IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001293-V**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 391 (AAC)**

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

Between:

AVS

Appellant

- v –

DISCLOSURE AND BARRING SERVICE

Respondent

Before: **Upper Tribunal Judge Rupert Jones**
Tribunal Member Roger Graham
Tribunal Member Christopher Akinleye

Hearing date: 30 September 2024
Decision date: 2 December 2024

Representation:
Appellant: Laura Bayley, counsel instructed by Stephensons Solicitors LLP
Respondent: Ashley Serr, counsel instructed on behalf of the DBS

DECISION

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

The decision of the Disclosure and Barring Service taken on 20 June 2022 to include the Appellant's name on the Children's Barred List was based upon material mistakes in findings of fact in relation to findings of relevant conduct. The decision of the DBS is therefore remitted for a new decision under section 4(6)(b) of the Safeguarding Vulnerable Groups Act 2006 based upon the findings we have made for the purposes of section 4(7)(a). The Appellant is to remain on the list pending the fresh decision being made pursuant to section 4(7)(b) of the Act.

The Upper Tribunal makes anonymity orders directing that there is to be no publication of any matter or disclosure of any documents likely to lead members of the public directly or indirectly to identify the Appellant, witnesses, complainants or any person who has been involved in the circumstances giving

rise to this appeal. The anonymity order and directions are made rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Introduction

1. The Appellant (also referred to as 'AVS') appeals to the Upper Tribunal against the decision of the Respondent (the Disclosure and Barring Service or 'DBS') dated 20 June 2022 to include his name on the Children's Barred List ('CBL') pursuant to paragraph 3 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 ("the Act").

2. Permission to appeal to the Upper Tribunal ('UT' or 'the Tribunal') was granted by the Judge on 21 November 2023 in respect of the grounds raised by the Appellant in the notice of appeal. In summary, the grounds of appeal were that each of the findings that the Appellant committed relevant conduct were based on mistakes of fact and a mistake of law – the DBS made an irrational and / or disproportionate decision to bar the Appellant from working with children.

3. The Tribunal held an in-person oral hearing of the appeal at the Rolls Building on 30 September 2024. The Judge, witnesses, counsel and the Appellant attended in person. The Tribunal members attended remotely by video with the consent of the parties after the Judge had been satisfied that it was just and fair to proceed in this manner.

4. The Appellant was represented by Laura Bayley of counsel who made written and oral submissions prior to and during the hearing. She filed post hearing submissions on 7 October 2024. The Respondent (the DBS) was represented at the hearing by Ashley Serr of counsel who made written and oral submissions. We are grateful to them both for the quality of their submissions which have assisted us in considering and determining the issues in dispute.

Rule 14 Anonymity Orders and directions

5. On 18 October 2022 a Judge of the UT made an order under rule 14(1)(b) that prohibited the disclosure or publication of the identity of DM, the child in these proceedings. In a letter dated 6 April 2023 from its legal representatives, DLA Piper, the DBS made an application for various orders under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the UT Rules'). A Tribunal Registrar made an order on 13 April 2023 under rule 14(1)(b) extending the prohibition against the disclosure or publication of the identity of DM's mother, MM.

6. The Tribunal made the following orders at the beginning of the hearing for the following reasons.

7. At the hearing, on 30 September 2024, we made a further order that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify the Appellant or any person who had been involved in the circumstances giving rise to this appeal (witnesses or complainants) pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

8. We also made an order under rule 14(1)(a) that no documents or information should be disclosed in relation to these proceedings that would tend to identify the Appellant or any person who had been involved in the circumstances giving rise to this appeal. Any documents sought to be disclosed would need to be redacted for identifying information as specified in the letter dated 6 April 2023.

9. We made a further order under rule 14(1)(b) and (2) prohibiting the publication or disclosure of any information or document which may lead members of the public to identify any of the individuals (witnesses and complainants) relied on in the Respondent's bundle of evidence in addition to the Appellant himself. Identifying the Appellant may also lead to the identification of any complainants or witnesses. The individuals listed in the Respondent's bundle of evidence are to be referred to in the manner set out within the letter dated 6 April 2023.

10. We were satisfied that the Appellant, should not be identified, directly by name or indirectly, in this decision but referred to as 'AVS' or 'the Appellant'. Having regard to the interests of justice, what is just and fair and in accordance with the overriding objective, and the individuals' right to privacy under Article 8 of the Convention, we were satisfied that it was proportionate to make such an order and give such a direction.

11. Identifying the Appellant may lead to the identification of the child DM, his mother MM, complainants and witnesses who are to be anonymised / not identified by virtue of the other orders being made and who may otherwise be identified or linked to the Appellant by virtue of the evidence in the case. Identifying the Appellant may also lead to the identification of any complainants or witnesses who are either vulnerable themselves or have an expectation of privacy.

12. Revealing the identity of any of the witnesses or complainants to the public would be likely to cause the complainants and the witnesses (social workers, children services, foster parents and the vulnerable child himself) emotional or psychological harm as they themselves were vulnerable, or potential victims of harmful conduct, or they had an expectation of privacy. Alternatively such disclosure of the witnesses' and complainants' identities may lead to the indirect identification the child himself. The Appellant has not been prejudiced by the anonymisation of the witnesses – he has been aware of their identities throughout and has been able to identify them to answer their evidence and allegations.

13. Further, the Appellant is the subject of misconduct allegations which took place in respect of his fostering of DM. We are satisfied that identifying him at this stage may lead to serious and disproportionate harm to his reputation and employment prospects (an interference with the right to private life under article 8 of the ECHR) when the barring decision of the Respondent is not published generally to the world. There is an expectation of privacy and legal prohibition that the name and identity of the Appellant as appearing on a barred list (and whomever is included on the barred lists) is not publicised to the world or generally (but is known by the Appellant, the DBS, and any other party who may legitimately seek to conduct a DBS check upon him eg. a prospective or current employer).

14. We rely on the further reasons explained in *R (SXM) v Disclosure and Barring Service* [2020] EWHC 624 (Admin), [2020] 1 WLR 3259. In that case the victim wanted to know the outcome of the referral to DBS. The Administrative Court held: (a) disclosure was not consistent with the statutory structure; (b) refusing to disclose was neither unreasonable nor disproportionate; and (c) there was no positive obligation to disclose under the Article 8 Convention right. The public interest in the protection and safeguarding of vulnerable groups is sufficiently protected by the barring decision itself and identification of the Appellant's name only to prospective employers or those otherwise entitled to obtain information regarding him from the DBS.

15. We therefore make an order prohibiting the disclosure of any information that would be likely to identify the Appellant, child, complainants or witnesses for the reasons given in the letter on behalf of the DBS dated 6 April 2023.

The Background

16. In broad summary, the background is as follows (page references in square brackets, [], are references to the hearing bundle prepared by the DBS).

17. AVS, the Appellant, was appointed and approved as a foster carer on 31 July 2020. During the course of his fostering career, the Appellant cared for four other children on a respite basis, with D[] Children's Services. These placements overlapped with the full time placement of DM. DM was his first full time placement, and this commenced on 20 August 2020. DM has had a traumatic family background, he is a looked after child under section 20 of the Children Act 1989 [21]. DM was a vulnerable teenager who had a history of self-harm. DM's father sadly took his own life in February 2021 during the course of his placement with the Appellant.

18. At the relevant time, the Appellant was an approved single foster carer for DM, aged 15 years old, placed by D[] Children's Trust. This placement commenced on 20 August 2020 and ended on 25 May 2021. It is noted that the placement took place within the context of Covid related restrictions.

19. Concerns arose during the course of DM's placement on 23 May 2021, when DM was admitted to hospital due to his deteriorating mental health. A supervising social worker attended D[] Infirmary on 24 May 2021 to relieve the Appellant, who was late attending hospital the following morning. Other concerns were raised about the Appellant prioritising work over DM's care, use of alcohol and the Appellant's willingness to act on professional advice. DM was moved to a new placement on 25 May 2021 on the grounds that the Appellant was not meeting DM's needs at a time of crisis [flag 2].

20. DM's placement was formally terminated on 1/6/21 [24]. The Appellant wrote to D[] Children's Services Trust on 3 June 2021 in a letter before action responding to concerns [flag 4] and disputing the decision to remove DM from his care.

21. D[] Local Authority Designated Officer ("LADO") meetings were held on 3 June 2021 [flag 6], and 1 July 2021 [flag 5]. Concerns were raised that the Appellant had continued to have contact with DM when he had been asked by social services not to. A strategy meeting was held on 19 August 2021 [flag 7].

22. The August 2021 D[] Children's Services strategy meeting minutes indicate that it was the unanimous decision that the threshold was met to initiate section 47 enquiries in respect of AVS. The scale of risk was assessed at five [69].

23. The Appellant was referred to the DBS by D[] Children's Services Trust on 12 September 2021, as discussed and recommended at the July 2021 LADO meeting.

24. An annual foster care review meeting took place on 27 January 2022 [flag 8], the conclusion of which was that the Appellant was not recommended to be re-approved as a foster carer for D[] Children's Services Trust. A reviewing officer report from RS dated 7 February 2022 does not recommend re-approval for AVS as a foster carer. She noted that between "6 April 2021 and 29 September 2021 there were four missed supervision dates as AVS had declined or asked for it to be postponed" [74]. It stated "I am concerned AVS has not understood the seriousness of what happened, and the concerns professionals had about his parenting behaviours and I feel concerned that after a year he thinks it would be appropriate for DM to return to his care…AVS has taken no part or no responsibility in any of his actions choosing to blame rather than to accept responsibility" [82].

The Barring process

25. On 14 April 2022, the DBS sent a Minded to Bar ("MTB") letter to the Appellant [8-11]. The MTB included proposed findings as follows:

"Based on the enclosed information, it appears, on the balance of probabilities, that:
• On 25 May 2021 whilst you were the foster carer for DM, aged 15, you failed to relieve the support worker and sit with DM in the hospital when requested to do so in the morning following the support worker having stayed with DM overnight.
• On dates between 25 May 2021 and 12 August 2021 you continued to contact DM, aged 15, despite having being requested not to for the well-being of DM following DM being re-moved from your care, where you shared information about the fostering investigation.
• On dates between 20 August 2020 and 24 May 2021, you woke DM, aged 15, at 5.30 a.m. on mornings before school, bringing him to work with you and having him complete work/school work prior to school, resulting in DM being tired and lethargic.
• On a date prior to 25 May 2021 you failed to dispose of medication which DM, aged 15, no longer required, leaving remaining medication in DM's possession who subsequently took an overdose of this which resulted in hospitalisation and his heart stopping for four seconds.
• On a date in 2018, you showed a pornographic image of oral sex that you had as your computer screensaver, showed an air gun and pellets in your drawer, and repeatedly asked three school girls who were at your workplace on work experience personal questions including if they had a boyfriend."

26. A number of documents were relied upon which are now included within the hearing bundle provided by the DBS, including:

a. Referral, 12 September 2021;
b. D[] Children's Services Trust Placement Termination, 1 June 2021;
c. CV;
d. AVS's Personal Letter;
e. LADO meeting B minutes, 1 July 2021;
f. LADO meeting A minutes, 3 June 2021;
g. Strategy meeting minutes, 19 August 2021; and
h. Fostering review meeting minutes, 27 January 2022.

27. The Appellant's reply with representations is dated 10 June 2022. The representations are professionally drafted and contain a statement of truth approving them from the Appellant [100-107].

28. The representations sent to the Respondent on behalf of the Appellant on 10 June 2022, also enclosed:

a. The Appellant's personal statement / letter [109-116];
b. Supportive Treatment and Recovery Team ("STAR") NHS paperwork relating to DM's hospital admission, 24 May 2021;
c. STAR assessment follow up letter, dated 3 June 2021
d. Messages between DM and the Appellant (no messages from the Appellant were included from 27 May 2021 at that stage);
e. Letter from DM re: "wishes and opinions", undated;
f. Email chain with social worker PS, dated May 2021;
g. Complaint regarding information on 2018 concern with LADO, 3 November 2021;

h. Enhanced Criminal Record Certificate from foster carer application; and
i. Character references.

29. The Appellant disputed finding 1 of the MTB in part, accepted finding 2 in part, denied finding 3 in part and disputed findings 4 and 5. The Appellant accepted that at times he did not adequately prioritise DM's emotional wellbeing. Representations were made that including the Appellant on the barred lists would be inappropriate and disproportionate. The Appellant provided a detailed personal statement /letter addressing the findings.

The Respondent's barring decision dated 20 June 2022

30. The Final Decision Letter from the Respondent dated 20 June 2022 notified the Appellant that it was including him on the Children's Barred List.

Findings of Relevant Conduct

31. The Final Decision letter states that, upon consideration of all the available information, the DBS was satisfied that:

• On 25 May 2021 whilst you were the foster carer for [DM], aged 15, you failed to relieve the support worker and sit with DM in hospital when requested to do so in the morning following the support worker having stayed with DM overnight.

• On dates between 25 May 2021 and 12 August 2021 you continued to contact [DM], aged 15, despite having been requested not to for the wellbeing of DM following DM being removed from your care, where you shared information about the fostering investigation.

• On dates between 20 August 2020 and 24 May 2021, you woke [DM], aged 15, at 5.30am on mornings before school, bringing him to work with you and having him complete work/schoolwork prior to school, resulting in DM being tired and lethargic.

• On a date prior to 25 May 2021 you failed to dispose of medication which [DM], aged 15, no longer required, leaving remaining medication in DM's possession who subsequently took an overdose of this which resulted in hospitalisation and his heart stopping for 4 seconds.

• On a date in 2018, you showed a pornographic image of oral sex that you had as your computer screen saver, showed an airgun and pellets in your drawer, and repeatedly asked 3 schoolgirls who were at your workplace on work experience personal questions including if they had a boyfriend.

32. The five allegations of fact were found proven. The DBS concluded that each of these five findings amounted to "relevant conduct" within the meaning of the Act which means that the Appellant "endangered a child or was likely to

endanger a child". The decision states inter alia explaining why its findings amount to relevant conduct for the purposes of the Act:

"Given the repeated failure to respond and act on guidance given by professionals, displaying an attitude of being unwilling to follow guidance given by professionals, the need to prioritise the needs of a child under your care above your own needs, failing to appropriately secure/dispose of medication, feeling unsupported despite support being offered, being unable or unwilling to engage with and maintain open and transparent communication with professionals, and attempting to influence DM into supporting him being returned to your care, there is a concern that if you were to be in a position in regulated activity with children where you are responsible for providing care and repeated these behaviours, it is likely that this would place children who will be in your care at risk of emotional and/or physical harm."

33. The DBS also explained why it was satisfied that in all the circumstances a barring decision - to include the Appellant on the Children's Barred List - was appropriate and proportionate. The DBS Final Decision included the following:

"We are satisfied a barring decision is appropriate.

This is because we are of the view that the evidence in this case shows that whilst in your role as a foster carer you failed to place the needs of a child first by failing to understand and acknowledge the responsibilities of your foster carer role whilst DM was in hospital.

You also despite being requested to stop DM waking early on the morning is due to concerns over his mental and physical health failed to follow this request.

Following the removal of DM from your care, you failed to adhere to ad-vice/guidance given to you by continuing to contact DM despite having being [sic] requested not to for the wellbeing of DM, and within this contact shared and requested information with DM around the fostering investigation and of what your wishes for the outcome of this were to be, as well as showing a disregard towards requests to turn DM away if he were to visit you.

You also failed to appropriately manage medication which had gone past its prescription end date whilst DM was under your care, with this remaining in the possession of DM, who subsequently took an overdose of this which resulted in hospitalisation. These incidents have resulted in DM suffering emotional and physical harm.

There were also previous concerns that when three school age girls were on work experience with you that you showed a porno-graphic image of oral sex that you had as your computer screen saver to them, showed an air gun and pellets in your drawer to them, and repeatedly asked personal questions including if they had a boyfriend, resulting in the girls experiencing emotional harm as a result of this.

