NCN No. [2025] UKUT 017 (AAC) **Appeal No. UA-2022-001239-V**

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

JA

Appellant

- v -

Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge E Fitzpatrick
Upper Tribunal Member J Heggie
Upper Tribunal Member S Jacoby

Hearing date: 3rd December 2024
Mode of hearing: Oral (face to face)
Venue: Birmingham Civil and Family Justice Centre

Representation:
Appellant: Ms L Bayley of counsel instructed by Richard Nelson LLP.
Respondent: Mr A Serr of counsel instructed by DLA Piper UK LLP.

RULE 14 Order

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the Appellant in these proceedings. This order does not apply to: (a) the Appellant; (b) any person to whom the Appellant discloses such a matter or who learns of it through publication by the Appellant; or (c) any person exercising statutory (including judicial) functions where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

SUMMARY OF DECISION

65 Safeguarding vulnerable groups, 65.1 Children's barred list, 65.9 Finding of fact, 65.10 materiality.

Judicial summary: Assessment of Appellant's credibility subsequent to giving oral evidence at hearing, finding of mistake of fact in relation to one of the Respondent's findings but this mistake was not material to the Respondent's decision to include JA on the Children's barred list.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION OF THE UPPER TRIBUNAL
On appeal from: Disclosure and Barring Service ("DBS")
DBS Reference: P0000KGNWBC
Final Decision Letter: 9th June 2022

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

REASONS FOR DECISION

A summary of the Upper Tribunal's decision

1. We conclude that the Disclosure and Barring Service's (DBS) decision does not involve any material mistake of fact or error of law. This is the only basis on which we can interfere with the decision. Accordingly, we confirm the Respondent's decision to include the Appellant (also referred to as 'JA') on the Children's Barred List.

Introductory matters

2. This is the Appellant's appeal against the Disclosure and Barring Service's final decision, dated 9th June 2022, to include him on the Children's Barred List under the Safeguarding Vulnerable Groups Act 2006 ("SVGA").

3. Permission to appeal was given by Judge Fitzpatrick on 7th November 2023 pursuant to an oral hearing of the application. We held an oral hearing of the full appeal at the Birmingham Civil and Family Justice Centre on 3rd December 2024. This was a face-to-face hearing with the panel, the Appellant and the legal representatives attending in person. The Appellant was accompanied by his mother and gave oral evidence for over one hour. We are grateful to the parties for their attendance and to both counsel for their submissions. It took some time to get a date for hearing which suited both parties, and we have therefore accorded a degree of priority to making this decision available to them as soon as we can.

The statutory framework

The legislation

The barring provisions

4. We set out paragraphs 3 and 4 of Schedule 3 to the SVGA relating to inclusion on the children's barred list:

Behaviour

Paragraph 3

(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 children, and

(b) DBS proposes to include him in the children's barred list.

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

(3) DBS must include the person in the children's 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 children, and

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

(4) This paragraph does not apply to a person if the relevant conduct consists only of an offence committed against a child before the commencement of section 2 and the court, having considered whether to make a disqualification order, decided not to.

(5) In sub-paragraph (4)–

(a) the reference to an offence committed against a child must be construed in accordance with Part 2 of the Criminal Justice and Court Services Act 2000;

(b) a disqualification order is an order under section 28, 29 or 29A of that Act.

Paragraph 4

(1) For the purposes of paragraph 3 relevant conduct is–

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

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

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

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

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

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

(a) harms a child,

(b) causes a child to be harmed,

(c) puts a child at risk of harm,

(d) attempts to harm a child, or

(e) incites another to harm a child.

(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.

The appeal provisions

5. Section 4 SVGA contains the Upper Tribunal's jurisdiction and powers on appeal:

4 Appeals

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

…

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

(c) a decision under paragraph 17, 18 or 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 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.

6. We highlight sub-section (3) above, namely that “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”. This means, in effect, that the issue of appropriateness is not appealable. For an appeal to succeed, an appellant must establish a material mistake of fact and/or an error of law on the part of the DBS on which its barring decision was based (see sub-section (2)).

