THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2024-000839-V
[2025] UKUT 045 (AAC)
KS V DISCLOSURE AND BARRING SERVICE

THE UPPER TRIBUNAL ORDERS that, without the permission of this Tribunal:

No one shall publish or reveal the name or address of any of the following:

(a) KS, who is the Appellant in these proceedings;

(b) any of the patients or staff mentioned in the documents or during the hearing;

or any information that would be likely to lead to the identification of any of them or any member of their families in connection with these proceedings.

Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

Decided following an oral hearing on 8 January 2025

Representatives

Appellant	Laura Herbert of counsel, instructed by Thompson Solicitors
Disclosure and Barring Service	Samantha Broadfoot KC, instructed by DBS Legal

DECISION OF THE UPPER TRIBUNAL

On appeal from the Disclosure and Barring Service (DBS from now on)

DBS Reference: 01007089445
Decision letter: 21 March 2024

This decision is given under section 4 of the Safeguarding Vulnerable Groups Act 2006 (SVGA from now on):

DBS did not make mistakes in law or in the findings of fact on which its decision was based. DBS's decision is confirmed.

REASONS FOR DECISION

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1. This appeal was heard by a Presidential Panel appointed to decide the proper approach for the Upper Tribunal to take to the issue of proportionality of a decision of DBS. We have decided that the Upper Tribunal must decide for itself whether DBS's decision was proportionate. We explain why, and what this involves, in Section V. Henceforth, this is the approach that should be taken by the Upper Tribunal.

2. We have also decided that the Upper Tribunal has power to permit an appellant to amend their grounds of appeal after permission to appeal has been given, although we refused to do so in this case. We explain the basis for this power, and why we have refused to exercise it, in Section III.

I THE APPEAL

A. DBS's decision

3. DBS included KS in both the children's barred list and the adults' barred list on 21 March 2024. It did so on the basis of these findings of relevant conduct:

> We have considered all the information we hold and are satisfied of the following:
>
> - On 28 June 2023, you have endangered patients when you have been late in completing observations and medication administration, failed to provide end-of-life medication to a patient, and failed to provide a sufficient handover, in a role which you knowingly provided a false employment reference for.

- On 7 July 2022 you, whilst working as a Staff Nurse, failed to record observations for a child, MB. and failed to administer medication to MB, then falsified the second checker's signature on the medication administration record for MB.
- On 25 March 2022 you, whilst working as a Nurse, failed to complete the required patient observations on two children.
- On 24 April 2021 you, whilst working as a Nurse, failed to complete patient observations on two patients as required and then falsified observation records.

You, whilst employed as a Nurse, neglected patient care when:

- On 29 August 2020 you fail to complete patient observations or supervise feeds,
- On 8 October 2020 failed to complete frequent enough patient observations.
- On 5 November 2020 you didn't complete required patient observations after 02.53am,
- On 19 November 2020 you didn't bring IVs forward when asked and didn't monitor feeds,
- On 5 December 2020 you failed to complete an IV chart, VIP chart and care plan for a patient,
- On 6 January 2021 [you] falsely recorded patient observations, and
- On 22 March 2021 you failed to do re-feed bloods and failed to complete an IV for a patient being discharged.

B. The application for permission to appeal

4. The grounds of appeal were drafted by Ray Short of the Professional Services Unit of KS's union, Unison:

> 1. We represent KS in this matter as her trade union representative.
>
> 2. It is our submission that the decision to include KS on either of the barred lists would be disproportionate and contrary to Article 8 of the European Convention of Human Rights.
>
> 3. Given that this matter relates to disputed employment and clinical matters that will be the subject of a statutory examination of the facts before an NMC [Nursing and Midwifery Council] substantive hearing it is grossly unfair that the disputed 'evidence' is being relied upon by the DBS without having the benefit of judging that evidence once it has been tested in its proper lawful process.
>
> 4. The matters in contention relate, almost in their entirety, to the competence of this newly qualified nurse, who joined the profession just as Covid hit the nursing world. Such was her chaotic start into the profession that she received little or none of the support a newly qualified nurse should get. Significantly she only received a formal preceptorship some sixteen months after her start on the ward.
>
> 5. It will also be the case that in any substantive hearing of these matters there will be the strongest challenge to the assertions from her employers that she was

given effective or consistent support and guidance to address issues of competence or safe local knowledge of procedures and practices.

6. We will say that the support and advice could be characterised as muddled and ineffective, without offering any consistent support during a period of intense strain, and that the lack of support is a fundamental factor in KS's performance as a nurse.

7. We would submit that the concerns that the DBS express about KS activities within regulated behaviour are addressed safely by the actions of the NMC in this case. We will contest the DBS assertion that a bar is required because KS could work outside nursing. Many of the concerns relate to clinical practice and do not translate into everyday life or other work. It is also the case that no deliberate harm is alleged.

8. KS is subject to an 18 month Interim Suspension Order which, in our submission is sufficient to address any risk posed to public or patients and serves to uphold the public interest throughout this process. Should the investigation prove a lengthy affair then the Order can be extended as necessary. The NMC has all of the powers necessary in this case to address all the concerns and to control any risk to patient or public.

9. We would submit that, in the light of the powers of the NMC in this matter, the decision of the DBS to bar does not strike a fair balance between KS's rights and the interests of the community, and their decision goes further than it is necessary to accomplish the aim of protecting vulnerable adults and children.

10. We would submit that it is disproportionate to bar a young mother who has had no concerns raised about her in relation to her own child, for matters that are restricted to the safely regulated field of nursing.

11. KS has a commitment to return to nursing and admits that she did struggle at work, but that struggle did not receive appropriate support. Any decision to bar her would disproportionately prevent her from any chance of remediating her practice.

