we do not make such a finding. There is no evidence in this case of behaviour which harms vulnerable adults, and the DBS do not assert that the appellant has carried out any offences involving vulnerable adults. The DBS say that aspects of the appellant's behaviour demonstrate character traits which mean that he also poses a risk to vulnerable adults. That concept, of behaviour against children evidencing a risk against vulnerable adults, or vice versa, has been referred to by the DBS and Upper Tribunal in other cases as 'transferability'. We are satisfied that the appellant's predispositions are as set out in paragraphs 46 and 47, and that they amount to significant risk factors. Some of those predispositions, such as sexual interest in children, relate only to risk to children. Others such as lack of empathy, exploitative attitudes and poor coping skills create risks to both children and vulnerable adults; they are transferable risk factors. The DBS's conclusion, with which we agree, is that those character traits mean that the appellant may be willing to transgress boundaries and fail to safeguard vulnerable adults.

51. We note that the type of material viewed was extreme, and that the appellant must have been desensitised to the harm being caused to children and capable of prioritising his own sexual gratification. We note in particular that although these offences were a considerable time ago, that the appellant has behaved in this way during two separate periods in his life, separated by a five year gap, and we agree with the DBS's view that there can be no confidence that the passage of time means he will not offend again. We note, as the DBS did, that the appellant has undertaken various programmes but there is limited evidence as to whether and how those programmes have lowered his risk level.

52. The DBS explicitly noted that inclusion in the lists would result in significant interference with the appellant's Article 8 rights, because it would prevent the appellant from engaging in his chosen profession, which he had spent years training for at personal financial cost, and have a significant effect on his ability to find employment and support himself financially. The DBS weighed that interference against the risks it had identified and concluded that inclusion in both lists was appropriate and proportionate. We agree.

53. We accept submissions that the effect of barring on the appellant's life is severe for all the reasons set out. However, given the type of risk posed and the nature of pharmacists' duties, we are satisfied, as the DBS was, that barring strikes a fair balance between the rights of the appellant and the interests of the community and was no more than was required to accomplish the aim of safeguarding children and vulnerable adults.

54. We make two further linked observations which have played some small part in our decision-making. First, we consider that public confidence would be undermined by permitting the appellant to work with children or vulnerable adults; the serious nature of the offending, public concern about this type of offending, and the position of trust that pharmacists hold means a decision not to include on both lists could undermine public confidence in the ability of the DBS to safeguard vulnerable groups. Second, we note that the particular type of offence which the appellant was convicted of is on the autobar with representations list for both children and vulnerable adults. Similarly, evidence of possession of indecent images of children (in the absence of a conviction) is listed as a type of 'relevant conduct' in relation to both children and vulnerable adults, which can lead to discretionary barring. It seems that possessing indecent images of children is thus recognised by Parliament as behaviour which involves such gross transgression of normal moral boundaries that it indicates a prima facie risk in relation to not just children, but vulnerable adults as well.

55. For completeness we find that it was not irrational for DBS to include the appellant on either list. Mr Bajwa KC did not press an argument of irrationality, and there is no basis on which it could be said that DBS's approach was irrational. We do not find that DBS failed to address its mind properly to the question of proportionality; the route followed by DBS was structured, evidence-based and logical. Finally, if we had applied the route to addressing proportionality as set out by the DBS we would have arrived at the same answer.

56. We turn to the remaining grounds of appeal.

Analysis: Ground 1: mistake of fact in the finding that the appellant possessed indecent images for a five month period rather than one month.

57. The relevant finding by DBS which was challenged was this: '*on an unspecified occasion/s between 16 February 2016 and 21 July 2016 you used specific search terms to search for and view material depicting the sexual abuse and/or exploitation of pre-teen children'.*

58. It was properly conceded by Mr Bajwa KC that this could not amount to a material error, even if it was an error. However, as the length of time of offending was referred to in the DBS's assessment, and may play some small part in the proportionality assessment, we consider it proper to determine the point.