We have concerns that you failed to take responsibility for the reasons DM was removed from your care, and failed to appropriately respond and act on the guidance on more than one occasion, prioritising work and your own needs ahead of DM.

There are also concerns that you continued to communicate with DM when requested not to, as well as asking and sharing information with him around the fostering investigation, and that you failed to appropriately manage the medication of DM. You were also unable or unwilling to maintain open and trans-parent communication with professionals, felt victimised by professionals, and showed a disregard for following advice and guidance. You have influenced DM into supporting your argument as to why he should be returned to your care, with you yourself gathering this information from DM when you should not have been having any contact with him and took this to DCST, with these behaviours dis-played to facilitate your objective of having DM returned to your care.

It is acknowledged that you recognised that you could have been more child focused, and that you met the health and educational needs of DM, and provided a safe and clean environment for him to live in. It is also recognised that following DM self harming you contacted out of hours, CAMHS, and had DM admitted to A&E. It is clear that you cared about DM and had a positive relationship with him. You had also requested support when feeling extremely fatigued to ensure DM was supported. You were also able to reflect and accept that you may not have adequately prioritised DM's emotional needs and well-being, and that more could have been done to support him, and that DM should have been your sole priority while he was in hospital.

However, given the repeated failure to respond and act on guidance given by professionals, displaying an attitude of being unwilling to follow guidance given by professionals, failing to prioritise the needs of a child under your care above your own needs, failing to appropriately secure/dispose of medication, feeling unsupported despite support being offered, being unable or unwilling to engage with and maintain open and transparent communication with professionals, and attempting to influence DM into supporting him being returned to your care, there is a concern that if you were to be in a position in regulated activity with children where you were responsible for providing care and repeated these behaviours, it is likely that this would place children who would be under your care at risk of emotional and/or physical harm, with it noted that there will be policies and procedures to follow in regulated Activity with children. Given the prioritising of your own needs, the negative manner you displayed in response to advice given to you by professionals, minimising the concerns of professionals, failing to understand the concerns raised by professionals and deflecting this on to professionals of a lack of support or understanding of your own personal needs, there are no assurances that you would not engage in similar harmful behaviours in the future.

We are therefore satisfied that it is appropriate to include you in the Children's Barred List.

... Having assessed all of the information available, we are satisfied that if you were to work in a regulated activity position with children, it is likely that you would failed to prioritise the needs of those under your care, be unable or unwilling to engage and follow advice/guidance given by professionals, and would attempt to influence those under your care in order to achieve your own objectives, placing children who will be under your care at risk of emotional and/or physical harm..."

The material relied upon by the DBS at the time of barring in support of the findings of relevant conduct

Failing to sit with DM in hospital

34. The LADO notes of June 2021 record that on 22 May 2021 DM self-harmed whilst AVS was on a driving holiday in Scotland (without DM). When AVS returned on 23 May 2021 he contacted 'out of hours' around 8pm for advice and after hours of delay he eventually contacted CAMHS. He then took DM to D[]Infirmary late on the evening of 23 May 2021 and, due to no beds being available, DM was sent to S[] hospital on 24 May 2021. AVS had stated he was fatigued and could not take DM so his fostering social worker took DM to S[] hospital around 2 AM on 24 May 2021. The fostering social worker sat with DM all night.

35. AVS then made a call stating that someone needed to release the fostering social worker. He was advised that he needed to go back to S[] and sit with DM as the foster carer. The Appellant informed the team that he needed to pop into work and would go then. He then informed the team stating he had to be at work and could not get to the hospital until 3-4 PM that day. He was informed by his fostering team that he needed to go to hospital immediately. In the meantime, the fostering team arranged for another foster carer to sit with DM [37].

36. This incident is also dealt with in the August 2021 D[] children's services strategy meeting notes. The social worker PS had a discussion with AVS and during that discussion she explained to him his roles and responsibilities as a foster carer and that he needed to put DM first, and he needed to be with DM because at times like this is when DM as a young person would need his carer the most. AVS maintained he had work commitments and that he could not go to the hospital. DM remained in hospital and was discharged on 25 May 2021. Because of this occurrence and because of the history leading up to it and the concerns around AVS in regard to him not prioritising DM in a specific time of need he was removed from his care on that date [56-57].

37. There are STAR NHS notes dated 24 May 2021 related to DM's period in S[] hospital at [117-121]. The notes document the self-harming incident in more detail, including DM's state of mind at the time.

Contacting DM between 25/5/21 and 12/821

38. In a letter before action dated 3/6/21 [29]-[34]in response to a letter from Children's Services on 1 June 2021, AVS acknowledged that on 25 May 2021 he received an email from PS, Social Worker, stating they would appreciate it if he did not contact DM at this stage as he was not well and that it could impact on his well-being, with this also followed up in a telephone conversation on 27 May 2021 [32-33].

39. The August 2021 strategy meeting notes state that following DM being discharged on 25 May 2021 into the care of different foster carers concerns continue to be raised because AVS was continuing to make inappropriate communication with DM [57]. The notes also state that PS had discussions with DM about not having communications with AVS and about this being in his safety plan.

40. The team manager Katie Fisher met with AVS on 11 August 2021 and at that time they met to discuss his fostering registration but during the conversation AVS informed her that DM had visited his place of work on 9 August 2021. AVS was told that should this happen again he would need to ask DM to leave immediately, however AVS did not agree with this course of action. The notes of the meeting stated that AVS was clearly not adhering to any advice, guidance or any recommendations that was being asked of him by the social work team or fostering team [58-59].

41. AVS response to this may be found in his submissions at [98-99] and attachments. In short AVS says that he was not told the reason for DM's removal for four days and he believed that this was a respite break and that he would be returning. Direct contact only took place until 27 May 2021 because on that date he was told why DM was being removed and the LADO review. The contact was in his view supportive and to help DM. In respect of the contact in August 2021 this followed an unsolicited visit at his place of work by DM. He did not send a message to DM and it was DM that asked AVS that he wanted an advocate and the trust would not allow it. AVS therefore advised him to write down his concerns. The letter was not fabricated it was a genuine letter written by DM.

Waking DM early and bringing him to work

42. An email likely to have been around 5 May 2021 from PS the supervising social worker for the fostering arrangement states that she had a concern around DM getting up early and then going to work with AVS before school. She states it is agreed that this is currently not in DM's best interest taking into account his poor physical and mental health. She asked that DM get up at a reasonable time to get ready for school and then get dropped off in order to start school [148].

43. AVS in a reply email dated 5 May 2021 denied that DM was getting up early. He said that he got him up at 6:30 AM and he arrives at school at 8:15 AM. He was not getting up early to come to work with DM. It does seem to be accepted that DM was coming to work with AVS for a period prior to the start of school [146-147].

44. The LADO notes dated 3/6/21 states that other issues have become known around AVS taking DM to work with him before school and was getting him up at 5:30 AM. On the days he wasn't going to work with him AVS still made him get up at this time to complete an hour's worth of school revision. This

was impacting on DM's day as he was tired. AVS was regimental in terms of the routines. He would get DM up at 5:30 AM and he had to be ready at the door at 6:30AM to leave at seven they would arrive at work and at 7:05 DM would have a hot drink DM would be doing unpaid work and then at 8:00 AM DM will be taken to school [50].

Failing to dispose of medication with which DM then overdosed 6/6/21

45. According to the LADO notes of 1 July 2021 and referral to the DBS by LADO, DM's current carers rang to say DM had taken an overdose of propranolol on 6/6/21. No one was aware that this medication was with DM in his new foster care home; DM said the tablets were in his schoolbag (confirmed by the nurse). Whilst he was in hospital after taking the overdose, his heart did stop for 4 seconds. DM informed the nurse that he could access his medication at any time whilst residing with AVS. This was said to be a serious safeguarding issue as DM should not have had these tablets, AVS should have disposed of the medication when DM stopped being prescribed it-[41/18].

46. AVS provided a rebuttal for this allegation in his submissions. He states that the medication had been held by DM for use when he needed it. It was within his personal property which was handed over to the new foster carers in late May. When DM was removed from AVS's care he only had possessions that were on his person at the time and taken to hospital. Anyone could have searched those possessions if they were concerned. AVS was never advised to keep the meds secure from DM and no previous issues had arisen. DM had reported that his migraines were continuing through the time of the removal and so as far as AVS was concerned there was an ongoing requirement for the Propranolol [100/101].

Showing pornography et al in 2018

47. The evidence for this is contained in the notes of a LADO meeting dated 1 July 2021 [40]. The notes state that concerns were reported to LADO from a teacher, and it related to concerns regarding three girls who were attending AVS's company on work experience in 2018. AVS was constantly asking about boyfriends and their personal life. One girl just said, 'yes' to a personal question asking if she had a boyfriend to 'shut him up'. On one occasion it is believed AVS sent a text message referring to one of these young girls to a male colleague, the reply to this was along the lines "yeah well you still would though??"

48. It was reported AVS also had a pornographic image of oral sex on his computer screen, which he showed to these young girls and showed the girls a gun (later discovered to be an airgun) in his desk drawer at work. These girls were only there one week and on the Friday of that week he offered them all a lift home; they declined due to feeling uncomfortable in his presence and from the previous experiences that week. They reported their experience and

fears to school and in turn this was reported to LADO. The records at the time described this as 'inappropriate adult banter' and took no action [40].

49. There is also a note in a D[] Children's Services strategy meeting of 19/8/21 [67] which states that in 2018 AVS was providing work placements for school-age children and there were three girls from a school that had gone to his workplace for this placement opportunity. 'They literally lasted a week and there were lots of concerns about how uncomfortable he made the girls feel and inappropriate comments. He had a picture on his computer screen visible of a woman giving a man oral sex and he had his messages coming through on his computer that were visible to all the girls and one of them was around him having a conversation with another male adult member of staff and AVS telling this adult member of staff that one of the young girls had got a boyfriend. Because he kept asking them all the time if they had boyfriends and then there was some joke made around but you still would wouldn't want you? And also, AVS opened his drawer and showed the girls an airgun with pellets which made them feel really unsafe. So, they reported their concerns, and they were immediately pulled from the placement and the school stopped using the placement' [67]. The referral does make clear that the allegation was against the owner who was said to have made inappropriate comments towards them and is in possession of a firearm on the premises.

50. AVS denied this allegation stating it is in respect to actions related to a business partner while he was out of the office [102]. From AVS's submissions dated 3 November 2021 [150-152] he reiterates that it was a co-worker who was responsible not him. He transcribes the LADO referral dated 1 October 2018. The firearm appears to have been a toy gun when looked at by the police. The matter was not actioned further either by the police or the LADO in 2018 but had been revived in 2021 after AVS's relationship with Children's Services had broken down.

Appellant's Grounds of Appeal

51. On 16 September 2022 AVS appealed to the Upper Tribunal against the barring decision. The grounds were as follows [203-204]:

a. The DBS materially erred in fact in finding that the Appellant:

i. Failed to sit at hospital with [DM] on the morning of 24/25 May 2021, as alleged or at all;

ii. Woke DM at 5:30am on mornings before school resulting in DM being tired and lethargic, as alleged or at all;

iii. Failed to dispose of medication which DM no longer required, as alleged or at all;

iv. On a date in 2018, you showed a pornographic image of oral sex that you had as your computer screensaver, showed an air gun and pellets in your drawer, and repeatedly asked three schoolgirls who were at your workplace on work experience personal questions including if they had a boyfriend;

v. Shared with DM his wishes for the outcome of the D[] Children's Services Trust investigation;
vi. Caused DM physical and/or emotional harm;
vii. Influenced DM into supporting his argument as to why DM should be returned to his care, as alleged or at all; and
viii. Is likely to fail to prioritise the needs of those under his care, be unable or unwilling to engage and follow advice/guidance given by professionals, and/or would attempt to influence those in his your care [sic] in order to achieve his own objectives.

b. The DBS wrongly concluded that the allegations met the threshold for relevant conduct; and

c. The DBS materially erred in law in that it:
i. Made findings of fact solely on the basis of multiple hearsay and multiple anonymous hearsay evidence;
ii. Came to conclusions based on inferences that it was not entitled to draw from the evidence;
iii. Came to a barring decision that was, in all the circumstances, disproportionate;
iv. Failed to take any or any sufficient account of the letter of representations and evidence sent on the Appellant's behalf in response to the Minded to Bar letter; and
v. There are no reasons provided to explain the findings of fact, inferences drawn from those findings or conclusions concerning risk; and
vi. The decision to include the Appellant on the Children's Barred List was, in all the circumstances, disproportionate.

Law

52. The full relevant statutory provisions and authorities are set out in the Appendix to this decision. Therefore, we only draw attention to the most relevant law at this stage.

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

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

55. Paragraphs 3 and 9 of Schedule 3 to the Act, set out the provisions in relation to inclusion on the CBL or ABL. They provide that, following an opportunity for and consideration of representations, DBS "must" include a person on the

List if: (i) it is satisfied that they have "engaged in relevant conduct"; (ii) it has reason to believe that they have been (or might in future) be "engaged in regulated activity relating to children/vulnerable adults"; and (iii) it is satisfied that it is "appropriate" to include them.

56. Therefore, pursuant paragraph 3(3) or 9(3) of Schedule 3, the DBS must include the person in the children's or adults' barred lists if:
(a) it is satisfied that the person has engaged in relevant conduct, and
(aa) it has reason to believe that the person is or has been or might in future be engaged in regulated activity relating to children / vulnerable adults, and
(b) it is satisfied that it is appropriate to include the person in the list.

57. An activity is a "regulated activity relating to children" for the purposes of paragraph 2(8)(b) of Schedule 3 if it falls within one of the subparagraphs in paragraph 1 of Schedule 4 to the Act; that provision broadly defines "regulated activity" and includes, in relation to children, "any form of teaching, training or instruction of children, unless the teaching, training or instruction is merely incidental to teaching, training or instruction of persons who are not children". An activity is regulated activity relating to vulnerable adults if it falls with paragraph 7. This includes the provision to an adult of healthcare, personal care or social work.

58. 'Relevant conduct' is defined under paragraphs 4 and 10 of Schedule 3 to the Act as set out in the Appendix. Paragraphs 4(1) and 10(1) of the same, sets out the meaning of "relevant conduct". It includes: (i) "conduct which endangers a child / vulnerable adult or is likely to endanger a child / vulnerable adult"; (ii) "conduct which, if repeated against or in relation to a child / vulnerable adult, would endanger that child / vulnerable adult or would be likely to endanger him". Paragraphs 4(2) and 10(2) of the same, provides that conduct "endangers a child / vulnerable adult if" among other things it: (i) "harms" a child / vulnerable adult ; or (ii) puts a child / vulnerable adult "at risk of harm".

59. Section 4 of the Act provides:

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

(4) An appeal under subsection (1) may be made only with the permission of the [Upper] Tribunal.
(5) Unless the [Upper] Tribunal finds that [DBS] 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.

60. As underlined above, an Appellant may appeal against the barring on the ground that the DBS has made a mistake:

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

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

62. The only issues in this appeal therefore are whether there were any material mistakes of law or fact relied upon by the DBS in including the Appellant on the ABL.

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

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

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

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

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

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

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

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

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

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

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

> "The Upper Tribunal is entitled to make a finding that an appellant's denial of wrongdoing is credible, such that it is a mistake of fact to find that she did the impugned act. In so doing, the Upper Tribunal is entitled to hear oral evidence from an appellant and to assess it against the documentary evidence on which the DBS based its decision. That is different from merely reviewing the evidence that was before the DBS and coming to different conclusions (which is not open to the Upper Tribunal)."

29.That is in my view an accurate description of the mistake of fact jurisdiction and corresponds with the guidance given by the Presidential Panel of the Upper Tribunal in *PF*, approved by this court in *Kihembo*.'

