IN THE UPPER TRIBUNAL **Appeal No UA-2024-000490-V**

ADMINISTRATIVE APPEALS CHAMBER **[2025] UKUT 95 (AAC)**

Between:

FKF

Appellant

- v –

Disclosure and Barring Service

Respondent

Before: Judge Monk
Upper Tribunal Member Graham
Upper Tribunal Member Hutchinson

Hearing date: 30 January 2025
Mode of hearing: Oral hearing at Birmingham Civil Justice Centre
Representation:
Appellant: In person
Respondent: Mr D Tinkler of Counsel
Ms J Brown from the DBS

DECISION

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

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) FKF, who is the Appellant in these proceedings;
(b) her children, her partner, former partners and any foster carers named
or any information that would be likely to lead to the identification of any of them.
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.

NCN no: [2025] UKUT 95 (AAC)

REASONS FOR DECISION

Introduction

1. This is the Appellant's appeal against the Disclosure and Barring Service's (DBS from now on) final decision, dated 18 April 2024 [373-379] to include her on both the Adults' and Children's Barred List under Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 ('the 2006 Act'). That letter replaced the earlier decision letter of 3 March 2023 [95-101] which had only included her on the Adults' barred list.

2. The appellant was granted permission on 30 September 2024 [410-11] to appeal, on the grounds that it was arguable that the DBS had made a mistake of fact and that the decision to place the Appellant on the Adults' Barred List and Children's Barred list was disproportionate. The appeal is opposed by the Respondent.

3. The Respondent considered that FKF met the criteria for regulated activity under the relevant provisions of the Safeguarding Vulnerable Groups Act 2006 ('the SVGA') by reason of her application for a role as a carer with Newbloom Healthcare on 30/3/22 and her application for a role as a driving instructor on 20 October 2023.

4. The appellant had lodged an appeal with the Upper Tribunal on 19 January 2024 [2-8] against the March 2023 decision but following the DBS issuing the April 2024 decision she was given the opportunity to provide further representations. She did so on 17 July 2024 [414-442] setting out further detailed grounds of appeal.

5. We held an in-person hearing at Birmingham Civil Justice Centre which the Appellant attended – she was not represented. We heard oral evidence from the Appellant. We had an electronic bundle of documents and references in [ ] are to the page number in the bundle. We had a bundle of authorities from the Respondent. The Appellant had a hard copy of both.

6. This was a private hearing. We refer to the Appellant as "FKF" or "the Appellant" throughout in order to preserve her privacy and anonymity. For that same reason, we make the rule 14 Order included at the head of this decision and will refer to other individuals by initials.

Legal Framework

7. There are several ways under Schedule 3 to the 2006 Act in which a person may be included on one or other of the two barred lists. This appeal is concerned with discretionary barring. This may be on the basis of either an individual's "relevant conduct" – in effect their past behaviour – (paragraphs 3 & 4) or the risk of harm they pose now and for the future (paragraph 11). This appeal concerns the former of those two discretionary routes to barring.

The basis for a "relevant conduct" barring decision

1. Paragraphs 3 and 4 of Schedule 3 to the 2006 Act deal with behaviour or "relevant conduct" in relation to children , those relating to vulnerable adults are at paragraphs 9 and 10 and are essentially the same:

> **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.**(1) For the purposes of paragraph 3 relevant conduct is—
>
> (a) conduct which endangers a child adult 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;
>
> …..
>
> (2) A person's conduct endangers a child adult 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.

Rights of appeal

8. An individual's appeal rights against a DBS barring decision are governed by section 4 of the 2006 Act:

> **4.**(1) An individual who is included in a barred list may appeal to the Upper Tribunal against—
>
> (a) …

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

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

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

(a) on any point of law;

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

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

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

(5) Unless the Upper Tribunal finds that 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.

