IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2023-001397-V
[2024] UKUT 359 (AAC)

On appeal from a decision of the Disclosure and Barring Service

Between:

KH

Appellant

- v –

The Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Monk, Ms Josephine Heggie and Mr Roger Graham

Hearing date: 2 October 2024

Representation:
Appellant: In person (attended by video)
Respondent: Mr A Deakin of Counsel accompanied by Ms C Hazel (DBS)

DECISION

The decision of the Upper Tribunal is to allow the appeal.

The decision of the Respondent (the Disclosure and Barring Service or the DBS) taken on 12 June 2023 to include the Appellant's name in the Adults' Barred List and the Children's Barred List involves material mistakes of fact.

The Respondent is directed to remove the Appellant from both lists.

REASONS FOR DECISION

Introduction

1. This is the Appellant's appeal against the Disclosure and Barring Service's final decision, dated 12 June 2023, to include him on the Adults and Children's Barred List under the Safeguarding Vulnerable Groups Act 2006 ('the 2006 Act'). The appellant appeals with the permission given by me, Judge Monk on 15 February 2024. Permission was given on the basis that it was arguable that the Disclosure and Barring Service (DBS) had made a mistake of fact in concluding that the Appellant was intending to engage in regulated activity.
2. We held an in person oral hearing of the full appeal on 2 October 2024. This appeal was listed as an in person hearing to be heard in Exeter. One of the panel members, Mr Graham, was to join by video. Unfortunately, the appellant notified the Tribunal on Monday 30th September that he had become unwell and was not certain he would be fit to attend the hearing, he was also concerned not to pass on his illness to anyone else. The Tribunal offered him the opportunity to attend by video which he took up. In the light of that, the other panel member Ms Heggie, who was due to travel some distance to attend in person, attended by video as well. So only those representing the Respondent. Mr Andrew Deakin of counsel, on behalf of the Respondent (the Disclosure and Barring Service or 'the DBS'), and Ms Catherine Hazel, instructing Solicitor and Judge Monk were present at the hearing centre.
3. The Appellant represented himself and gave oral evidence.
4. The Respondent had prepared the bundle of papers for the hearing which ran to 174 pages. (References in square brackets are to page numbers in that bundle). The Respondent had also served a bundle of case authorities. All those documents had been provided to the Appellant in both electronic and hard copy.

Rule 14 order

5. The Order made by the UT Registrar of 22 November 2023 directing certain redactions is confirmed. Further Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the applicant and others named in that Order in these proceedings. We refer to him throughout as the appellant or by the initials 'KH'.

The Legislative Framework

6. This case concerns what is known as the auto bar procedure where a person is automatically included in the barred list subject, in this case, to the right to representations being made.

SAFEGUARDING VULNERABLE GROUPS ACT 2006

Schedule 3

Part 1
Children's barred list

Inclusion subject to consideration of representations

Paragraph 2

(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 children.

(4) DBS must give the person the opportunity to make representations as to why the person should not be included in the children's barred 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 children, and

(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.

7. Para 8 of Schedule 3 states the same as above but in reference to vulnerable adults and the Adults' Barred List.
8. Reg 4 of the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 states:

4.— Prescribed criteria — automatic inclusion in the Children's Barred List

with the right to make representations

(1) The criteria prescribed for the purposes of paragraph 2(1) of Schedule 3 to the Act are the criteria set out in paragraphs (2) to (6).

…

(5) The criterion set out in this paragraph is that the person has, on or after the relevant date, been convicted of, or cautioned in relation to, an offence specified in paragraph 2 of the Schedule.

Reg 6 provides the same in respect of automatic inclusion in the Adult's Barred List.

9. **Section 4 SVGA**

This section contains the Upper Tribunal's jurisdiction and powers.

4 Appeals

(1) An individual who is included in a barred list may appeal to the Upper Tribunal against–

…

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

(c) a decision under paragraph 17, 18 or 18 A 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 has made a mistake of law or fact, it must confirm the decision of DBS.

