Neutral Citation Number: [2025] UKUT 117 (AAC)
Appeal No. UA-2023-001952-V

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, her former partners or her children. This order does not apply to any person exercising statutory (including judicial) functions where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

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.

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

LJCB

Appellant

- v -

DISCLOSURE AND BARRING SERVICE

Respondent

Before: **Upper Tribunal Judge Stout**
Tribunal Member Hutchinson
Tribunal Member Tynan

Hearing date(s): 12 March 2025
Mode of hearing: By video

Representation:
Appellant: No appearance or representation
Respondent: Ashley Serr (counsel)

On appeal from:
DBS Decision Ref: 00996054937
Decision Date: 15 September 2023

SUMMARY OF DECISION

SAFEGUARDING OF VULNERABLE GROUPS (65)

The Disclosure and Barring Service (DBS) included the appellant on the adults' barred list pursuant to paragraph 9 of Schedule 3 to the Safeguarding of Vulnerable Groups Act 2006 (SVGA 2006) because she had had two of her own children removed from her care by the Family Court. The Upper Tribunal concludes that the only lawful decision on the evidence was that the appellant should not be included in the barred list and directs her removal. The Upper Tribunal held that DBS made a mistake of law in concluding that the appellant had engaged in "relevant conduct". "Conduct" refers to behaviour or actions, not to human features such as personality traits, learning difficulties, medical conditions, or to other people's concerns or opinions; nor does it refer to what may have been done to that person in the past (by their own parents or abusive partners) that might render them more or less likely to conduct themselves inappropriately towards others in future. In this case, the only potential "relevant conduct" of the appellant was her failure to leave her abusive ex-partner in order to care for her first child on her own. The Upper Tribunal held that that was not conduct that was capable of being repeated against a vulnerable adult so as to constitute relevant conduct within the meaning of paragraph 10(1)(b) of Schedule 3 to the SVGA 2006. Further, or alternatively, it was disproportionate to bar the appellant because the risk she poses as a result of her history of relationships with abusive partners is a risk that only arises in personal and family contexts, which (by virtue of section 58 of the SVGA 2006) are not regulated activities. There was therefore no rational connection between the objective of the barring scheme and the barring decision in this case; the risk she posed could be addressed by less intrusive measures; and barring the appellant struck the wrong balance between her private rights and the objectives of the barring scheme.

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 Tribunal follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. Pursuant to section 4(6)(a) of the Safeguarding of Vulnerable Groups Act 2006, the Disclosure and Barring Service is directed to remove the appellant from the adults' barred list.

REASONS FOR DECISION

Introduction

1. The appellant appeals under section 4 of the Safeguarding Vulnerable Groups Act 2006 (SVGA 2006) against the decision of the Disclosure and Barring Service

(DBS) of 15 September 2023 including her in the adults' barred list pursuant to paragraph 9 of Schedule 3 to the SVGA 2006. DBS included her in the barred list because her children were removed from her care by a Family Court in 2015 and 2022.

2. Permission to appeal was granted by Judge Stout on 17 September 2024 on an unlimited basis, but in particular because the judge considered it arguable:-

> (1) That it was irrational for DBS to conclude that the appellant had engaged in conduct which if repeated against a vulnerable adult would endanger or be likely to endanger them (and/or DBS had given insufficient reasons for that conclusion); and,
>
> (2) The decision was disproportionate.

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

Rule 14: Anonymity

4. The case is subject to an anonymity order made under Rule 14 by a Registrar on 26 September 2024. We were satisfied that this order remained appropriate as it strikes the right balance in this case between the principle of open justice and the rights of the appellant, her children and former partners under Article 8 of the European Convention on Human Rights. It also reflects and respects the approach and orders of the Family Court that have been relied on by DBS in these proceedings.

The Upper Tribunal hearing

5. This appeal was originally listed for final hearing on 13 January 2025. The appellant did not attend, but sent a brief email in advance saying that she was in hospital and wished the appeal to go ahead in her absence. Out of concern for

her health and whether she understood the options that were open to her in terms of requesting a postponement, or stay, we did not proceed on that occasion but made directions for the hearing to be re-listed and the appellant given a further opportunity to attend or express her wishes regarding the appeal. The appellant in response made it clear that she did wish the appeal to go ahead in her absence. She also explained that she was in (unspecified) new employment.

