**NCN. [2025] UKUT 075 (AAC)**
**Appeal No. UA-2024-000444-V**

**IN THE UPPER TRIBUNAL**
**ADMINISTRATIVE APPEALS CHAMBER**

**Between:**

**MG**

**Appellant**

**- v -**

**DISCLOSURE AND BARRING SERVICE**

**Respondent**

**Before: Upper Tribunal Judge Holly Stout, Tribunal Member Roger Graham and Tribunal Member John Hutchinson**
**Hearing date(s):** 16 October 2024
**Mode of hearing:** In person

**Representation:**
**Appellant:** In person
**Respondent:** Mr Ashley Serr (counsel)

*On appeal from:*
DBS Decision Reference: 00997358874
DBS Decision Date: 16 January 2024

**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 or any other individuals referred to in these proceedings, or the name of home where the appellant worked.**

## SUMMARY OF DECISION

## SAFEGUARDING VULNERABLE GROUPS (65)

The Disclosure and Barring Service (DBS) decided to include the appellant on the children's and adults' barred lists because she had slept whilst on duty as a Night Support Worker. The Upper Tribunal decided that while DBS was correct that the appellant had slept whilst on duty, DBS had made material mistakes of fact in its decision in finding that the appellant intended to sleep whilst on duty and as to her attitude and response to the incident. The Upper Tribunal made a preliminary decision that DBS had made mistakes of fact, but adjourned consideration of the appellant's further ground of appeal, which was based on the proportionality of DBS's decision. The parties were invited to make further submissions on proportionality. DBS then reviewed its decision of its own motion under paragraph 18A of Schedule 3 to the Safeguarding of Vulnerable Groups Act 2006 and decided to remove the appellant from the registers. The parties then consented to the appeal being disposed of by consent. This document includes both the Upper Tribunal's Decision On Preliminary Issue and the Consent Order.

***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 ON PRELIMINARY ISSUE

**The decision of the Upper Tribunal is that the decision of DBS including the appellant on a barred list involved mistakes in material findings of fact.**

## DIRECTIONS

1. The Tribunal directs that this decision stands as a decision on a preliminary issue.

2. DBS must file submissions in relation to proportionality and disposal **within 28 days** of this decision being issued to the parties. In those submissions DBS must also state whether it wishes a further hearing to be listed to determine the proportionality ground of appeal or whether it is content for that to be decided by the Tribunal on the papers on the basis of written submissions.

3. The Appellant must file submissions in response to DBS **within 14 days** of receiving DBS's submissions. In those submissions, the Appellant must also state whether she wishes a further hearing to be listed to determine the proportionality ground of appeal or whether she is content for that to be decided by the Tribunal on the basis of written submissions.

4. Time for appealing this decision on a preliminary issue is extended so as to run from the date that any final decision in the case is issued to the parties.

5. The case will be then referred back to Judge Stout for further directions as to case management.

## REASONS FOR DECISION

### Introduction

1. This is an appeal by the appellant under section 4 of the Safeguarding Vulnerable Groups Act 2006 (SVGA 2006) against the decision of the respondent Disclosure and Barring Service (DBS) of 16 January 2024. DBS decided to include her in the children's and adults' barred lists pursuant to (respectively) paragraphs 3 and 9 of Schedule 3 to the SVGA 2006 because DBS was satisfied that she had slept whilst on duty as a Night Support Worker on 27 September 2022, thereby placing service users at risk.

2. Judge Stout granted permission to appeal on the papers in this matter in a decision sent to the parties on 13 May 2024. The reasons for granting permission conveniently summarise the parties' positions and grounds of appeal as follows:-

> 16. In this case, DBS placed the appellant on both barred lists because it concluded that the appellant had slept whilst on duty as a Night Support Worker on 27 September [2022]. DBS took into account that the risk to service users had been increased by the appellant failing to inform colleagues that she needed to take a break despite a phone being available for her to use. DBS also took into account that she had taken a quilt to work with her, from which it inferred that she planned to sleep.
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> 17. In her grounds of appeal, the appellant denies sleeping on shift, denies endangering service users, denies that there was a phone available for use to notify other staff, denies planning to sleep and advances mitigating circumstances for fatigue including that she was (unknown to her at the time) pregnant. She also attaches a letter dated 23 December 2022 from Sean King (Operations Director) for her employer who heard her appeal and sought to withdraw the referral to DBS on the basis that there were other individuals working as Waking Night Support Workers in the building at the time of the incident so that she was not lone working and did not pose a risk of harm to vulnerable adults.
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> 18. I am satisfied that it is arguable that DBS erred in fact and/or in law in deciding to place the appellant on the children's and adult's barred lists. In particular, it is arguable that the factual basis for the decision may be wrong as the appellant alleges. It is also arguable that the decision was disproportionate and/or a breach of the appellant's Article 8 rights. Given the mitigating factors that the appellant relies on, the fact that it was a single incident, and the limited risk posed to service users as a result, it is arguable that the decision to bar the appellant and thus prevent her from continuing to work in the sector in which she has qualifications, training and experience was disproportionate.

3. The structure of this decision is as follows:-

## The Upper Tribunal hearing

4. Following the grant of permission, directions were given for a response by DBS, the filing of evidence by the parties and the listing of this in-person hearing. At this hearing, we have before us a joint bundle of documents, and a bundle of authorities and supplementary authorities from DBS.

5. The appellant had not apparently read or understood the directions given by the Tribunal in advance of the hearing and had not brought a copy of the hearing bundle with her. This had been sent to her by DBS only in electronic form and she had not been able to access it. We arranged for a printed copy of the bundle to be provided to the appellant for use at the hearing and adjourned the hearing for approximately an hour for this to be achieved and for the appellant to have an opportunity to see the contents of the bundle. We were satisfied that it was fair to proceed despite the difficulty with the bundle as all the documents in the bundle had been seen by the appellant before and she had brought many (but by no means all) of the key documents with her in 'loose' form. She was content to proceed on that basis, and so was Mr Serr.

6. The appellant did not prepare a witness statement, but it was agreed that her grounds of appeal to the Upper Tribunal would stand as her witness statement. She swore/affirmed the truth of that document and then was questioned by Mr Serr for DBS, and by the Tribunal.

7. The appellant had video evidence on which she wished to rely. Again, she had not read the order that the Judge made last week requiring this to be disclosed to DBS prior to the hearing. Having discussed with the parties, we directed that the appellant should share the three videos with DBS during a break. This she did and two of the videos were then forwarded from the appellant's phone to DBS and onto the Tribunal. It was not possible for technical reasons for the third video to be shared in this way, but the parties agreed that the third video showed a member of staff asleep in a chair with a blanket on their legs. The appellant said that this was another staff member and the video was taken in October 2022. The other two videos showed staff members asleep or dozing in chairs but without

blankets. As a panel we viewed these videos after the hearing and have taken this evidence into account. As DBS has seen the dates on the videos and given that the appellant was only working in one home at that time, we see no reason not to accept that they videos of colleagues as she says.

**Rule 14 Order**

8. The appellant had requested that the hearing be held in private. We explained that the importance of the principle open justice was such that we could not consider holding the hearing in private unless there was no other appropriate way of protecting any private interests at stake. In this case, having given the parties an opportunity to make submissions, we were satisfied that the private interests of the appellant, and also other individuals named in the papers, were such that it was appropriate to protect those interests by anonymising them at the hearing and in this judgment pursuant to a Rule 14 Order. Our reasons for so concluding may be briefly stated as follows.

9. Open justice means that justice must not only be done, it must be seen to be done. In *Cape Intermediate Holdings Limited v Dring* [2019] UKSC 38, [2020] AC 629 the Supreme Court explained the purpose of the principle as follows:

> "42. The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the ways in which courts decide cases – to hold the judges to account the decisions they make and to enable the public to have confidence that they are doing their job properly. …
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> 43. …the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases".

10. Numerous cases have emphasised the link between open justice and the right under Article 10 of the European Convention of Human Rights to freedom of expression and have provided guidance on the nature of that right, including stressing the importance of names to the exercise of that freedom (see, in particular, *Khuja v Times Newspapers Limited and ors* [2017] UKSC 49, [2019] AC 161 at [14]-[30]). Section 12(4) of the Human Rights Act 1998 (HRA 1998) requires the Court to have "particular regard to the importance of the Convention right to freedom of expression" when considering whether to make any order that might affect the exercise of that right.