Caselaw

9. In Disclosure and Barring Service v AB [2021] EWCA Civ 1575 [2022] 1 WLR 1002 (DBS v AB) the Court of Appeal considered the respective roles of the Upper Tribunal and the DBS. In particular:

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

> *concerned, and the appropriateness of including him in a list barring him from regulated activity with children or vulnerable adults, is a matter for the DBS.*

10. At Paragraph 54 there was a warning that the UT could not simply remake a decision with which it disagreed. And at paragraph [55] of Lewis LJ made the following observations on the nature of the findings of fact made by the Upper Tribunal:

> [55]. *The Upper Tribunal also made findings of fact and made comments on other matters. Section 4(7) of the Act provides that where the Upper Tribunal remits a matter to the DBS it "may set out any findings of fact which it has made (on which DBS must base its new decision)". It is neither necessary nor feasible to set out precisely the limits on that power. The following should, however, be borne in mind. First, the Upper Tribunal may set out findings of fact. It will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter. By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to a marriage being a "strong" marriage or a "mutually supportive one" may be more of a value judgment rather than a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third "finding" would certainly not involve a finding of fact. Secondly, an Upper Tribunal will need to consider carefully whether it is appropriate for it to set out particular facts on which the DBS must base its decision when remitting a matter to the DBS for a new decision. For example, Upper Tribunal would have to have sufficient evidence to find a fact. Further, given that the primary responsibility for assessing the appropriateness of including a person in the children's barred list (or the adults' barred list) is for the DBS, the Upper Tribunal will have to consider whether, in context, it is appropriate for it to find facts on which the DBS must base its new decision.'*

11. There is also the guidance of the Upper Tribunal (Farbey J, Upper Tribunal (UT) Judge Jacobs and UT Specialist Member Ms Joffe) in PF v Disclosure and Barring Service [2020] UKUT 256 (AAC); [2021] AACR 3:

> [39] *There is no limit to the form that a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or an omission. It may relate to anything that may properly be the subject of a finding of fact. This includes matters such as who did what, when where and how. It includes inactions as well as actions. It also includes states of mind like intentions, motives and beliefs.*

And at:

> *[49] We prefer to avoid talking in terms of respect, or in terms of the starting point for the tribunal's consideration beyond saying that an appellant must demonstrate a mistake of law or fact. We put it like this. The DBS's reasoning will be before the Upper Tribunal and the tribunal will take account of it for what it is worth in the context of the evidence as a whole. At one extreme, it*

> *may be of little assistance. If the tribunal has received significant further evidence (such as oral evidence that would not have been available to the DBS), it is likely that its evaluation of the evidence that was before it will have been overtaken so that the only appropriate approach will be for the Upper Tribunal to begin afresh. At the opposite extreme, it may play a significant role.*

And they concluded as follows:

Summary

> [51] *Drawing the various strands together, we conclude as follows:*
>
> *a) In those narrow but well-established circumstances in which an error of fact may give rise to an error of law, the tribunal has jurisdiction an error of fact may give rise to an error of law, the tribunal has jurisdiction to interfere with a decision of the DBS under section 4(2)(a).*
>
> *b) In relation to factual mistakes, the tribunal may only interfere with the DBS decision if the decision was based on the mistaken finding of fact. This means that the mistake of fact must be material to the decision: it must have made a material contribution to the overall decision.*
>
> *c) In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose.*
>
> *d) The tribunal has the power to consider all factual matters other than those relating only to whether or not it is appropriate for an individual to be included in a barred list, which is a matter for the DBS (section 4(3)).*
>
> *e) In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it.*
>
> *f) The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS's factual findings in matters that engage its expertise. Matters of specialist judgment relating to the risk to the public which an appellant may pose are likely to engage the DBS's expertise and will therefore in general be accorded weight.*
>
> *g) The starting point for the tribunal's consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker.*

12. In AB v DBS [2022] UKUT 134 (AAC) the Upper Tribunal considered the competing arguments in AB v DBS [2021] EWCA Civ 1575 and PF v DBS:

45. The question is then where this all leaves the Upper Tribunal in practical terms in the exercise of its appellate jurisdiction in safeguarding cases.