The guidance in the case law

Mistakes of fact

7. The scope of the Upper Tribunal's fact-finding jurisdiction was analysed in the decision of the three-judge panel in *PF v DBS [2020] UKUT 256 (AAC)*. That decision demonstrates that there is no limit to the form that a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding or an omission. A mistake may be in a primary fact, or in an inference, but some mistake by the DBS must still be identified in order for an appeal to succeed. It is not enough that the Upper Tribunal would have made a different finding of fact. Furthermore, the Upper Tribunal, in deciding an appeal, is not limited to considering the appellant's criticism of the DBS's decision nor the evidence before the respondent, but it should assess the evidence as a whole, including the evidence that may be relevant to the reliability of the appellant's evidence. The Court of Appeal has also provided further guidance in a series of cases on the role of the Upper Tribunal in fact-finding, including notably in *DBS v JHB [2023] EWCA Civ 982, Kihembo v DBS [2023] EWCA Civ 1547 and DBS v RI [2024] EWCA Civ 95,* which we also took into account.

Mistakes of law

8. The Upper Tribunal may consider whether the DBS made a mistake of law in making the barring decision. This will include considering whether the DBS has properly interpreted or applied the law, whether its decision was procedurally fair and whether there was any error of law in its decision or findings of fact (whether it made an unreasonable decision or finding, failed to take into account relevant evidence or took into account irrelevant evidence). A mistake of law may be established if the barring decision is irrational, however the test is a high one: a decision that no reasonable decision maker properly instructed could make. Finally, there will also be a mistake of law if the barring decision was disproportionate. Therefore, while the Tribunal may consider if the decision is proportionate, as already noted, the decision that it is appropriate to bar is not within the Upper Tribunal's jurisdiction but is a matter for the DBS.

The DBS's barring decision

9. Initially DBS were considering 2 further allegations of relevant conduct which are outlined in their minded to bar letter of 11.4.22. The first of these was that during the period between August 2016 and April 2018, when employed as a Youth Worker at Young People First, the Appellant blurred the professional boundaries of his role in a number of respects. Secondly, when employed as a caretaker the Appellant contacted young people (believed to be children - under 18 years) via social media and invited

them into school premises without permission and out of hours, resulting in damage being caused. These matters did not form part of the DBS's findings of relevant conduct in the barring decision of DBS and are not included in the final decision letter. We simply refer to them for the sake of completeness.

10. The DBS final decision letter of 9.6.22 states that DBS was satisfied on the balance of probabilities, having considered all the information, that JA had committed relevant conduct. It made the following two findings of relevant conduct:

> 1. "*Between the dates of 16 - 18 December 2019, engaged in sexually motivated communications with who you believed was a 15-year-old boy named "L" (decoy) via Grinder and WhatsApp. After being told that the decoy was 15 years old and that he was a schoolboy, you continued to engage and:*
> *- shared pictures of yourself in your boxer shorts (underwear)*
> *- asked "L" how many inches his penis was*
> *- asked "L" to sneak in to their bedroom to 'mess about'*
> *- attempted to meet with "L" at what you thought was their home address*
> *- asked "L" for pictures of himself in his underwear/ nude*
>
> *2. Following your arrest on 19 December 2019, you were found to be in possession of a Category C Indecent Image of a Child, (created on 21 July 2019) depicting a naked 10–12-year-old male child in the back seat of a car, with his bare buttocks exposed.*

11. The reasoning of the DBS in its final decision letter also included the following:

> *The DBS acknowledges that you have disputed these allegations in your representations, however having re-examined and considered the evidence we hold, we are satisfied that the above allegations remain substantiated on the balance of probabilities. We recognise that you have told us in representations that you were not aware of and did not know how the Category C Indecent Image of a Child was on your device. You explained this as possibly being planted on the device by the witness (member of the CIM group), which we found to be an implausible explanation as the image was created before the interactions with the decoy. Therefore, whilst we accept that the police could not substantiate to a legal burden of proof i.e. beyond a reasonable doubt, we believe that the police evidence shows on the balance of probabilities that you were in possession of an indecent image of a child. Therefore, the allegation is substantiated."*

A brief summary of the factual background to the appeal

12. On Thursday 19th December 2019 Warwickshire police were contacted by the headteacher at the primary school where JA worked. She stated she had been contacted by Children's Innocence Matters Facebook group (CIM) who claimed JA had been messaging a member of the group posing as a 15-year-old boy on the Grindr app (known as "L") and that he had arranged to meet the boy near his given home address on 18th December 2019 but members of the group attended the meeting place and JA left the scene.