11. However, in this particular jurisdiction, the considerations are somewhat different because this is an appeal in relation to the appellant's inclusion on the barred lists, the statutory scheme for which provides for the identity of those on the lists to be kept confidential and only revealed by DBS to those with a legitimate interest in knowing. Generally, that just means prospective employers, as the Divisional Court (Flaux LJ and Lewis J) explained in *R (SXM) v DBS* [2020] EWHC 624 (Admin), [2020] 1 WLR 3259. (In that case, the Divisional Court held that DBS had acted lawfully in refusing to inform someone who claimed to be a victim of sexual abuse whether the alleged perpetrator had been included on the barred list.)

12. In this particular case, we are satisfied that the appellant's right to privacy under Article 8 of the European Convention on Human Rights is engaged as the issues in the case are capable of significantly affecting her personal life and reputation. The appellant herself explained in her application form that she felt this was "a personal issue" that should be kept private and she maintained that at this hearing, saying how "embarrassed" she was to have been included on the list. Revealing the appellant's name would undermine the statutory scheme for the reasons explained in *SXM*. On the other hand, there is no particular public interest in anyone knowing the appellant's name. The principle of open justice is very nearly as well served in this case by the public hearing and the publishing of this judgment without names as it would be with names.

13. We are therefore satisfied that the appropriate balance in this case between the principle of open justice, Article 10 and the appellant's Article 8 rights, is for the hearing and judgment to be public, but for the appellant to be anonymised.

14. For anonymity to be achieved in practice in this case, it seems to us (and the parties agreed) that this means the name of the home in which the appellant worked must also not be made public (although the name of the provider organisation may be). It also means that the names of other individuals in the case should be anonymised so that the appellant's identity is not revealed by way of 'jigsaw identification'.

15. However, we were also satisfied that the other individuals in the case required anonymisation in their own right. Their Article 8 rights are also engaged. Their personal reputations are not engaged to the same degree as the appellant's, but some of them have been the subject of argument and allegations as to their credibility. The proceedings relate to matters that occurred at their work two years' ago which those involved would have had no reason to think would become public. These other individuals have not been involved in these proceedings, are probably unaware of the proceedings and have had no opportunity to answer any allegations made against them in these proceedings. There is a real risk of unfairness to them if their names are made public, and revealing their names would do little in this case to further the principle of open justice as their identities are not important to the facts of the case. All these factors mean that, even absent the considerations about the appellant, we would have made Rule 14 Orders requiring these individuals to be anonymised.

## Legal framework

Relevant legal framework for DBS's decision

16. The appellant in this case was included on the children's barred list using DBS's powers in paragraph 3 of Schedule 3 to the SVGA 2006 and on the adults' barred list using its powers in paragraph 9 of Schedule 3.

17. Under those paragraphs, subject to the right to make representations, DBS must include a person on the relevant list if (in summary and in so far as relevant to the present appeal):

a. The person has engaged in conduct which endangers or is likely to endanger a child or vulnerable adult (Sch 3, paragraph 3 and 4(1)(a) and paragraph 9 and 10(1)(a)) or has engaged in conduct which if repeated against a child or vulnerable adult would endanger or be likely to endanger them (paragraph 4(1)(b)/10(1)(b));

b. The person has been or might in future be engaged in regulated activity in relation to (respectively) adults or children; and,

c. DBS is satisfied that it is appropriate to include them in the relevant list.

18. "Endangers" means (in summary) that the conduct harms or might harm the child or vulnerable adult: see Schedule 3, paragraphs 4(4) and 10(4).

19. By paragraph 3(2) and 9(2) of Schedule 3 DBS must give the person an opportunity to make representations before including them on the barred list. By paragraph 16(1) a person who is given the opportunity to make representations must have the opportunity to make representations in relation to all of the information on which DBS intends to rely in taking a decision under Schedule 3.

20. By paragraphs 17(2) and (3) a person who does not make representations within the prescribed time may apply to DBS for permission to make representations out of time and if DBS grants permission it must consider those representations and remove the person from the list if it considers it appropriate.

21. A person included in a barred list may apply for a review of their inclusion after the prescribed minimum period of 10 years (paragraph 18), or at any time on the basis of new information, a change in circumstances or an error (paragraph 18A).

<u>The Upper Tribunal's jurisdiction on appeal</u>

22. An appeal to the Upper Tribunal under section 4 of the SVGA 2006 lies only on grounds that DBS has, in deciding to include a person on a list or in refusing to remove a person from a list on review, made a mistake: (a) on any point of law; or (b) in any material finding of fact (cf s 4(2)).

23. If the Upper Tribunal finds that DBS has not made a mistake of law or fact it must confirm the decision: SVGA 2006, section 4(5). If the Upper Tribunal finds that DBS has made a mistake of law or fact, it must either direct DBS to remove the person from the list or remit the matter to DBS for a new decision: section 4(6). If the Upper Tribunal remits a matter to DBS then the Upper Tribunal may set out any findings of fact which it has made on which DBS must base its new decision and the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise: section 4(7).

24. There is no right of appeal against the DBS's exercise of discretion as to whether it is appropriate to include an individual on a barred list (or to refuse to remove them), since the statute provides 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 (s 4(3)).

25. A mistake of fact is a finding of fact that is, on the balance of probabilities, wrong in the light of any evidence that was available to the DBS or is put before the Upper Tribunal; a finding of fact is not wrong merely because the Upper Tribunal would have made different findings, but neither is the Upper Tribunal restricted to considering only whether DBS's findings of fact are reasonable; the Upper Tribunal is entitled to evaluate all the evidence itself to decide whether DBS has made a mistake (see generally *PF v DBS* [2020] UKUT 256 (AAC), as subsequently approved in *DBS v JHB* [2023] EWCA Civ 982 at [71]-[89] per Laing LJ, giving the judgment of the Court and *DBS v RI* [2024] EWCA Civ 95 at [28]-[37] per Bean LJ and at [49]-[51]). A finding of fact may be made by inference (*JHB*, ibid, [88]), but facts must be distinguished from "value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness [of including the person on the barred list]": *AB v DBS* [2021] EWCA Civ 1575, [2022] 1 WLR 1002 at [55] per Lewis LJ (giving the judgment of the court).

26. A mistake of law includes making an error of legal principle, failure to take into account relevant matters, taking into account irrelevant matters, material unfairness and failure to give adequate reasons for a decision. (See generally *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9]-[11].) On ordinary administrative law principles, accordingly, “an allegation of unreasonableness has to be a *Wednesbury* rationality challenge, i.e. that the decision is perverse” (*Khakh v ISA* [2013] EWCA Civ 1341 at [18]).

27. However, a mistake of law also includes making a decision to include a person a barred list that is disproportionate or otherwise in breach of that individual’s rights under Article 8 of the European Convention on Human Rights (ECHR). In *ISA v SB* [2012] EWCA Civ 977, [2013] 1 WLR 308 the Court of Appeal explained the approach to be taken by the Upper Tribunal as follows:

> *(1) The approach to proportionality*
> 14. Although section 4(3) of the 2006 Act inhibits the Upper Tribunal from revisiting the question “whether or not it is appropriate for an individual to be included in a barred list”, Ms Lieven concedes, correctly in my view, that the Upper Tribunal is empowered to determine proportionality and rationality. In this regard, the passage from the judgment of Wyn Williams J in *R (Royal College of Nursing) v Secretary of State for the Home Department [2011] PTSR 1193* (see para 8 above) is undoubtedly correct. Thus, the Upper Tribunal cannot carry out a full merits reconsideration. Its jurisdiction is more limited. In this respect, it is narrower than was the jurisdiction of the Care Standards Tribunal under the previous legislation.
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> 15. The ISA is an independent statutory body charged with the primary decision-making tasks as to whether an individual should be listed or not. Listing is plainly a matter which may engage article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8 provides a qualified right which will require, among other things, consideration of whether listing is “necessary in a

democratic society" or, in other words, proportionate. In *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening) [2012] 1 AC 621* , Lord Wilson JSC summarised the approach to proportionality in such a context which had been expounded by Lord Bingham of Cornhill in *Huang v Secretary of State for the Home Department [2007] 2 AC 167* , para 19. Lord Wilson JSC said, at para 45:

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

There, as here, the main focus is on questions (c) and (d). In *R (SB) v Governors of Denbigh High School [2007] 1 AC 100*, para 30 Lord Bingham of Cornhill explained the difference between such a proportionality exercise and traditional judicial review in the following passage:

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

16. All that is now well established. The next question—and the one upon which Ms Lieven focuses—is how the court, or in this case the Upper Tribunal, should approach the decision of the primary decision-maker, in this case the ISA. Whilst it is apparent from authorities such as *Huang's* case and *Aguilar Quila's case* that it is wrong to approach the decision in question with "deference", the requisite approach requires (per Lord Bingham in *Huang's case* [2007] 2 AC 167 , para 16, and see, to like effect, Lord Wilson JSC in *Aguilar Quila's case* [2012] 1 AC 621 , para 46):

> "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."