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

'43. By way of preliminary observation, the role of the Upper Tribunal on considering an appeal needs to be borne in mind. The Act is intended to ensure the protection of children and vulnerable adults. It does so by providing that the DBS may include people within a list of persons who are barred from engaging in certain activities with children or vulnerable adults. The DBS must decide whether or not the criteria for inclusion of a person within the relevant barred list are satisfied, or, as here, if it is satisfied that it is no longer appropriate to continue to include a person's name in the list. The role of the Upper Tribunal on an appeal is to consider if the DBS has made a mistake on any point of law or in any finding of fact. It cannot consider the appropriateness of listing (see section 4(3) of the Act). That is, unless the decision of the DBS is legally or factually flawed, the assessment of the risk presented by the person concerned, and the appropriateness of including him in a list barring him from regulated activity with children or vulnerable adults, is a matter for the DBS.

55. Section 4(7) of the Act provides that where the Upper Tribunal remits a matter to the DBS it "may set out any findings of fact which it has made (on which DBS must base its new decision)". It is neither necessary nor feasible to set out precisely the limits on that power. The following should, however, be borne in mind. First, the Upper Tribunal may set out findings of fact. It will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter. By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to a marriage being a "strong" marriage or a "mutually-supportive one" may be more of a value judgment rather than a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third "finding" would certainly not involve a finding of fact.

> Secondly, an Upper Tribunal will need to consider carefully whether it is appropriate for it to set out particular facts on which the DBS must base its decision when remitting a matter to the DBS for a new decision. For example, an Upper Tribunal would have to have sufficient evidence to find a fact. Further, given that the primary responsibility for assessing the appropriateness of including a person in the children's barred list (or the adults' barred list) is for the DBS, the Upper Tribunal will have to consider whether, in context, it is appropriate for it to find facts on which the DBS must base its new decision.'

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

71. Only if a risk assessment is made by the DBS in error of fact, eg. based on an incorrect fact, or made in error of law, for example, that a risk assessment relied upon by the DBS is irrational (one that no properly directed decision maker could reasonably have arrived at on the evidence before it), can the barring decision on which it is based be disturbed on appeal.

72. Thus, the role of the Upper Tribunal on an appeal is to consider if the DBS has made a material mistake on any point of law or in any finding of fact – one upon which its barring decision was based. The UT cannot consider the appropriateness of barring (see section 4(3) of the Act) - the appropriateness of including a person in a list barring them from regulated activity with children or vulnerable adults, is a matter for the DBS.

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

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

74. After *AB* the usual order will be remission back to the DBS unless no other decision than removal is possible on the facts found (for example that there is a finding that the Appellant has not committed any relevant conduct such that they do not satisfy the statutory condition for inclusion on a barring list).

DBS's submissions

75. Mr Serr made oral and written submissions on behalf of the DBS in resisting the appeal. His written submissions were dated 3 May 2023, 24 October 2023 and 23 September 2024 which we summarise below.

No material mistake of fact

76. Mr Serr submitted that the appeal should be dismissed as there were no mistakes of fact or law contained within the DBS's barring decision.

77. He noted that the appeal grounds raised three essential points:

    1. The DBS failed to consider the representations of AVS.
    2. The DBS made findings on multiple anonymous hearsay which was unreliable.
    3. The decision was disproportionate.

78. Mr Serr noted that the appeal grounds were drafted before the DBS's Barring Decision Summary Process Document ('BDP') was disclosed. The BDP shows that the representations were fully considered.

79. The DBS received LADO meeting notes for June and July 2021, D[] Children's Services Trust notes for August 2021 a reviewing officer's report as part of a foster care review and AVS's own statements / representations before making its decision.

80. Therefore, he submitted that the DBS had the evidence of highly specialised experts in their fields. The attendees for the June and July LADO meetings and the strategy meeting are listed as social work team managers, advances partitioners from the fostering team, social workers independent reviewing officers and the police [36/46/55].

81. The evidence is said to amount by AVS to "multiple anonymous hearsay" but Mr Serr submitted that the written evidence they gave or relied upon is credible and reliable. Mr Serr accepted that there is some hearsay evidence relied upon by the DBS but there is also a substantial amount of direct evidence. There is no rule against relying on hearsay by the DBS. Hearsay evidence and anonymous evidence commonly makes up information that the DBS relies upon. The standard is of course the civil not criminal standard of proof.

82. He addressed the five findings of relevant conduct made by the DBS:

i) In respect of the first finding, the failure of AVS to attend to DM while he was in hospital and rather to hand the responsibility over to a social worker was a serious breach of his foster care duties and led to the child being removed from his care. The LADO notes evidence social services concern as to the harm that this did or could do to DM and highly vulnerable child. This was a particularly difficult time for DM, a time when he needed his carer present and AVS prioritised his own needs and requirements over DM, a child with physical and mental health problems whose mental health breakdown had led to an admission to hospital and to the input of the mental health team. While AVS largely seeks to blame others and takes little responsibility for his action he does accept at least "more could have been done to support DM" [111-112].

ii) The issue in respect of the second finding on contact is very clear. AVS was given an instruction by a social worker on 25 May 2021 on behalf of children

services not to contact DM. That instruction was ignored. There is evidence that AVS in fact would continue to ignore instructions not to contact or continue contact with DM. As the BDP states "There was an occasion on 9 August 2021 where DM arrived at AVS's work, and AVS was advised if this were to happen again then he was to ask DM to leave immediately, however that he did not agree with this course of action"-[213]. This evidences AVS's inability to adhere to clear instructions and guidance being provided by children services. Such a failure is bound to or at least likely to lead to harm to a child or a vulnerable adult if replicated. Child Services concerns go further and reflect undue influence and coercion on DM by AVS [58-59].

iii) In respect of the third finding, there is clear evidence from the email sent from PS and the LADO notes that child services were very concerned about the morning regime of DM in particular the fact that he was being taken to work with AVS, was getting up much earlier than was required and it was causing him fatigue during the day. It needs to be borne in mind that DM was vulnerable and had significant physical and mental health problems. The fact that he was being taken to work by AVS was further evidence arguably of AVS prioritising his own needs over those of DM.

iv) In respect of the fourth finding, there is no doubt it seems even on his own admission that AVS should not have allowed DM to have medication the prescription for which had expired. AVS should have taken it off DM. He did not. This was a failure on AVS's part to properly store and dispose of medication. He admits to poor record-keeping. Leaving medication such as this that had expired on the person who had mental and physical health difficulties was an obvious and serious risk. As he states, "I was not aware of a prescription expiry and have only recently come to notice that the course of tablets should have been completed by a certain date (taken prophylactic rather than as required). I also recognise that whilst under significant pressure at this time, I would have been able to keep better records in the style of the fostering organisation should I have my time again"-[114]. The risk is confirmed in notes in the referral by LADO to the DBS at [18] by a nurse RW.

v) In respect of the fifth finding, the LADO notes in respect of the pornography incident in 2018 would appear clear in that the allegation was against the owner of the business: 'A'. The notes of the incident are that "Three Sixth Form girls were on work placement at A[] Limited on C[] Road (a graphics design business) and have alleged that the owner has made inappropriate comments towards them and is in possession of a firearm on the premises. Please see attached statements from the girls and image of firearm"-[151. There has been no factual mistake the allegation was against AVS and not anyone else. AVS's assertion that it was in fact a co-worker is fanciful. He was the sole director of the business at the time [221].

83. Mr Serr also noted that AVS has had his caring responsibilities removed. A recent report confirms he remains an unsuitable person to be a foster carer and the LADO notes show that the threshold was met for a s.47 inquiry.

84. He submitted that the above concerns both individually and cumulatively evidence serious relevant conduct and ongoing risk justifying inclusion in the CBL. The appeal reveals no mistake of fact or law and permission to appeal should be refused.

Transferability/Proportionality

85. Mr Serr argued that AVS's barring relates to CBL only so the issue of transferability (to the ABL) is irrelevant. So far as proportionality is concerned it is a high threshold for the UT to find a decision was disproportionate. The DBS has addressed proportionality extensively – see [237]. AVS demonstrated a pattern of conduct whereby he prioritised himself over a young looked after person for whom he was in loco parentis by abrogating his responsibility to attend to DM to social workers during a crisis, ignored the recommendations of social work professionals, and failed to adhere to rules for retained medication which led to an overdose. These were serious failings.

86. He contended that the impact of barring upon AVS however is limited-he would not be able to carry out a role as a foster carer and work in a voluntary capacity (although as of 2022 he had not been recommended for re-approval as a foster carer [74/82]). It in particular has no pecuniary impact on AVS.

87. Mr Serr submitted that the above failings both individually and cumulatively evidence serious relevant conduct and on-going risk justifying inclusion of AVS in the CBL. The appeal reveals no mistake of fact or law in the barring decision and permission to appeal should be refused.

Conclusions on the Appeal

88. Mr Serr accepted that there is no question that AVS is an intelligent, accomplished and capable individual-see for example his CV at [25-28]. He no doubt became an approved foster carer in July 2020 with the best of intentions. DM however was a highly vulnerable young person with severe mental health problems. His placement with AVS went catastrophically wrong because of the actions and omissions of AVS. This resulted in the premature ending of the placement and further disruption to an already damaged child (as well as harm or risk of harm occurring during the placement).

89. He argued that AVS was inexperienced as a foster carer and was unable to prioritise DM's needs and most concerningly perhaps, failed to adhere to professionals' guidance, take instructions and communicate with those professionals. It would appear that AVS simply refused to accept the validity of those instructions.

90. He contended that AVS has demonstrated a deep-seated attitudinal problem to support and advice from professionals in the child care context. There is little evidence of insight, reflection or remorse- see for example the letter before action sent to D[] Children's Service Trust on 03/06/21 following the termination of the placement- [28-34]; AVS's statement to the UT dated 30/06/23 [277-282]; and the reviewing officer report of RS dated 07/02/22 [82]:

> "When considering his 3 wishes, I am concerned AVS has not understood the seriousness of what happened and the concerns professionals had about his parenting behaviours and I feel concerned that after a year he thinks it would be appropriate for D to be returned to his care. There may be reflection, but I am not sure this is in relation to D. He says he has reflected and I am sure he has in some regards but I do believe AVS has demonstrated some behaviours that he knows professionals will want to hear and I am concerned AVS will not action his changes in the future. AVS has taken no part or no responsibility in any of his actions, choosing to blame rather them [sic] to accept some responsibility."

91. Mr Serr submitted that the above both individually and cumulatively evidence serious relevant conduct and on-going risk justifying inclusion in the CBL. The appeal reveals no mistake of fact or law and the appeal should be refused. In the alternative the DBS would seek remission back for further a decision and not removal from the CBL.

Submissions on behalf of the Appellant

92. We consider Ms Bayley's submissions in our discussion section below.

Discussion: Findings of Fact and Analysis of grounds of appeal

The evidence in the appeal

93. The DBS relied on written evidence from witnesses and notes or reports of meetings contained in the bundle of evidence it filed and served which contained 322 pages. It included all the material relied upon by the DBS in making the barring decision, as summarised above, and in defending the appeal as well as the material provided by the Appellant.

94. The evidence relied on by the DBS included that from Social Workers, Children's Services, LADO meeting notes and reports of what DM himself had said and correspondence. As we note below, none of the witnesses on behalf of the DBS made formal witness statements containing statements of truth, nor gave oral evidence nor were cross examined. Their evidence was contained by way of written reports from LADO meeting, notes or correspondence and therefore untested hearsay. This is a matter to take into account when considering its reliability and the weight it is to be given.

95. The Appellant relied upon his sets of written submissions and representations sent to the DBS and witness statements and oral evidence given to the Tribunal by him and his witnesses.

96. It goes without saying that all subsequent written and oral evidence of the Appellant was not available to the DBS when making its barring decision.

97. The relevant evidence [page numbers in square brackets] is referred to in the discussion section below. Therein, we make findings of fact and draw conclusions based upon it.

The Appellant's evidence

98. The Appellant denied the allegations of relevant conduct and material facts found in the Final Decision Letter in material and significant respects. In terms of written evidence, the Appellant relied upon his notice of appeal and the representations of fact made together with his witness statement. He supplemented this with oral evidence of fact given during the appeal hearing. The Appellant gave evidence in chief at length supplementing his witness statement and was cross examined by Mr Serr in relation to all of his evidence. The Appellant's factual representations and evidence denying many of the allegations, were in similar terms to the grounds contained in the notice of appeal dated 16 September 2022.

99. Mr Serr suggested that none of the findings of relevant conduct contained mistakes of fact and there was no mistake of fact in any of the matter relied upon in the DBS barring decision. He put the relevant pieces of documentary evidence to the Appellant and suggested his account was neither reliable nor credible.

100. As noted below, the Appellant's oral evidence was largely consistent with the factual representations he made to the DBS in several sets of submissions, in the notice of appeal and his witness statement. The evidence that was before the DBS when it made its Decision obviously did not include all the factual representations and evidence we received from the Appellant during the hearing.

101. In summary, we have come to the conclusion and find that the Appellant's written and oral evidence was largely consistent, reliable and credible for the reasons we give below. We give reasons where we have not accepted certain parts of it.

102. We have examined all the evidence in the case with care, both that which was before the DBS and that provided by the Appellant as part of his appeal (most of which was not available to the DBS at the time it made its Decision).

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

> 'The starting point for the tribunal's consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker.'

104. Furthermore, the UT stated in *PF*:

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

105. We make findings of fact in relation to the evidence and give our reasons in the section below. We make findings of fact – both of primary facts and secondary facts (inferences from primary fact). However, it is not within our jurisdiction when considering whether there have been mistakes of fact to make our own evaluative judgments (for example, what was reasonable for the Appellant to do or whether there would be a risk of repetition). The proper evaluative judgements which should be made based upon the primary facts found are a matter for the DBS. we would not interfere unless such judgments are based upon mistakes of primary fact or are irrational (contain a mistake of law).

Post Hearing application for the admission of late evidence

106. On 7 October 2024, one week after the hearing, the Appellant applied for the late admission of evidence, served on the Upper Tribunal and the Respondent on Friday 4 October 2024. This comprised emails sent between the Appellant and social services on 24 and 25 May 2021.

107. The application was made in accordance with Rules 2 and 15(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008. It was accepted by the Appellant that the Respondent ought to be given an opportunity to comment on their content and the DBS made no objection to admission of the emails.

We have decided to admit the evidence as being just and fair, in accordance with the overriding objective.

108. There can be no real prejudice arising from the late admission of evidence, which was referred to at the final appeal hearing in general terms, with the view being expressed that the contemporaneous documents were likely to be material. Some criticism might be made of the Appellant for failing to produce the emails on an earlier occasion but equally the DBS might have obtained this evidence from Children's Services before making its decision. The late admission is therefore justified in the interests of justice as the evidence is relevant and material to our decision.

The Appellant's representations from 3 June 2021 and assessment of his reliability

109. While over three years have passed since the events in question, the Appellant's factual case has been largely consistent. Indeed, the Appellant effectively set out his case in writing on Findings 1, 2 and 3 contemporaneously (and consistently) in his letter to Children's Services of 3 June 2021 in which he disputed the removal of DM from his care:

'I did not and still do not support these reasons for DM's removal from this placement or his removal. Overall I find your letter to be without context and heavily biased towards post removal validation. There are several factual inaccuracies within your letter:

1. At no time did I refuse to transport DM to S[] Children's Hospital. As there had been a disclosure of harm, and the CSW had been struggling to expedite CAMHS support, I took the decision to seek medical support for DM. I transported him to D[] A&E Paediatrics Department at approximately 8:30pm on Sunday 23rd May 2021. Following an initial emergency CAMHS assessment it was decided to admit him to the paediatrics ward. I requested the support of my Supervising Social Worker DH who offered to relieve me at D[] and arrived at around 2am. Once I had left for rest, It was decided to transfer DM to S[] Children's hospital as the Paediatrics ward at D[] had been flooded and there were insufficient beds. I cannot speak to DH's offer to transport DM however the hospital would also have had a duty of care to do so.