46. On the one hand, the Court of Appeal has stated that "the assessment of the risk presented by the person concerned… is a matter for the DBS" (DBS v AB at paragraph [43]).

47. On the other hand, in cases in which the DBS relies on a risk of harm under paragraph 5 of Schedule 3, rather than 'relevant conduct' under paragraph 3, the Upper Tribunal may have to determine as a question of fact whether a person "may—(a) harm a child, (b) cause a child to be harmed, (c) put a child at risk of harm" (etc) (see paragraph 5(4)).

48. There is, in our view, a way of squaring this circle while respecting both Court of Appeal authority and the primacy of statute (and in particular section 4(1) to (3) of the 2006 Act). We return to the ambiguity we identified in the passage from DBS v AB discussed at paragraph 34 above. We are satisfied that the Court of Appeal was saying no more than that the element of the risk assessment which is part and parcel of the assessment of appropriateness for the purposes of deciding whether to place the individual on a barred list is non-appealable. This reading is consistent with the fact that any decision taken under paragraph 5 of Schedule 3 – which, as we have seen, necessarily includes some findings as to risk – to include an individual on the Children's Barred List is undoubtedly appealable (see section 4(1)(b)). To that extent we do agree with Mr Geering.

49. In this context, however, we make a distinction between (i) deciding as a matter of fact whether a person poses a risk; and (ii) deciding on the level of the risk posed by way of a risk assessment.

Concluding that they could make findings about the risk issues which were findings of fact whereas findings on the level of risk were not.

13. We also bear in mind the analysis of the Upper Tribunal panel in the recent decision of EB v Disclosure and Barring Service [2023] UKUT 105 (AAC) and particularly the discussion at paragraphs [13]-[36]. In that case the Upper Tribunal concluded as follows:

35. However, where an appellant wishes to give evidence at an oral hearing and the Upper Tribunal accedes to that request, which it will do if the appellant has an arguable case and it appears unlikely that disputes of fact will fairly be resolved without such evidence being admitted, it may make its own findings of fact, in which case it will allow the appeal if its findings are materially different from those made by DBS, in the sense that they would or might lead to a different conclusion as to the appropriateness of including the appellant in the relevant List(s). We do not consider it necessary for the Upper Tribunal to identify an error in DBS's reasoning, but it must explain why it reaches a different conclusion and that may in practice result in one or more defects being identified. If arguments of law have also been raised in such a case, the new findings may make it unnecessary to address those arguments

> *independently, although the arguments may be relevant to the approach that the Upper Tribunal takes to the evidence. In our view, it follows that the Upper Tribunal may make different findings when it considers an appeal without an oral hearing, again without necessarily finding an error in DBS's reasoning but explaining its own. There are therefore different ways in which an appeal may be approached.*
>
> *36. Thus, the fundamental point relevant to this case is that unlike in an appeal under section 11 of the Tribunals, Courts and Enforcement Act 2007, it is not necessary for the Upper Tribunal to find an error of law in DBS's fact-finding before it substitutes its own findings of fact. While the Upper Tribunal's decision should show why it is differing from DBS on matters of fact, it is not obliged to find a defect in DBS's reasoning; it is enough that it takes a different view of the evidence.*

14. There is further guidance in DBS v JHB [2023] EWCA Civ 982:

> (90) *On the reasoning in PF, the decision of the DBS was therefore the starting point for the UT's consideration of the appeal. JHB did not claim that the DBS had erred in law. The UT could not exercise any powers on the appeal, therefore, unless it identified an error of fact in the approach of the DBS to the findings of fact on which the Decision was based. Those findings were the conviction for the Offence, which JHB did not challenge, finding 1, which JHB admitted, and findings 2 and 3. Those findings of fact did not include the DBS's assessment of the weight to given to the reports. The UT was not free to make its own assessment of the written evidence unless, and until, it found such an error.*

The Court of Appeal said that was impermissible, because the UT was only entitled to carry out its own evaluation of the evidence that was before the DBS if it had first identified that the DBS had made a finding which was not available to it on the evidence on the balance of probabilities.