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

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

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

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

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

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

10. We also bear in mind the guidance in In PF v DBS [2020] UKUT 256 (AAC), a Presidential Panel of the Upper Tribunal (Administrative Appeals Chamber) which gave guidance on the Upper Tribunal's mistake of fact jurisdiction. That guidance was affirmed as good law in Kihembo v DBS (2023) EWCA Civ 1547. In PF, the Presidential Panel stated:

    "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."

Background

11. On 13 February 2018 the Appellant was convicted of sexual assault for an offence committed on 3 November 2016 with a female adult. That conviction was under Section 3 of the Sexual Offences Act 2003.He was given a 36-month community sentence which ran until 12th February 2021, was required to attend an accredited sexual offending programme, and was made subject to a Sex Offender Register Order until February 2023. [38-39] He was assessed as being a medium risk to the public, specifically adult females to whom he

might be attracted or have a grievance towards, including strangers and a low risk to children. He complied and engaged with all the requirements of the Order.

12. On 11 May 2022 [114-115] the Appellant was sent an Intention to Bar letter by the DBS saying that, because of his conviction, they were considering including him on the Children's Barred List (CBL). This was triggered by a request for an enhanced disclosure because he had applied for a role with Rentokil Initial UK Ltd which they considered to be regulated activity as the role involved a regular contract at schools and care homes.

13. The Appellant made representations that the role did not involve unsupervised contact with children and provided a character reference from his then partner; a letter from his Offender Manager, confirming he had completed the community order successfully and there had been no safeguarding concerns or suggestion of increase in risk of reoffending and a letter from his Probation Officer, again confirming compliance with the Community Order.

14. In his own letter of representations [126] he stated that he had never been accused or implicated in a crime against children and '*I have no desire now or in the future to work with children. I work for a pest control company. This only involves on a rare occasion entering a school, in which I am assisted with a caretaker to show me the issues at hand. I am more likely to pass children in the street or days out with my family than I am when I perform these jobs. I do not interact with any children in the workplace."*

15. On 30 June 2022 the Appellant was sent a 'No Action Letter' by the DBS [123] informing him that they had decided not to include his name on the CBL at that time because they did not believe that he met the criteria for regulated activity. The letter stated that the DBS might reconsider the decision if he applied to carry out regulated activity in the future. At that stage the appellant was not given their reasons for that decision. It is clear from subsequently disclosed information in these proceedings, namely a minute dated 30.6.22 [153], that the decision was primarily based on the frequency of contact because the DBS was satisfied that KH would only enter schools on rare occasions.

16. In February 2023 the Appellant stopped being subject to the Sex Offender Register Order and made enhanced disclosure applications for roles as an Ambulance Driver and to work with NHS 111. A letter was issued to the appellant by the DBS on 7 March 2023 [28] informing him that as he had applied for the enhanced disclosure with barred list check for the role of Ambulance Care Assistant that demonstrated an intention to engage in regulated activity with children and vulnerable adults and it was therefore appropriate for them to consider his inclusion in the ABL and CBL under Paragraphs 2 and 8 Schedule 3 SVGA. There was also the additional application for a role with NHS 111 as a Health advisor which the DBS notified him subsequently on 16 March 2023 would also be considered regulated activity [33].

17. In his representations to the first letter on 10 March 2023 the Appellant stated "*I will not be starting the ambulance driving job as I've decided to keep my career in the sector that I'm already in... please note that I have not done any work with the ambulance driving job; voluntarily or otherwise, I have simply changed my mind... to this effect I need your advice on having to bring a case*

to prevent a barred listing as I believe it's not necessary due to previously stated points." [32]. He said that he was continuing his career in pest control, albeit by setting up his own business, for which he believed he had already received approval given the DBS's 2022 decision.

18. In the letter dated 16 March 2023 [33] the DBS acknowledged that the appellant had said he had not done any work in the ambulance driving job but said that the fact that he had applied for an Enhanced Disclosure demonstrated his intention to engage in regulated activity with children and adults and they deemed that he 'might in the future' be engaged in such activity because of his previous application. They also referred to the application for the NHS 111 role which they said also demonstrated an intent to engage in regulated activity.