2. At no time did I refuse to remain with DM overnight. As per STAR DSH Assessment (Emergency CAMHS) Document, I had just returned from a Driving Holiday in Scotland, completing 1,390 miles in 4 days (approx. 8-10hrs of driving a day) and was severely fatigued. This respite was approved by social care. I had returned and collected DM around 6pm. Following taking him to D[] at 8:30pm and staying with him until 2am, I made a reasonable request for DH to support me as my Supervising Social Worker which she freely offered to do upon hearing the reasons and knowing we were simply awaiting a visit at that point. In addition, DM was now under professional medical NHS care and in a safe and appropriate environment. I did discuss with him if he wished for me to stay which he did not and offered to return with more creature comforts from home the next day.

3. At no point did I prioritise work commitments over any urgent needs DM had. Once taken to S[] Children's Hospital he was admitted and it has been evidenced through

the STAR DSH team that he then slept for most of the morning and afternoon. His medical needs were fully taken care of. He had a Professional Social Worker with him at all times and he had no emotional support needs. I was available on the telephone for any support required and then attended the hospital at approx. 11:30 that morning.
…

5. I have not been making DM wake up at 5:30am to accompany me to work. This is evidence in an email from myself to PS Social Worker dated 5/5/2021 at 18:36 to which you were cc'd in. As can be seen from the email I was requesting DM to be ready to leave the house at 6:30am, a very reasonable time for a teenager in secondary education who does not live within walking distance of their school. Should a person prepare the night before most people are able to awaken and leave the house within 10-15 minutes or so. I had taken into account NHS guidance of required sleep for a teenager for which DM was receiving the upper band. What DM chose to do before 6:30am has been left up to him to promote his growing independence. When queried on this subject by PS in my presence he supported his current 'day to day routine' confirming it within his wishes and feelings.

This is not an exhaustive response to each point in your letter, but highlights significant inaccuracies and out of context concerns I have come to expect over my care of DM.
…
Contact

I received an email from PS dated 25th May 2021 at 12:09pm to which you were cc'd in stating "We would appreciate for you not to contact DM at this stage as he is not well and would have an impact on his well-being."

Furthermore, in a recorded telephone conversation at around noon on Thursday 27th May 2021, when queried what negative impact your team thought my communication with DM would have, PS told me "You was asked, appreciated not to do that and you have decided to do so [contact DM]".

When asking for contact with DM, PS went on to say "Well we have said at the moment, it would be ideally for him, because he needs to settle, we don't want this placement disrupting, we are not recommending any contact at this stage" and when asking how long this recommendation would last for, PS did not know and said it would have to be reviewed, advising "If it should be agreed [that you can have contact with him] you will be notified".

When asking what power or authority this request not to contact came under, I was advised "it is a recommendation from social care, it is not a legal obligation, we are recommending and recommendations from social care should be taken seriously. If not, then it could have implications, I don't know what implications".

Point 9 of my conversation with Leah Keegan, a CAMHS mental health professional who assessed DM clearly asserts their positive feelings on contact between DM and myself. Additionally, I was made to feel both threatened and warned off by PS's insinuation of implications should I continue to contact DM to provide any kind of emotional support.

> The STAR DSH Assessment makes clear DM's wishes to maintain a strong relationship with me going forward to which Leah will be issuing further evidence to in a letter which will be going out in the coming days. I will continue to abide by the no contact request until I receive notification otherwise however I do not agree with the reasons for the request and would echo the CAMHS mental health professionals position.'

110. We also note that the Appellant attended the hearing of the appeal, gave evidence and was cross examined. This is in contrast to the witnesses relied upon by the DBS who did not. Where there is a dispute of fact between AVS and the DBS's witnesses, we note that their evidence mainly consisted of written records or correspondence and it was untested by cross examination so that potentially less weight is to be given to it. As is made apparent below, their reliability and credibility has been challenged by the Appellant to some degree.

111. Therefore, we have had to balance our assessment of the reliability and credibility of the DBS witnesses against our assessment of the Appellant's reliability and credibility having heard him give oral evidence.

112. We repeat that we are satisfied that the Appellant has been, for the most part, consistent and given largely reliable representations and evidence throughout the DBS appeal process. We consider that he has provided the Tribunal and the Respondent with evidence to support and corroborate much of his account. This is borne out in the disclosure of further emails after the hearing. As such, the Tribunal considers the Appellant's evidence to be largely credible and reliable. Where we found have found his evidence to be unreliable in any regard we have explained our reasons below.

113. The Tribunal also had the benefit of hearing evidence from two witnesses, AF and SH, who gave character evidence on behalf of the Appellant. They also gave evidence of fact confirming that they witnessed the Appellant acting as a caring and dedicated foster parent, with DM's best interests at heart (see also testimonials [154-174]). The Tribunal considers that such evidence is relevant, to some degree, to both the Appellant's propensity to behave in the way alleged and to support his reliability as a witness of fact.

Ground 1

<u>Material mistake of fact: first finding of relevant conduct – Finding 1</u>

Finding 1: On 25 May 2021 whilst you were the foster carer for DM, aged 15, you failed to relieve the support worker and sit with DM in the hospital when requested to do so in the morning following the support worker having stayed with DM overnight

114. The evidence and submissions relied upon by the DBS in support of this finding are set out above. In particular the DBS rely on the LADO notes made by supervising social worker PS dated 03/06/21 [47] and the LADO notes made by PS dated 1/7/21 [37] which state identically:

> 'On the 22/05/2021 this child self-harmed whilst the carer was on holiday for a week. When the Foster Carer (FC) returned on 23/05/2021 he contacted out of hours (around 8pm) for advice and after hours of delay he eventually contacted CAMHS / 101. He then took the child to D[] Infirmary and due to no beds being available the child was sent to S[] hospital. The FC stated he was fatigued and could not take the child, so his fostering s/w [social worker] took DM to S[] (around 2am). The fostering s/w sat with the child all night. I arrived at the office and FC called me stating that someone needed to release the fostering s/w. He was advised that he needed to go back to S[] and sit with the child as his foster carer. He informed me that he needed to pop into work and would go then. He then informed me, stating he had to be at work and could not get to the hospital until 3 / 4pm that day.
>
> He was informed by his fostering team that he needed to go to hospital. In the meantime the fostering team arranged for another foster carer to sit with the child.
>
> A vast amount of e-mails then were received from the FC stating it is not an emergency and he is in a safe place and did not need anyone sitting with him. FC was reminded of his role as FC who then stated that he is not his parent, but the responsibility of the child care team. FC then stated that he could not offer 24 / 7 support for the child once the child was discharged from hospital.
>
> This caused concerns and with managers decision it was agreed for this child not to return to this FC. Another FC was identified and once the child was discharged on 25/05/2021 was place with the new FC to ensure he was safe and well.'

115. It is clear from the BDP reasoning in relation to finding 1 that the Respondent has accepted, wholesale and without question, all of the evidence within flags 1 to 8. The reasons given are as follows [p210]:

> "The evidence provided by social work/fostering team has been based upon several professionals' involvement, meetings/communication with AVS, and speaking with DM and his current foster carers, and the evidence is assessed as a credible source of evidence."

116. This rationale is carried through each of the five factual findings of relevant conduct.

117. The DBS also relies upon the Appellant's original submissions to the decision maker on 10 June 2022 (approved by AVS in a statement of truth on [108]) in which AVS appears to accept he had acted inappropriately [p97 para 35]:

> 35. At the time, AVS had believed he had weighed the competing interest of needing to resolve his business emergency and be satisfied that DM was being looked after, however he now realises that DM should have been the sole priority and he should have returned immediately [on the morning of 24/5/21], if not having left at all due to the fatigue.

118. Mr Serr points out that now in his latest evidence/submissions the Appellant seems to row back from any admission. He also seeks to further put a gloss on his 'work commitment' now stating that it was to provide safety equipment for a vulnerable patient albeit this has never been mentioned before [p.279 para 14].

119. He also relies on the email of PS at [288] dated 24/05/21 and timed at 10.45am as being relevant to finding 1. He submits that the tone of the email makes quite clear the dissatisfaction of PS, a social worker, with AVS's conduct and failure to support DM by attending the hospital:

'Hi A[VS]
Sorry I am just going out on an emergency and have not been able to get hold of
N. I believe fostering have contacted you asking you to go to the hospital immediately to support DM, which I am strongly recommending you do. You are his foster carer and it is expected of you as his carer for you to prioritise and
support DM at all times.

You will need to undertake further discussions with the fostering team in regards of
additional support

Thanks [PS]'

120. The Appellant replied to the email on the following day on 25 May 2021 at 09.04am [287]:

'Good morning P[S],
I attended hospital yesterday [24/5/21] for an hour or two during which DM was resting (unconscious) and also took him some creature comforts from home.
I believe my request for some respite support has been answered with a Carer called [Na] who is currently off work and able to take an iPad for some entertainment etc. and sit at the hospital.

> Following on from this, I spoke with [Ni] last night who confirmed D was still in the Hospital and that he should be being released this morning.
> I believe the plan is to continue his respite as the couple who have been nominated would have more resource for things like 24hr waking care should this be included into the safety plan, to see him through this crisis period while CAMHS finally put in place the support he needs.
> …
> I am happy to go to hospital today again to see him and provide emotional support and also made this offer last night to [Ni] however he believed DM was again unconscious and thus this would have had no benefit. I remain able and willing to support DM, can you please let me know the outcome of the CAMHS assessment and what the plan is for DM's care over the next 7 days and at what point we will transition him back into his home here.
> …'

121. Mr Serr submits that it is clear from AVS's response that by 25/05/21 AVS accepted that he was not in a position to provide the support needed at that time. His reference to attending hospital the previous day 'for an hour or two' (on 24/5/21) is indicative of the Appellant's failure to prioritise DM at this crisis point. He argues that AVS's appeal on this allegation raises no arguable mistake of fact within the meaning of the Act. It is simply a quarrel with the seriousness that LADO and the social work team (who felt it justified removal of the young person from AVS's care) and subsequently DBS ascribed to it. It is simply a submission on appropriateness.

122. We disagree. The DBS have chosen to rely on a very specific finding of relevant conduct in relation to the Appellant's conduct in the period 23-25 May 2021 and it is the specific finding of failing to relieve the support worker and sit with DM in hospital on the morning of 24 May 2021 which we must consider. The relevant date is 24 May 2021 (rather than 25 May 2021 as stated in the finding) as the events concern the evening of 23 May 2021 and morning of 24 May 2021 but nothing appears to flow from this.

123. We are satisfied on the balance of probabilities that the Appellant did not fail to relieve the support worker and sit with DM in the hospital when requested on 24 May 2021 as the DBS found.

124. The specific finding is addressed by the Appellant in the 3 June 2021 letter, set out above, letter of representations in response to the MTB in April 2022 [para 23 to 35], the Notice and Grounds of appeal [p198-199, para 43 to 47 and further submissions on behalf of the Appellant [p270]. In the Appellant's witness statement dated 30 June 2023 he states at paragraphs 12 to 17:

> '12. Whilst I was away on a planned holiday and DM was on respite leave, he self harmed by superficially cutting his upper leg whilst I was away. The respite carers were not aware of this as he concealed the cuts with clothing. On my return on Sunday 23 May 2021 I discovered the injuries and took him to D[] Infirmary. Part

of my reason for taking DM to hospital was that this was the second occasion on which he had undertaken self harming cutting behaviour. On a previous occasion in April 2021, he had made superficial cuts to his arm which were reported, and a referral was made to Child and Adolescent Mental Health services [CAMHS]. Unfortunately, no appointment had been received, so the apparent escalation in self harming behaviour made me want to take him to hospital to ensure that the further incident was responded to and hopefully would result in an immediate referral to CAMHS whilst at the hospital. I believe this decision was made in the best interests of DM and demonstrated my primary concern to seek help and support for him.

13. I contacted the duty social worker at the agency and explained the situation, it transpired that this was DM's own supervising social worker so we arranged to meet at the hospital. I explained that I was extremely fatigued after just arriving back from a road trip and tour around Scotland. The social worker attended at the hospital around 1:30 - 2:00am[on 24/5/21]. DM was settled and sleeping at this time, but I had checked if he was content for me to go home, rest and get some items together to bring back. I agreed that I would return the following morning (she had suggested 800-830) and would bring items requested by DM. I asked DM if he wanted me to stay prior to leaving, but he said he was not bothered. Before I left, I checked that DM had everything he might need, I was satisfied that his social worker was known to him and he was safe.

14. I got home at about 3:30am [on 24/5/21] and went to bed. At approximately 6:30am I received an urgent telephone call from the office advising of an issue at the office requiring attention. This may have resulted in legal action being taken against my company which I am a director and owner of. The issue related to the delivery of an urgent item to a customer and problems arising from the potential failure to meet the delivery deadline. This issue also had what I would refer to as a moral dimension to it. My company provides items to organisations on an urgent basis as needed for safeguarding purposes. The delivery was therefore one of a risk management plan, from recollection it related to padding which needed to be delivered to be placed on a wall to prevent a vulnerable patient from striking their head against a wall in a room they were being cared in, thus preventing them from harming themselves.

15. I had a conversation with the D[] Childrens services and was told that DM had been transferred to S[] Hospital. I advised that I needed to attend work before heading to the hospital to deal with the emergency that had arisen. I recall that I tried to convey the urgent nature of the need to resolve the issue at the office but, accept that I became quite frustrated when I was told I had to attend the hospital immediately. This was now S[] hospital some distance away in rush hour and there would be a delay in me getting there apart from the need to resolve the business issue to resolve the contract requirement, avoid litigation and morally ensure that the patient was protected from self harm. I therefore asked if another social worker could sit with him. I also weighed in whether his mother may attend as she still had P[arental]R[esponsibility] and had agreed to DM being accommodated on a voluntary basis, As such, the placement was on a shared care basis in practical terms.

16. I arrived at S[] Hospital at around 11:30am [on 24/5/21] following traffic delays and parking. [Na] the respite worker was at the hospital when I got there, this was

> one of the carers who subsequently cared for DM up to the recent breakdown of placement. It does not appear that his mother had been contacted, despite section 20 and entitlement to be advised. I contacted DM's mother later that day when I realized she had not been contacted and she attended soon after and on the following days sitting with DM.
>
> 17. Discussions occurred regarding the need for some respite and this revolved around my concerns that I was a lone carer and could not provide 24/7 waking care to DM practically. It was therefore agreed that DM would be placed in respite care for a few days, but this in fact turned out to be permanent. I attach as EXHIBIT AVS 2 a copy of emails between myself and D[] Children's Services. These reflect my ongoing concerns for DM's welfare.'

125. The Appellant gave oral evidence consistent with his statement during the hearing which we accept as largely reliable.

126. The BDP appears to accept that the Appellant attended hospital by 11:30am on 24/5/21. It is acknowledged that the Appellant showed concern for DM and believed he was safe and being cared for in hospital in the meantime. The Appellant's reflections on the events and insight [112] are acknowledged by the Respondent. The criticism appears to be that the Appellant was asked by social services to attend earlier in the morning and should not have attended to the emergency at work.