12. We would submit the decision to bar will have a devastating effect on a young mother, much more so that the average individual, and would be disproportionate. It would also have a significant effect on her reputation and her financial future.

13. It is our submission that the public consideration of placing KS on the barred lists could be seen as overly punitive and draconian given that the NMC's actions answer all of the risks, and that the NMC will hold an objective and scrupulous substantive and public hearing of all of these matters and will publish its findings in full before KS could return to nursing.

14. None of the long term factors that the DBS deem relevant in considering issuing barring decisions are present. There is no evidence whatsoever of sexual or violent concerns, nor any stated concerns of this nature

15. We would argue that none of the alleged behaviour would engage as a long term factor in DBS considerations. There has been no actual harm to any patient.

16. The DBS refers, more than once to a lack of empathy by KS, but they appear to have not properly considered, if at all, the report by about her being invited to attend the Nursing Times Awards by her senior manager as a student had nominated KS's ward as Student Placement of The Year, and it was on the final short list. The student had nominated this ward because of the support shown by KS to her throughout a traumatic event and its aftermath on the ward, and for the caring and coping skills she had acquired working with KS.

17. This very public and high profile recognition of her empathy and care for others should have had a material effect on the decision to bar given the public recognition of empathetic practice by KS, and its implications for future good practice.

18. It is, therefore, submitted that the decision to include KS on either barred list is both unnecessary and disproportionate.

5. Upper Tribunal Judge Jacobs gave KS permission to appeal, saying:

3. The test for permission is whether the appellant has a realistic prospect of success: *R (Reid) v Upper Tribunal (Administrative Appeals Chamber), Disclosure and Barring Service interested party* [2022] EWHC 2180 (Admin) at [44]. I consider that that test is satisfied.

4. The Upper Tribunal will not allow KS 'to enlarge the scope of the appeal beyond the limits of the grant of permission': *Disclosure and Barring Service v JHB* [2023] EWCA Civ 982 at [97].

5. I have read the grounds provided by Ray Short of the Professional Services Unit Unison, dated 14 June 2024. I give permission on those grounds. In summary, and without restricting the scope of the grant of permission, the argument is that DBS's decision was disproportionate.

6. This case will provide a convenient opportunity to consider the correct approach for the Upper Tribunal to take to the issue of proportionality.

7. The Upper Tribunal's starting point has always been with the decision of the Court of Appeal in *B v Independent Safeguarding Authority* [2012] EWCA Civ 977, [2013] 1 WLR 308.

8. The way that the Upper Tribunal has applied that case varies. I have picked three recent cases, presided over by different judges, from our website:

- NC v Disclosure and Barring Service [2024] UKUT 42 (AAC) at [38] – Wednesbury approach.
- KB v Disclosure and Barring Service [2021] UKUT 325 (AAC) at [130] – issue decided afresh.
- WW v Disclosure and Barring Service [2023] UKUT 241 (AAC) at [55] - no fresh consideration, approach consistent with role under SVGA.

9. How, if at all, does the analysis of the Court of Appeal in *Dalston Projects Ltd v Secretary of State for Transport* [2024] EWCA Civ 172, [2024] 1 WLR 3327 affect the approach under section 4 SVGA?

The judge then gave directions for an oral hearing.

6. On 29 August 2024, the President of the Administrative Appeals Chamber appointed a special panel consisting of Upper Tribunal Judges Jacobs and Wright, sitting with a specialist member, to decide 'a question of special difficulty: what is the correct approach to proportionality on appeal under section 4 of the Safeguarding Vulnerable Groups Act 2006?'

II THE LEGISLATION

A. SVGA barring provisions

7. We set out the provisions of Schedule 3 SVGA relating to children; those relating to vulnerable adults are essentially the same. Paragraphs 9 and 10 are the equivalents for vulnerable adults.

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.

B. SVGA review provisions

8. Schedule 3 contains provisions allowing DBS to review a person's inclusion in a list. Paragraph 18A is relevant to our reasoning:

Review

Paragraph 18A

(1) Sub-paragraph (2) applies if a person's inclusion in a barred list is not subject to—

(a) a review under paragraph 18, or

(b) an application under that paragraph,

which has not yet been determined.

(2) DBS may, at any time, review the person's inclusion in the list.

(3) On any such review, DBS may remove the person from the list if, and only if, it is satisfied that, in the light of—

(a) information which it did not have at the time of the person's inclusion in the list,

(b) any change of circumstances relating to the person concerned, or

(c) any error by DBS,

it is not appropriate for the person to be included in the list.

C. SVGA appeal provisions

9. Section 4 SVGA contains the Upper Tribunal's jurisdiction and powers.

4 Appeals

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

…

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

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

…

D. Human Rights Act 1998 provisions

10. These are the relevant sections of this Act:

3 Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

6 Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section “public authority” includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

…

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) 'An act' includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

11. The Article 8 Convention right is in Schedule 1:

Article 8

Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

E. Upper Tribunal procedure provisions

12. These are the relevant provisions of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698):

2 Overriding objective and parties' obligation to co-operate with the Upper Tribunal

(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes-

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Upper Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Upper Tribunal must seek to give effect to the overriding objective when it-

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must-

(a) help the Upper Tribunal to further the overriding objective; and

(b) co-operate with the Upper Tribunal generally.

5 Case management powers

(1) Subject to the provisions of the 2007 Act and any other enactment, the Upper Tribunal may regulate its own procedure.