13. JA was arrested on 19th December 2019 and interviewed under caution. He produced a prepared statement denying the allegations. On 4th June 2020, JA was arrested for possession of a Class C indecent image of a child found on his mobile phone. He was interviewed under caution and denied knowing the image was on his phone. There were no criminal proceedings in relation to either of these allegations.

The grounds of appeal and the parties' submissions

14. The Appellant has made a number of written submissions, but these have helpfully been consolidated in the Appellant's comprehensive skeleton argument of 19th November 2024 which also sets out the perfected grounds of appeal. Given the length of this document, we will not rehearse these in detail.

15. In summary, the perfected grounds of appeal submit as follows: i) the screenshots shown by the decoy to the police officer were not those relating to the age of the 'the boy'(L); ii) the DBS failed to properly or adequately consider the weight of evidence that put in question the credibility of the witness that made the allegation; iii) the DBS's findings as to relevant conduct were irrational; iv) the DBS took into account matters it should not have done; and v) that the DBS decision was disproportionate. There was also reference made to DBS "reaching a different decision than that reached and communicated by the Respondent on 11 June 2020." This last point was not substantively argued at the oral hearing. We note that the Respondent's letter of 16th September 2022 refers to receiving further evidence which DBS would consider. Proportionality was mentioned by the Appellant's representative during the hearing but was not substantively argued. We have not referred in detail to the grounds relating to the indecent image found on the Appellant's phone for reasons which will become apparent.

16. The main issue in the appeal, which was common ground between the parties, was whether the Appellant believed he was communicating with a 15-year-old boy, and the hearing reflected the focus on this issue. The Respondent's position is set out in Mr Serr's skeleton argument

17. We thank counsel for their helpful oral and written submissions.

The oral hearing of the substantive appeal

18. Both parties agreed at hearing that the key issue was in relation to what we will, for convenience, refer to as DBS's first finding of relevant conduct (as referred to at 1 in paragraph 10). This was whether the Appellant believed "L" was a 15-year-old boy at the time the incident occurred. As such, much of the focus was on this specific issue when the Appellant gave his oral evidence.

19. It may be helpful at this stage to set out some extracts from the exchange between the appellant and "L" as included in MB's statement:

> *".....On Tuesday 17th of December 2019 JA sent another message to L saying "What you up to"*
> *L replied "nothing really, I'm bored WBU"*
> *L then sent another message saying*
> *"how old R U I'm 15 and I'm in Birmingham"*
> *JA replied "same just sat in my car, wondering where to go"*
> *JA then send L another message saying*
> *"25 in Warwick"*
> *L replied "that's cool, my mum works at 8 pm till 3 am so might just watch a movie or visit a mate"*
> *JA replied "you wanna meet up".....*

20. The statement continues:

> *....."L then said "I'll let u know when my stepdad has picked up my little sis okay"*
> *JA replied "okay, can you send me a address so I can load it into my satnav"*
> *L replied "yeah it's F…… Road, but wait till I no when he's coming"*
> *JA replied "it takes 38 minutes so I will set off even if I have to sit in my car for a bit it will be fine"*
> *At 9:05 pm JA messages L again on the Grindr app sending him a live location which showed JA to be on F….. Road in S…...*
> *JA then switched between messaging L on WhatsApp and Grindr.*

L told JA he wasn't able to come out tonight and JA asks if L could sneak him into the house.
L told JA he can't meet him until tomorrow night when his mom would be at work".

JA's oral evidence at hearing

21. JA gave evidence for well over an hour at hearing. He stated he had a diagnosis of dyspraxia. Counsel had discussed this prior to hearing and agreed to adapt their questions accordingly. He was quite open regarding his use of the Grindr app as a way of meeting people to "hook up". In his evidence in chief, he essentially agreed with MB's account of the messages between him and "L" with the crucial exception of "L" stating that he was 15, which he denied. He also denied asking if he could "sneak in" to "L's" house and said it was unlikely he would have used that specific phrase but may have used an alternative phrase. He also confirmed he had sent 3 photos of himself to "L" and had requested photos from him. He denied sending the message "*25 and in Warwick"* although he admitted he had said he was from Warwick, and he was 25 years old at the time.