59. The appellant's submissions are that DBS's finding was a mistake of fact because the appellant's conduct was limited to a one month period as set out in the indictment. The DBS's submissions are that this finding is a finding about conduct which is separate from the finding relating to the conviction, and there is no mistake of fact. The DBS said in written submissions that it is based on the forensic report '*which identifies the use of relevant search terms between 16.02.16 and 21.07.16. Those dates are consistent with, and corroborated by, MFAG's own account during his pre-sentence report interview that he had been viewing similar images for around 5 months; and they were not challenged by MFAG in his submissions to the DBS*.'

60. We do not accept that summary by the DBS's summary of the evidence. The forensic report does not show the use of search terms over a 5 month period as contended. It shows '*user access to files'* with file names relating to indecent images of children between 17 February 2016 and 20 July 2016. The term 'user access to

files' is not explained in the report. The pre sentence report does not include an admission by MFAG that he had been viewing images for 5 months. The report says '*the current online activity occurred over a period of 5 months'* (p310); it does not say that MFAG said that the current activity had occurred over a period of 5 months, and we consider that this part of the report is simply summarising the author's understanding about the online activity. The author of the report was under the impression that the offence dates were between 16 February 2016 and 21 July 2016 (p309), based on the dates in the referral form which is filled in by the court (p289).

61. However, we are satisfied that, at the very least, the forensic report supports an inference of some activity by the appellant relating to indecent images of children from the 17 February 2016 to 21 July 2016, i.e. a five month period, although it cannot be said what type of activity that was, or what seriousness of images it related to. The DBS was loose in its language, but there was no mistake of fact, and there was certainly no material error as has been conceded.

Analysis: Ground 2: inference of sexual images risk and/or sexual contact risk

62. Ground 2 relates to the following observations by DBS in its decision letter (p410,413) :

"It is also considered that you have engaged in relevant conduct in relation to vulnerable adults, specifically conduct which, if repeated against or in relation to a vulnerable adult, would endanger that vulnerable adult or would be likely to endanger him or her."

"However, the DBS believe that some vulnerable adults can present with the physical and mental attributes of children and lack the capacity to consent to engaging in sexual activity."

63. The appellant submits that the DBS "*made a mistake in the above finding of fact on the basis that an inference cannot reasonably be drawn of there being either a sexual images risk and/or sexual contact risk to a vulnerable adult*" (paragraphs 65 et seq, p454). The appellant submits that there is no evidence of MFAG having an interest in sexual images of a vulnerable adult and/or being likely to engage in offending behaviour involving actual sexual contact with a vulnerable adult.

64. The DBS submits "*Ground 2 is a challenge to the DBS's statement that MFAG's conduct, if repeated, may in the future endanger a vulnerable adult. Had the DBS found, for example, that MFAG had an interest in sexual images of vulnerable adults, then that finding would have been susceptible to being overturned on appeal as being unsupported by evidence; but that is not the finding. The DBS has merely accurately identified and recorded a risk*."

65. DBS pursued the discretionary barring route in addition to the 'autobar with representations' route which related to the convictions. The first paragraph complained of relates to the discretionary barring route. The DBS was not saying in the passage above that the appellant had engaged in inappropriate behaviour towards vulnerable adults which might be repeated, although it may read in that way at first sight. Rather, DBS was setting out the basis upon which it followed the 'discretionary barring' route under paragraph 10, Schedule 3 of the Act. The discretionary barring route requires the DBS to identify 'relevant conduct'. There is a list in paragraph 10 of types of

'relevant conduct'. The list of types of relevant conduct includes conduct involving sexual material relating to children which, perhaps surprisingly, DBS chose not to rely on. The type of relevant conduct which DBS *did* rely on was '*conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him'*. It is not clear to us what the DBS meant. Plainly conduct relating to indecent images of children is not conduct which can be 'repeated' against vulnerable adults. Did DBS mean that the appellant might view pornography which involved adult participants who were vulnerable and not consenting?

66. Regardless of the lack of clarity, there is no material error of law in the observations by DBS. Given that we have found that the decision to bar was proportionate, the DBS have an unassailable 'autobar with representations' route to the appellant being placed on both lists. It follows that any errors in relation to the discretionary barring route cannot be material.

67. It is for all of the above reasons that we dismiss the appeal and confirm the decision of the DBS.

Upper Tribunal Judge Brunner KC
Michele Tynan
Elizabeth Stuart-Cole
15 October 2024