(2) The Upper Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Upper Tribunal may-

(a) extend or shorten the time for complying with any rule, practice direction or direction;

…

(c) permit or require a party to amend a document;

…

(h) adjourn or postpone a hearing; …

15 Evidence and submissions

(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Upper Tribunal may give directions as to-

(a) issues on which it requires evidence or submissions; …

21 Application to the Upper Tribunal for permission to appeal

…

(3) An application for permission to appeal must be made in writing and received by the Upper Tribunal no later than–

(a) in the case of an application under section 4 of the Safeguarding Vulnerable Groups Act 2006, 3 months after the date on which written notice of the decision being challenged was sent to the appellant; …

(4) The application must state-

…

(e) the grounds on which the appellant relies; …

22 Decision in relation to permission to appeal

…

(2) If the Upper Tribunal gives permission to appeal–

(a) the Upper Tribunal must send written notice of the permission, and of the reasons for any limitations or conditions on such permission, to each party;

(b) subject to any direction by the Upper Tribunal, the application for permission to appeal stands as the notice of appeal and the Upper Tribunal must send to each respondent a copy of the application for permission to appeal and any documents provided with it by the appellant; …

III THE SCOPE OF THE APPEAL

A. Why this issue arises

13. We directed a hearing with a time estimate of one day. On 18 November 2024, DBS wrote saying both parties considered that one day would not give sufficient time for a hearing of KS's evidence and argument on the legal issue. On the following day, KS's solicitors wrote to the same effect. Judge Wright then issued a direction saying that both judges were not persuaded that a second day was necessary. He added that any matters outstanding at the end of the hearing could be addressed in written submissions.

14. In her skeleton argument dated 3 December 2024, Ms Herbert set out her interpretation of the grant of permission:

> 2. Permission to appeal was granted on the grounds raised within the representations dated 14 June 2024 by Ray Short these include: (inter-alia)
>
> i) That the DBS decision is disproportionate under Article 8 ECHR
>
> ii) The DBS decision to bar disproportionately prevents KS from any chance in remediating her practice
>
> iii) The DBS decision would have a disproportionate effect on KS as a young mother who has had wider problems in her life and makes the decision overly punitive and draconian
>
> iv) That the 'evidence' relied on by the DBS is insufficient and has not been properly tested
>
> v) That the DBS failed to consider the wider context of the allegations
>
> vi) That KS was supported by her employers is disputed
>
> vii) The NMC proceedings and actions allay the risks and make the DBS's actions unnecessary as the NMC address the wider public interest and has the aim of protecting vulnerable adults and children (as these are patients)
>
> viii) None of the long-term factors the DBS consider relevant in the barring decision are present
>
> ix) There has never been any harm to any patient
>
> x) [DBS] failed to consider the relevant positive information regarding KS's empathy and care.

Ms Herbert then dealt in detail with DBS's findings. This was the first indication that DBS or the Upper Tribunal had of this interpretation of the grant of permission.

15. In her skeleton argument dated 16 December 2024, Ms Broadfoot took issue with Ms Herbert's statement of what was covered by the grant of permission. KS signed her

witness statement on 18 December 2024, disagreeing with most of DBS's findings and providing additional evidence.

16. On 6 January 2025, two days before the hearing, KS's solicitors emailed the Upper Tribunal saying:

> We write to inform the tribunal that the Appellant maintains that the grant of permission allows us to argue that the DBS decision included mistakes of fact. point 3 of the grounds of appeal … makes clear there is a challenge to the DBS's factual findings. We also intend to call KS to give evidence, this is integral to both this factual challenge, but also the Article 8 (Right to Private and family life) argument on which the appeal relates.
>
> We understand that the hearing may go part heard to allow for submissions or alternatively it may be that submissions can be made in writing.

17. At the beginning of the hearing on 8 January 2025, we heard argument on the scope of the appeal. This raised three issues: (a) was Ms Herbert's interpretation of the grounds of appeal correct; (b) if not, does the Upper Tribunal have power to give permission to extend the grant of permission; and (c) if it does, should it exercise that power in this case?

B. There was no doubt about the meaning of the grant of permission

18. Rule 21(4)(e) of the rules of procedure provides that an application for permission must include the grounds of appeal on which the appellant relies. If the Upper Tribunal gives permission, its usual approach under rule 22(2)(b) is to allow the grounds on which permission was given to stand as the notice of appeal.

19. It follows that the scope of the appeal was governed by the terms in which Judge Jacobs gave permission to appeal. He gave permission on the grounds set out by Ray Short. Our reading of those grounds is that they covered whether: (a) given DBS's findings, its decision was disproportionate; and (b) KS was given effective or consistent support and guidance to address issues of competence or safe local knowledge of procedures and practices (paragraph 5 of the grounds).

20. We consider that there was no uncertainty and no basis for interpreting the grant of permission as Ms Herbert had done. The grant of permission must be read as a whole. Judge Jacobs said that he was giving permission on the grounds in Ray Short's application. There is no doubt about what that means. He then said: 'In summary, and without restricting the scope of the grant of permission, the argument is that DBS's decision was disproportionate.' That does not detract from or add to the terms of the grant. It says it is a summary, meaning a summary of what the grounds of appeal were. It says it does not restrict the scope of the grant, meaning restrict it beyond the grounds. It does not indicate that it is extending the grant beyond the grounds. Finally, it mentions proportionality, which was the focus of the grounds. We accept Ms Broadfoot's argument that paragraph 3 in the grounds of appeal is not a challenge by KS to the factual findings on which the barring decision is based. It is just a complaint about DBS relying on evidence before it had been tested in the NMC proceedings.