15. The scope of the mistake of fact jurisdiction was further considered by the Court of Appeal in the recent cases of Kihembo v DBS [2023] EWCA Civ 1547 and in DBS v RI [2024] EWCA Civ 95. The decision in Kihembo confirmed that PF v DBS remains good law. In RI v DBS Males LJ explained that the restrictive approach adopted by the Court of Appeal in JHB should be confined to those cases where the barred person does not give oral evidence at all or gives no evidence relevant to the question of whether the barred person committed the relevant act relied upon. Where the barred person does give oral evidence before the Upper Tribunal: "the evidence before the Upper Tribunal is necessarily different from that which was before the DBS for a paper-based decision. Even if the appellant can do no more than repeat the account which they have already given in written representations, the fact that they submit to cross-examination, which may go well or badly, necessarily means that the Upper Tribunal has to assess the quality of that evidence in a way which did not arise before the DBS" (per Males LJ at [55]) LW -v- DBS Case no: UA-2022-001136-V [2024] UKUT 129 (AAC)6.

16. Males LJ interpreted the scope of the Upper Tribunal's jurisdiction under section 4(2)(b) of the 2006 Act as follows: "In conferring a right of appeal in the terms of section 4(2)(b), Parliament must therefore have intended that it would be open to a person included on a barred list to contend before the Upper Tribunal that the DBS was mistaken to find that they committed the relevant act – or in other words, to contend that they did not commit the relevant act and that the decision of the DBS that they did was therefore mistaken. On its plain words, the section does not require any more granular mistake to be identified than that" (RI v DBS, per Males LJ at [49]).

17. Bean LJ rejected the DBS's argument that the Upper Tribunal was in effect bound to ignore an appellant's oral evidence unless it contains something entirely new. He said in RI v DBS at [37] that: "where Parliament has created a tribunal with the power to hear oral evidence it entrusts the tribunal with the task of deciding, by reference to all the oral and written evidence in the case, whether a witness is telling the truth."

Facts

18. The findings of fact which gave rise to the Barring Decision were set out in the Respondent's Final Decision letter of 18/4/24 [373-377]. That letter stated as follows:

"We have considered all the information we hold and are satisfied of the following:

- *That between 02/01/21 and 04/01/21, you inflicted injuries to VFF, your 7-year-old child, and that these injuries were caused by you having given VFF a direct blow to the face with greater force than is normal or by inept handling of him, by a blow across VFF's ear or his ear being gripped and pulled and by a blow across his mouth.*
- *That you knew that your actions at Allegation 1 had caused significant injury to VFF and that you failed to seek timely and necessary medical treatment for him and further concealed the truth about how the injuries had occurred.*

19. The factual matters relied upon by the DBS were that on 4/1/21 FKF had spoken with social services. FKF reported that VFF had given himself a black eye because FKF would not charge his Amazon Fire Tablet. FKF reported that on Saturday night (2/1/21) she had heard VFF throwing toys around his room. FKF said she went to see what he was doing and saw a red mark on VFF's face. FKF said that VFF told her he had hit himself with a toy. It was decided that a Child Protection Medical examination was necessary.

20. On examination it was noted that VFF had sustained bruising to the left eye, bruising to the top and back of the left ear, bruising to the left cheek and left jaw [22].

21. On 5/1/21 a strategy meeting took place at which details of VFF's injuries were shared [267-269]. Dr Rekha Fowler (the examining paediatrician) stated that the injuries may have been self-inflicted having witnessed the child's erratic presentation [22]. It was noted that Cheshire West and Chester Children's Social Care were aware that VFF had displayed self-harming behaviours such as hitting, scratching and self-strangulation.