127. We accept the Appellant's written and oral evidence, that he stayed with DM in hospital overnight until around 2am on 24 May 2021. This is corroborated by his text messages, sent after 02:16 on 24 May 2021 [p125] when he returned from the hospital (D Infirmary) having left DM in the early morning and the Appellant recontacting DM against from 6am to check on his welfare by which point DM had been moved to a different hospital (S Hospital):

> [24/05/2021, 02:16:47] [Appellant]: Just got in. Things ok with DH?
> [24/05/2021, 02:17:27] DM: Yeah life is good she's not asking anything yet really just going about her reading
> [24/05/2021, 02:17:56] DM: Hopefully she'll have the common sense to realise now isn't the time for interrogation
> [24/05/2021, 02:20:31] Appellant: One would hope. Well done this evening. Proud of you xxx
> [24/05/2021, 02:33:10] DM: Thankyou c
> [24/05/2021, 06:07:58] DM: Just made it into S[]
> [24/05/2021, 06:35:17] DM: If it's not too late to ask could you bring me a teeshirt and some deodorant please
> [24/05/2021, 06:36:23] Appellant: I will do pal.
> [24/05/2021, 06:36:51] DM: Thankyou. Any old anything will do
> [24/05/2021, 06:36:55] Appellant: Going to get another hour
> [24/05/2021, 06:37:02] Appellant: Are you ok?
> [24/05/2021, 06:37:30] DM: Okie dokie no problem. Yeah I'm ok doing ok aside from the obvious

128. We accept the evidence given by the Appellant that he spoke to Children's Services by telephone somewhere around 08.30am on 24 May 2021 who asked him to come into the hospital to be with DM but we are satisfied that the Appellant responded and came shortly thereafter arriving at S[] Hospital around 11:30am. The Appellant therefore did respond to the request made at around 8.30am and go to relieve the support worker at 11.30am and had contacted DM in the mean time to check on him. The Appellant did not 'fail to relieve the support worker and sit with DM in the hospital when requested to do so in the morning' as the DBS found.

129. We are satisfied that the above errors of fact are material to this finding of relevant conduct. The Respondent's erroneous finding appears within the Structured Judgment Process ("SJP") [p222-232] and the Final Decision Letter. The mistakes of fact are material in the sense that the barring decision was partly based upon an erroneous finding.

130. The fact that the Appellant went first to work before going to DM on 24 May 2021 and arrived later than originally agreed or indicated when he left the hospital in the early hours and needed to be requested again before he arrived does not give rise to any failure to relieve the support worker when requested in the morning.

131. Further, we are satisfied that our fresh findings on this allegation would not amount to relevant conduct by the Appellant. DM was at not point endangered, harmed or put at risk of harm by the Appellant not attending the hospital earlier that morning between 8.30 and 11.30am to relieve the support worker – nor would there be a risk if the Appellant's conduct were repeated in respect of another child.

132. DM's needs were being met during the Appellant's respite period away from hospital between 2 am and 11am on 24 May 2021. The detail can be found in the Appellant's statement [279-280, paras 12 to 17] as set out above. Arriving at 11.30am was not, as asserted on behalf of the Respondent, a "serious breach of his foster care duties" [p262, para 45.3]. The Appellant ensured that someone would be with DM whilst he dealt with an emergency at work. Exhibit AVS2 [p287] sets out the steps the Appellant took following DM's admission to hospital, including arranging for respite care to enable someone to sit with DM, speaking to his mother, his school, bringing items in from home, rescheduling DM's appointments and asking the social worker for updates on DM's assessments.

133. We also accept the Appellant's emails sent on 25 May 2021 as being reliable that state that he offered to go in again to the hospital and had made himself available on 24 and 25 May 2021 to care for DM while he was in hospital.

134. For the vast majority of the time between 2am and 11am on 24 May 2021 the Appellant prioritised DM's needs over his own and responded to DM's needs throughout this time period. We are satisfied that in addressing the narrow timeframe of the morning of 24 May 2021, the actions of the Appellant in arriving of the hospital at 11.30am were that of reasonably caring and foster parent genuinely concerned for the health and wellbeing of a very vulnerable young man.

135. The Appellant also gave detailed evidence about the impact of Covid on the level of support and guidance available to him during his fostering career, as well as the extra pressures of Covid self-isolation rules. We accept this evidence on this.

136. From the emails disclosed after the hearing, it can also be seen that the Appellant was grateful for the respite provided by social services and the fostering social worker while DM was in hospital (email sent by him at 10:02am on 25 May 2021). However, at 11.51 on 25 May 2021 DH informed the Appellant by email in reply that DM would not be returning to his care.

137. Despite deciding that there was a mistake of fact in the DBS's specific finding, that is not to find that the Appellant's actions were without any fault.

138. We do consider that there is merit to the general criticism that the Appellant failed to prioritise DM's needs on 24 May 2021 (and that this was a rational conclusion based on facts established). While there are no specific findings of relevant conduct addressing this, the allegation was contained in the evidence relied upon by Children's Services and the DBS. The allegation of a failure to prioritise DM's needs was put to the Appellant in cross examination and relied upon by the DBS.

139. Fair criticisms can be made of the Appellant on the basis of these further allegations. For example, the following is not in dispute: the Appellant arrived at the hospital on 24 May 2021 later than anticipated or previously indicated or agreed when he left the hospital in the early hours of the morning; he had to be asked again to attend in the morning when he had not arrived by around 08.30am so that he had to be asked before he came; and that he went to work first thing that morning before seeing DM even if there was an emergency there he had to deal with.

140. The Appellant accepted in oral evidence that perhaps with hindsight he could have been more amenable and cooperated more with the social worker in their dealings but he was extremely tired following the return from holiday and had had little sleep. He also pointed to the fact that he had a bad relationship with one of the social workers having previously complained about them. We agree that he might have been more emollient and cooperative when dealing with social services in the way he accepts.

141. We also agree that, like the Appellant originally did in representations in 2022 (which he approved with a statement of truth), he might have done more to care for DM on 24 May 2021:

> '35. At the time, AVS had believed he had weighed the competing interest of needing to resolve his business emergency and be satisfied that DM was being looked after, however he now realises that DM should have been the sole priority and he should have returned immediately, if not having left at all due to the fatigue.'

142. DM was a very vulnerable young man who had self harmed and this occurred in the context of his father recently taking his own life. We accept the evidence on behalf of the DBS that DM's needs were paramount.

143. There are further matters for the DBS to consider in respect of the wider and connected allegations, given that we explain that we will be remitting the case for reconsideration.

144. The finding of relevant conduct does not require us to determine whether the Appellant failed to prioritise DM's needs or care over the entire time period from 23-25 May 2021, and whether this caused harm or a risk of harm to DM, even if the Appellant did not fail to relieve DM's support worker on the morning of 24 May 2021.

145. The DBS have not produced direct, contemporaneous or any further evidence in support of the other allegations as to what occurred on 24 and 25 May 2021 - for example it is suggested that the Appellant initially refused to go into the hospital until 3/4pm on 24 May 2021. We have only received the Appellant's direct and tested evidence which does not address this allegation and the emails which he has produced which do not mention it. In the absence of the DBS (or the Appellant) producing all contemporaneous emails or notes of any telephone conversations, and this not constituting a finding of relevant conduct made by the DBS, it is not necessary to determine and we are not able to find whether the Appellant said this.

146. As part of the wider allegation of the Appellant's failure to prioritise DM's needs, Children's Services and the DBS relied on evidence of contained in the emails and LADO notes. The notes state that one of the reasons the social workers removed the DM from the Appellant as being Foster Carer on the morning of 25 May 2021 was because the Appellant was not prepared to be available 24/7 for DM after he was discharged from hospital (see [37] and [47] and the 03/06/21 & 01/07/21 LADO notes cited above). It is stated that the Appellant had indicated so in a 'vast amount of emails' on 24 May 2021 stating 'it is not an emergency and he is in a safe place and did not need anyone sitting with him' and 'that he could not offer 24 / 7 support for the child once the child was discharged from hospital.'

147. Again, we have not been directed to any emails, contemporary or any other direct evidence by either party in which the Appellant stated that he was not prepared to go into the hospital to sit with him or look after DM on a 24/7 basis after discharge from hospital and whether if he had said this, this conduct would be relevant conduct or likely to endanger DM. This dispute centres on whether it was reasonable for the Appellant to be removed as a foster carer or would have endangered DM. As stated above, this is not the basis of any finding of relevant conduct but is a matter that the DBS may reconsider on remittal.

148. In summary, there are mistakes of fact in Finding 1 and based upon this finding the Appellant has not committed relevant conduct. Nonetheless there are further connected allegations that the DBS may consider on the case being remitted.

Finding 2: On dates between 25 May 2021 and 12 August 2021 you continued to contact DM, aged 15, despite having being [sic] re-quested not to for the wellbeing of DM following DM being removed from your care, where you shared information about the fostering investigation.

149. The evidence and submissions relied upon by the DBS in relation to this finding are addressed above [251-252/263]. The Appellant supplied emails which include the following from PS to him on 25 May 2021:

> 'Just to confirm what DH is stating. DM will not be returning back to your care and DM has been spoken to about this and his mother is also aware of this. We would appreciate for you not to contact DM at this stage as he is not well and would have an impact on his well-being. This is a difficult time for DM, which I am sure you will appreciate.'

150. Mr Serr submits that it is difficult to identify the mistake of fact relied on by AVS in his recent submissions [271-272] as opposed to a quarrel with the DBS about the seriousness with which this conduct should be viewed and whether in AVS's view it was harmful. Whether it was advice/guidance/recommendation or an instruction (the decision letter indeed refers to it as advice/guidance [176]), AVS did contact DM after he was told not to by the social work team. The fact that AVS says at para 18 [280] that he distinguished between a request and an instruction and sought legal advice on the issue continues to demonstrate a disregard by AVS of the advice of the experts that he was receiving for the good of the child.

151. This allegation is addressed by the Appellant in his letter of 3/6/21 set out above, in the letter of representations in response to the MTB in April 2022 [para 36 to 45], the Notice and Grounds [p199, para 48], further submissions on behalf of the Appellant [p271-272].

152. The Appellant states in his witness statement dated 30 June 2023 [280 and 282 para 18, 19, 29 to 31], repeatedly, that this was a request or advice,

rather than an instruction (as asserted by the Respondent) from the fostering team.

'18. In my representations I accepted that I had contact with DM up until 27 May 2021. This was on the basis that I was not told that I could not, there was language requesting that I did not have contact. I sought legal advice on this issue and was satisfied the request was not a prohibition.

19. I made no further contact with him after 27 May 2021 because the agency told me that they had powers to call the police and tell them that any contact could be grooming, and police would arrest me under child abduction laws. I therefore took note of this severity of power and complied with not contacting DM further because of the potential risk of being reported to the police. No further messages were sent and I attach a copy of screen shots, to compare against enclosure 4 of the reps AS Exhibit AVS 3. DM did continue to send messages but I did not respond. I confirm no messages have been deleted.

20. DM did attend at my place of work unsolicited and unexpectedly in August. I told him he would need to raise the concerns he had through his advocate. I confirm that I did not ask him to attend nor invited him to do so.
…
30. The DBS have made findings that I shared information about the fostering investigations with DM, but this is not correct. At no time did I share the conversations with social workers or the subsequent complaints with DM

31. DM approached me in September 2022 to express his concern at the way in which we had been treated and subsequently provided me with a copy of a complaint he had made via an independent advocate. I had no involvement in this complaint being made and only learned about it when a copy of the complaint response was given to me by DM. I attach a copy as Exhibit AVS 4

32. DM's mother remained in contact with me following the removal of DM from the placement and sent an email to me setting out her observations and feelings that DM wished to stay with me in placement. I attach a copy of the email as EXHIBIT AVS 5.'

153. The Appellant gave oral evidence consistent with this.

154. The Appellant has produced the totality of WhatsApp messages [290, AVS3] between himself and DM, which make clear that the Appellant made contact with DM by messaging him between 25 and 27 May 2021 but did not send any thereafter and did not respond to any messages from DM to him after 27 May 2021. He states that the messages demonstrate the high regard DM has for the Appellant. They also make clear that DM complained to the social workers absent any coercion or discussion with the Appellant.

155. It is accepted that the Appellant contacted DM from 25 to 27 May 2021 in multiple text messages after being asked not to by PS in an email earlier on 25/5/21 (see the number of messages beginning at [130-135]). For example:

[25/05/2021, 17:12:35] [Appellant]: They have asked me not to speak to you, however they have not given me a reason which by itself is not good enough. The are also ignoring my questions around why they have moved you. They say they have told you but no one else, even your mother doesn't know why they have moved you. Additionally, i have spoken to the legal people about what has happened and they believe this move is in breach of the law, as in it is *illegal* what they have done.
I need to know if you have been told not to speak to me and, ultimately if you want me to keep in touch with you, and if you want me to fight this or not. For me, i am
struggling to come to terms that you have been removed from our home in this manner and that you want to be here and that i want you here, but its your life, and it has to be up to you pal.
If you would prefer to be elsewhere i completely understand, if you want to be here, i will fight it with everything i have.
Let me know

[25/05/2021, 20:46:51] DM: Hi pal. I think it's awful thag they've asked you not to talk to me. I want you to talk to me and to be in contact with me and to stay in my
life. I've been thinking about where is safest with what's going on with me and I feel like it's with my mum becusse of her experience with it all. My life is going to
be different and more difficult in part becuase obviously it's not the same environment with the same types of benifits to living with you but right now what I'm focused on is safety. In another placement I wouldn't be safe and I don't know how safe I am from myself that is in my placement with you. Plus they've really made it our to me like coming back home isn't an option. They told me that i was removed becusse you haven't been following rules and you were no longer an adequate carer for me. I want you to fight to still be in contact with me I want to
come see you in the morning at work before school I want to come over for Sunday dinners go horse riding with you If you'll have me sleep over at home becusse I want to keep you in my life. You've been the best person to ever walk into my life. You've treat me like gold and you've shown me who I want to be and how
to get there. You're my inspiration to be a better me and no part of my placement with you has been unpleasant or wrong in any way. You've always been more than
amazing for me and I don't want to lose you from my life. I see you as my father like you've always been a part of my life and I refuse to lose that even tho where
I'm safest is at my mums. I think the way you're being treated by them is disgusting and with my return to my mum you should consider working for an agency now
you don't have to worry about losing me. I want you to be there for my first day at uni my birthday Christmas all the major things becusse you're family to me now. I also don't want to lose the connection with S[] and E[] and An[]

> and A[] because you all have been the making of me. I love you and I love everyone else who has helped me become the person I am. Thankyou for the life you've given me and thankyou for being in my life. I refuse to let them have a say in whether you can
> see me. Once I'm with my mum it's up to her and you as people. The trust will no longer have a say
>
> …
> [Thereafter 18 messages from the Appellant and 8 from DM until this message:]
>
> [27/05/2021, 10:58:25] [Appellant]: Morning pal. PS will get all your stuff around 11:30 today. Thinking about you and hope your well (no need to reply) xx

156. It is acknowledged in the BDP that there was no prohibition on the Appellant contacting DM, only that PS had stated in the email of 25 May 2021 that they " would appreciate it if [the Appellant] did not contact DM at this stage" [212].

157. In respect of this finding, we are satisfied that the Appellant was requested by a social worker on behalf of children's services not to contact DM on 25 May 2021 and that this was language was clear whether it was advice, guidance or an instruction (even if in reasonably polite terms). The request was made on the basis of DM's wellbeing and on behalf of a social worker and Children's Services – a reason was therefore given to AVS.

158. The request to cease contact came, on 25 May 2021, at some time after the initial email alerting the Appellant that DM was not to return to his care. The recently disclosed emails corroborate the Appellant's evidence that the news that DM was to be removed from his care was communicated in very short and abrupt terms at 11:51am on 25 May 2021.

159. The relevant request was sent by email to AVS thereafter: "we would appreciate for you not to contact [DM] at this stage as he is not well and would have an impact on his wellbeing".

160. We are also satisfied that the Appellant understood the nature of that request based on the text message he sent DM at 17.02 on 25 May 2021 set out above. We do not accept the Appellant's evidence that there was anything ambiguous or unclear about the request in the nature of the language 'we would appreciate'. It was clearly a request not to contact DM. Further, it is not in dispute that AVS thereafter contacted DM in multiple text messages between 25 and 27 May 2021 as he accepts.

161. We accept that it was reasonable for the DBS to come to the view that the Appellant should have complied with the request in circumstances where

Children Services had responsibility and authority to make request of (and ultimately direct) the Appellant as a foster carer.