There is, in my judgment, no tension between those passages and the approach seen in *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 which was concerned with a challenge to the decision of the city council to refuse a licensing application for a sex shop on the grounds that the decision was a disproportionate interference with the claimant's Convention rights. Lord Hoffmann said, at para 16:

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

Baroness Hale of Richmond added, at para 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."

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

> 17. Ms Lieven's first complaint is that the Upper Tribunal failed to accord appropriate weight to the decision of the ISA. The 16-page decision of the Upper Tribunal was undoubtedly the product of a careful and conscientious consideration. However, it seems to me that the Upper Tribunal did not accord any particular weight to the decision of the ISA but proceeded to a de novo consideration of its own….
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> 20. The assessment of the ISA caseworker was itself a careful compilation produced on a template headed "Structured judgment process" which tabulated "indications" and "counter indications" in adjacent columns. Moreover, examination of that assessment and the decision which it informed suggests to me that the conclusion of the Upper Tribunal that the ISA had failed to take account of "the wealth of evidence" that SB imposes a low risk of reoffending and "gave no weight or at least very little weight, to the issue of [him] as a person" was simply erroneous. The "wealth of evidence" seems to relate to the numerous positive references but it is apparent that these were taken into account in the caseworker's assessment and in the decision of the ISA. The assessment was a fair representation of the many indications and counter indications and specific mention was made of the numerous references and the fact that SB had voluntarily sought counselling.
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> 21. This brings me to two particular points. First, there is the fact that, unlike the ISA, the Upper Tribunal saw and heard SB giving evidence. However, it cannot be suggested that it was unlawful for the ISA not to do so. It had had at its disposal a wealth of material, not least the material upon which the criminal conviction had been founded and which had informed the sentencing process. The objective facts were not in dispute. Secondly, Mr Ian Wise QC, on behalf of the RCN, emphasises the fact that the Upper Tribunal is not a non-specialist court reviewing the decision of a specialist decision-maker, which would necessitate the according of considerable weight to the original decision. It is itself a specialist tribunal. Whilst there is truth in this submission, it has its limitations for the following reasons: (1) unlike its predecessor, the Care Standards Tribunal, it is statutorily disabled from revisiting the appropriateness of an individual being included in a barred list, simpliciter; and (2) whereas the Upper Tribunal judge is flanked by non-legal members who themselves come from a variety of relevant professions, they are or may be less specialised than the ISA decision-makers who, by paragraph 1(2)(b) of schedule 1 to the 2006 Act, "must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults". I intend no disrespect to the judicial or non-legal members of the Upper Tribunal in the present or any other case when I say that, by necessary statutory qualification, the ISA is particularly equipped to make safeguarding decisions of this kind, whereas the Upper Tribunal is designed not to consider the appropriateness of listing but more to adjudicate upon "mistakes" on points of law or findings of fact: see section 4(3) of the 2006 Act.
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> 22. For all these reasons I consider that the complaint that the Upper Tribunal did not accord "appropriate weight" to the decision of the ISA is justified.

28. The Court of Appeal's approach in *SB* was approved and followed by the Court of Appeal in *DBS v Harvey* [2013] EWCA Civ 180. In this case, Mr Serr for DBS has drawn our attention to three later decisions of the Upper Tribunal where at

first blush it appears that divergent approaches have been taken to the issue of proportionality (*KB v DBS* [2021] UKUT 325, at [130]-[135], panel chaired by Judge Jones; *WW v DBS* [2023] UKUT 241 (AAC), at [55], panel chaired by Judge Wikeley; and *NV v DBS* [2024] UKUT 42, at [38], panel chaired by Judge Wright). A three-judge panel of the Upper Tribunal is accordingly being listed for early in 2025 to consider the proper approach to the question of proportionality in appeals against DBS decisions in the case of *KS v DBS* (UA-2024-000839-V). It has not, however, been suggested that we should stay consideration of this case pending that decision, and we do not consider it necessary to do so. Pending the decision in *KS*, it seems to us (and Mr Serr for DBS agrees) that we should in this case continue to apply the approach laid down by the Court of Appeal in *SB* and *Harvey*, the ratio of those decisions being in any event binding on us. We note that this was also the approach recently taken by the Upper Tribunal chaired by Judge Brunner KC in *MFAG v DBS* [2024] UKUT 330 (AAC) at [24]-[27] (also there referring to the decision of the Court of Appeal in *Dalston Projects and ors v Secretary of State for Transport* [2024] EWCA Civ 172 which affirms the "well-established" principle that the question of whether an act is incompatible with a Convention right is a question of substance for the court itself to decide).

29. We do, however, add the following further observations as regards the decision of the Court of Appeal in *SB*.

30. First, the Court of Appeal was in *SB* concerned to emphasise the expertise of the Independent Safeguarding Authority (ISA, DBS' predecessor) and the importance of weight being given to the views of ISA as the primary decision-maker under the statutory scheme. As was pointed out by the Upper Tribunal chaired by Judge Wikeley in *CM v Disclosure and Barring Service* [2015] UKUT 707 (AAC) at [59]-[64], however, it is not clear that the Court of Appeal in *SB* had its attention drawn to the Practice Statement on the *Composition of Tribunals in relation to matters that fall to be decided by the Administrative Appeals Chamber of the Upper Tribunal on or after 26th March 2014* which sets out the requirements as to the expertise of Upper Tribunal lay panel members. We agree with the Upper Tribunal in *CM* that, once that Practice Statement is considered, the Court of Appeal's suggestion that there is a relevant difference between the expertise of DBS decision-makers and lay panel members of the Upper Tribunal is undermined. To use the Latin phrase, it seems to us that the Court of Appeal's observation on the relative expertise of Upper Tribunal panel members and DBS decision-makers is *per incuriam*.

31. Secondly, DBS as a matter of practice makes its decisions on the papers alone, whereas the Upper Tribunal has the benefit of a hearing with witness evidence. While the Court of Appeal in *SB* rightly noted (at [21]) that it was not an error of law for DBS not to hold a hearing, it also seems to us to be important to remember, when considering the approach we should take, that the hearing before the Upper Tribunal in DBS cases is the "fair and public hearing … by an independent and impartial tribunal" with "full jurisdiction over fact and law" which secures that the barring scheme under the SVGA 2006 is compliant with Article 6 of the European Convention on Human Rights. The appellant has a civil right to practice her profession and to work with children/vulnerable adults: see *R (G)*

*v Governors of X School* [2011] UKSC 30, [2012] 1 AC 167 at [33]. In that case, which concerned whether Article 6 applied to the employer's internal disciplinary proceedings stage of the process, the Supreme Court proceeded on the assumption that the barring scheme as operated by what is now DBS, together with the right of appeal to the Upper Tribunal, ensured compliance with Article 6: see [84] *per* Lord Dyson, [94] *per* Lord Hope and [101] *per* Lord Brown. (We have not set those paragraphs out in this judgment because there is no need to do so, but we add for the benefit of anyone who troubles to make the cross-reference that the point that the Supreme Court is 'not deciding' in those paragraphs is the more complex argument as to whether, if Article 6 had been held to apply to the employer's internal disciplinary proceedings in that case, the lack of procedural safeguards in the internal disciplinary proceedings, could have been 'cured' by the subsequent decision-making processes of the ISA and appeal to the Upper Tribunal. The Supreme Court's decision leaves no room for doubt that including someone on a barred list is a determination of their civil rights and thus one to which Article 6 applies and in respect of which the appeal to the Upper Tribunal must be one where the Upper Tribunal has "full jurisdiction" over fact and law in order to secure compliance with Article 6.)