22. JA confirmed he enjoyed working with young people and had had several roles in the past including as a youth worker and working as a caretaker at a school. He stated he liked to help and inspire young people, and he has a degree in outdoor education. He had also undertaken significant safeguarding training in the past and was qualified as a level 2 youth worker. JA confirmed he had an additional job in a security role which involved checking people's identification to ensure they were old enough to buy drinks. He stated he was quite good at spotting underage people as these days "you could not always tell".

23. JA also confirmed he attended the meeting point at the petrol station on 18th December 2019 but when members of the Children's Innocence Matters (CIM) group arrived he was worried he was being car jacked and drove off. He stated he was concerned CIM would find his location and that is why he deleted the Grindr app shortly thereafter.

24. In cross examination the Appellant confirmed he had obtained GCSE's, A levels and a foundation degree and had completed safeguarding training. He initially stated this did not involve safeguarding training in relation to online safety and said this would be more relevant in the last 10 years. However, he subsequently conceded during cross-examination the training probably did cover the online safety of young people (albeit not his online safety). We note the Appellant undertook safeguarding training prior to his employment in CE Primary School. This was not referred to in his evidence.

He confirmed the account of the exchange of messages in MB's statement was accurate with the exception of the ages of the participants being included and the fact he would not have used the phrase "sneak in" (but may have used an alternative phrase). Regarding the message "25 and in Warwick" he stated he "did not believe that message was sent". He conceded he had said at some point he lived in Warwick (albeit not in that message) and that this age was correct at that time.

25. In response to questions in relation to "L's" reference to his stepdad picking up his little sister and the fact that "L" lived at home with his mother, the Appellant stated this did not raise any alarm bells as to "L's" age as he too lived at home with his mother and had a sibling. He stated he assumed everyone who used Grindr was 18 as that is part of the terms and conditions. JA denied Mr Serr's suggestion that he switched the conversation to WhatsApp to make the communications more anonymous as he was aware he was in contact with a 15-year-old boy. It was also suggested to the Appellant the fact he drove to meet "L" was suggestive of the latter not being able to drive due to the fact he was 15. He also denied "L's" suggestion the Appellant wait until the house was empty indicated he was under 18.

Our assessment of the appellant's evidence and findings of fact

26. Given the content of the exchange of messages was agreed by both parties, subject to the exceptions referred to at paragraph 21 above, the Appellant's credibility was a key issue in the proceedings. Considering the Appellant's evidence in the context of the evidence in the appeal as a whole, we found a number of aspects of his evidence problematic.

27. We considered there were a number of statements from "L" in the message chain above which would, in our view (and taking into account the experience which the specialist members bring to the panel), raise a real concern in terms of "L's" age. These include: the specific references to his mum and stepdad; the implication he lives at home with them, reference to his little sister and the fact he will only agree to meet JA when his parents are not in the house. None of this exchange is disputed by the Appellant. There is no reference to "L" driving at any stage. This information is not disputed by the Appellant. Put another way, we are satisfied that there is information contained in the exchange which is clearly suggestive of "L" being under 18 and nothing to suggest he is over 18.

28. There are also a number of inconsistencies in the Appellant's evidence. We referred to his evidence regarding safeguarding training in online safety for children. As referred to at paragraph 24 above JA initially said this was not included in his training but subsequently changed his evidence to say the training probably had included online safety for young people. The implication is that when the training was

received (circa 2016) children's online safety was not as significant a concern as it is currently. In our view, this is unlikely. JA also received safeguarding training in relation to his work at CE school which was also in our view highly likely to contain an online safety element. This was not referred to by JA in his evidence.

29. Given the significant amount of safeguarding training JA had received and his security-type role involving checking young people's ages and his own evidence that he was "quite good" at spotting underage people, we find it surprising that JA was not concerned as to "L's" age given the messages sent by him, the training JA had received and the fact his job involved the specific consideration of young people's ages on a regular basis.

30. We found his evidence, that because he too lived at home with his parents, he did not find anything concerning regarding L's age in the messages, not to be credible.

31. In our judgment, there is sufficient information provided by "L" in the message chain referred to at paragraphs 19 and 20 above to, at the very least raise, a serious concern regarding his age. Given the Appellant had received significant safeguarding training, was a qualified youth worker and worked in an environment where making assessments (albeit visual) of peoples' ages was part and parcel of his job, we did not accept the Appellant's evidence on this point.