162. We are satisfied that the DBS was entitled to find that the Appellant should reasonably have acceded to the request and authority of the social worker in circumstances from 25 May 2021 where the child was no longer in his care or responsibility. In the absence of written and clear authority, the Appellant should reasonably have complied with the request, guidance or advice even if he disagreed with it. The Appellant had mechanisms by which he could disagree or complain about the request but was not reasonably entitled to ignore it in the meantime.

163. Even if the Appellant profoundly disagreed with the initial request on 25 May 2021, he should reasonably have complied with it until the position had been confirmed after any challenge or complaint. Likewise, even if he took legal advice, the Appellant was not entitled unilaterally to ignore the request without clarification or confirmation either from Children Services, a social worker or court (having succeeded in a legal challenge). Children's Services had ultimate responsibility for the wellbeing of DM who was a very vulnerable child with a history of mental health difficulties, self harm and trauma in his recent background (including his mother's alcoholism and father's recent suicide).

164. We also accept that the Appellant questioned the logic of the decision and was not finally instructed to cease contact until 27 May 2021, when contact did cease. While we accept the Appellant's evidence that he did not understand the force of the request on 25 May 2021, it was not explained to him until 27 May 2021, and the email was not a clear direction not to contact DM, it was still a request from an official with responsibility for DM's care.

165. The text messages at [290-293] between DM and AVS from June 2021-November 2021 also evidence the fact that AVS and DM remained in contact long after he was removed from AVS's care and the instruction was given to AVS not to have contact.

166. However, it is to the Appellant's credit that from 5 June 2021 to 23 November 2021 there were a number of text messages sent from DM to the Appellant [136 to 137] to which the Appellant did not respond. This is contact by DM to AVS rather than AVS contacting DM. The emails and messages corroborate the Appellant's evidence on that point. It is to be noted that contact ceased once a formal investigation had begun. There also seems to be no doubt that DM thought highly of AVS and wished to continue contact with him.

167. We are satisfied that there was no mistake of fact in that part of the finding made by the DBS that contact continued and was initiated by the Appellant between 25 and 27 May 2021 when he had been requested not to

do so for the wellbeing of DM. There was no mistake of fact in that part of the finding.

168. Nonetheless, the DBS was mistaken if finding that the text message communication which followed the initial request [p130, 17:12 to 27 May 2021, 10:58] included any information about the fostering investigation. The Appellant was unaware of the investigation for four days after DM's removal. We find that this aspect of the allegation amounts to a material error of fact.

169. It is also important to note that having reviewed all the contents of these messages between 25 and 27 May 2021 and 5 June 2021 to 23 November 2021 we are not satisfied that the Appellant shared information about the fostering investigation with the Appellant during this time. There is no reference to it in the messages.

170. Therefore, we are not satisfied that the Appellant shared any information with DM about the fostering investigation in writing or as result of the Appellant making contact with DM. This again is to the Appellant's credit and reveals a mistake of fact in the DBS finding.

171. However, while it is accepted that the text messages sent by DM to AVS after 27 May 2021 emanate from DM, AVS appears to have done nothing to dissuade DM from continuing to contact him. The Appellant demonstrated insight into these concerns in response to the Minded to Bar letter [p113].

172. As a result, the next contact between DM and the AVS was on 9 August 2021 when DM came to visit the Appellant in person at his office. We do not find this to be the Appellant contacting DM but DM contacting AVS. The contact on 9 August 2021 followed an unsolicited visit to his place of work by DM. The suggestion that the Appellant sent a message to DM to precipitate the meeting is denied and there is no proper evidence provided to substantiate the assertion that was made at the strategy meeting.

173. The Appellant accepted in oral evidence that DM came and stayed for about an hour or so on 9 August 2021. The Appellant stated that the discussion between him and DM concentrated mainly on pastoral and welfare issues but he accepted in cross examination that he may have briefly mentioned the fact that Children's Services were investigating him – albeit not in great detail.

174. We are satisfied that the Appellant did share some high level information about the fostering investigation with DM at this contact on 9 August 2021 – at a time not when the Appellant contacted DM but when DM contacted him.

175. We accept the Appellant's further evidence about this meeting. On this occasion, DM told AVS that he wanted an advocate and the trust would not allow this. The Appellant therefore advised him to write down and date his concerns and this was done in DM's 'wishes and feelings letter'. A copy of

those concerns in the 'wishes and feelings letter' was provided to DCST by AVS following him seeking advice from his independent advisor. The Appellant told the Tribunal that he was still a foster carer and gave DM advice about his absolute right to advocacy, took his complaint [p138], advised DM to write down his concerns and that it was, in such circumstances, the Appellant's duty to pass that on. He denied grooming DM or putting words into his mouth. We do not accept that the Appellant did this on the balance of probabilities. It cannot be reasonably be inferred from the nature of DM's letter. It is apparent from his text messages that, whatever his vulnerabilities, he was an articulate 15 year old capable of expressing his own wishes clearly and we are satisfied that he drafted the letter of his own accord because he wanted to.

176. At the strategy meeting on 19 August 2021 there appears to be some evidence of a concern that the Appellant shared his wishes for the outcome of the children's services investigation with DM and therefore encouraged him to write the 'wishes and feelings' letter. The same is not discussed within the BDP related to this allegation. The allegation is that the Appellant shared and requested information with DM around the fostering investigation and of what his wishes for the outcome of this were to be, as well as showing a disregard towards requests to turn DM away if he were to visit him.

177. The DBS also relies upon the letter dated 29/09/21 from D[] Children's Services Trust to DM in reply to his 'wishes and feelings letter' provides further support to these allegations for which AVS was placed on the CBL.

1.1 DM was asked not to contact AVS-p.297. AVS was told directly not to contact DM-[298]

'AVS has also been told directly that he should not be having contact with you now he is no longer your foster carer. This means that he should not contact you and if you turn up to see him we expect him to advise you to go back home, or not respond to messages or calls from you. I do understand that this is difficult for you and I wanted to take the opportunity to explain to you that AVS has been told this by the Trust so you understand there is a need for AVS to act in a way he has been told to act'

1.2 DM was not able to visit AVS or stay the night-[298].

1.3 DM confirmed that AVS had shared professional conversations he had had with him and this was of concern to the team manager-[299].

1.4 The team manager confirmed concerns around the way AVS spoke to DM, DM's appearance, the morning regime DM was subject to and the fact DM suggested AVS was controlling-p.299.

1.5 AVS gave DM alcohol at social gatherings despite the fact he was at the material time only 15-p.300.

1.6 DM's body language gave social workers cause for concern while in the presence of AVS reflecting distress and discomfort-p.303.

',,,PS said that when she visited you when you were at AVS's she was concerned about your body language in that you physically reacted each

time AVS walked into the room. PS said that AVS kept walking into the room, in a meeting with you that should not have been interrupted, and each time he walked in your head would go down and you avoided eye contact with him by looking downwards.'

178. The Appellant accepted that at the meeting on 9 August 2021 DM wrote the letter to Children's Services in support of him. The BDP highlights that there was a speculative discussion within the 19 August 2021 strategy meeting that there were "concerns" that the Appellant had influenced or coerced DM into supporting his case with children's services.

179. This is not sufficient evidence to support a finding that the Appellant in fact influenced DM into supporting his argument as to why DM should be returned to the Appellant's care. This finding is made on the basis of a speculative discussion reported in the multiple anonymous hearsay minutes of a strategy meeting. We prefer the Appellant's oral evidence on this topic.

180. We are satisfied that, notwithstanding our findings of mitigating factors, there is no mistake of fact in the finding that 'On dates between 25 May 2021 and 12 August 2021 you continued to contact DM, aged 15, despite having being [sic] re-quested not to for the wellbeing of DM following DM being removed from your care'. We are also satisfied that 'on 9 August 2021 when DM contacted the Appellant he shared information with DM about the fostering investigation.'

181. We therefore find that there are mistakes of fact in the second finding. We accept that the Appellant contacted DM for two days after being requested not to for his wellbeing. However, thereafter DM contacted the Appellant. Some high level information about the fostering investigation was shared on 9 August 2021 but this was on a date when DM contacted the Appellant. Therefore, part of the second finding is confirmed but part of the second finding contains mistakes of fact.

182. Further we are not satisfied that, based upon our fresh findings of fact, the Appellant's conduct harmed or was likely to harm or endanger DM – there is no reliable evidence that he was emotionally harmed by the contact on 25-27 May 2021 nor by the subsequent contact which DM initiated (indeed, the fact that DM initiated contact throughout the period June to November 2021 and the contents of the messages supports the finding that he was not harmed). There is no reliable evidence of DM actually being endangered, at risk of harm or caused harm by the messages. A belief, expressed by an unknown social worked at a strategy meeting on 19 August 2021 [213] that the contact was having a negative emotional impact on DM is insufficient to support a finding on the balance of probabilities that DM was put at risk of or caused any harm by the contact.

183. It is also relevant that some months later, DM, through his advocate, expressed directly to the local authority that he wished to maintain contact

with the Appellant and that preventing that contact was emotionally harming him [see in particular 302-3].

184. We do however find that the Appellant's conduct in contacting DM between 25-27 May 2021 after being requested not to do so by a social worker for his wellbeing, would be likely to put a child at risk of emotional harm, if repeated in respect of a different child and is therefore capable of amounting to relevant conduct for the purposes of paragraph 4 of Schedule 3 to the Act.

185. While we are satisfied that there were mistakes of fact in the DBS's finding, we are satisfied that our own findings could amount to relevant conduct. Nonetheless, we are satisfied that if the action of ignoring a request not to contact a child for their wellbeing made by a social worker or children's services for a foster parent in the position of the Appellant were repeated in relation to a vulnerable child it would be likely to put them at risk of emotional or psychological harm.

Finding 3: On dates between 20 August 2020 and 24 May 2021, you woke DM, aged 15, at 5.30 a.m. on mornings before school, bringing him to work with you and having him complete work/school work prior to school, resulting in DM being tired and lethargic

186. The submissions relied upon by the DBS in respect of this finding are set out above. The evidence relied upon by the DBS for this comes from D[] Childrens Safeguarding Trust and LADO meetings [191] and the inference from AVS's own admission that DM had to be ready to leave the house by 6.30am. The impact on DM's mental and physical health is documented by PS, the supervising social worker.

187. Notwithstanding the evidence relied upon by the DBS to make its finding we are satisfied that the finding is based upon material mistakes of fact. The finding is addressed in the Appellant's original letter to Children's Services on 3 June 2021, letter of representations in response to the MTB in April 2022 [para 46 to 50 and see p113] and the Notice and Grounds [p199-200, para 49 to 51] and further submissions on behalf of the Appellant [272].

188. The Appellant's witness statement dated June 2023 also sets out his response to this allegation [p281, paras 21 to 23].

> 21. I would confirm the content of my representations and the email correspondence attached at enclosure 6. DM decided what time he would get up in order to come to work with me or alternatively go and get the bus to school. I did not tell him to get up at 5:30am and he would get up at this time to take shower and do his hair on some mornings, on others he may get up later. I believed that I was allowing DM to show an autonomy for his age and confirm that I had made reference to NHS guidance on sleeping periods (8-9 hours for 12-18 years old).

> DM would normally go to bed at around 9pm so by my understanding he was meeting this recommendation.
>
> 22. I would also wish to clarify that I was not in the office everyday and so this routine only applied, when I was required to go in. This was also set out in the email to PS which formed enclosure 6 of my representations.
>
> 23. I provided alternative explanations within my representations as to why DM may have appeared tired at times, including the unresolved issue of whether he suffered from fibromyalgia (see paragraph 49 representations).

189. The Appellant gave oral evidence consistent with the statement. The only evidence we have from DM is contained in the letter from children's services in response to DM's 'wishes and feeling letter'. The letter states that it was DM's choice to get out of bed at 5:30am [299]. This is supported by the evidence of AF and SH.

190. We accept the Appellant's evidence as being reliable on the balance of probabilities and as follows. He stated that he gave DM the choice as to when to wake and how he was to get to school. If DM wanted a lift from the Appellant then DM knew he would have to leave the house at 6.30am to travel in the car with the Appellant, spend time in the office first and then be driven to school. The alternative was that DM could make his own way to school by bus but DM would have to at the bus stop for 6.45am to get to school. DM, as a teenager, was given autonomy and could set his own alarm and choose how and when to get up. DM was able to get sufficient sleep which complied with the NHS guidelines. When DM did complete schoolwork prior to school while at the Appellant's office then this was DM's choice and to his benefit.

191. There is no direct or reported evidence that the Appellant woke DM at 5:30am or that doing so resulted in DM being tired and lethargic. It was simply an inference or conclusion drawn in the LADO minutes. There is no explanation within the BDP for the finding that the Appellant woke DM. The complaint appears to be that the Appellant did not let DM sleep in but dropped DM to school, as suggested by PS [216].

192. The evidence that DM was tired and lethargic as a result of waking early is unreliable, multiple hearsay, which amounts only to speculation that DM was lethargic due to waking up early. If DM was tired and lethargic, there is no reliable evidence that this was due to anything the Appellant said or did. The causal link was not established. This is not acknowledged in the BDP.

193. Further, there is no reliable evidence from which it can be reasonably inferred that DM was endangered, caused or put at risk of any physical, emotional or psychological harm from waking early. DM was a teenage boy. His school provided a positive reference to the LADO, attesting to the Appellant's support of DM's education "at all levels, he ensured D attended school, offered school runs, supported his academic achievements and offered outdoor and more in-formal methods of education through after school

and social activities". This again accords with the Appellant's evidence about encouraging homework and revision and taking educational trips.

194. DM explained in his complaint letter [302] that the Appellant was helping with his physical health by arranging and accompanying DM to appointments, noticing changes in his physical health. It appears that, without sufficient evidence, the local authority jumped to conclusions, which were adopted, by the Respondent. The primary facts and conclusions are not established on the balance of probabilities.

195. The Tribunal accepts the Appellant's evidence that he and DM trialled having longer lie ins, but that this resulted in DM being tired at school and they decided this was not working for DM. This was discussed at a meeting with social services earlier in May 2021, who did not disagree or raise any further concerns about DM's morning routine in the Appellant's review meeting.

196. We are satisfied on balance that the Appellant did not wake DM at 5:30am. We are not satisfied that DM was tired and lethargic due any actions of the Appellant. These mistakes of fact in the finding were material to the barring decision.

197. There were mistakes of fact upon which the finding, which appears within the BDP [222-232] and the Final Decision Letter, and barring decision were based. The errors of fact are material.

198. Further on the basis of the findings of fact we have made, we are not satisfied that the Appellant's actions amount to relevant conduct, or would be capable of giving rise to a risk of harm to a child such that a barring decision based upon this finding would be necessary or proportionate.

199. We consider that even if the Appellant's approach to parenting was regimented or partly for his own convenience, it did not cause harm to DM and in any event this is not the specific finding of relevant conduct that the DBS made.

Finding 4: On a date prior to 25 May 2021 you failed to dispose of medication which DM, aged 15, no longer required, leaving remaining medication in DM's possession who subsequently took an overdose of this which resulted in hospitalisation and his heart stopping for four seconds.

200. It is not in dispute that DM took an overdose of medication on 6 June 2021, shortly after being removed from AVS's care, from which he recovered. It is not in dispute that the medication DM used was that which he had in his possession while in the care of AVS. The notes record as follows:

> '06 Jun 2021 Notified by DM's carers that DM M took an overdose late Saturday evening with medication Propranolol which he no longer uses

> but took when in AVS's care. Concern raised why DM had this given his emotional state prior to moving in with his current carers who were not aware of him having this medication. It was felt AVS should have stored it and disposed of it safely.
>
> 09 Jun 2021 Confirmation from RW LAC Nurse that DM had the medication he overdosed on in his school bag while he was in the care of AVS which should have been disposed of given he no longer was taking it and DM has informed RW that he had access to his medication at any time whilst residing with AVS.'

201. The submissions and evidence on which DBS relies are set out above. Mr Serr submits that the genesis of this failure is that AVS as the foster carer should have been fully aware of the medication that DM had in his possession and expiry dates and did not properly store or dispose of expired medication when he should have done. The risk of harm, which he submits materialised in this case, of not doing so is obvious. DM was a looked after child with serious mental health problems and AVS should have been fully aware of his medications [18].