19. On 21 April 2023, KH sent the DBS representations stating: "*I have no desire now or in the future to work with children. I work for a pest control company. … I believe it would be an unfair representation of my character to say that I am a risk to children. I have done everything that is asked of me since my conviction and shown exemplary behaviour. Now all I wish is to be able to move on with my life without fear of future repercussions.*" [35-36] He also enclosed his representations and the supporting letters from his June 2022 representations.

20. In the more detailed representations he explained why he had chosen not to take up the ambulance driver role [40]:

> "Firstly*, I have chosen not to take up this role and have never done any work within this sector. After a management change at my previous position, I was looking for a possible change in career and applied to several jobs via indeed. I have chosen to continue to work within my current sector of pest control, which I have already been approved to do so by your organisation. I have set up my own company within the pest control sector and have no plans to deviate from this path. That said, I understand why I am required to represent myself. As I could potentially do this job if approved as explained in your letter to me.*
>
> *When applying for this role, I did so with the knowledge that if I was to accept this position then all persons under the age of 18 would be accompanied by an adult. As per the company's policy. Additionally, I would have also been working with a colleague and not be unsupervised. I would never have been alone or in direct care of children. Instead I would have transport them to the hospital along with their parental guardian. I have no desire to work with children as this does not interest me. Most jobs will have some limited contact with persons under the age of 18. I believe the ambulance driver job falls under this, as it's not a position in which working with children is the primary focus. This role also does not give any powers to vulnerable people's money or finance. In regards to vulnerable people the most involved I would be is manual handling into the ambulance, of which I would do with a colleague.*
>
> *My strongest and most impactful reason for not being on any barred list is I have never been accused or implicated with any crime with a child or vulnerable person……I have grown and matured in the long seven years and have moved on from my conviction. I don't believe I have demonstrated any behaviours to condemn me to the barred registers."*

21. On 2 June 2023 the appellant emailed the DBS in response to their having sent information from the police about the index offence saying that he did not wish to comment on that further and reiterating that "*As previously mentioned I do not intend to work within the ambulance service and at the time I was weighing up options as I was not happy with my previous employer (Rentokil). I have set up a pest control business of which I encourage you to look at (*website address provided*). I am currently doing well and hoping to hire staff before the end of this year."* [79].

22. On 12 June 2023 the DBS issued its final decision letter notifying the appellant that he was included in both the CBL and ABL [81-83]

    "In your representations you confirmed having applied for the ambulance service role and although you did not undertake the role, your application demonstrated intention to work with vulnerable groups. You also discussed that children transported in this role would be accompanied by a parent or guardian, however as the role was specifically for ambulance care assistant and this role with .. Medical Transport Services includes the provision of first-aid or healthcare to patients, as well as physical assistance and conveying them to places they would receive healthcare, this would constitute regulated activity. In addition, the provision of health care advice by or under the direction of a health professional, such as in the role of Child & Adult Workforce NHS 111 Health Advisor, would also constitute regulated activity for both vulnerable groups." [81-82]

Evidence

23. We heard evidence from the appellant who made a statement and then answered questions from the panel and Counsel for the DBS. We found him to be a credible witness who was measured and straightforward in both his approach to his evidence and in answering questions. There was no challenge by the DBS to the matters on which he gave evidence. The relevant additional factual matters we found based on his evidence are as follows:

24. The appellant had served in the Royal Marines as young man leaving in 2015 when he was still only 24 years old. He described the transition from military life as a difficult period as he found it hard to adjust to the lack of structure and described himself as young and stupid and prone to drinking too much. He did a number of different job roles; he worked at an outdoor activity centre Go Ape and supplemented his income by working as an Asda delivery driver and as a gym instructor. When he moved to the Southwest he worked for a time as bushcraft instructor for Haven Holiday Company and again supplemented that with work at Morrisons Supermarket shelf stacking on the nightshift. He enjoyed the physical fitness and outdoor elements of his roles at Go Ape and in teaching bushcraft which involved working with families and young people.

He said that while the bushcraft role involved some instructing and teaching of children and young adults the role at Go Ape was much more of a safety role. He had also done some work, during his last year of service in the Royal Marines, working in recruitment and taking groups of young adults out to give them a taste of life in the Army but that had been done because he was instructed to do so. He told us that he had no desire to work with children or young adults in any sort of teaching capacity.