6. The hearing accordingly proceeded in the appellant's absence, but with counsel and solicitor for DBS present. The Tribunal panel heard submissions from counsel and also asked a number of questions with a view to ensuring, in line with the overriding objective, that the appellant's appeal was properly considered despite her absence.

The documentary evidence

7. The documentary evidence before us is the same as the documentary evidence before DBS. Our understanding of it was illuminated by Mr Serr in the course of his helpful submissions.

8. The appellant came to DBS's attention when she applied for a DBS check in relation to engaging in regulated activity with adults. In accordance with its usual procedures, on receipt of such a request, DBS requests information from the police. Derbyshire Constabulary responded on 28 November 2022 with information as follows:

> Derbyshire Constabulary Ref: 103-22/23 Derbyshire Constabulary hold the following information which is believed to be relevant to the application of [LJCB] for the adult workforce.
>
> The information is as follows:
> [LJCB's] unborn child was placed upon a pre-birth child protection plan under the category of neglect on 19th October 2021. This was due to concerns regarding [LJCB's] capacity to safely care for the child, having had a previous child, born in 2015, removed from her care as she was unable to prioritise the child's needs above her own and her abusive partner's.
>
> [LJCB] has had a history of relationships where domestic violence has played a key theme and she has also been dishonest with professionals.
>
> [LJCB's] child born on 6th January 2022 was placed with foster carers under an Interim Care Order on 14th January 2022. [LJCB] was having virtual contact with her child every two weeks. A final hearing for the child's future is due on 7th December 2022.
>
> After careful consideration, the Chief Officer believes that this information is relevant and ought to be disclosed to an employer in this instance because it relates to local authority intervention regarding the

> safeguarding of [LJCB's] children, and she has applied for roles within the adult workforce which involve safeguarding responsibilities.
>
> Disclosure will allow the proposed employer to undertake their part in the process diligently and to properly assess any risk that they feel exists before taking suitable steps to mitigate them.
>
> The interference with the human rights of those concerned has been considered and it has been determined that, in this instance, disclosure is relevant, proportionate and necessary.

9. DBS then appears to have requested disclosure from the appellant's local authority of documents relating to the appellant's child born on 6 January 2022 ("Child B"). The local authority provided DBS with two documents:

    a. Section 47 Investigation and Assessment or Report to ICPC (12 October 2021);

    b. Social Worker Report for LAC Review (18 January 2022).

10. The Section 47 assessment was written when the appellant was approximately 23 weeks pregnant with Child B. It contains some information going beyond that which was contained in the police information set out above. The additional information includes: that the appellant is 29 years' old; that she has a diagnosis of depression; that she may have a learning need, but this is denied by her and undiagnosed; her previous child (Child A) was adopted in 2016 "due to the risk of physical and emotional harm whilst in the care of his parents"; the summary section of the assessment (p 49) refers to the appellant having been subject to a negative parenting assessment as a sole carer for Child A, but the more detailed history (p 42) states that "subsequently" the appellant was given the option of separating from Child A's father in order to care independently for Child A but elected to remain with Child A's father; there were historic concerns about substance and alcohol misuse (including an admission of cocaine use when forced by a previous partner), but the appellant had volunteered to participate in drug and alcohol testing to ensure no remaining concerns; the appellant had recently fled a domestically abusive relationship and was living in a refuge for a period and at the time of the report was living independently in a flat; the appellant lost another baby previously at 20 weeks due to domestic abuse by a previous partner and there is a 5-year non-molestation order in place against him; she engaged with and completed the Freedom programme in June 2021 from which she reported she had learned a lot about dealing with/avoiding abusive relationships; there are two putative fathers for Child B, one of whom the appellant does not want to be in a relationship with and who she recognises as dangerous, and another who she sees as a positive for her and Child B, although she intends to raise Child B on her own if she can; the appellant had agreed to paternity testing to be carried out to establish the true father; there were no known concerns for unborn Child B's health and development, home conditions were appropriate and the appellant was attending all appointments appropriately and

preparing appropriately for baby's arrival; the appellant was removed from her own mother's care when she was younger and may not have a positive role model to show her how to parent her children.