22. On 5/1/21, FKF's three children (including VFF) were taken into foster care under a voluntary agreement [22].

23. On 6/1/21 Dr Fowler discussed the findings following the Child Protection Medical Examination with two other medical professionals: Dr Rajiv Mittal and Dr Sara Dubois. The medical professionals concluded that it was unlikely that VFF's multiple facial injuries were self-inflicted. In the opinion of the medical professionals, VFF's injuries were non-accidental physical injuries [22].

24. On 8/1/21 FKF was arrested on suspicion of an assault occasioning actual bodily harm. Under police interview, FKF stated that on Sunday night (3/1/21) she, had heard persistent banging coming from VFF's room. She said she went in to see VFF at about 8pm and found him upset. She said VFF had been playing with little metal cars and said he had been crashing them together by bringing his arms together to impact them. FKF said she found VFF with redness on his face which she indicated had been in the area of the later black eye. FKF said she thought VFF had been hitting himself as he had done that before [112].

25. On 24/2/21 Cheshire Police decided to take no further action in respect of the alleged assault. The Police concluded that, whilst the conclusion following the Child Protection Medical Examination was that VFF's injuries were non- accidental, there was no evidence that FKF was responsible for causing the injuries to VFF [357].

26. On 2/12/21,following a final hearing in the Family Court over 5 days the Judge ordered that FKF's three children should be placed in the care of Cheshire West and Chester Council. The Order set out the following findings [338]:

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SUMMARY OF FINDINGS MADE
INJURIES

1. Between 2–3 January 2021 the child [VFF] suffered significant physical harm by way of inflicted injury as follows:

(i) Left black eye; Swelling of eyelids and deep purple bruising. 0.5cm split of the skin at the lateral angle of the eyelid. 3 parallel linear marks extending from the lateral border of the left eyebrow;

(ii) Left ear; deep patch of bruising 1.5cm within the helix (upper rim of the external ear);

(iii) Left ear posterior edge; Purple 0.5cm bruise on the back surface of the left ear;

(iv) Left mid cheek; small circular grey bruise 0.5cm diameter;

(v) Left jawbone; 1cm brown bruise at the midpoint of the bony margin of the jaw;

(vi) Right forehead; circular bruise grey 2.5cm diameter with associated petechiae;

2. Between 3–4 January 2021, the child [VFF] suffered significant physical harm by way of inflicted injury as follows:

(i) Intra oral injury; Upper lip: purple bruising to the mucosa (the inner wet surface of the lip) in the midline;

(ii) Intra oral injury Lower lip; midline ulceration and erythema (redness) of the mucosa (inner surface of the lip).

3. The injury at paragraph 1(i) was caused by a direct below to the face with greater force then in normal or inept handling of a child. At the time injuries were inflicted, [VFF] was in pain and cried out. His injuries remained tender to touch for a number of days.
4. The injuries at paragraphs 1(ii)(iii) were caused by a blow across [VFF's] ear or his ear being gripped and pulled.
5. The injuries at paragraphs 2(i)(ii) were caused by blow across the mouth.
6. When the injuries are taken in totality, the injuries at paragraphs 1(iv)(v)(vi) were all caused during the episodes of trauma described above.
7. The child, [VFF], has no underlying health condition causing or rendering him more susceptible to the injuries he sustained.
8. The injuries set out above were caused by [FKF];
9. [FKF] knew her actions had caused injury to [VFF] and she failed to seek timely and necessary medical treatment for him and further concealed the truth about how the injuries had occurred.

27. On 28/3/22 an Enhanced DBS Certificate was issued in respect of FKF.

28. Cheshire Police included on the Certificate (amongst other matters) details of the injuries suffered by VFF, the initial opinion of Dr Fowler that the injuries may have been self-inflicted and the subsequent conclusion by the medical professional that the injuries were non-accidental physical injuries [21-23].

29. On 27/1/23 the Respondent sent a Minded to Bar letter. The letter set out the Respondent's view that it may be appropriate to include FKF on the adult's barred list [39-43]. That letter could not be delivered to FKF [46].