25. After the allegation was made against him of sexual assault, he took 7 to 8 months off work and it was only once he had been convicted that he returned to employment. He went to work as a butcher and then, when the lockdown for the pandemic affected the butchery business, he got a job at Morrisons supermarket as a butcher. He enjoyed the work but could not see any career progression.

26. The appellant then moved to the role in pest control at Rentokil that led to his first DBS check. He used his time at Rentokil to obtain qualifications in all aspects of the work and to gain experience that would then enable him to set up his own business.

27. The appellant decided that he wanted to set up his own business and in order to fund the transition from paid employment to self-employment he started applying for other roles which would fit in with his fledgling business. He applied for around 40 jobs including the ambulance driver role with medical Transport and the NHS 111 call handler role. The other job roles covered a very broad spectrum from artificial grass installer to working for a betting company, from cleaning for the local council to driving roles. They were not roles which he particularly wanted to do but he saw them as a stop gap which would also give him some financial security. He was indiscriminate in his applications and did not give much thought to the jobs which he applied for as they were just a means to an end. The only common factor was that they all had flexible hours which suited him as he started his own business. He was adamant that had he known that either of those two roles would trigger barring decisions he would not have applied for them.

28. The appellant's understanding of the ambulance driver role, for which he had an interview, was that it was not a healthcare role but more of a glorified taxi driver job with some manual handling to assist vulnerable people in and out of transport which would be done with a colleague. He also believed that all under 17-year-old passengers would be accompanied by a guardian so he had not anticipated that it would require a DBS check, particularly given his experience in 2022.

29. As far as the NHS 111 call handler role was concerned, he applied for that because it had good flexibility on the hours. He did not believe that was a healthcare role either. He did not understand it to involve working with children and knew all calls would be recorded, he reiterated that he would not have applied for either role if he thought they involved working with children as that was not something that he was interested in doing. He did not consider that either role involved regulated activity and at the time, based on his experience with the 2022 intention to bar process, had thought that the DBS were only concerned about the possibility of his working with children. That was because his role at Rentokil had involved going into care homes as well as schools and that had not triggered any notification of an intention to put him on the ABL.

Submissions

30. We had helpful written and oral submissions from Mr Deakin which were focused on the central issue in the case which was whether the DBS made a mistake of fact in finding that the appellant might in future be engaged in regulated activity. He dealt firstly with the point about whether they had made an error of fact because they reached a different conclusion from the 2022 decision and argued that the 2002 decision had made clear that they could reopen their assessment in the future and in any event the facts in 2023 were different. The core of the argument was that no mistake of fact had been identified by the appellant – the DBS were aware at the date of decision that he was not going to pursue the ambulance driver job and did not make such a finding rather they concluded that he 'might in the future' engage in regulated activity.
31. The second limb of that argument was that decision was not a finding of fact but rather an assessment based on the facts with which we as the tribunal cannot interfere unless it could be considered to be irrational. Their conclusion was not plainly irrational and was one that they were entitled to reach. He argued that nothing in the evidence before the Tribunal at the hearing disturbed that rationality as the appellant had applied for 2 jobs which did meet the criteria for regulated activity.
32. Mr Deakin reminded us that the threshold to establish whether someone was intending to engage in regulated activity or 'might in the future' was a low one as set out in DF v DBS [2015] UKUT199(AAC) [77-107 of authorities bundle] ("DF")

"*72. However, the threshold for finding that a person might in future engage in regulated activity is low – merely that there is a risk that is more than fanciful and therefore cannot sensibly be ignored and it is material that having engaged in regulated activity in the past is sufficient as an alternative ground even without other evidence of there being a continuing risk. We also observe that, to the extent that the Appellant does not intend to engage in regulated activity, the practical disadvantage to her in being included in the children's barred list is limited. Given the Appellant's statements that she loves*

children, the fact that she no longer sees her own children and her comparatively recent desire to work with children, we are satisfied that the Respondent did not make a mistake of fact on either 14 November 2012 or 31 October 2013 in finding that the Appellant might in future be engaged in regulated activity relating to children."