32. We also have concerns regarding other aspects of the Appellant's evidence. He claimed when approached by CIM at the petrol station (where he drove to meet "L") he was fearful he was being car-jacked, and he describes this at paragraph 22 of his statement of truth as "incredibly traumatic". He also states these cars "chased him across Birmingham." It is somewhat surprising in our view, given this concern, that he did not report the incident to the police.

33. Given a key issue in these proceedings was whether the Appellant believed "L" to be 15 we also found the Appellant's evidence regarding the information on "L's" age on Grindr to be less than credible. In his evidence in chief, he initially said the photo of "L" was topless and it said age 18 beside the photograph. He then changed his evidence to say he was "unaware" of his age and "did not know if his age was there (on Grindr) or not" but that he assumed he was 18 as only those over 18 should sign up to the app. He continued "I would say he looked 18" (in the photo).

34. We have two concerns regarding this part of JA's evidence. Firstly, he changed his evidence significantly on what is the key issue in the case, i.e. his belief as to "L's" age,

specifically regarding what information on "L's" age he had seen on Grindr. Secondly, given the Appellant's training, experience and security-type role, which involves identifying young people under 18 trying to pass themselves as 18 by checking their identification, we do not consider it is at all likely that JA honestly believed everyone on Grindr was entirely candid about their age and everyone who used the app was therefore over 18.

35. We found JA's evidence in response to the question why he had not contacted "L" afterwards less than credible. He stated this was because the "battery died" on his phone. We do not find this believable. The Appellant is clearly sufficiently technologically competent to use and download apps. Charging a mobile phone is a relatively quick process. We did not accept his evidence on this point. We also note during examination in chief when referring to the disputed message *'Im 15 and I'm in Birmingham"* the Appellant initially stated he could not remember that message but subsequently changed his evidence to "it didn't happen". This is a significant change and, in our view, undermines the Appellant's credibility on this key issue. We also note Mr Serr's point that the modus operandi of an organisation such as CIM involves making it obvious the "decoy" is underage otherwise it would be a pointless exercise.

36. The credibility of the Appellant is a significant issue in this appeal given the first DBS finding we are considering relates to his belief that "L" was 15. We are mindful therefore that we must assess JA's credibility by considering the consistency and plausibility of his evidence and its alignment with the other evidence in the appeal as a whole.

37. We have had the opportunity to hear and assess the Appellant's evidence at first hand with the benefit of the specialist panel members and the knowledge and experience they bring to the jurisdiction. Put simply we do not accept significant (and key) parts of the appellant's evidence as credible.

38. We are satisfied that JA believed "L" to be 15 years old on the balance of probabilities. The finding contains no mistake of fact. There is no dispute that the finding amounts to relevant conduct because if JA's conduct was repeated in relation to children, it would cause harm (whether sexual, emotional or psychological) or a risk of harm to them. We are therefore satisfied that there was no mistake of fact or law in the DBS's first finding of relevant conduct.

Other grounds of appeal relating to first finding of relevant conduct

39. This appeal is set in a somewhat unusual factual and evidential landscape given it involves an online campaign group (CIM). We express no views as to their actions.

40. Nonetheless, we must decide whether on the balance of probabilities DBS have made a mistake on any point of law or in any finding of fact which it has made and on which the decision to bar JA was based. In considering the Appellant's grounds of appeal, we have concluded that none of the grounds of appeal are made out in relation to DBS's first finding of relevant conduct.

41. There is evidence at pages 61/62 of the UT bundle that a Police Officer from West Midlands Constabulary did see the screenshots of the messages. A statement was taken from MB detailing what these messages were. It was suggested by counsel for DBS that this statement was likely compiled from the messages as it contained significant detail. The statement was made the day after the incident. The contents of the message thread were not disputed by the Appellant subject to the exceptions referred to above.

42. We do not agree in the circumstances of this appeal DBS "erred in the finding of fact in that it has inaccurately interpreted the evidence". Nor are we persuaded the Respondent took into account matters it should not have. Neither do we agree DBS has failed to "adequately consider the weight of evidence that put in question the credibility of the witness that made the allegation." While MB is an anonymous witness, this has less significance in this appeal because: (i) the appellant agrees with almost the whole conversation and was able to give oral evidence regarding the parts he disputed; and (ii) no evidence or motive as to why MB would be untruthful has been advanced. The Appellant was given an opportunity and did make representations to DBS. In all the facts and circumstances of this case we consider DBS was entitled to make finding one as set out at paragraph 10 above. None of these grounds of appeal establish any mistake of fact or law in the first finding of relevant conduct.