32. We mention this point about Article 6 because it underscores for us the importance of what the Court of Appeal said in *SB* at [15], citing *R (SB) v Governors of Denbigh High School*, about proportionality being a matter for objective assessment by the Upper Tribunal. Due weight must be given to the views of DBS given its role as the primary statutory decision-maker, reinforced by the statutory prescription in section 4(3) that the question of whether it is appropriate for someone to be included in a list is not a question of fact or law in this context. However, it is ultimately for the Upper Tribunal as a court of full jurisdiction to determine whether the inclusion of a person on a barred list is or is not proportionate and compatible with their Convention rights.

33. In short summary, therefore, the approach we have to apply to this case to the appellant's proportionality argument is as follows:-

    a. The DBS's decision engages the appellant's Article 8 rights (cf *SB* at [15]) as placing someone on a barred list affects their reputation, their ability to practise their chosen profession and earn a living. It is also likely to impact on their family and personal relationships. The right to practise a profession is a civil right engaging Article 6 of the Convention.

    b. We proceed on the assumption (*cf SB* at [15]) that the legislative object of the barring scheme (protecting children and vulnerable adults) is sufficiently important in principle to justify limiting those rights and that, where there has been conduct that endangers or is likely to endanger children or vulnerable adults, a barring decision is in principle rationally connected to that legislative object.

    c. The questions for us, however, are (*SB,* [15]):

i. whether the barring decision is in the particular case more than is necessary to accomplish the legislative object; and/or

ii. whether a barring decision strikes a fair balance between the rights of the appellant and the public interest in protection of children and vulnerable adults.

d. In deciding whether the DBS' decision is compatible with the appellant's Convention rights as required by s 6 of the Human Rights Act 1998 (HRA 1998), the Upper Tribunal must accord particular weight to DBS' view and take due account of the differences in the jurisdiction of DBS and the Upper Tribunal and the material available to each at the time of taking their respective decisions.

**DBS's decision in this case**

34. DBS's final decision was issued on 16 January 2024. DBS's principal finding was expressed as follows:

> On the night shift of 27 September [2022], whilst in your role of Night Support Worker, you slept whilst on duty thereby placing service users at risk by failing to ensure that they were monitored and supported as required throughout the whole of the shift.

35. DBS stated that it was accordingly satisfied that the appellant had engaged in relevant conduct in relation to vulnerable adults as her conduct in sleeping on shift endangered or was likely to endanger the vulnerable adults in her care. DBS explained that it considered that if this conduct were repeated in relation to children it would also endanger or be likely to endanger them.

36. DBS went on to explain why it considered it to be appropriate to bar the appellant, and the key parts of the final decision letter so far as relevant to the present appeal are as follows:

> We are satisfied a barring decision is appropriate. This is because we are satisfied that the information around this case shows that on 27 September 2022, whilst employed by CareTech Community Services as a Night Support Worker in a residential setting for severely disabled adults, you slept whilst on duty. We are satisfied that this behaviour endangered vulnerable adults in your care and as such that it constitutes relevant conduct for Adults.
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> It is acknowledged that your employer, Care Tech Community Services, requested a withdrawal of this referral to DBS following the completion of the appeal process, however, whilst the appeal process acknowledges error around the relevance of two witness statements, it upholds the original findings. It also states that you placed residents at unnecessary risk, which could have resulted in serious harm, as such we are satisfied that this undermines Care Tech's recommendation for the withdrawal of this referral on the grounds that you were not lone working and which was also contradicted by your own statements that you were working alone on the upper floor. We are satisfied that the withdrawal recommendation was based upon the issue of consistency in decisions made by the company in relation to similar cases, rather than

on the specific risk presented in this case. As such it remains the duty of DBS to consider the future risk.

…
Whilst it is acknowledged that you had been working in this responsible role for a period of around 3.5 years prior to this incident, we are satisfied that you chose to sleep whilst on a waking night duty, in charge of a floor of 6 severely disabled residents whom needed hourly checks, regular pad changes and general supervision to prevent accidents such as falls and choking. We are satisfied that the risks from this behaviour were increased by you failing to inform your colleagues that you needed to take a break, despite a telephone being available for you to use, as such leaving the service users on your floor unmonitored.

Whilst you stated in your representations that no phone was available, you had previously stated that you could not access a phone due to a member of staff being asleep in the office, however, we are satisfied that the sleep-in staff was your manager, and that if you had felt too ill or too tired to fulfil your role you could have woken her, either to use the phone or to request her to provide cover, as this is one of the many purposes of a sleep-in being available. … It is acknowledged that you now inform via your representations that you were unknowingly in the early stages of pregnancy at the time of this behaviour, and that this rather than your studies made you tired. However, regardless of the cause of your tiredness, we are satisfied that you were aware that you were not, under any circumstances allowed to sleep during a waking nightshift, whether on a break or not, as the service users needed a member of staff to be alert to their needs at all times. We are also satisfied that you had failed to keep your manager up to date about your issues with and treatments for migraine, which you stated made you feel sleepy and as such may at times have had a detrimental impact upon your ability to meet the requirements of the role, including completing the more routine but necessary tasks. As such concerns remain that you made a series of decisions prior to and during this shift which demonstrated a pattern of irresponsibility.

Whilst it is acknowledged that you had been employed in this caring role for almost 3.5yrs when this incident occurred, we are satisfied that you failed to consider the emotional impact of this behaviour upon the severely disabled service users in your care, at being left without supervision and support for their multiple needs. We are also satisfied that this lack of thought for the residents was present in your choice to bring into work your own quilt to cover yourself, and that it demonstrates that you had pre-planned to sleep whilst on duty, or that at the very least you had chosen a course of action which made it more likely that you would fall asleep on duty. We are satisfied that you demonstrated little remorse for, or insight into the potential impact of your behaviour upon service users within your representations, as such concerns remain that you lack empathy with those in your care and that you are likely to repeat similar behaviour within other regulated activity roles.

We are satisfied that you planned to sleep on waking night duty, or at the least chose a course of action which made this behaviour more likely, and that you did not ensure other staff covered the needs of the residents on the floor you were responsible for,

as such we are satisfied that both irresponsibility and lack of empathy are causal factors in your behaviour. Whilst there is no evidence that you wished any physical or emotional harm to come to the service users, we are satisfied that the risk of future harm is too serious to ignore as the service users were left with no one to attend to either their routine or emergency needs and were therefore placed at risk of events such as falls or being left in their own incontinence. We are also satisfied that you were fully aware that your role required you to be awake and alert to the needs of residents at all times of the shift.

If you were to continue to work with adults in the regulated activity sector, you would always be required to follow the policies which are in place to safeguard service users from harm. Given your irresponsible disregard for such policies whilst in this role in order to meet your own needs, despite being aware of the potential consequences for the service users, we are satisfied that it is likely you would repeat such behaviour. Such behaviour could cause harm to or endanger a vulnerable adult and as such we are satisfied that it constitutes relevant conduct for Adults. Therefore, we are satisfied that it is appropriate to include you on the Adults' Barred List.

Whilst this behaviour was not against or in relation to a child, in any roles within the Children's regulated activity sector, you would be likely to be tasked with similar supervision duties and would similarly be required to strictly adhere to policy in order to protect the children from harm. Given your failure to meet these responsibilities in this role, in order to meet your own needs, we are satisfied that it is likely you would repeat such behaviour within a role with children. Such behaviour could cause harm to or endanger a child and as such we are satisfied that it constitutes relevant conduct for Children.