C. The Upper Tribunal has power to allow an appellant to amend their grounds

21. The starting point is the decision of the Court of Appeal in *Disclosure and Barring Service v JHB* [2023] EWCA Civ 982. This is the paragraph in full:

> 97. Nevertheless, in case the UT's analysis of its own reasoning is, itself, incorrect, I should consider whether, if the UT did, in substance, rely to any extent on the reasoning in paragraphs 18-19, it was guilty of a procedural irregularity. I consider that, if and to the extent that the UT did, in substance, rely on this reasoning in the Judgment, there was a procedural irregularity. It acted unfairly in basing any part of its decision on this reasoning, as it had not given the DBS a chance to comment on it. If it was going to base any part of its decision on this point, it should have given the DBS notice of this proposed reasoning. The UT's explanation for its approach in its decision refusing permission to appeal (see paragraph 80, above) suggests that the UT's understanding of its powers on an appeal was mistaken. An appeal under section 4 of the SVGA can only be made with the permission of the UT after the UT has considered whether the grounds of appeal fall within the scope of section 4(2), and only to the extent that they do (section 4(4)). Section 4 does not give the UT power, once it has given permission to appeal, to enlarge the scope of the appeal beyond the limits of the grant of permission.

22. Ms Herbert argued that that paragraph had to be read in the light of [60]. That paragraph merely summarised one part of Judge Jacobs' refusal of permission in *JHB*. We can see no basis for relying on [60] to understand, still less restrict, [97].

23. Taking [97] as it stands, we accept that section 4 does not confer power to amend the grounds of appeal. However, we accept Ms Herbert's argument that the Upper Tribunal can use its case management powers to allow an appellant to amend their grounds. Section 4 is concerned with jurisdiction, not case management.

24. The Upper Tribunal must surely be allowed to take account of changes in the law, more likely case law than legislation, since the grant of permission. Also, as *JHB* recognised at [95], the Upper Tribunal has power to 'hear relevant evidence that was not before the DBS.' See also *RI v Disclosure and Barring Service* [2024] 1 WLR 4033 at [50]. It is possible that the findings of fact made on that new evidence could raise issues that could not have been anticipated in advance. It would be in accordance with the overriding objective to allow those issues to be considered on their merits. We are not suggesting that an amendment would only be allowed if there were a change of circumstances. That is simply the most likely basis for doing so. We have used it to show that the power exists.

25. We accept Ms Herbert's argument that the correct approach is to apply under rule 5(3)(c) to amend a document. The document is the notice to appeal under rule 22(2)(b), which consists of the grounds on which permission was given. This coincides with the approach under CPR rule 52.17:

> An appeal notice may not be amended without the permission of the appeal court.

As Hickinbottom LJ explained in *Hickey v Secretary of State for Work and Pensions* [2018] 4 WLR 71:

> 74. … an appellant who has obtained permission to appeal and wishes to add to or otherwise amend his grounds must make a formal application to do so under CPR r 52.17, *as soon as he reasonably can*. Grounds of appeal cannot be covertly amended, for example by including changes to them in the skeleton argument. …
>
> 75. Compliance with the rules will ensure that appeal hearings are properly focused, as they must be. Although of course the merits of an application to amend grounds of appeal will necessarily be fact-specific, where an appellant proposes substantial changes to the grounds of appeal from those upon which he has obtained permission to appeal but has made no application — or no *reasonably prompt application* — to amend, he should not expect an appeal court to be sympathetic. Appeal courts have a variety of sanctions at their command should a party fail to comply with important mandatory procedural rules that apply to appeals.

Those remarks related to CPR, but they apply equally to the position under our rules of procedure. We have emphasised the references to the timescale for applying for permission to amend. Lateness will be a consideration in the Upper Tribunal's assessment of whether to give permission.

26. Any amendment to the grounds of appeal would naturally be subject to conditions to ensure fairness by allowing DBS: (a) a chance to make submissions on whether the grounds should be altered; and (b) time to prepare to deal with the amended grounds.

D. Why we refused permission for KS to amend her grounds

27. We refused to allow KS to amend her grounds for the following reasons in combination.

28. The grounds of appeal were clear, as we have said. Ms Herbert was right that they were not written by a lawyer. They were, though, written by an experienced official from KS's Union. More importantly, they showed an understanding of the DBS legislation and were cogently reasoned. It follows that the grant of permission accepting those grounds was also clear. There was no justification for misunderstanding the grounds on which permission was given or for believing that they included a challenge on the facts to almost every one of DBS's findings. Moreover, the Upper Tribunal's rejection of the application to allow more time for the hearing should have suggested that it did not consider that extensive evidence and cross-examination would be involved.

29. Ms Herbert either assumed that the grounds were as she believed them to be or that the Upper Tribunal would allow her to amend the grounds. The email of 6 January 2025, admittedly from her instructing solicitor, suggests the former. She wrote her skeleton argument without sight of KS's witness statement and told us at the hearing that she could not rely on some of the points in that statement as they were not reasonably arguable. Her skeleton was the first notice of her interpretation of the grant of permission to DBS and to the Upper Tribunal.

30. Ms Broadfoot's response in her skeleton argument should have put Ms Herbert, or her instructing solicitors if she was not available, on notice that DBS did not agree

with her interpretation of the scope of the appeal. That should have alerted them to the need to apply for permission to amend the grounds of appeal, at least as a precaution. In the event, the application was only made at the hearing.

31. Even at that stage Ms Herbert did not provide a definitive list of the specific mistakes of fact on which she wanted to rely. That left Ms Broadfoot and the panel unclear about what the amended grounds of appeal would be. That presumably would only have been revealed by Ms Herbert's questions to KS in the course of the hearing, had we allowed that course to be taken. That is a wholly inappropriate basis on which to apply to amend the grounds of appeal.

32. The Upper Tribunal should not give permission in those circumstances. We take account, too, of the unfairness from lack of notice and of a chance to prepare that would be caused to DBS and Ms Broadfoot, to the Upper Tribunal panel, and thereby to KS herself.

IV SUPPORT AND GUIDANCE

33. This section deals with paragraph 5 of Ray Short's grounds of appeal:

> 5. It will also be the case that in any substantive hearing of these matters there will be the strongest challenge to the assertions from her employers that she was given effective or consistent support and guidance to address issues of competence or safe local knowledge of procedures and practices.