11. The Section 47 assessment recorded the outcome of the Child Protection Conference on 19 October 2021 as being that the threshold for a child protection plan was met for Child B. The reasons given are as follows:

> Whilst there are some positives regarding this case, there is a lack of evidence of sustained change and the concerns remain in place that [LJCB's] unborn child is at significant risk of neglect. It remains a concern for the local authority that [LJCB] has been in domestically violent relationships up until last year where she lost a baby at 22 weeks due to the violence that was perpetrated against her as a result of her previous partner. Whilst it is recognised that since then [LJCB] has completed the freedom programme, there is a limited amount of time to evidence that [LJCB] has fully taken on board the learning that comes with this course and there is a lack of evidence of sustained change has been implemented, as there are also questions regarding the putative fathers … suitability to be potential fathers for unborn [Child B]. It is the view of social care that threshold has been met for a Child Protection plan.

12. The second document, the Social Worker Report, was prepared after Child B's birth on 6 January 2022. It states that Child B was residing with foster carers from 6 January 2022, although the Interim Care Order by the Family Court under section 31 of the CA 1989 seems only to have been made on 14 January 2022. The additional information in this report was as follows: Child B was seeing LJCB three times a week in a local authority contact centre for 1 hr 30 mins; he was very healthy and there were no concerns about his health; LJCB wants him to return to her care and "live as a family unit" but "accepts that necessary assessments need to take place before a decision about [his] long-term care can be made, to ensure that if [he] were to return to their care it would be safe".

13. DBS sent the appellant a Minded to Bar letter on 4 July 2023 indicating that it was minded to include her in the adults' barred list. The appellant made representations in response. In summary, she accepted that she had had problems caring for and safeguarding her child, but she wanted to work in the care sector and with adults and felt like she was being punished by the care system. She said she had made mistakes in her life but now wanted an opportunity to better her life through work as the local authority had advised her to do. She said she was really enjoying the work and did not want to give it up. She said if she had to give up her job, it would exacerbate her depression. *"They've already taken my child, what else are they try to take from me"* (sic).

DBS's decision

14. DBS issued a final decision on 15 September 2023 placing the appellant on the adults' barred list.

15. DBS's letter explained that it was placing her on the list for two reasons: (a) Child B was removed from her care in 2022 "due to concerns about neglect and his safety and welfare whilst in your care"; and, (b) that Child A was removed from her care in 2015 "due to the risk of physical and emotional harm and your inability to protect and prioritise your child's needs above your own".

16. DBS was satisfied in the light of that conduct that she had engaged in relevant conduct in relation to vulnerable adults because it considered that her conduct, if repeated against or in relation to a vulnerable adult, would endanger that vulnerable adult or would be likely to endanger him or her.

17. DBS's letter continued as follows:

> We are satisfied a barring decision is appropriate. This is because following consideration of representations submitted by yourself, alongside the evidence in this case, the DBS remains concerned that you demonstrated poor problem solving and coping skills in relation to being able to protect your children and as a result they have been exposed to neglect, emotional and potentially physical harm, these concerns persisted with evidence of issues in 2016 and again in 2020 and 2022, when although the local authority stated that you had taken some positive steps in regard to recognising domestically abusive relationships; with evidence indicating that more recently you obtained a non-molestation order in regard to an ex-partner and had made Clare's law application in regard to putative fathers of her unborn child, these were insufficient to lower the significant concerns held by professionals involved in the matters relating to child protection. The evidence indicates that there was a negative parenting assessment in 2016 and it is stated that you did not believe you could care for your baby on your own. Whilst concerns remained in 2021 you are reported to have demonstrated insight into why your previous child was removed and had a willingness to work with professionals to keep your baby and look after them as a single parent and whilst your unborn child was placed on a Child Protection Plan it was considered them remaining in your care may have been achievable, however the baby was removed following birth and has subsequently been adopted under a court order, due to the persisting concerns that remained regarding you being able to meet your child's needs.
>
> There are some concerns that you were unable to prioritise the needs of your child over your own need to be in a relationship with the child's father, who was abusive and that concerns persist. It is acknowledged that you were also a victim of the abuse, but despite support you chose to remain in a relationship that placed your child at significant risk of harm. There is evidence that you cared for your unborn child, preparing for their arrival and wanting to work with professionals to keep the child with you and raise them on your own, so whilst there are concerns regarding a lack of empathy, the evidence indicates that you cared for your children and a lack of empathy is not considered to be a causal

factor to the behaviour, which is better explained in poor problem solving and coping skills.