30. On 3/3/23 FKF was placed on the adult's barred list [54-57]. The Final Decision Letter setting out the decision was not sent to FKF because of the lack of a valid address.

31. On 19/1/24 FKF appealed against the Respondent's decision [2-8]. FKF stated (amongst other matters) that the police had found her not guilty and that the paediatrician who had examined VFF believed that he was capable of inflicting the injuries on himself.

32. On 13/2/24 the Minded to Bar letter dated 27/1/23 and the Final Decision Letter of 3/3/23 were sent to FKF as DBS had been made aware of her address [82- 87].

33. On 19/2/24 FKF was sent a Minded to Bar letter setting out the Respondent's view that it might be appropriate to add FKF's name to the children's barred list [102-105]. The letter attached the documents relied upon by the Respondent in forming that view [108-341] which included the Cheshire police letter of 1/5/22, the interview notes from FKF's police interview, various witness statements including from VFF and her daughter, KF, then aged 5, foster carers, social services records and the Family Court Order.

34. On 13/3/24 FKF submitted a lengthy response to the Minded to Bar letter. FKF stated that she was innocent of the allegations against her. FKF alleged that social services had withheld evidence from the Family Court [343-349].

35. On 18/4/24 the Respondent sent a Final Decision letter to FKF setting out the Barring Decision [373-377].

36. FKF provided (undated) written representations in response to the Barring Decision [414-416].

37. The appellant's evidence both in her written statements [2-8; 16-17, 34343- 349, 408-409 and 414-423] and in her oral evidence to the Tribunal focussed on the missing information that she said had not been before the Family Court and which she said would have shown that she was innocent of the finding that she had injured VFF and not sought medical attention. She maintained that the only doctor who examined VFF, Dr Fowler, was of the opinion that the injuries were self-inflicted; that there was blood test evidence which showed that his immune system was compromised and so he may have been susceptible to bruising; that he had haemorrhages/spotting around the eyes which accounted for the bruised eye; that not all the photographs were shown to the two other doctors who concluded the injuries were non-accidental and that the MRI scan showed no previous injuries . She also relied on both VFF and one of her other children KF saying that he had injured himself and the NSPCC report (350-355) which said VFF was enjoying living with his mum and she was handling the difficult parenting situation appropriately.

38. Taking these points in turn and examining where that evidence could be found and what it might show. FKF produced no further evidence other than the material she had sent to the DBS with her representations. So, we considered her oral evidence and the documents we had.

39. Dr Fowler examined VFF on his admission to hospital and it was noted on the enhanced DBS check that in the multi-agency strategy meeting on 5 January 2021 that she stated that VFF's injuries may have been self-inflicted having witnessed his erratic self-presentation. Social services were also aware of previous self-harming behaviours [22]. However, when the matter was discussed with two other doctors the following day, 6th January, it was concluded that it was unlikely that the injuries were accidental. The record of Dr Fowler's report to the multi-agency strategy meeting appears to be noted in the record of that [267-269]. It is not wholly clear as the names are redacted but there is firstly report of the severity of the injuries and a number of red flags indicating non accidental injury which appear to be from the examining Dr's perspective. It is noted then that she also thought "it is possible he picked up a toy and hit himself" and '"She feels an open mind is required. [She] came

away yesterday thinking there was no way he could have inflicted these injuries on himself, however then did more reading and wondered perhaps he could have picked up his toy and slammed it to the side of his face.”

40. We do not have any evidence of the further discussions between the medical professions but the Enhanced DBS check [22] stated ‘Dr Rekha Fowler discussed the child protection medical findings with two other medical professionals Dr Rajiv Mittal and Dr Sara Dubois. They concluded on 6 January 2021 that it was unlikely that the child’s multiple facial injuries were self-inflicted. The medical professional’s (sic) opinion was that the child’s injuries were non-accidental physical injury.’ It was not disputed that Dr Fowler was the only doctor who examined VFF and the other two doctors relied on photographs, the medical test which were carried out and the report of the examination by Dr Fowler. There was also a medical report prepared by a Paediatrician, Dr Birth who gave evidence in the Family Court proceedings [337]. FKF said that report was also just based on the medical evidence on not on first hand examination of VFF. That had concluded that the injuries were non-accidental.