34. The above argument relates to the concluding sentence from the following passage in DBS's decision letter:

> … the evidence in this case shows that you have repeatedly demonstrated over a period of several months, between August 2020 and March 2021, an inability to successfully amend and maintain your behaviour in relation to frequently and consistently completing patient observations and documentation. You have been offered support and guidance from Management in relation to these areas, however, you haven't amended your behaviour.

35. We deal with this ground briefly because, on our proportionality analysis, it does not affect the outcome of the appeal. This is so whether we view DBS's finding as one on which the decision was based, and so relevant to section 4(2)(b) SVGA, or as a general finding relevant to the proportionality analysis. Our conclusion on proportionality would not be affected even if we were to accept that DBS made a mistake in the finding.

36. KS referred to this in her witness statement:

> 24. In relation to any support I was offered by my employers. I was placed on action short of suspension (ASOS) twice and then suspended once due to different allegations by … Hospital, this was between April 2021 and July 2021 and April 2022 and June 2022. After the first ASOS I was told I could not work in a clinical area but I was redeployed to work with senior nurses in tissue viability to check patient's to see if they needed parafricta boots for pressure sores. After the second ASOS I was redeployed to work in the paediatric offices and asked to make packs with information and activity wallets for diabetes patient's who were

> going on a residential. It was not clinical and so I was not getting any clinical training. I then went off sick in April/May 2022 which was also when my ex-partner's court case was. There were no specific requirements of the ASOS.
>
> 25. Following the first ASOS in 2021 I was asked by JL to complete 12 documented tables from 12 different shifts which would provide information on each patient I was looking after and what was wrong with them, and how often their observations and medications etc were due. I handed them in to PB the Nurse Educator on the ward. There was no other performance improvement plans or other assistance offered by the trust following this. I stopped working at … Hospital on 7 July 2022.

37. KS gave evidence and was cross-examined. Her answers were often lengthy and tended to drift from the point of the questions. Some answers seemed to relate more to proceedings against her employer before an employment tribunal. Others did not address the question at all.

38. Our judgement on the evidence before us was that KS was given support and guidance, but it was not as much as she wanted. However, an evaluative exercise about the quantity and quality of the support and guidance that had been provided to KS by her employer was not the issue before us.

39. KS's argument was that DBS made a mistake of fact about her having been offered support and guidance by her employer. The evidence before us did not support this ground. By way of example, KS's Ward Manager's email of 30 June 2021 sets out that he had had many conversations with KS regarding issues, and in context that was plainly about issues around KS's work. The same Ward Manager in the records of the employer's investigation meeting of 24 May 2021 accepted he had not directly supervised KS. However, that same investigation meeting records the Ward Manager as saying he had worked many shifts with KS and had met with her formally on three separate occasions since September 2020, with each such formal meeting taking around an hour, and had also had many informal conversations with KS. We reject KS's evidence before us that these meetings and conversations were for no more than a few minutes each time. We cannot see why the Ward Manager would have made up such evidence. Moreover, one outcome of these meetings as described by the Ward Manager was the creation of a template to help KS record what she had done for patients, and those templates are set out in the evidence. Those templates, even taken on their own, are evidence of KS's employer offering her support and guidance.

V PROPORTIONALITY

40. The question of special difficulty that we were set up to answer arises from DBS's decision to include KS in both barred lists. That decision engaged her Article 8 Convention right. This is a qualified right, which permits interference that is 'in accordance with the law and is necessary in a democratic society …' In this case, that requires a proportionality analysis.

A. The proportionality questions

41. The Supreme Court gave the most recent and most authoritative statement of what that analysis involves in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC

700. It did not decide anything new. It merely set out the analysis as established by European and domestic case law. The analysis does not depend upon the circumstances of those cases, although its application will depend on the individual facts and circumstances of the case in hand.

42. Lord Sumption said:

> 20. … the question 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. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. …

He then referred to Lord Reed's formulation of the concept of proportionality, saying there was nothing in it with which he would disagree. Lord Reed said:

> 74. … it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. … I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

43. In *Wilson v First County Trust (No 2)* [2004] 1 AC 816 at [61], the House of Lords decided that the test has to be applied 'by reference to the circumstances prevailing when the issue has to be decided.' In DBS cases, that means the date of the decision under appeal: *SD v Disclosure v Barring Service* [2024] UKUT 249 (AAC).

B. Proportionality and the Upper Tribunal's jurisdiction

44. Section 3 of the Human Rights Act provides that legislation must be interpreted and applied in a way that is compatible with Convention rights, so far as it is possible to do so. That duty applies to DBS and to the Upper Tribunal. In addition, section 6 of the Act imposes a duty on courts and tribunals to act in a way that is compatible with Convention rights.

45. Section 4 SVGA provides for an appeal to the Upper Tribunal. Its jurisdiction is limited to mistakes of fact and law. It must not exceed that jurisdiction, but nor may it

abdicate any part of it: *Stuart v Goldberg* [2008] 1 WLR 823 at [76]. In other words, an appeal must be effective to its fullest extent, even when it involves the proportionality of an infringement of a Convention right: *P3 v Secretary of State for the Home Department* [2022] 1 WLR 2869 at [118].

46. The Upper Tribunal has jurisdiction to deal with issues of fact and law. Either may affect the proportionality of DBS's decision. The analysis will depend on whether DBS's findings were both correct and complete. However, whether a decision of DBS is disproportionate is an issue of law: *R (Royal College of Nursing) v Secretary of State for the Home Department* [2011] PTSR 1193 at [104] and *B v Independent Safeguarding Authority (Royal College of Nursing intervening)* [2013] 1 WLR 308 at [14].