18. Further reasoning in the letter explains why DBS considered that her conduct if repeated against a vulnerable adult would endanger them:

> The evidence in this case indicates there were no concerns regarding home conditions in 2021/22 and you had previously been working with vulnerable adults in a care home for the elderly, although the DBS has no further information in regard to this role, you have not previously come to the attention of the DBS. At the time of the assessment in 2021, although you were not working, you were stated to have been claiming benefits and stated you had no debts. Whilst there are some references to substance misuse there is no evidence of this during your pregnancy in 2021. The DBS does not have concerns that you have an impulsive, chaotic and unstable lifestyle.
>
> When considering if the risks associated with your poor problem solving and coping skills are transferable into regulated activity with vulnerable adults, you were asked to provide evidence from your employer to support your representations, you have not done so and without any information to address or mitigate our concerns we are satisfied that there is a risk that you would not be able to provide safe and appropriate care to vulnerable adults or safeguard those in your care if you were to witness abusive behaviours from those around you. Vulnerable adults rely on their carers to meet their needs and if these are neglected it could result in significant harm, we are concerned that you do not recognise problems where they exist and despite support from professionals have been unable to demonstrate sustained capacity for positive change, if you failed to address issues in the workplace, this could lead to vulnerable adults being neglected. If the behaviour were to be repeated in relation to a vulnerable adult, it could result in significant harm, it is therefore appropriate to include your name in the Adults' Barred List.
>
> …

19. DBS's letter also explained that it had considered whether barring was proportionate and reasoned as follows:

> Any safeguarding decision must take into consideration and balance not only the rights of the individual but also those of the vulnerable groups who may be at risk of harm from them. The DBS must properly consider whether there is a need to impose a preventative mechanism in order to protect the vulnerable.
>
> In considering the proportionality of inclusion in the Adults' Barred List, it is acknowledged that it will result in an interference with your rights under article 8 of the European Convention on Human Rights as it would

> prevent you volunteering or seeking employment opportunities in the future with vulnerable adults.
>
> The evidence in this case indicates this is a sector in which you have experience and may currently be in employment, although nothing is known about the amount of experience or training you have, this is an area in which you are currently in paid employment and a restriction would mean you could no longer remain in this employment and will affect your ability to provide financially for yourself and any dependents you may have.
>
> It is also acknowledged that you may feel some stigma due to inclusion in the Adults' Barred List, however this information is not in the public domain and would only need to be disclosed by you where a legal duty to do so exists.

20. In considering proportionality, DBS went on to emphasise again that the appellant had failed to produce evidence that in DBS's opinion mitigated or addressed the risks it had identified as emerging from the circumstances of the adoption of her two children:

> Currently the DBS has no information that mitigates or addresses the concerns that we hold in relation to your children being removed from your care on two separate occasions due to neglect and you being able to safeguard your children due to persistent concerns in regard to domestically abusive relationships and your ability to make and sustain positive change despite evidence of a willingness to make changes and a recognition of the reasons your first child was removed from your care for their protection in 2016.
>
> If you neglected or failed to act appropriately to safeguard vulnerable adults as you are unable to cope or recognise problems and implement changes to address these where they exist this would represent a significant risk, as vulnerable adults rely on their carers to recognise and meet their needs in demanding environments and the evidence indicates you may not be able to do this consistently and a vulnerable adult may not have the capacity to report concerns, therefore it is appropriate and necessary to safeguard against the identified risk by including your name in the Adults' Barred List.

The appeal to this Tribunal

21. The appellant first emailed the Upper Tribunal seeking permission to appeal on 23 September 2023. She set out grounds of appeal in an email and attached a copy of the DBS's final decision letter. That letter included the appellant's full name and postal address, and email address. It did not state whether she wanted the application to be dealt with at a hearing, but otherwise the appellant's email of 23 September 2023 complied fully with the requirements of rule 21(3) and (4) and (5) of the Upper Tribunal Rules and was a properly instituted appeal.

22. Unfortunately, the appellant's email appears to have been overlooked by the Upper Tribunal's administrative staff. Also unfortunately, the appellant did not chase her appeal until 29 April 2024, when she was informed by a member of administrative staff that she needed to file a UT10 form. This she did on 11 May 2024, providing reasons for why her appeal was now, as she understood the position, "late". However, Judge Stout decided that the appeal was not "late" because the rules do not require appellants to complete any particular form; she formally admitted the appeal, waiving the minor irregularity about the appellant having failed to indicate whether she wanted an oral hearing.