41. FKF said in her evidence that there were some form of haemorrhages or spotting on VFF’s eyelids which she believed may have caused the bruising around his eye. She also said that his blood test results showed he had a tummy bug which meant he had a low immune system and so may have been more susceptible to bruising. There was no medical evidence which confirmed that. Dr Fowler had reported during the multi-agency meeting that ‘there was no suggestion from FKF that he (VFF) may bruise more easily [270].” The MRI scan which was done showed no evidence of previous injuries.

42. FKF had reported to her social worker, by text message [360], on 2 January 2021 that “we all have tummy bugs again even me today … so don’t think I’m going to send them to school till at least Wednesday…”. On 4 January she sent another message about another issue but there was no mention of any illness or of VFF’s injuries. FKF said that she did text her social worker about the injury to VFF’s face but the only copy of her text messages which she provided cut off after the social worker’s reply on 4th January asking if the children were off school that day.

43. In the multi-agency strategy meeting on 5th January [226-267] the social worker confirmed that she had had a text conversation on the 4th with FKF and it appears that she was told during that by FKF that VFF had a given himself a black eye on the Saturday night (2nd January) and that VFF had said he had hit himself with a toy. In the police interview on 8th January FKF [112] had said the injury had happened on the Sunday (3rd January) night and she noticed it on Monday morning (4th January). In evidence FKF could not explain why she had given different dates for when the injury occurred but thought she had got mixed up and was sure it was the Sunday night when the injury had occurred and she had noticed it on the Monday morning when she said she had texted the social worker to tell her both about the tummy bugs and the injury.

44. The social worker had carried out a visit on 4 January and had noted that VFF had not just a black eye but ‘substantial bruising’ over his face and that he had said he had hit himself with a monster truck toy.

45. VFF himself gave varying accounts of how the injury had occurred. In the Social Service strategy meeting on 5/1/21 to discuss VFF [267-269] it was reported VFF had said he had punched a toy and it hit him in the face which was a different account to his previously saying he had himself with a toy. In the police interview on 29 January 2021 [116-125] VFF said that he did not hit himself, that he did not know how he got the black eye, but he also said that he thought he got it by hurting himself and his mummy did not do it. He also said that his mummy sometimes strangled him and punched him, and she had told him to forget about the black eye.

46. FKF's daughter, KF, then aged 5 was also interviewed by the police [126-128] and she said that she thought VFF had jumped off his bed but that was what her mummy had told her. FKF's youngest child was too young to be interviewed.

47. The foster carer who had looked after VFF reported in their police interview [129-130] that VFF said he did not want to live with his mummy because she strangled him and was mean. And the foster carer who had looked after KF in their police interview [133-134] reported that KF had said that VFF had bumped himself when he jumped down the stairs. She also said that KF thought mummy was angry and upset at the time.

48. The police finalised the investigation with 'No Further Action' on 24th February 2021. Whilst accepting that the conclusion of the Child Protection medical was that the child's injuries were non-accidental physical injuries, the police concluded there was no evidence that FKF was responsible for causing the injuries.

49. FKF had provided as evidence to the DBS a report which had been prepared by the NSPCC in May 2020 for a multi-agency meeting about the referral of VFF (then 6 years old) because of concerns about harmful sexual behaviour he had displayed. [350-355]. She pointed out the report confirmed she was handling the situation with the children appropriately and ensuring that they were always supervised and there were no concerns with her parenting. It also noted that VFF had made excellent progress at school with his behaviour since he had moved to living with FKF.