47. Proportionality sets the limit to what may be appropriate. It is never appropriate for DBS to make a decision that is disproportionate. It does not, though, occupy the whole space covered by appropriateness. In other words, DBS need not find it appropriate to bar just because it would be proportionate to do so. The Upper Tribunal must bear this in mind when considering disposal under section 4(6) and (7) SVGA. We say more about this at [79] below.

C. Proportionality on appeal to the Upper Tribunal

48. The approach on appeal to proportionality as part of a Convention right depends on whether it is the first judicial consideration. As Lord Neuberger explained in *In re B (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911:

> 84. It is well established that a court entertaining a challenge to an administrative decision, ie a decision of the executive rather than a decision of a judge, must decide the issue of proportionality for itself – see the statements of principle in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, paras 29-30 and 63, and in *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, paras 12-14, 24-27, 31, 42-46 and 89-91. However, this does not mean that an appellate court entertaining a challenge to a judicial decision, as opposed to an executive decision, must similarly decide the issue of proportionality for itself. …

This case involves a first judicial consideration, so the Upper Tribunal must decide the issue of proportionality for itself.

49. But what does it mean to 'decide the issue of proportionality for itself'?

50. First, it means that the Upper Tribunal is not undertaking a rationality or *Wednesbury* assessment. It is not concerned with the process followed by DBS. As Lord Bingham explained in the *Denbigh High School* case:

> 29. … the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated. … The unlawfulness proscribed by section 6(1) is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning …

51. Process issues may, though, be relevant from a practical point of view, as Lord Bingham went on to explain:

> 31. … The Court of Appeal's decision-making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even with a solicitor to help them. If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it.

52. There are comments in the cases that might suggest a tribunal or a court should take a rationality approach. The comment of Lord Hoffmann in the *Belfast City Council* case might be read as an example:

> 17. … This is an area of social control in which the Strasbourg court has always accorded a wide margin of appreciation to member States, which in terms of the domestic constitution translates into the broad power of judgment entrusted to local authorities by the legislature. 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.

And Baroness Hale said:

> 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, a court would find it hard to upset the balance which the local authority had struck. …

However, those comments have to be read in the context of an application for a licence to operate as a sex shop. Both judges were referring to the practicalities of decision-making in that context. Lord Hoffmann referred to 'very unusual facts', while Baroness Hale referred to it being 'hard to upset the balance'. The latter reflects the language of Lord Bingham. That is how the Court of Appeal interpreted these passages in *B* at [16].

53. Second, the Upper Tribunal must have regard to DBS's statutory role as the primary decision-maker. This is consistent with the Upper Tribunal having to decide proportionality for itself. It makes the decision but takes account of DBS's analysis when doing so. As the House of Lords said in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167:

> 16. … The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of 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. That is how any rational judicial decision-maker is likely to proceed. …

It is for the Upper Tribunal to assess the appropriate weight to be given to the judgement of DBS as primary decision-maker. It is unlikely to reject it in its entirety.

More realistically, it may accept it as a whole, or accept some parts and reject other parts. It may attribute different weight to different aspects of DBS's analysis. Having done that, it must make its assessment of the relevant factors as a whole. In that way, the Upper Tribunal avoids 'supine acceptance' of DBS's analysis, subjects its reasoning to 'careful scrutiny' and prevents 'an erosion of the right of appeal': *P3* at [118], [126], [129], [134] and [135].

54. Third, the Upper Tribunal must make its own analysis of proportionality, but in practice it will have the benefit of argument from the parties, at least if the appellant is represented. That argument should have identified the extent to which DBS's analysis is disputed. That will allow the tribunal to focus on those points in its analysis. But, to repeat, it is for the Upper Tribunal to make the final analysis.

D. DBS's analysis

55. This is how DBS explained its analysis of proportionality in its decision:

> In examining the proportionality of inclusion on the Adult's Barred List and the Children's Barred List, your Article 8 human rights (European Convention on Human Rights) have been considered as follows:
>
> It is recognised that your inclusion on the Adult's Barred List and the Children's Barred List will have a significant impact upon your ability to work in your chosen profession as a Nurse and in any form of regulated activity in respect of vulnerable adults and children. This will significantly limit your employment and volunteering opportunities, which will likely lead to financial implications. Your inclusion may also cause some personal stigma, which may impact on your wellbeing. It is acknowledged that this will have some impact on your Article 8 human rights, given that you are a new mother and you intended to rehabilitate your practice to return to a Nursing role.
>
> However, you are likely to pose a significant risk of harm to vulnerable adults and children by neglecting their care if you were to obtain a position of responsibility within a regulated activity role.
>
> Therefore, consideration of these concerns is relevant and necessary. It is also considered that poor practice in relation to patient care does translate out of a clinical setting into the wider workforce of regulated activity towards children and vulnerable adults. Mr …, your Unison Representative, highlights the ongoing NMC investigation and their powers to conduct a civil hearing and test the evidence. However, DBS has evaluated the available evidence and established findings on the balance of probabilities in line with its legislative power to do so. Whilst the NMC's investigation and Interim Suspension Order are acknowledged, DBS has a duty to safeguard vulnerable groups across the whole child and adult workforce within regulated activity and this suspension is limited to your role as a Registered Nurse and would not preclude you from other regulated activity roles towards vulnerable groups.
>
> It is also acknowledged that you have been dismissed by … NHS Trust and your practice was restricted by National Locums in July 2023, which could be disclosed to any prospective employer within a reference request. However, as the

prospective employer can choose to disregard this it is considered that this does not provide sufficient safeguarding protection. Therefore, in the absence of any sufficient safeguarding measure, DBS is satisfied that it is both a necessary and proportionate safeguarding action to include you on the Adult's Barred List and the Children's Barred List.