202. This finding is addressed by the Appellant in his letter of representations in response to the MTB dated April 2022 [para 51 to 58 and see p114], the Notice and Grounds [p200-201, para 52 to 54] and the further submissions on behalf of the Appellant [p273].

203. The Appellant also sets out his account in his witness statement dated June 2023 [p281, paras 24-26].

> 24. This allegation was denied in my representations. I had no knowledge that the medication referred to had expired or that there was a need to dispose of the medication. No overdose, or misuse of medication occurred whilst in my care.
>
> 25. The overdose that is referred to took place at his new placement and after discharge from hospital. It had been agreed with DM's mother (after the placement with me had come to an end) that before discharge, his belongings would be checked to ensure that there was nothing that could cause harm. I had handed his belongings to a social worker and believed they would be checked as agreed before being returned to him.
>
> 26. At this stage, DM had been removed from my care. I previously accepted and maintain that on reflection and subsequent clarification, I recognise that a more detailed medication list should have been kept including expiry dates for looked after children of all ages and maturity. This was not something I had fully recognised at the time, but my training had occurred at arms length due to Covid so the amount of information I had to process had resulted in me now appreciating this.

204. The Appellant gave oral evidence consistent with this.

205. The Tribunal heard and accepts the evidence from the Appellant about the care with which he treated medication at the start of the placement, mindful of DM's past drug misuse. The Appellant stated that he was encouraged to give DM more freedom, which included allowing him control over his migraine medication. We accept his evidence that it was reasonable for him to believe that such medication ought to be kept available to DM at short notice, when a migraine was beginning, in order for it to be effective. No one had suggested otherwise to him.

206. We accept the Appellant's evidence that he did not knowingly leave medication in DM's possession – he bagged up all DM's possessions as requested once DM left his care and passed them to a social worker to pass to the new foster parent to pass to DM assuming that the possessions should all have checked. The Appellant handed over DM's possessions to the social services office. It would appear that it was then given to the new foster carers. It is unclear how the medication them came into DM's possession. We also accept his evidence that no one suggested that the Appellant ought to go through all of DM's possessions.

207. The Propanadol was out of date and AVS accepted that he should have completed the medications form and might reasonably have been more assiduous in checking for expiry dates. He also accepted that with the benefit of hindsight he should have competed the medication form but he did not knowingly or directly leave any medication in DM's possession or pass it to him.

208. Having accepted AVS's evidence, we turn to the finding of relevant conduct itself.

209. It is not in dispute the AVS did not dispose of the medication which DM no longer required but then used to overdose. Therefore, in its narrow terms there is no mistake of fact in the finding itself – AVS did fail to dispose of the medication - albeit that the medication passed through a number of hands between the Appellant and before it was received by DM and there was no active intent on the part of the Appellant to transfer it to him. It was also reasonable for the DBS to conclude that AVS should have destroyed the medication on its expiry or at least removed it from DM's possession.

210. We also accept that failing to dispose of non-required or out of date medication which a child then uses to overdose is capable of being relevant conduct because it endangers or is likely to endanger a child (causes them physical or psychological harm or puts them at risk of harm).

211. Therefore, the Tribunal finds that there was no mistake of fact or law in the narrow terms of the finding made by the DBS.

212. However, its seriousness is substantially mitigated by the further findings of fact we have made and these further findings would be material to reconsideration of the barring decision.

213. An important issue when considering the finding is the level of the Appellant's culpability in failing to dispose of medication. The DBS has not provided any direct evidence of the nature or basis of the Appellant's obligation to dispose of the medication such that it can be considered to represent a significant 'failure' as opposed to a mere absence of action in not disposing of the expired medication.

214. While we accept that there was an element of carelessness in the Appellant not documenting the drug on a medication list and not destroying it when it was out of date or not required, we are satisfied that this was a low level of culpability.

215. Further there was a very low level of causation or connection between the Appellant's actions and DM's overdose given the number of other adults (social workers and foster carers) and Children's Services who held positions of responsibility who might themselves have removed or destroyed the medication and who were responsible for supervising DM before or at the relevant time when he took an overdose.

Finding 5: On a date in 2018, you showed a pornographic image of oral sex that you had as your computer screensaver, showed an air gun and pellets in your drawer, and repeatedly asked three school girls who were at your workplace on work experience personal questions including if they had a boyfriend.

216. This finding is addressed in the DBS submissions and evidence relied upon above. The DBS submits that the finding is a rational and one it was entitled to make the perpetrator was said to be the owner of the business and called by AVS's first name A[]. This is AVS's first name and he has confirmed that he was the only registered director of the business at the time [221]. Further, AVS has never named the person he accuses of being the perpetrator AVS's statement para 28 [282] although he has offered to.

217. This allegation is addressed in the Appellant's letter of representations [para 59 to 63] and the Notice and Grounds [p201, para 55 to 56] and further submissions on behalf of the Appellant [p273].

218. The Appellant's witness statement in June 2023 makes clear that this allegation has never been accepted by him [p281-282, para 27 to 29].

> 27. This allegation was disputed strongly within the representations and I provided a copy of a complaint I lodged with the Trust, as this was the first reference to this incident that was brought to my knowledge in disclosure with the MTB letter.

28. I verify that the information provided referred to the actions of a business partner whom I did not name within the representations, but can do so if required. A visit occurred from police, in respect of the allegation that there had been an air gun and no concerns were raised.

29. No response has still been received to my complaint and request for rectification under the Data Protection Act.

219. The Appellant relied on his earlier representations in the response to the Minded to Bar letter of April 2022 [114-115, 150-152] and the Respondent, made no further attempts to investigate, verify or undermine the Appellant's account which was in the following terms:

'In 2018 I ran a Marketing Agency and had over 100 successful secondary school student work placements over the years with no issues, helping to support a number of agency's, schools and students within the borough. At the time of this LADO referral one of my colleagues was a gentleman the same age as myself and a person with significant authority within the company (a partner).

During this placement with three teenage girls around 15-16yrs, myself and colleagues quickly got the impression that they did not want to be in the placement and perhaps this was the only placement available to them at the time. They became disruptive and unfocused as the week progressed with inappropriate conversations between them.

The week after the placement South Yorkshire Police attended our offices without warning, advising they had received an anonymous report of a firearm on the premises. Upon clarification of a description of this item and without hesitation I took them to our office and show them a toy item on display. Upon full inspection the police were more than satisfied that this was not a firearm and thanked me for my honesty and proactive nature. They immediately left in goodwill and with no further action. They did not speak to me nor did they allude to any inappropriate behaviour or any of the other accusations in the LADO. I was not even aware that the firearms report was in relation to a LADO until 2021, the other concerns surrounding inappropriateness, or to be honest, what a LADO even was.

Additionally, I would find the seriousness of the other concerns in the LADO report to fall under the category of a police matter, them being of a sexual nature towards children. I would argue that should the LADO, JF or the Police have any concern whatsoever they would have investigated further as was their responsibility and I would have been informed.

In 2021 when I found out the nature of this issue I issued a complaint containing a statement to correct the facts. However, to this day I have not received a complaint response from DCST despite chasing. I also do not understand how, if no new evidence has come to light, how the decision of the original LADO [in 2018] can be overturned.

If the possibility was even remote, the police would have had a duty of care to interview me under a voluntary basis, as showing pornographic images to minors is a criminal matter.

> Additionally the investigating LADO of the day [in 2018] would not have dismissed it so quickly. This also occurred four years ago, and any professional with a concern would have escalated this to DBS disclosure before now.
>
> To this day, several bodies still approach me for work experience support. This does include an agency whom I have disclosed this full allegation to. They still ask me to support them and have faith in my ability and trustworthiness, writing a email of support. I have declined.'

220. This finding has been consistently denied by the Appellant. He relied on the fact that the original LADO report and the police investigation of 2018 decided the matter should be taken no further, yet it was revived in a further LADO in 2021.

221. We accept the Appellant's evidence on the balance of probabilities.

222. The evidence relied upon by the Respondent is internally inconsistent. The Appellant complained to the local authority on 3 November 2021 [150, see also 115], noting that the police in 2018 only discussed a complaint about an imitation firearm rather than anything concerning pornography or inappropriate comments to young women. Again, the Appellant's evidence that this was all that was discussed was supported by the evidence before the Respondent from the LADO meeting police contribution in 2018.

223. We are satisfied that it is unlikely that the Appellant would have been approved in 2020 as a foster carer for vulnerable children if the LADO had evidence or serious concerns of an allegation such as this back in 2018.

224. No reasons appear within the BDP for rejecting the Appellant's response to this allegation, other than "there [is] no evidence to support the Appellant's claim that it was his colleague and not him" [221].

225. The LADO documentation is unclear and unreliable and the Respondent was mistaken in making this finding of fact. The Respondent has clearly accepted, without question, the content of the LADO report, noting "As shown in Allegation 1, the information provided by DCST has been assessed as a credible source of evidence" [220]. Further, as noted above, the LADO reports consisted of untested and anonymous hearsay evidence.

226. There is no acknowledgement that the evidence considered in relation to this allegation was multiple, anonymous hearsay, or apparently even considered the potential for mistaken identity. The Appellant's personal statement is evidence and ought not to have been rejected without reason. The Appellant's statement [para 26 to 28] and oral evidence supports this finding having been made in error on balance.

227. Moreover, the Respondent ought to have been more alive to the breakdown of the relationship between Children's services and the Appellant

and the potential that this coloured the LADO investigation and outcome. The Respondent gave evidence that the LADO were actively considering whether they could rely upon the Appellant's conduct to form a criminal harassment complaint [p63-66]. The Appellant gave evidence about being mocked by social workers, about which he complained and received an apology. It is apparent that there was a degree of antipathy between the Appellant and social workers / children's services by the time DM was removed from his care.

228. Having accepted the Appellant's oral evidence, we are satisfied on the balance of probabilities that this finding is not established in any part (including any of the sub-findings regarding the gun, the pornography and the alleged inappropriate comments). We accept the Appellant evidence that this allegation does not relate to him and contains mistakes of fact. This is supported by the evidence of the local authority [p49] that "There has been no previous safeguarding concerns" and the fact that the Appellant was previously cleared to be a foster parent in 2020.

229. We are satisfied that in making this finding proved on the balance of probabilities, the Respondent materially erred in fact. This mistake of fact was relied upon in the Final Decision Letter and in the BDP in relation to this finding [p228]. The mistakes of fact were material to the risk assessment and ultimate decision to bar.

Conclusions on mistakes of fact in five findings of relevant conduct

230. We have found the following:

i) Finding 1 (failing to relieve the support worker) contains mistakes of fact which were material to the barring decision and our fresh findings on this allegation as narrowly drawn do not amount to relevant conduct. However, there are other related matters, such as the broader allegation of failure to prioritise DM's needs by virtue of all communications and actions of AVS on 23-25 May 2021, that can be considered by the DBS on remittal.

ii) Finding 2 (AVS continuing contact with DM) contains some mistakes of fact albeit that some of the finding is upheld. That part which is upheld does amount to relevant conduct on the basis that, if repeated in respect of a child other than DM (whom we do not find to have been harmed or put at risk of harm), they would be put at risk of harm.

iii) Finding 3 (waking DM early) contains mistakes of fact which were material to the barring decision and our fresh findings do not amount to relevant conduct.

iv) Finding 4 (failing to dispose of medication) contains no mistakes of fact, albeit that the finding upheld is in very narrow terms and with substantial mitigation. Nonetheless it is does amount to relevant conduct.

v) Finding 5 (showing a gun and pornography and making inappropriate remarks) contains mistakes of fact in all regards. The mistakes were

material to the barring decision and our fresh findings do not amount to relevant conduct.

Erroneous Inferences – Appellant submissions

231. The Appellant also argues that there were other mistakes of fact relied upon by the DBS in making the barring decision (either in the Final Decision letter on in the BDP). These errors are highlighted within the Notice and Grounds [p201-202, paras 57 to 60] and further submissions on behalf of the Appellant [p274 to 275].

232. Ms Bayley submits that there is no sufficient evidence within the papers that DM suffered emotional or physical harm as a result of the Appellant's actions. The Respondent was wrong to conclude in the BDP (although not repeated in the Final Decision Letter) "These incidents have resulted in DM suffering emotional and physical harm" [p232].

233. She argues that BDP discloses no further evidence or reasoning for the inference that the Appellant "influenced DM into supporting your argument as to why he should be returned to your care, with you yourself gathering this information from DM" or of the Appellant "attempting to influence DM into supporting him being returned to your care". Any such suggestion amounts purely to speculation on behalf of the social work team and should not have been treated as fact by the Respondent and does not amount to "clear information", as set out in the BDP [p225]. This wrongly appears within the SJP as being "central to the harmful behaviour displayed" and wrongly appears as a definite risk factor.

234. Ms Bayley contends that there is no sufficient evidence or reasoning to support the evaluative judgment in the risk assessment that the it is "likely that you would failed to prioritise the needs of those under your care, be unable or unwilling to engage and follow advice/guidance given by professionals, and would attempt to influence those under your care in order to achieve your own objective". The Respondent was not entitled to come to such conclusions on the basis of the information before it.

235. She also submits that the SJP makes several references to the Appellant feeling unsupported, despite "a great deal of support being offered". This is considered to be a concern in the risk assessment. There is no explanation for this inference being drawn and no identifiable evidence to support it.

236. Ms Bayley also contends that there is no reliable evidence of a general disregard on the part of the Appellant to disregard procedures and guidance. Exhibit AVS1 demonstrates that the Appellant was keen to keep social services up to date with any and all relevant information about DM's care. It is clear the Appellant was working well with social services until the relationship broke down shortly before DM's removal from his care.

Our determination

237. Given our conclusions concerning the five findings of relevant conduct, there is no need for us to consider these submissions further but they are matters that may be considered by the DBS upon the barring decision being remitted for reconsideration.

Remedy – Remittal to the DBS pursuant to section 4(6)(b) & 7 of the Act

238. We are not satisfied that we should direct that the Appellant's name be removed from the barred list with immediate effect but that he should remain on the list while the barring decision is reconsidered. This is because we have upheld in part two of the DBS's findings as not containing mistakes of fact and we have found that the findings are capable of amounting to relevant conduct. Questions of appropriateness, necessity and proportionality of barring will be for the DBS on remittal.

239. In light of our findings that there was a material mistake of fact in relation to the first, second (in part), third and fifth findings of relevant conduct, we have decided to remit the Appellant's case to the DBS for a fresh barring decision based upon the findings we have made above (see sections 4(6)(b) & (7)(a) of the Act). Given that we have upheld some of the second and all of the fourth findings of relevant conduct in relation to continuing contact and not destroying medication, and we have found that this constitutes relevant conduct, it would not be appropriate for us to direct the Appellant's removal.

240. The DBS will need to reconsider the appropriateness and proportionality of including the Appellant on the CBL in light of the findings we have made.

241. It is therefore unnecessary for us to decide whether the decision to bar the Appellant was proportionate and whether there was any other mistake of law based upon the findings it relied upon. Nonetheless, we offer some observations upon the proportionality of the barring decision to assist the DBS in re-making its decision.

Mistake of Law - Proportionality

242. In light of our findings on errors of fact and our decision that the barring decision will need to be remitted for reconsideration, there is no need for us to consider whether the Respondent's decision to include the Appellant on the Children's Barred List was, based on the original five findings of relevant conduct, disproportionate.

243. Nonetheless, we record some of the evidence and submissions received. The Tribunal heard evidence from the Appellant, SH and AF about the severe, wide-ranging and ongoing impact of the barring decision on the Appellant, not just in his ability to foster again but also in restricting his volunteering opportunities with children. The question of whether the

Appellant is entitled to have contact with DM as a friend, given that DM is now an adult in law and the Appellant no longer has a fostering relationship with him, appears now to be resolved.