Conclusions

50. The central question for us was whether the DBS made a mistake of fact in their decision to place FKF on the Vulnerable Adult and Children's Barred Lists. We have had the benefit of hearing from FKF and have listened carefully to all her evidence. We understand her heartfelt desire to challenge and overturn the decision of the Family Court which concluded that she had inflicted injury on her son and had delayed in seeking medical evidence for him because she is so desperate to have her children returned to her. But that is not the function of this tribunal – we have to consider whether the DBS made any mistakes of fact in their decision-making process. They relied on the findings of the Family Court so is there any evidence before us which suggests that they were wrong to do so or which they overlooked or misunderstood which might have made a difference.

51. FKF says the Family Court and the DBS were wrong not to place weight on the view of Dr Fowler that the injury may have been self-inflicted because she was the only medical practitioner who actually examined VFF and she thought they may have

been accidental. But this is not a case where there are conflicting medical expert views – Dr Fowler considered the possibility that the injuries may have been accidental and initially kept an open mind but, having looked at all the evidence and discussed it with two colleagues the stated view was that it was a non-accidental injury. That was similarly the conclusion of the Paediatrician instructed in the Family Court Proceedings. FKF has not produced any further medical evidence which casts any doubt on that central conclusion.

52. FKF's own evidence to us was not always entirely consistent and whilst she maintained that she did not injure her son, as she did throughout the police process and the Family Court proceedings, there has been nothing in her evidence which suggested that the findings relied upon by the DBS were unsound. She suggested that her children's evidence supported her but, sadly, it did not. Both children gave different versions of what might have caused the injury to VFF. VFF himself reported being hurt by his mother on other occasions. The NSPCC report, whilst supportive of her parenting in 2020 in challenging circumstances, did not go to the central incident in this case.

53. The findings of the Family Court were clear and based on the evidence before it after a 5-day hearing. The injuries to VFF were clearly serious and if not self-inflicted then there was no suggestion by FKF of another perpetrator. So, although the police did not conclude there was sufficient evidence that she was responsible for the injuries to justify prosecuting that is not the test which the Family Court or the DBS had to apply. They made decisions about whether it was more likely that not that FKF caused the injuries. There is no evidence before us to suggest that the Family Court were wrong to make that decision or that the DBS were wrong to rely on that decision.

54. We therefore conclude that the DBS did not make any mistakes of fact. We have then considered the issue of proportionality and whether there was a risk which transferred to vulnerable adults. The DBS concluded that FKF had injured her own child and that injury was significant and she had delayed in seeking medical help. So, whilst there was no other evidence of causing harm previously to her own or other children or to any vulnerable adults, we conclude that the DBS were entitled to consider her a risk to both children and vulnerable adults because there was a risk of repetition particularly given the level of harm caused.

55. We have also considered whether the decision was proportionate. FKF is working full-time in non-regulated activity and has not given any evidence of particular hardship. We accept she is no longer able to work in a care home as an administrator and has not been able to work as a driving instructor but she is in a permanent role as a receptionist. The decision has clearly affected her personal wellbeing, she does not understand why she is considered a risk to children and vulnerable adults and she displayed considerable distress during the course of the hearing about the findings. Whilst not wanting in any way to minimise her distress it stems primarily from the findings of the Family Court and the decision made about taking her children into care. The decision of the DBS was a proportionate one in the circumstances as it balanced the potential risk against the impact of barring on FKF from working with children and vulnerable adults.

56. It is for all the reasons above that we dismiss this appeal.

57. The Tribunal acknowledges that this decision will be very hard for FKF who has seen these proceedings as a route to challenging the outcome of the Family Court, which it is not. She became, understandably, very distressed at the conclusion of the hearing and we were all concerned for her wellbeing. We would urge her, as we did in the hearing, to seek professional support when she receives this decision and to seek legal advice about her routes to any challenge of the current situation with her access to her children.

Judge Fiona Monk
Chamber President of the WPAFCC
Sitting as a judge of the Upper Tribunal
Upper Tribunal Member Graham
Upper Tribunal Member Hutchinson

Approved for issue on 17 March 2025