Therefore, we are satisfied that it is appropriate to include you on the Children's Barred List also.

In examining the proportionality of your inclusion on both the Adults' and Children's Barred lists, your rights under Article 8 of the Convention on Human Rights have been considered as follows:

It is acknowledged that inclusion will exclude you from working in all regulated activity roles and that this would exclude you not only from care sector roles but also prevent you from continuing your career progression into nursing. It is also acknowledged that this would reduce the scope of work available to you and could have a negative impact upon your income and consequently your standard of living.

It is also acknowledged that a bar would exclude you from voluntary roles within the regulated activity sector and may also bring with it a sense of personal stigma. However, your rights must be considered alongside the rights of the children and vulnerable adults whom would be reliant upon you for their care, and we are satisfied that you represent an unacceptable risk of harm by continuing to engage in regulated activity roles with them.

> It is acknowledged that you do not have any police cautions or criminal convictions and that you have not previously been referred to DBS. However, there is no guarantee that the circumstances of your dismissal from this role would be disclosed to any potential employers, and as such it is considered that there is insufficient information available for them to make an effective safeguarding decision upon when considering you for a regulated activity position.
>
> As such we are satisfied that a barring decision is a necessary safeguarding measure. Therefore, we are satisfied that it is both appropriate and proportionate to include you on both the Adults' and Children's Barred Lists.

**Our approach to the evidence**

37. Having considered the documentary evidence in the bundle, the oral evidence of the appellant and the submissions of the parties, we make the following findings of fact, applying the balance of probabilities standard. We do so as a preliminary step to considering whether DBS has made a 'mistake of fact' in any material respect in its decision. It does not necessarily follow that because our findings of fact differ to DBS's findings in its decision that DBS has made a 'mistake of fact'. We consider whether or not it has made a mistake in any material respect in our analysis and conclusions section.

38. Before setting out our findings, however, we make some general observations about the evidence from the appellant in this case.

39. It was evident to us from the appellant's difficulties with the documentation for this hearing, and the way she dealt with documents to which she was referred by Mr Serr in the course of questioning, that she is not someone who finds it easy to take in documents of any length. She does not pay close attention to written text and does not react to or refer to words on a page in the way that some people do.

40. Her 'Grounds for Consideration' submitted to DBS and to the Upper Tribunal as Grounds of Appeal were drafted by a solicitor. Although the appellant was content to affirm the truth of the document at the start of giving her evidence, that document is not expressed in her words and although she was given time to re-read it before affirming it, we gained the impression that she was not really taking it in.

41. The appellant is also not always accurate in her speaking. For example, at the start of the hearing when we were asking her about the video evidence she wished to submit, we had to ask several times to work out how many videos there were and of what length. She said one and then four when in fact she meant three; it took some time to achieve clarity. A similar process of the appellant saying one thing, and then another, happened in relation to a number of questions that Mr Serr asked, for example in relation to the number of other people working in the home on the night of 27 September 2022.

42. In some cases, these sorts of issues might lead to us finding that a witness was not credible or, even, dishonest. However, in the appellant's case, we considered

that this was not the explanation. Rather, it seemed to us that the appellant is an honest witness who has some difficulties with word finding so that she does not always say what she means or mean what she says. Understanding what she means and what constitutes her genuine recollection requires careful attention from listeners and piecing that together with the documentary evidence. Sitting as a three-person panel was helpful in this respect as we were able to compare our understanding and impressions and we feel confident that our combined conclusions about the appellant and her evidence are robust.

43. We also need to make some observations about the documentary evidence and the other people involved in the evidence in this case from whom we have not heard.

44. The documentary evidence comprises the records of the employer's internal disciplinary proceedings. Those proceedings followed a standard process of obtaining statements from other staff (AG, JO and SS), an invitation to an investigation meeting (19 October 2022, p 83) an investigation meeting with the appellant (21 October 2022; p 80 of our bundle), an investigation report prepared by the investigating manager (p 77), an invitation to a disciplinary hearing (1 November 2022, p 75), a disciplinary hearing (7 November 2022, p 70), and notice of dismissal (14 November 2022, p 66), following which the employer referred the appellant's case to DBS. Meanwhile, the appellant appealed and an appeal hearing was held on 14 December 2022 (p 94) and the outcome notified on 23 December 2022 (p 90). Her appeal was dismissed, but (in a departure from the standard process) her employer sought by letter of 23 December 2022 to withdraw the referral to DBS.

45. We have before us written statements from three of the appellant's colleagues (her manager AG and two 'peers' SS and JO). We also have notes of meetings prepared by others who were involved in conducting the employer's internal disciplinary process. The internal process itself did not involve any questioning of witnesses (other than the appellant). While we are sympathetic to DBS's normal practice of not calling witnesses in cases such as this, and understand that it may be seen as an unreasonable intrusion in the lives of other witnesses for them to be called, so far as we are aware they have not even been asked to attend. Witness orders could have been sought if witnesses were unwilling, but that has not happened. It does of course leave us in the position where, in case of conflict between the appellant's evidence and a document or statement for which another (potential) witness is responsible, we in general give more weight to the appellant's evidence than to the evidence of (potential) witnesses whose evidence (unlike the appellant's) has not been given on oath/affirmation or tested by questioning.

46. There are further specific reasons why we place less weight on the written statements of AG, SS and JO than we might.

47. As to AG, she found the appellant sleeping on the night of 27 September 2022. She provided a typed statement for the disciplinary process. She did not normally do sleep-in shifts, but was doing one that night apparently specifically in order to

check whether staff were sleeping as there had (according to her statement) been a safeguarding referral that mentioned staff "sleeping in the lounge and the conservatory". Her statement indicates that she considered that, having caught the appellant sleeping on one occasion in the lounge, she had identified the 'culprit' referred to in the safeguarding alert. (We note here for clarity that there is no evidence that the appellant was at any point sleeping in the conservatory. The only evidence that the appellant had previously slept in the lounge on one occasion is that of JO and SS (as to which, see below).) AG's statement says that on finding the appellant she "stood over her for 5 minutes then left to get my phone I had planned to take a picture as I knew MG would deny she was asleep". AG's statement contains no explanation for why, despite apparently being on a sleep-in shift to make checks, she: (i) did not wake the appellant up having found her; and (ii) did not return to take a picture. These omissions are significant and they diminish the credibility of her statement. We return to these points in our findings of fact below.

48. The appellant's colleagues JO and SS made statements purporting to be about the night of 27 September 2022, and accepted as such by the employer at the disciplinary hearing stage, but the employer acknowledged at the appeal stage that these could not relate to 27 September 2022 as neither member of staff was on duty that night. It is further evident that their statements relate to an incident where they were unhappy because the appellant had challenged them because they were neither of them doing what they were supposed to be doing. Their statements may therefore have been motivated by a desire to undermine the appellant. For all these reasons, we place less weight on their statements.

49. We also note at this point that although the invitation to the first investigation meeting (p 84) stated that the appellant would be provided with the (non verbatim) notes of that meeting and asked to confirm their accuracy, there is no documentary evidence of her having been given that opportunity or having done so. The notes are evidently not a verbatim account of a meeting but appear to be retrospective in many respects, written as if the meeting was in the past and with interpolations that appear to be the notetaker's recollection or opinion rather than a record of the meeting (for example the opening paragraph on p 80, the observation in the sixth bullet point on p 81 that what the claimant had said about timing was "not true" and the bracketed "she said for an hour" on p 81 in relation to the time for which the appellant was sleeping).

50. When Mr Serr put points to the appellant from the notes of the investigation meeting, she seemed genuinely surprised by their content. For example, Mr Serr put to the appellant that in that meeting she had agreed that by going to sleep she had "intentionally put the people we support at risk" (p 81). The appellant denied this in evidence to us and as it is inherently unlikely that the appellant would have agreed to such a statement given the rest of her evidence. All these factors lead us to put less weight on the notes of the investigation meeting than we would otherwise have done.

51. The notes of the disciplinary and appeal hearings appear more reliable, and do appear to have been reviewed by the appellant during the disciplinary process,

but in reading those notes, we bear in mind our observations above about the extent to which the appellant pays detailed attention to written documents, and as to the appellant's speaking style.