E. Our analysis

56. We begin by rejecting as irrelevant the conduct of the staff that KS worked with. Ms Herbert referred to their failings and the lack of consequences for those failings. Those matters are irrelevant. We are only concerned with what KS did or failed to do. Whether KS should be included in the lists is not a comparative exercise. It does not depend on whether others acted as she did, or share the blame for what happened, or were subject to the same disciplinary steps as she was. DBS is required to apply a personal assessment. So is the Upper Tribunal.

57. We now come to apply the proportionality analysis, which we apply around the four issues as formulated by Lord Reed in *Bank Mellat*.

(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right

58. The measure is the barring scheme under SVGA and DBS's decision under that scheme. Its objective, in the most general terms, is to protect children and vulnerable adults from harm by those entrusted with their care in regulated activity. It may be that, in some cases, a more specific statement is needed. For this case, and probably for most, our statement will be sufficient. That objective is sufficiently important to justify interfering with KS's exercise of her Article 8 Convention right.

(2) whether the measure is rationally connected to the objective

59. DBS's decision under the barring scheme prohibits KS from engaging in regulated activity. That is rationally connected to the objective of the scheme.

(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective

60. This is where Ray Short's argument on proportionality naturally arises.

61. There are only three options available to DBS. It may: (a) include the person in one of the lists, but not the other; (b) include the person in both lists; or (c) decide not to include the person in either list. It has no power to limit the extent to which the bar applies. It cannot apply a temporary bar while it investigates the case or limit the scope of the bar to specified types of regulated activity. Nor can it permit a person to engage in regulated activity but subject to conditions. The trigger for acting is governed by SVGA. It may not include a person in a list unless and until the statutory conditions are satisfied. But once they are satisfied, DBS is under a duty to include the person in either or both lists. And DBS must be satisfied that it is proportionate to do so.

62. Ray Short argued in his grounds of appeal that:

> 7. … Many of the concerns relate to clinical practice and do not translate into everyday life or other work. …

That raises the issue whether relying on a bar by the NMC on KS working as a nurse would be an acceptable less intrusive measure than including her in the barred lists. That is based on an assumption that NMC was better placed than DBS or, by implication, the Upper Tribunal to investigate and decide the factual matters in dispute.

63. We have decided, for three reasons, that this is not an appropriate case to decide whether it would be permissible to rely on NMC's decision as a less intrusive measure. First, as we explain at [66] below, there is no final decision of NMC regulating KS's work. Second, we heard limited argument on whether DBS is permitted to rely on protection by another regulator as being sufficient if the nature of the risk posed justifies it. Third, even if it is permissible in principle, it would not be acceptable to rely on a decision by NMC as a less intrusive measure in this case. We say that, because we do not accept the premise of Ray Short's argument that the concerns are limited to clinical work and do not translate to other work.

64. We accept that some aspects of DBS's findings are limited to the clinical setting. Just to take one example, DBS found that on 28 June 2023 KS 'failed to provide end-of-life medication to a patient'. In her witness statement, KS explained that this related to setting up a syringe driver, which is the device by which end-of-life medication is delivered. As she was a children's nurse, she had no experience of setting up a driver. Assuming that that is correct, it would be limited to the clinical setting.

65. There are, though, other findings that are not limited to a clinical setting, do not depend on KS's training or support, and are not affected by her health or domestic relationship. They are sufficient to show that some of KS's failings when working as a nurse can properly be transferred to other settings. These are important failings that show how she might conduct herself in other regulated activity. She used her mother as a character referee on a job application, when she must have known that a parent does not have sufficient detachment to speak objectively to an applicant's character. She falsified records of observations and she used another nurse's initials to countersign for medication without her permission. These are matters of basic honesty. She also failed to tell an employment agency that she had been dismissed by her NHS Trust. This attitude is in no way limited to work as a nurse.

66. Timing is important. Mr Short's argument may work once NMC has made a final decision. When that happens, DBS will know the outcome of the proceedings and may have the benefit of NMC's findings of fact. DBS may then review KS's inclusion in the list under paragraph 18A of Schedule 3 SVGA. At present, though, the NMC has not yet decided whether KS has a case to answer, let alone decided whether she should be allowed to practice as a nurse. This is not unusual in our experience – NMC proceedings regularly take years to complete. Until then, the interim suspension order prevents her from practicing as a nurse. But suppose she wants to work in other regulated activity? Until then, DBS is the only body to protect children and vulnerable adults outside NMC's remit. And its options, as we have set out at [61] above, are limited by SVGA.

(4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter

67. Given our analysis so far, the outcome of the appeal depends on this issue.

68. Lord Reed's language identifies the factors to consider and provides a structure for the analysis. In practice, it may be easier to apply this as a whole rather than take an analytical approach. We have favoured the latter to identify where some of the factors identified by Ms Herbert arguments would fit into the analysis. If they do not fit, they cannot be taken into account.

69. To set the context, Ms Herbert referred to a range of factors: KS's career, the impact of the pandemic on her training, her qualities as a nurse, her character as attested to by the numerous character references, her medical history, her state of health, her pregnancy, her abusive relationship, and the conduct of co-workers.

70. We begin with the objective of including KS in the barred lists. We identified this in issue 1. Its importance speaks for itself. Preventing KS from working in regulated activity will contribute to achieving that objective. This is the effect on KS's Article 8 Convention right. The severity of those effects is a matter of judgement in the context of the case. Inclusion in the lists prevents KS from following her chosen career in caring, especially but not exclusively with children. She has worked as a support worker, and she has trained as a paediatric nurse and worked both with children and in adult nursing. She is now unable to pursue those activities or any other form of regulated activity. Otherwise, she is free to undertake any other activity that is not regulated. Her medical and caring knowledge and experience may be relevant to some of those activities. So far, then, the factors identified by Ms Herbert could not affect the analysis.