33. The DBS' written submissions [138 -152] argued that "Parliament has set the threshold at precautionary level not dependent on subjective notifications of intention by the individual who has applied for enhanced disclosure. "*Migh*t" is broad enough to capture an intent to work in a particular role notwithstanding subsequent intent not to do so. As a standard of likelihood, it well below (sic) 'the balance of probabilities' or even 'reasonably likely', attention of which might require a subjective statement by KH that he intends to pursue the role applied for. As confirmed in DF v DBS at para 72, the threshold for finding that a person "*might*" in future engage in regulated activity is merely that "*there is a risk that is more than fanciful".*"

34. Counsel also relied on the more recent decision in A v DBS (UA-2022-000899-V) which is understood to be under appeal. There the Upper Tribunal engaged with whether the appellant in that case might in the future be engaged in regulated activity and considered how much evidence was required.

"28. *We shall start with the way in which the DBS dealt with the regulated activity test. As was pointed out in the grant of permission to appeal, no-one has suggested that A "is or has been" engaged in such regulated activity. But, nevertheless, the test is satisfied if he "might in future be". Mr Serr submits to us that that element of the test sets a low bar. We agree, on the wording, that it does. But care has to be taken to avoid setting the bar so low that virtually anyone might fall within it. For example, it would not be enough, in our view, for an individual to fall within the regulated activity test as it might be applied to football coaching, for that individual to have an interest in football and to have some spare time which could be filled by coaching. There needs to be some evidence-based reason to think, in our view, that the individual genuinely might take up relevant regulated activity. A conclusion that a person might in future undertake such activity might be underpinned by, for example, conduct such as a previous serious expression of interest in performing such activity or the seeking out of knowledge or qualifications which might be required for the proper performance of such activity although we do not at all regard that as amounting to an exhaustive list or the specifying of essential requirements. We simply say that those sorts of factors might, in some cases, be useful pointers."*

35. The Appellant gave a clear closing statement pointing out that his previous work history demonstrated no intention or wish to work with children, and he believed that the DBS did not have any issue with him working with vulnerable adults because of their previous actions in 2022. He did not consider either role as an ambulance driver or NHS 111 call handler to be regulated activity as he presumed, they would be looking at work where working with children or vulnerable adults was a core component. He pointed to his having worked with children before and that having raised no character issue at all. He accepted that he had been found guilty but considered the lack of transparency in the process which meant that he had been unable to check in advance if a role

might constitute regulated activity had led to him unfairly being placed on the ABL and CBL.

Conclusions

36. The central question for us was whether the DBS made a mistake of fact in concluding that the appellant might in future be engaged in regulated activity both with children and adults. The only facts they relied upon were his applications for the 2 roles and his stated position both in 2022 and in 2023 that he had no intention of working with children.

37. We accept that we have to tread cautiously and to give due weight to the DBS' expertise in matters of judgment in accordance with the guidance in PF v DBS [2020] UKUT 256 (AAC) but it seems clear from the evidence we have heard that the DBS failed to take account of the following facts:
    - The appellant's previous work history - his work with children was incidental only and there was no attempt post his conviction to work with children.
    - The appellant's qualifications and experience all showed commitment to the pest control business.
    - The appellant had never stated a desire to work with children or vulnerable adults.
    - The context of the two applications was that they were 2 of around 40 temporary jobs he applied for that were flexible enough to support his transition to self-employed.
    - The appellant's belief that he was not applying for regulated roles and once he realised, they were considered to be regulated, he made clear it was not his intention to do so in both 2022 and 2023.

38. We have carefully considered the case of DF where the DBS's decision stated "*We believe that you might in the future be engaged in regulated activity with children. This is due to your letter dated 17 October 2011, in which you state, 'I also wish to work with children'*. The Appellant in that case backtracked on a stated intention to work with children and the Upper Tribunal concluded that the DBS did not make a mistake of fact in finding that in future she might be engaged in regulated activity. We note that the Upper Tribunal accepted that finding was a finding of fact, and it was not suggested that it strayed into a judgment on the facts as the Respondent contends here. But also, the facts in DF can be differentiated – there she had stated only recently before a desire to work with children and then changed her position. Whereas in the case before us the appellant has always stated consistently that he had no desire to work with children. His explanation as to why he applied for the two roles which were and deemed to be regulated activity was not challenged.