**The facts**

52. The appellant was born in January 1987 and was aged 35 at the time of the event that led to DBS's barring decision. She is a single mother with four young children. In September 2022 three of her children were of school age and one was pre-school. One of her children has a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and places more significant demands on the appellant.

53. The appellant has been working in the care sector since 2019. She started working with Caretech Community Services in 2019, initially on an agency basis and then as an employee. She worked on average 20-25 hours per week, i.e. usually two working night shifts and sometimes three depending on her employer's requirements.

54. The appellant has ambitions to become a qualified Mental Health Nurse and was studying towards that qualification one day per week as at September 2022. Her place on that course was terminated when she was placed on the barred list. This has been a source of considerable distress to the appellant.

55. Caretech has a Wake Night Staff Policy which requires staff "to remain awake and alert at all times", "to be responsible for colleague remaining awake and alert" and "to report immediately to Line Manager if colleagues sleep on duty". It also states "To be found asleep on Wake Night duty will constitute gross misconduct in accordance with CareTech Disciplinary Policy and Procedure and will result in dismissal".

56. The Wake Night Staff Policy requires staff to clock into a TNA system every 2 hours during a night shift. The Policy makes no provision for staff to have breaks. In oral evidence, the appellant told us there was no system for taking breaks. Staff would just rest when they had done their tasks, as she said could be seen on the video evidence she had provided. (We add here that we assume the employer takes the view that Waking Night Support Workers are providing continuous care so that they are by virtue of regulation 21(c)(i) of the Working Time Regulations 1998 exempt from the regulatory requirement for rest breaks.)

57. The incident that led to the appellant's referral to DBS occurred on 27 September 2022.

58. On the night of 27 September 2022 the appellant was on a waking-night shift, 9.30pm to 7.30am. She was working upstairs. There were six residents upstairs. One of them has difficulty sleeping and is often active most of the night. The others sleep. The residents have continence issues and may need pads changing during the night, although changing pads requires two members of staff. The appellant was required to check on residents every 30 minutes, complete a record to show she had done that and also to do other cleaning tasks during the night.

59. There were two other staff present in the building. Her line manager (AG) was doing a sleep-in shift, sleeping in a room upstairs. Although there was always a sleep-in member of staff, it was unusual for it to be AG as she does not normally do sleep-in shifts. Another staff member (agency staff) was working downstairs, where there were six other residents. At times the appellant has suggested there may have been another member of staff present in the building, but in her evidence to us she settled her recollection as being that there were only two other staff present and we accept that as it seems most consistent with the other evidence we have heard.

60. There is no doubt that at some point during her night shift, the appellant fell asleep on a chair in the lounge with a blanket on her legs and was found asleep by AG. However, that is only the 'bare bones' of what happened. In what follows we piece together the evidence and we set out our conclusions at the end.

61. For the reasons explained above, we consider that the employer's notes of the appellant's investigation meeting are not wholly reliable. However, it does seem to be clear from the investigation meeting notes, subsequent meeting notes and the appellant's oral evidence to us that the appellant did on that night deliberately take a break when she has not taken a break before and there is no policy permitting staff to take breaks. It does not follow that she deliberately went to sleep and the appellant denies this.

62. In her UT10 appeal form and accompanying documents the appellant had maintained that she did not fall asleep. However, it was apparent from the start of her oral evidence to us that she accepts that she did. The denial of this in some of the documents seems to be because the appellant was advised by her solicitor that she instructed to assist her with making representations to DBS that there is a difference between "sleeping" and "dozing". Now when she refers to 'sleeping', she appears to mean deliberately going to sleep whereas "dozing" she regards as not deliberate. The appellant is convinced that she did not deliberately go to sleep.

63. The nature of sleep is that it is not something that people are in general in control of. People may fall asleep when they do not mean to, and also fail to fall asleep even when they feel very tired. Particularly in the middle of the night, when alone and stationary, a person may fall asleep without making any conscious decisions about that. DBS uses a phrase in its decision letter "you had chosen a course of action which made it more likely that you would fall asleep on duty". As we explain, we consider accurately captures what happened in the appellant's case when all the evidence is considered.

64. Reading the investigation meeting notes can give the impression that the appellant deliberately went to sleep on a break. However, on a careful reading of that document, it is apparent that what has happened is that the appellant states she was taking a break and the person carrying out the investigation (SC) puts two and two together and starts asking questions on the assumption that the appellant had decided to go to sleep on her break. In fact, at p 82, the notes record "MG kept stating she was on a break and not sleeping", which is consistent

with the position she maintained subsequently at the appeal hearing and before us, i.e. that she had deliberately taken a break but had not deliberately fallen asleep. In the disciplinary hearing notes, the appellant is also recorded as speaking in terms that indicate she deliberately went to sleep on her break. However, having heard the appellant's oral evidence and considered the whole of the notes of the investigation, disciplinary and appeal hearings, we find that what she is recorded as saying in the disciplinary hearing merely reflects the position she had reached in her own head at that point in terms of seeking to explain/justify what had happened. The appellant in the course of the investigation meeting seems to have had the thought that, if she was entitled to a break, she was entitled to sleep on a break and thus she spoke as she did in the disciplinary meeting. However, we find that this does not reflect what actually happened on 27 September 2022, which was that she fell asleep inadvertently.

65. What the appellant did at around 2.30am was to fetch a blanket/quilt from a room of spares and sit down in the lounge with the blanket/quilt over her knees. She did this because she was cold and the heaters provided were insufficient. We accept her evidence on this point. The documents refer repeatedly to the appellant having brought in a quilt from home, but the notes of the meetings do not record her as actually saying that. According to the notes, the appellant was first asked about the issue of the quilt in the disciplinary investigation meeting (p 71). According to the notes, she was not asked an open question. EB is recorded as asking "why were you wrapped up in your quilt?". This appears to have been because EB has assumed, having read JO's and AG's statements, that the appellant had brought in her own quilt (JO) or blankets (AG).

66. When the appellant was asked about being wrapped up "in your quilt" at the disciplinary hearing, the appellant is then recorded as answering (after a further question) "I bring my quilt because it is cold. Since then I have not used my quilt. I have never slept on shift before that day". It is understandable why anyone reading that would assume that she meant she had brought the quilt in from home (and why EB who assumed that is what she had done heard her response as meaning that), but that is not what she is actually recorded as saying. Further, when you hear the appellant say those words in real life, and check with her where the quilt was from, it is apparent that it was not from home. As she explained to us, she had never brought in a quilt from home, she brought "my quilt" from where spare bedding is kept in the care home into the lounge area. At the appeal hearing, the appellant maintained that she had not intended to sleep but had just dozed off for a few minutes. She was not challenged by the appeal manager (SK) on this or asked about whether she had brought in her quilt; the key question of whether the appellant had intended to go to sleep was not discussed at that appeal hearing. SK's conclusions at the appeal stage thus appear to be based on the conclusions of the disciplinary hearing, which had of course in part been founded on the discredited statements of JO and SS and assumptions by the disciplinary hearing manager as we have noted.

67. The next issue we have to consider is how long the appellant was sleeping for. It seems to us that the combined effect of the statements of AG, SS and JO made it appear to the employer at the disciplinary hearing stage in particular (at which

point it was not appreciated that SS and JO had not even been present on the night in question) that the appellant had been asleep for hours. In fact, having considered all the evidence, we conclude that it was a relatively short period of between about 15 minutes and an hour. We so find for the following reasons:-

68. First, that has been essentially the appellant's evidence from the outset. She mentioned a period of an hour in the investigation meeting; in subsequent meetings, she says that she just 'dozed off'.

69. Secondly, the appellant's evidence that this was 2.30am and that she woke up after AG had been standing in front of her for what AG said was '5 minutes' is more credible than AG's statement in this respect as it explains why AG does not in her statement mention waking the appellant up and why she did not take a picture of her asleep. We find it too hard to accept that a manager who was doing a sleep-in shift for the purpose of making checks on sleeping staff in the light of a safeguarding referral would not have woken up the member of staff or taken a photo and then woken them up. We cannot accept that AG, being supposedly responsible for the home, just left the only upstairs member of waking night staff sleeping in the lounge. This flaw in AG's statement leads us to doubt the reliability of the rest of her statement, including as to what she says about the time that she found the appellant asleep.