The indecent image: second finding of relevant conduct

43. We consider there are significant evidential problems with this finding. It was not in dispute that the indecent image was found on JA's phone. What was in dispute was that JA was aware the image was there. There is no evidence to establish, on the balance of probabilities, how the image was obtained or that the Appellant either viewed or shared the image. The real question is whether the finding amounts to relevant conduct - did it harm or cause a risk of harm to a child? Given there is no evidence to prove JA was aware the image was on his phone, we find DBS have not proved on the balance of probabilities JA committed relevant conduct in relation to this

finding. We do not consider therefore DBS could rationally maintain this as a finding of relevant conduct and in that respect, the respondent is in error of law.

Materiality

44. We consider however the mistake in relation to the second finding of relevant conduct does not materially impact on the DBS's decision overall to include the Appellant in the Children's Barred List. This is because we consider there is no error of law or mistake of fact on which the Respondent's decision was based in relation to the first finding of relevant conduct and this finding is sufficiently serious to justify inclusion on the Children's Barred List. We are satisfied that it is inevitable that the DBS would have decided to include the Appellant on the barred list based on the first finding of relevant conduct alone (including that it was proportionate to do so).

Proportionality

45. This issue was mentioned in the Appellant's written submission and at the oral hearing but was not argued in any detail. We note the decision in *MFAG v The Disclosure and Barring Service: [2024] UKUT 330 (AAC)* where I*ndependent Safeguarding Authority v SB [2012] EWCA Civ 977* was followed:

> *"24. The central principles to be derived from ISA v SB appear to us to be that on a proportionality challenge the Upper Tribunal should objectively judge whether DBS's decision to bar was proportionate, undertaking the ordinary judicial task of weighing up the competing considerations on each side, but giving appropriate weight to DBS's views."*

46. There was no application to stay this case pending the outcome of another Upper Tribunal appeal focusing on proportionality.

47. We have examined whether the DBS barring decision disproportionately interferes with the Appellant's Article 8 right to respect for his family and private life, including to work in his field of choice and proficiency. That right must be balanced against the public interest in safeguarding children from harm. The test is whether it is proportionate to bar him from working in regulated activity with this vulnerable group in all the circumstances.

48. 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?

49.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.

50.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.

51.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 and the findings we have made on appeal (even though we found the second finding of relevant conduct to contain mistake(s) of law).

52.On the basis of the findings that the DBS made in its final decision letter and the findings we have made in this appeal, we are satisfied that it was proportionate and reasonably necessary to bar JA in order to achieve its (important and) legitimate safeguarding aims.

53.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.

54.We are satisfied that when making the barring decision, there were no other measures in place sufficient to adequately safeguard children from JA participating in regulated activity and committing further acts of relevant conduct such that it was the least intrusive measure necessary.

55. We are also satisfied that barring was necessary and struck a fair balance between JA's right to a private life and the interests of the community. The DBS expressly carried out the "balancing act" exercise required. Based on our findings we would have done the same. We are satisfied that the DBS was entitled to find that the Appellant presented a risk of harm to children at the time of the decision based upon the first finding of relevant conduct 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.

56. We are persuaded in this regard; the DBS has used its own expertise as a statutory body considering issues of this kind and has come to a barring decision that we agree was proportionate. In all the circumstances of this case, considering the serious nature of the Respondent's first finding, we do not consider the DBS decision to include the Appellant on the Children's barred list was disproportionate. Neither do we consider, given the evidence available to DBS, their decision on this issue is irrational. There was no mistake of law.

Disposal

57. Having decided that the DBS decision does not involve any material mistake of fact or error of law, there can only be one outcome to this appeal. This is because section 4(5) of the 2006 Act states as follows:
(5) Unless the Upper Tribunal finds that has made a mistake of law or fact, it must confirm the decision of DBS. That being so, we confirm the DBS's decision to include the Appellant on the Children's Barred List.

58. The appeal is dismissed.

E Fitzpatrick
Judge of the Upper Tribunal

J Heggie
Specialist Member of the Upper Tribunal

S Jacoby
Specialist Member of the Upper Tribunal

Authorised for issue on 7th January 2024