39. We consider that the case of A v DBS can also be differentiated on the facts. There the facts found by tribunal were that A had stated a wish to work as a football coach and then backtracked but there was additional evidence of obtaining qualifications and evidence from friends/relatives about his wish to

work as a coach. That is very different from appellant here, who has never expressed a wish to or taken any steps to obtain experience or qualifications which would indicate a wish to work with children. Looking at the potential indicators identified in A v DBS; a previous serious expression of interest in performing or seeking out of knowledge or qualifications which might be required – there was a complete absence of that. But also a stated intent by KH on 3 occasions to the DBS of no desire to work with children and there were no previous job applications to work with children or vulnerable adults.

40. The Appellant had also never stated a desire to work with vulnerable adults or taken any steps to indicate a wish to work in that sector. Whilst he never made a categorical statement to the DBS about his intention regarding vulnerable adults that was because from his previous interaction with the DBS in 2022, he had not understood there to be any concern about his working with vulnerable adults; he thought his conviction had only triggered a concern about working with children. That is supported by the fact that the job with Rentokil was stated to be working on contracts with both schools and care home and the DBS only considered putting him on the CBL.

41. We therefore conclude that the DBS did make material errors of fact when it concluded that the 2 job applications evinced an intention to work with children and vulnerable adults as it failed to take account of the totality of the evidence before it and did not have the benefit of the appellant's evidence to the Tribunal.

Disposal

42. The relevant law is set out in section 4(5)-(7) of the 2006 Act as follows:

> (5) Unless the Upper Tribunal finds that has made a mistake of law or fact, it must confirm the decision of DBS.
>
> (6) If the Upper Tribunal finds that DBS has made such a mistake it must—
>
> (a)direct DBS to remove the person from the list, or
>
> (b) remit the matter to DBS for a new decision.
>
> (7) If the Upper Tribunal remits a matter to DBS under subsection (6)(b)—
>
> (a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and
>
> (b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.

43. Section 4(5) does not apply, as we have concluded that the DBS's decision involved relevant mistakes of fact. So, we are not obliged to confirm the DBS's decision. Accordingly, the choice for disposal is between either directing the DBS to remove the Appellant from the CBL and ABL or remitting the matter to DBS for a new decision (section 4(6)(a) or (b) respectively).

44. In applying section 4(6), we are bound by the Court of Appeal's decision in *DBS v AB* [2021] EWCA 1575.

[72]. *Section 4(6) of the Act… sets out the powers of the Upper Tribunal when it has found an error of law or fact. The Upper Tribunal then has a power to direct removal or remission of the matter back to the DBS. The question is when it would be appropriate to direct removal rather than remitting the matter back to the DBS. The fact that the Upper Tribunal is not intended to consider questions of appropriateness when deciding if there has been an error is, in my judgment, a strong pointer to the fact that the Upper Tribunal should not be deciding that question when deciding on the appropriate disposal under section 4(6) of the Act. Unless it is clear that the only decision that the DBS could lawfully come to is removal, the matter should be remitted to the DBS to consider. If, therefore, there is a question of whether it is appropriate to include a person's name on a barred list, the appropriate action under section 4(6) of the Act would be to remit the matter to the DBS so that it could decide the issue of appropriateness. That is consistent with the statutory scheme which provides for the DBS to determine the appropriateness of inclusion on a barred list but ensures that the Upper Tribunal can check that there has been no error of law or fact in the decision-making process.*

45. We have therefore considered whether, based on the facts we have found above the only conclusion which the DBS could come to would be to remove the Appellant from both lists. And we conclude that it is. There are no facts which point to the appellant potentially engaging in regulated activity in the future and had the DBS had the opportunity to consider all the evidence which has been before us then that is the only reasonable decision which could have been made, in our view.

46. The appeal is allowed, and we direct the removal of the appellant from both the Children's and the Adults' Barred Lists accordingly.

Judge Fiona Monk
Sitting as a Judge of the Upper Tribunal

Ms Josephine Heggie
Specialist Member of the Upper Tribunal

Mr Roger Graham
Specialist Member of the Upper Tribunal

authorised for issue on 14 November 2024