70. Thirdly, the evidence indicates that the appellant had to complete records of her checks on service users every 30 minutes during the night and clock in to a TNA system every 2 hours. There is no evidence that she failed to do either; if she had failed to complete records, we would have expected to see this dealt with as part of the employer's investigation, but there was never any allegation either that she failed to complete records or clock in to TNA or that she fraudulently completed any records.

71. Fourthly, the appellant's evidence is consistent with her handwritten letter of apology that she wrote immediately afterwards to AG. The appellant wrote: "I am writing you concerning the recent incident which occurred in my last shift. You caught me sleeping while on duty during my WN [waking night]. You said I should explain while [sic] I was sleeping on duty. The reason is that I was bit tired that very particular day, I wouldn't say I did any other activity outside or working in another organisation. I only work for Careteck. Is just that the day you caught me sleeping I was tired. And I was studying during the day. Accept my apoligies (sic) I won't sleep any more while on duty. Thanks for your understanding". That letter is, in our judgment, consistent with the appellant's evidence, confirmed orally to us, that she woke up and found AG standing in front of her and that is how she knew she had been 'caught'. If the appellant had only found out that AG had 'caught' her sleeping when she was challenged by her in the morning when awake, as AG's statement has it, we do not think she would have written her letter in the terms that she did. There would have been more denial or doubt in the letter, such as 'you said I was sleeping' or something like that.

72. A further element of the evidence concerns what the appellant did or should have done about notifying her colleagues that she was going on a break. It was

suggested during the course of the internal disciplinary proceedings that she should have gone downstairs to tell her colleagues she was taking a break or that she could have phoned from a phone in the upstairs room. This whole issue becomes academic, however, once it is understood that what she did in terms of taking 'a break' was actually the norm in the home, and that she did not intend to go to sleep. We can see from the appellant's video evidence that, as one would expect, it is normal for staff to sit down and take a rest during their shift. It is also apparent from the notes of the investigation meeting, and in particular what is noted of SC's reaction (at p 82) to the suggestion that the appellant was taking a break, that formal breaks are not something that anyone takes so there are no formal arrangements for taking breaks. (Whether that is good practice or not, is not a matter for us.) Finally, although we accept in principle the appellant's evidence that there was no phone that she could have used to tell colleagues that she was going on a break (since even if there is a phone in the office where her manager was asleep, her manager was asleep there, so using it would have disturbed her), the reality is that there was nothing for her to tell colleagues because she was not intending to fall asleep. Falling asleep was inadvertent.

73. We need also to make findings about the mitigating circumstances advanced by the appellant. These begin with the appellant's handwritten letter we have just quoted. As can be seen, the appellant apologised in writing immediately after the incident, explaining that she was tired because she had been studying and gave her assurance that it would not happen again. At the investigation meeting, the appellant added that she had recently had an injection in her head to help with her migraines, which she said also made her tired. She said she had told her co-workers that she was tired when she came on shift, but that she did not want to cancel her shift at the 'last moment' because her manager would have been cross. She is noted as having accepted making a "mistake" and that it was 'her fault'. At the disciplinary hearing she said that she had not told anyone about her migraines because she did not consider she needed to. She accepted again that she had 'made a mistake' and it was 'her fault'. At the appeal stage, she added that she was also tired because she is a single mother who cares for her four children, including one daughter who has ADHD and is very hyperactive. When making representations to DBS in response to the minded to bar letter on 29 December 2022, the appellant added that as of 27 September 2022 she had also been in the early stages of pregnancy and she thought that had also made her tired. In evidence to us the appellant explained that she had not wanted to tell her employer about her pregnancy at her appeal hearing on 14 December 2022. We understood her to mean that this was because it was such an early stage in the pregnancy, but once it got to responding to DBS she thought it was so serious that she needed to mention everything. In evidence to us, the appellant maintained that all the mitigating circumstances she mentioned were true. In response to a question from Mr Serr, she added that she would not have been paid if she had cancelled her shift as her understanding was she was not entitled even to statutory sick pay.

74. The appellant's employer and DBS have regarded the appellant's additions to her mitigating circumstances over the course of the process as evidence that she is

being untruthful. We do not find it so. We see no reason not to accept that all the factors mentioned are true. We understand that the appellant had initially thought that her letter of apology to AG would be sufficient and nothing more would be said about the incident. As it moved from stage to stage, she cast around to mention more and more reasons why she might have been tired. This is perfectly plausible and understandable, particularly when it is appreciated that the reason why someone falls asleep is not the kind of issue that is susceptible to proof one way or another. All the appellant can do, all anyone can do, is to list out all the things about their life that they are finding tiring. The fact that it took the appellant time to think of all the things in her life that might have caused her fatigue that night does not make her evidence incredible. Nor do we draw any adverse inference from her failure to mention the pregnancy at the appeal hearing. The early stages of pregnancy are a time that many people feel reticent about talking about pregnancy. A pregnancy that started at or shortly before 27 September 2022, would only have been coming up to the crucial 12-week point at or around mid-late December 2022.

75. Finally, we record what the appellant told us in evidence about the impact on her of the barring decision. In the hearing, she cried and said that she had been trying to do so much for her and her children, she realised she had been trying to do too much, that she should have cancelled the shift, but she was afraid to because her employer would be angry and also she would not be paid. She explained that she really wanted to become a mental health nurse, and had been in the third year of her course, but she was removed from the course once she was put on the barred list. She had not found other work as she is not qualified for other work. Working with children and vulnerable adults is all she knows how to do. She is embarrassed by the barring. She has been on benefits, which she does not want as she wants to work. She has £50,000 debt from a student loan that she cannot pay off because she cannot obtain work. She suffered serious post-natal depression (which she connected with the barring decision), when she was not able to get out of bed for days and weeks.

**The parties' closing submissions**

76. In his closing submissions, Mr Serr for DBS spoke to DBS's written response to the appeal and urged us to uphold the decision.

77. Regarding the videos that the appellant had provided, he submitted that they were taken after the incident, that they do not shed any light on whether there has been a mistake of fact. He observed that it was worrying that the appellant did not report the matter when she saw the people were asleep. It does not add anything to the decision.

78. He submitted that, despite the appellant's evidence about the blanket not having been brought in from home, there was still evidence of intention to sleep. He referred to her having fetched a blanket, her failure to alert her employer to her medical condition or tiredness or need for a break. He submitted that her evidence was not wholly credible, given her shifting reasons for why she slept, and shifting accounts of whether she was asleep. He submitted she deliberately took a sleep during what she believed to be a break. He pointed out that AG does

not mention there being an interaction with the appellant during which she woke up. He acknowledged it was not possible to fill the gap in AG's evidence about why she did not come back to take a photo.

79. He reminded us that the employer says a phone was available and she could have alerted colleagues. He accepted that if she dozed off accidentally then there was nothing to tell, but emphasised that she knew she needed to be awake and alert.

80. Regarding the employer's change of heart regarding the DBS referral, Mr Serr submitted that this was just the appeal manager trying to do the appellant a favour. What was said in the letter to DBS seeking to withdraw the referral about the appellant not posing a danger to service users because she was not lone working was in fact substantially contradicted by the appeal manager's findings on the appeal which included that there was a risk to service users. He pointed out that the other waking staff are downstairs, not upstairs. There is no interaction between the two floors. There is clearly risk in a situation where you are the nightworker and you fall asleep when looking after vulnerable service users. Staffing levels are only adequate if the staff are awake. He submitted that there was also some evidence from SS and JO of the appellant having slept on other occasions.

81. As to proportionality, he submitted that the appellant's lack of insight, reflection or remorse makes the decision proportionate. He submitted there was a continuing risk.

82. The appellant in her closing submissions reiterated and elaborated on what she had told us in evidence about her mitigating circumstances, her acceptance of the mistake she had made and the impact on her of the barring decision. She said that when she wrote the letter of apology to AG immediately after the incident, she thought it would end there, she never thought it would escalate as it has. She explained that she had recorded the videos of colleagues to show that what she had done was part of a pattern; when staff have finished their duties, they can relax. They may doze off as she did. She did not plan to start sleeping.