Appellant's submissions on Proportionality

244. Ms Bayley noted that proportionality was addressed in the Appellant's letter of representations [para 70 to 77] and the Notice and Grounds of Appeal [p202, para 61 to 63] and further submissions on behalf of the Appellant (now Appellant) [p275-276].

245. She submitted that the BDP demonstrates a superficial and inadequate assessment of necessity and proportionality was applied. The only factors considered to relate to the impact of a bar upon the Appellant at proportionality stage are the potential impact on the Appellant's mental health, stigma and being prevented from carrying on regulated activity.

246. She contended that assessing proportionality requires the balancing of the seriousness of the impact on the Appellant's rights against the possible seriousness of the consequences to vulnerable adults and children were he not to be included in the lists. No assessment was made by the Respondent of the likely seriousness of the consequences to vulnerable adults and children of not including the Appellant in the barred lists, which required an assessment of both the likelihood of further incidents arising and of the likely seriousness of such incidents.

247. Ms Bayley argued that the Respondent must have regard to the principles of proportionality in all its findings. In this case, that means that the bar should be no more than necessary to meet the legitimate aim of safeguarding vulnerable groups. Assessing necessity requires consideration of other, less drastic, action that might reasonably be expected to be taken, not necessarily by the Respondent, to eliminate or reduce a risk. The Respondent was aware that DM was removed from the Appellant's care and that he was deregistered from fostering. It was unnecessary for the Appellant to further be included in the barred lists.

248. She submitted that the allegations relate very specifically to the Appellant's parenting skills and his ability to remain as a foster carer. It is unlikely that the Appellant would apply to foster again, however if he did, there would be a robust checking system which undoubtedly would reveal the concerns raised by D[] Children's Services Trust. The decision to bar was, in all the circumstances, disproportionate.

Discussion

249. The DBS will have to reconsider the appropriateness and proportionality of making any fresh barring decision in light of our findings. We record our view as to the rationality and proportionality based on the original findings so

as to assist them with that process. Obviously, the DBS will have to re-decide whether it is appropriate, necessary and proportionate to bar the Appellant from regulated activity with children based on the findings we have now made.

250. Given the findings of relevant conduct that the DBS originally made, we are satisfied it was not a "perverse" or irrational decision by DBS to have included the Appellant on the CBL at the time it made its decision. There is a high bar for perversity/irrationality challenges to barring decisions and we are satisfied that the decision to bar was neither perverse nor irrational but one the DBS was entitled to reach at that time based on the findings it made.

251. We next consider if there was any mistake of law in the barring decision based upon the findings made at the time on the grounds of proportionality. It is accepted that barring represents an interference with a person's private life for the purpose of Article 8 of the European Convention on Human Rights but the question is whether it is proportionate.

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

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

253. These four questions were later developed by Lord Sumption in *Bank Mellat* [2013] UKSC 39 at 20:

> … the question [of proportionality] depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

254. In assessing proportionality, the Upper Tribunal has '…to give appropriate weight to the decision of a body charged by statute with a task of expert evaluation' (see *Independent Safeguarding Authority v SB* [2012]

EWCA Civ 977 at [17] as set out above). However, we must conduct our own assessment of proportionality afresh rather than simply review the DBS's assessment.

255. We are satisfied that each of questions a)-d) should be answered in favour of the barring decision being proportionate based on the findings that the DBS made at the time (even though those findings are now disturbed because we have found they contained mistakes of fact).

256. On the basis of the findings that the DBS made in its final decision letter, we are satisfied that the DBS was entitled to conclude that it was proportionate and reasonably necessary to bar AVS in order to achieve its (important and) legitimate safeguarding aims.

257. There is no real question that the public interest and legislative objective of safeguarding vulnerable groups is sufficiently important to justify the interference with private life that barring constitutes and that barring is rationally connected to protecting those groups.

258. We are satisfied that when making the original barring decision, the DBS correctly concluded that no other measures were in place sufficient to adequately safeguard children from AVS participating in regulated activity of fostering and committing further acts of neglect or the like such that it was the least intrusive measure necessary.

259. We are also satisfied that barring was necessary and struck a fair balance between AVS's right to a private life and the interests of the community. The DBS expressly carried out the "balancing act" exercise required. Based on the original findings we would have done the same. We are satisfied that the DBS was entitled to consider that the Appellant presented a risk of harm to children at the time of the decision based upon Findings 1-5 as originally made. The decision that the Appellant posed a risk of repeating similar acts at the time of the barring decision was also rational.

260. However, the assessment of proportionality of barring may be rather different in light of the findings we have now made.

261. As we have set out above, the barring decision will have to be remade on a different factual basis that only the second finding is upheld in part and fourth finding of relevant conduct is established but is substantially mitigated. It may also consider the wider connected allegations in respect of the first finding.

262. When reconsidering the issue of proportionality, the DBS will need to look again at applying the third and fourth stages of *Aguilar Quila* / *Bank Mellat* to this case.

263. When looking at the third stage and the least intrusive measure necessary, the DBS will be mindful that barring is a blunt tool. Unlike professional regulators who have a range of sanctions they can impose for disciplinary misconduct the DBS cannot make suspension or conditions of practice orders that might impose training or supervision requirements. Barring is an all or nothing outcome as far as regulated activity is concerned. In an alternative legislative landscape it might be that a condition could be imposed that the Appellant be trained if working in fostering or regulated activity generally, or that he could work in other forms of regulated activity without restriction. However, that type of order is not available under the existing legislation. We also bear in mind that there is a measure of protection already in place in that the Appellant is no longer approved to act as a foster carer so that the barring only additionally prohibits other regulated activity.

264. The fourth question is whether on the findings then made a fair balance would be struck between the seriousness of the findings of relevant conduct upheld, and any risk of further harm to children that can be rationally derived from it, as against the impact and effect of baring on the Appellant's private life.

265. The risk assessment (of the risk that the Appellant may now pose to children if working in regulated activity) will now need to be reconducted in light of our findings of fact in relation to the relevant conduct and its impact on the likelihood of repeat occurrences. It remains a matter for the DBS to decide whether our findings, and its revised risk assessment in light of those findings, means that the public interest in safeguarding children outweighs the impact of barring upon the Appellant.

266. We accept that it will be for the DBS to re-decide whether barring is necessary and whether it strikes a fair balance has been the Tribunal's findings of relevant conduct, and the DBS's revised risk assessment. This will be balanced against the factual matrix now found as to the interference with / impact upon the Appellant's private life and voluntary restrictions it imposes on him (not only preventing him from fostering but also progressing his ability to offer volunteering or work placements to children). If the DBS does decide that barring remains proportionate, that decision will be subject to a right of appeal and the Tribunal would then carry out its proportionality decision afresh.

Conclusion and Disposal

267. For the reasons set out above, the Appellant's appeal should be allowed.

268. We conclude for the purposes of section 4(6)(b) of the Act that there were material mistakes of fact in the first, second (in part), third and fifth findings of relevant conduct upon which the ultimate decision to include the Appellant on the CBL was based. The Respondent made mistakes of fact

when making its five findings of relevant conduct. On a careful analysis of the evidence now presented, the Respondent should not have made the erroneous factual findings.

269. The Appellant has been barred from participating in regulated activity with children for two and half years already and the DBS is invited to conduct a fresh reconsideration speedily. However, in all the circumstances, the Upper Tribunal is not prepared to direct that the Appellant's name be removed from the barred list in the interim. We therefore remit the decision of the DBS to include the Appellant on CBL for it to make a new decision in light of our findings of fact for the purposes of section 4(7)(a) of the Act. We also direct for the purposes of section 4(7)(b) that he remains on the list pending the DBS making its new decision.

Authorised for release:
Judge Rupert Jones
Judge of the Upper Tribunal **Dated: 2 December 2024**

Appendix

The lists and listing under the 2006 Act

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

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

'2(1) DBS must establish and maintain—

(a) the children's barred list;

(b) the adults' barred list.

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

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

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

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

Children's barred list

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

Vulnerable adults' barred list

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

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

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

(a) this paragraph applies to a person, and

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

to vulnerable adults.

……

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

(5) Sub-paragraph (6) applies if—

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

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

(6) If [DBS] —

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

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

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

(8) If [DBS] —

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added]

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

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

(b) conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him;

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

(d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to [DBS] that the conduct is inappropriate;

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

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

(a) harms a vulnerable adult,

(b) causes a vulnerable adult to be harmed,

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

(d) attempts to harm a vulnerable adult, or

(e) incites another to harm a vulnerable adult.

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

(a) indecent images of children, or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) harm a vulnerable adult,

(b) cause a vulnerable adult to be harmed,

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

(d) attempt to harm a vulnerable adult, or

(e) incite another to harm a vulnerable adult.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Right of Appeal and jurisdiction of the Upper Tribunal

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

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

(a) . . .

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

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

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

(a) on any point of law;

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

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

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

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

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

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

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

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

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

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

[Emphasis added]

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

'102.During oral submissions there was some debate about the meaning to be attributed to the phrase "a mistake ….in any finding of fact within section 4(2)(b) of the Act". I can see no reason why the sub-section should be interpreted restrictively. In my

judgment the Upper Tribunal has jurisdiction to investigate any arguable alleged wrong finding of fact provided the finding is material to the ultimate decision.

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

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

Mistake or error of fact

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

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

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

20. The Upper Tribunal must begin by examining the DBS decision and deciding whether it made any mistakes when finding the facts (such findings will have been made based on the documentary material available to it). However, the

Upper Tribunal may also make its own fresh findings of fact having heard all potentially relevant evidence and witnesses during the appeal process by which it may determine whether the DBS made a mistake of fact which was material to the making of its decision.

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

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

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

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

'55. The Upper Tribunal also made findings of fact and made comments on other matters. Section 4(7) of the Act provides that where the Upper Tribunal remits a matter to the DBS it "may set out any findings of fact which it has made (on which DBS must base its new decision)". It is neither necessary nor feasible to set out precisely the limits on that power. The following should, however, be borne in mind.

First, the Upper Tribunal may set out findings of fact. It will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter. By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to a marriage being a "strong" marriage or a "mutually-supportive one" may be more of a value judgment rather than a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third "finding" would certainly not involve a finding of fact.

Secondly, an Upper Tribunal will need to consider carefully whether it is appropriate for it to set out particular facts on which the DBS must base its decision when remitting a matter to the DBS for a new decision. For example, Upper Tribunal would have to have sufficient evidence to find a fact. Further, given that the primary responsibility for assessing the appropriateness of including a person in the children's barred list (or the adults' barred list) is for the DBS, the Upper Tribunal will have to consider whether, in context, it is appropriate for it to find facts on which the DBS must base its new decision.'

Appropriateness

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

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

'104.I am more troubled by the absence of a full merits based appeal but I am persuaded that its absence does not render the scheme as a whole in breach of Article 6 for the following reasons.

First, the Interested Party is a body which is independent of the executive agencies which will have referred individuals for inclusion/possible inclusion upon the barred lists. It is an expert body consisting of a board of individuals appointed under regulations governing public appointments and a team of highly-trained case workers. Paragraph 1(2)(b) of Schedule 1 to the 2006 Act specifies that the chairman and members "must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults."

The Interested Party is in the best position to make a reasoned judgment as to when it is appropriate to include an individual's name on a barred list or remove an individual from the barred list. In the absence of an error of law or fact it is difficult to envisage a situation in which an appeal against the judgment of the Interested Party would have any realistic prospect of success.

Second, if the Interested Party reached a decision that it was appropriate for an individual to be included in a barred list or appropriate to refuse to remove an individual

from a barred list yet that conclusion was unreasonable or irrational that would constitute an error of law. I do not read section 4(3) of the Act as precluding a challenge to the ultimate decision on grounds that a decision to include an individual upon a barred list or to refuse to remove him from a list was unreasonable or irrational or, as Mr. Grodzinski submits, disproportionate. In my judgment all that section 4(3) precludes is an appeal against the ultimate decision when that decision is not flawed by any error of law or fact.'

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

'67. The context, and the nature of the statutory scheme, is that it creates a system for the protection of children and vulnerable adults. It provides for an independent body, the DBS, to determine whether specified criteria are met and, in the case of paragraph 3 of Schedule 3 to the Act, that it is appropriate to include a person's name in the children's barred list or the adults' barred list. There is a safeguard for individuals in that they may appeal to the Upper Tribunal on the basis that the DBS has made an error of law or fact. The Upper Tribunal cannot consider the appropriateness of the decision to include or retain the person's name in a barred list when deciding if the DBS had made such an error. If the DBS has not made an error of law or fact, the Upper Tribunal must confirm the decision of the DBS (section 4(5) of the Act). Only if the DBS has made an error of law or fact, can the Upper Tribunal determine whether to remit or direct removal of the person's name from the list (section 4(6) of the Act).

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

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

Mistake or error of law

27. A mistake or error of law includes instances where the DBS have got the particular legal test or tests wrong (applied or interpreted the law incorrectly), or failed to consider all the relevant evidence or made a perverse, unreasonable or irrational finding of fact, or failed to explain the decision properly by giving

sufficient or accurate reasons, or breached the rules of natural justice by failing to provide a fair procedure or hearing (in the rare circumstances where it considers oral representations).

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

Proportionality

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

30. Maintenance of public confidence, in the regulatory scheme and the barred lists, will "always" be a material factor when seeking to balance the rights of the individual and the interests of the community (e.g. B). Where it is alleged that the decision to include a person in a barred list is disproportionate to the relevant conduct or risk of harm relied on by the DBS, the Tribunal must, in determining that issue, give proper weight to the view of the DBS as it is enabled by statute to decide appropriateness - see the Court of Appeal's judgment in B at paragraphs [16]-[22] (ISA formerly assuming the role of the DBS):

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

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

There, as here, the main focus is on questions (c) and (d). In R (SB) v Governors of Denbigh High School [2007] 1 AC 100 Lord Bingham explained the difference between

such a proportionality exercise and traditional judicial review in the following passage (at paragraph 30):

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

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

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

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

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

Lady Hale added (at paragraph 37):

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

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

…….

22. This brings me to two particular points. First, there is the fact that, unlike the ISA, the UT saw and heard SB giving evidence. However, it cannot be suggested that it was unlawful for the ISA not to do so. It had had at its disposal a wealth of material, not least the material upon which the criminal conviction had been founded and which had informed the sentencing process. The objective facts were not in dispute. Secondly, Mr Ian Wise QC, on behalf of the Royal College of Nursing, emphasises the fact that the UT is not a non-specialist court reviewing the decision of a specialist decision-maker, which would necessitate the according of considerable weight to the original decision. It is itself a specialist tribunal. Whilst there is truth in this submission, it has its limitations for the following reasons: (1) unlike its predecessor, the Care Standards Tribunal, it is statutorily disabled from revisiting the appropriateness of an individual being included in a Barred List, simpliciter; and (2) whereas the UT judge is flanked by

non-legal members who themselves come from a variety of relevant professions, they are or may be less specialised than the ISA decision-makers who, by paragraph 1(2) of schedule 1 to the 2006 Act "must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults". I intend no disrespect to the judicial or non-legal members of the UT in the present or any other case when I say that, by necessary statutory qualification, the ISA is particularly equipped to make safeguarding decisions of this kind, whereas the UT is designed not to consider the appropriateness of listing but more to adjudicate upon "mistakes" on points of law or findings of fact (section 4(3)).'

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

…But was it "necessary in a democratic society"? It is within this question that an assessment of the amendment's proportionality must be undertaken. In Huang v Secretary of State for the Home Department [2007] 2 AC 167, Lord Bingham suggested, at para 19, that in such a context four questions generally arise, namely:

a) is the legislative objective sufficiently important to justify limiting a fundamental right?

b) are the measures which have been designed to meet it rationally connected to it?

c) are they no more than are necessary to accomplish it?

d) do they strike a fair balance between the rights of the individual and the interests of the community?

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

Burden and Standard of proof

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