71. Continuing with that analysis, the rest of it consists of a balancing exercise between the severity of the effects on KS's exercise of her Article 8 Convention right and the importance of the objective of barring her from regulated activity. This is a matter of judgement. Our judgement is that the effects are outweighed by the importance of the objective. We have come to that conclusion given the facts found by DBS and in particular those that are transferable to other contexts within the scope of regulated activity. We have already explained their importance under issue 3 from *Bank Mellat*.

72. We agree with what the Upper Tribunal said in *MFAG v Disclosure and Barring Service* [2024] UKUT 330 (AAC) at [31(a)]: 'Plainly in the course of determining proportionality and giving weight to the DBS's decision, the Upper Tribunal will closely examine the DBS's conclusions, rationale and reasoning.' We accept Ms Herbert's argument that the facts relevant to proportionality are not limited to findings about relevant conduct, provided they are relevant to one of the issues or to any element of issue 4 from *Bank Mellat*. We see no relevance of any of Ms Herbert's factors to the balancing exercise. They give a fuller picture of KS and show her qualities that, together with her failings, give a fuller picture of her as a person. As a courtesy to KS, we will say what we made of a couple of those factors. We accept that KS has qualities as a nurse. Even when colleagues and managers were complaining of her

performance, they recognised her abilities. But those qualities have to be set in the context of her actions and failings as found by DBS. We also accept the character references as honest statements of the referee's experience of KS. But, as with the evidence of her qualities as a nurse, they are only part of the picture. Within the context of protecting the vulnerable, KS's actions and failings are more important than her qualities.

73. The Upper Tribunal has to take account of DBS's judgement to reflect its role as the primary decision-maker. As the Upper Tribunal in the exercise of its mistake of law jurisdiction has to make the decision for itself, we cannot simply accept DBS's judgement on proportionality. There must be no supine acceptance. How are these reconciled? The answer lies in the regard that the tribunal must accord to DBS's judgement. In *Huang* at [16], the House of Lords spoke of 'appropriate weight', as did the Court of Appeal in *B v Independent Safeguarding Authority* at [17]. Ms Broadfoot suggested 'significant'. We prefer the former as the most authoritative statement. Changing it would involve departing from the highest authority and risk causing uncertainty and confusion. 'Significant' may properly describe the appropriate weight to be given to DBS's assessment in a particular case, as it was in *MFAG* at [30], but that was about the application of the correct legal test in the circumstances of a particular case.

74. Finally, we have to consider public confidence. As the Court of Appeal explained in *B*, after citing cases from other contexts:

> 25. I can see no reason why this approach should not be equally applicable to the decisions of the UT on appeal from the ISA. True, public confidence is not an inevitable trump card. However, it is something which must be placed in the scales when consideration is being given to the personal characteristics and interests of an appellant. Indeed, as Mr Wise himself submits, it is implicit in the fourth question posed by Lord Bingham in *Huang* and Lord Wilson in *Quila* concerning the fair balance between the rights of the individual and the interests of the community. In my judgment, it will always be a material consideration but, on the face of it, it was not specifically addressed in the decision of the UT in the present case.

75. DBS provided a copy its document entitled *Appropriateness and Proportionality* of 21 November 2023. This is what it says about public confidence:

> **Public Confidence**
>
> 3.6. The reasonable perceptions of the public should be considered when reaching decisions regarding 'appropriateness'. The question to consider is whether a decision to bar (or not to bar) would cause a reasonable person's confidence in the statutory arrangements for the safeguarding of vulnerable groups to be undermined (where that person had full knowledge of the circumstances of the case, including relevant mitigation).
>
> 3.7. In cases where Public Confidence is a significant factor caseworkers must record this assessment as part of the appropriateness consideration. Caseworkers should document and clearly demonstrate their full consideration of public confidence highlighting the key issues and relevant

factors which have been identified and considered. Please refer to the Board Guidance on Public Confidence.

3.8. Public Confidence should be considered in every case, but it is not a requirement that it is documented in each case. Where public confidence has a bearing on the appropriateness of a barring decision, this should be clearly articulated, with reasons as to why.

76. There was no mention of public confidence in DBS's decision letter or in its **Barring Decision Summary**. That must mean that public confidence was not sufficiently significant to have a bearing on appropriateness such as to require to be documented. Neither counsel raised it at the hearing. Given the facts on which the decision to bar was based, there is no concern that it would affect public confidence in the system.

F. Issues for another day

77. We have already explained at [63] above why we have not decided whether a decision of a regulator may amount to a less intrusive measure for the purposes of proportionality.

78. We have decided that the Upper Tribunal must decide the issue of proportionality for itself. We also have power, as we have said, to hear evidence and make our own findings of fact. We have decided this case on the facts as found by DBS. That leaves outstanding whether, if we had found new facts, we should have applied the proportionality analysis on those facts or only on the facts found by DBS. Having heard no argument on that issue, we express no opinion.

79. And finally, disposal. Having found no mistake of fact or law, we have confirmed DBS's decision. In other circumstances, a different outcome may be appropriate. If the decision to bar was disproportionate, the Upper Tribunal will be under a duty to direct DBS to remove the appellant from the list or lists. If the decision to bar was proportionate, it will still be permissible for DBS to decide that it was not appropriate to include the appellant in the list. That outcome, however, would be dependent on the Upper Tribunal having remitted the matter to DBS for a new decision on some other basis. We give no guidance as to when this outcome might properly arise, as it will depend on the facts and circumstances of the case, including any facts found by the Upper Tribunal, and the views of the parties, and because appropriateness is not a matter for the Upper Tribunal.

Authorised for issue
on 07 February 2025

Edward Jacobs
Stewart Wright
Upper Tribunal Judges

Rachael Smith
Specialist Member