**Our analysis and conclusions**

83. We consider first whether DBS has made a material mistake of fact in any respect in its decision in the way alleged by the appellant in her grounds of appeal.

84. The appellant in her grounds of appeal denied sleeping on shift. At the hearing, however, it became apparent that the appellant does not deny sleeping on shift. Indeed, she has accepted from the outset that she fell asleep while on shift. That part of DBS's decision is therefore not in error.

85. The focus of the appellant's case is, rather, that she did not intend to sleep on shift. On this issue of fact, we have accepted the appellant's evidence for the reasons set out in our findings of fact above. We have found that she did not intend to sleep on shift. She did not bring in a quilt from home. We are sufficiently certain about our findings of fact in these respects that in our judgment DBS was

wrong to conclude otherwise in its decision. These are mistakes of fact in DBS's decision. As such, DBS's conclusion that the appellant was also at fault in not alerting other staff that she was planning to sleep on a break is also a mistake of fact. Not only was there, we find, no phone that the appellant could reasonably have used to alert other staff, but there was nothing she could reasonably have alerted them about because she was not planning to sleep. Nor was there any other procedure to be followed by the appellant that she failed to follow. The practice in the home was for staff to sit and rest when they could during their shifts. They were required to remain awake and alert, but there was no prohibition on sitting down for a rest when checks on residents had been completed and all was quiet.

86. In these respects, therefore, we find that DBS made mistakes of fact in regarding the appellant's case as one in which she had deliberately planned to sleep and failed to alert other staff so as to ensure adequate cover for service users. We consider these to be material mistakes of fact as it is apparent from DBS's decision letter that it placed considerable weight on these factual elements of the appellant's case, drawing inferences from these primary facts as to the risk that the appellant might pose in the future. Although DBS did in its decision refer in the alternative to the appellant having chosen a course of action that made it more likely she would fall asleep on duty, and we have agreed with DBS's assessment in that respect, much of the reasoning in DBS's decision letter falls away if in fact the appellant's conduct was not deliberate. That fact potentially puts a very different complexion both on the incident itself and the risk that DBS may consider the appellant poses in future.

87. The appellant's other ground of appeal was that DBS erred in law in determining that it was proportionate to bar her in all the circumstances. There are a number of facts that we have found that are relevant to this ground of appeal that might potentially lead to a different conclusion in relation to proportionality. These include the mistakes of fact already identified about falling asleep not being deliberate and also the following:-

    a. The appellant apologised immediately in writing for the incident and promised not to sleep on shift again. She accepted at the investigation, disciplinary and appeal hearing stages that she had made a mistake and was at fault in not cancelling the shift. The submissions made to DBS on her behalf by solicitors (and her grounds of appeal to this Tribunal) are more combative and do not acknowledge error, but these do not reflect the appellant's personal attitude or views;

    b. She had an otherwise unblemished disciplinary record. There is thus no evidence that the appellant is someone who is unable or unwilling to learn lessons from disciplinary action by an employer;

    c. Although on the facts as we found them to be, the appellant did chose a course of action that made it more likely she would fall asleep on duty, in that she sat down in a chair with a blanket on her legs, in this respect her

conduct did not differ substantially from normal practice in the home. There was no policy in relation to taking breaks that she failed to follow;

d. The appellant was not asleep very long and there is no evidence that any resident was in fact endangered that night by her conduct, although that of course may have been fortuitous as she may have slept longer if she had not been 'caught' by AG;

e. All of the mitigating circumstances relied on by the appellant were true, including the migraines, the head injection, studying during the day, being a single mother of four children including one with ADHD and the pregnancy. It is also the case that she had not alerted her manager to these matters;

f. The impact on the appellant of the barring decision has been very significant. She is relatively young, with four children to support as a single mother. She has been unable to obtain other work, not having qualifications or experience in other fields. She was dedicating herself to improving her caring skills and qualifications by seeking to qualify as a mental health nurse. She lost the opportunity of completing that qualification as a result of the barring decision. She has been left in substantial debt with a student loan she cannot repay and she is dependent on benefits.

88. The legal principles that we have identified in the legal framework section of this judgment make clear that it is a matter for this Tribunal to determine proportionality, but also that we must place due weight on DBS's view.

**Next steps**

89. In this case, as a result of DBS's mistakes of fact in its decision, we do not as yet have the benefit of DBS's view as to whether it is necessary and proportionate to bar the appellant in the light of the facts as we have found them to be.

90. In those circumstances, it seemed to us that there were two options open to us: either:

a. we could issue this decision as a final decision allowing the appeal on the basis of the mistakes of fact found and remit the matter to DBS under section 4(6)(b) and 4(7) of the SVGA 2006 to make a new decision on the basis of the facts as we have found them to be; or

b. we could issue this decision as a decision on a preliminary issue under rule 5(3)(e), and invite the parties to make further submissions on the issue of proportionality in the light of the facts as we have found them to be.

91. We consider that the very significant advantage of adopting the latter course is that it avoids delay and multiplicity of proceedings. In this case, the appellant was dismissed by her employer on 14 November 2022 and referred to DBS

immediately. It took DBS until 26 September 2023 to issue a Minded to Bar letter and until 16 January 2024 to issue a Final Decision letter. The appellant appealed to the Upper Tribunal on 4 April 2024 and 16 October 2024 was the earliest date possible for a hearing. If we remit to DBS, there is a likely to be a delay again until a decision is taken by DBS. If the decision is adverse, the appellant may appeal again. It may take another year before her appeal is heard. In the meantime, the likelihood is that the appellant will continue as she is now, i.e. out of work, in debt and on benefits. While that may be how things have to be if the barring decision is finally confirmed, if it ultimately turns out that the decision to bar was wrong, then the reality is that every week, month and year during which the appellant has been prevented from exercising her civil right to practice her chosen profession will have been highly prejudicial to her.

92. For these reasons we have issued this decision as a decision on a preliminary issue and made directions for the further conduct of this appeal. To ensure there is no prejudice to either party's appeal rights from our adopting this course, we extend time for appealing this decision so that time will run from the date on which our final decision in this matter is issued.

93. We acknowledge that we have taken these case management decisions without inviting the parties' submissions. That is because we consider that the parties could only fairly be expected to make submissions on the issues of case management having had the opportunity to consider this decision. If, having so considered, either party disagrees with the course that we have adopted in terms of case management, they may apply under rule 5(2) for us to set aside or vary our case management decisions.

94. Our directions are set out at the start of this decision.

**Holly Stout**
**Judge of the Upper Tribunal**

**Roger Graham**
**Tribunal Member**

**John Hutchinson**
**Tribunal Member**

Authorised by the Judge for issue on 22 November 2024

**Appeal No. UA-2024-000444-V**

**IN THE UPPER TRIBUNAL**
**ADMINISTRATIVE APPEALS CHAMBER**

**THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008**

| | |
|---|---|
| **Appellant:** | MOG |
| **Respondent:** | Disclosure and Barring Service (DBS) |
| **DBS Reference:** | 00997358874 |
| **DBS Decision Date:** | 16 January 2024 |

**DISPOSAL BY CONSENT**
**Rule 39**

**The appeal is disposed of by consent.**

Made under section 4 of the Safeguarding Vulnerable Groups Act 2006 (SVGA 2006) and the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) (the UT Rules).

**REASONS**

1. The Upper Tribunal's Decision on Preliminary Issue in this case was issued on 5 December 2024.
2. By letter dated 16 December 2024, DBS informed the Upper Tribunal that, by decision dated 12 December 2024, it had decided on review under paragraph 18A of Schedule 3 to the SVGA 2006 to remove the appellant's name from the children's and adults barred lists.
3. In the light of DBS's decision, I directed that the parties confirm whether they were content for the appeal to be disposed of by consent under rule 39(1).
4. Both parties have now confirmed that they are so content and I am satisfied that it is appropriate in the circumstances for the appeal to be so disposed of.

**Holly Stout**
**Upper Tribunal Judge**

Authorised for issue on 28 February 2025