23. In her appeal to this Tribunal, the appellant argued that she did not consider that because she made mistakes with her children she would make mistakes with other people's lives. She said that she was desperate to get back into the care industry. She enclosed a reference from a friend providing further details of abuse the friend believed LJCB suffered as a child and supporting the appellant's claims that she loved caring for residents.

The relevant legal principles

Relevant legal framework for DBS's decision

24. The appellant in this case was included on the adults' barred list using DBS's powers in paragraph 9 of Schedule 3.

25. Under those paragraphs, subject to the right to make representations, DBS must include a person on the list if three conditions are satisfied:-

26. First, the person must have engaged in "relevant conduct" (paragraph 9(3)(a)) which, in summary and in so far as relevant to the present appeal, means conduct which endangers or is likely to endanger a vulnerable adult (paragraph 9 and 10(1)(a)) **or** conduct which, if repeated against a vulnerable adult, would endanger or be likely to endanger them (paragraph 10(1)(b)).

27. Secondly, the person must have been or might in future be engaged in regulated activity in relation to adults (paragraph 9(3)(aa)).

28. Thirdly, DBS must be satisfied that it is appropriate to include the person in the relevant list (paragraph 9(3)(b)).

The Upper Tribunal's jurisdiction on appeal

29. 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 section 4(2)).

30. 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 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 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]).

31. As the Tribunal put it in *PF* at [39], "There is no limit to the form a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or an omission". 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). In that same paragraph Lewis LJ noted that assessment of the risk presented by the person would not be a question of fact, but a matter for DBS as part of the assessment of appropriateness.

32. 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]-[13].)

33. A failure to give adequate reasons is itself an error of law. The standard for reasons in this context is that the DBS must give *"intelligible reasons … sufficient to enable the applicant to know why his representations were of no avail"*: *AB v DBS* [2021] EWCA Civ 1575, [2022] 1 WLR 1002 at [45] *per* Lewis LJ.

34. A mistake of law also includes making a decision to include a person on a barred list that is disproportionate or otherwise in breach of that individual's rights under the European Convention on Human Rights. A person has a civil right to practise a 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]. A barring decision also engages a person's rights under Article 8 of the Convention: see *KS v DBS* [2025] UKUT 045 (AAC) at [40]. Where proportionality is raised as a ground of appeal, it is a matter for the Upper Tribunal to decide for itself whether DBS' decision is compatible with the individual's Convention rights as required by section 6 of the Human Rights Act 1998 (HRA 1998). The Upper Tribunal does not apply a rationality or *Wednesbury* approach, but determines the proportionality question for itself by reference to the well-established four-stage process.

35. As the Upper Tribunal in *KS* held, in most cases, there will be no issue as to the first two stages, i.e.: (1) that the objective of protecting children and vulnerable adults is sufficiently important in principle to justify the limitation of the individual's rights; and, (2) the barring decision is rationally connected to the objective. Stage (3) requires the Upper Tribunal to consider whether a less intrusive measure

could have been used without unacceptably compromising the achievement of the objective. Stage 4 requires the Upper Tribunal to consider whether, in the individual case, the severity of the effects of the decision to bar on the individual are outweighed by the importance of the objective, insofar as barring the particular individual will contribute to achievement of that objective. In determining the proportionality issue, the Upper Tribunal must afford appropriate weight and respect to the view of DBS as the primary decision-maker, the Tribunal must "closely examine the DBS's conclusions, rationale and reasoning" (*KS,* ibid, at [72]) and have regard to the need for public confidence in the system (*KS*, ibid, at [74]-[76]).

36. Although the Upper Tribunal may take into account evidence not available to DBS at the time of its decision, the correctness of DBS's decision is to be judged by reference to the circumstances as they were at the time of its decision: see *SD v DBS* [2024] UKUT 249 (AAC), especially at [22]-[27].

37. Any error of law or fact must be material to the decision in order to amount to a 'mistake' for the purposes of section 4(2) SVGA 2006: *SM v DBS* [2025] UKUT 86 (AAC) at [76].

38. If the Upper Tribunal concludes there is no mistake of law or fact in the decision, it must confirm the decision: section 4(5) SVGA 2006. If the Upper Tribunal concludes that a mistake of law or fact has been made it must by section 4(6) remit the matter to DBS for a new decision or, if satisfied that the only lawful outcome is that the person is removed from the list, the Upper Tribunal must so direct: *DBS v AB* [2021] EWCA Civ 1575, [2022] 1 WLR 1002 at [73] *per* Lewis LJ).

39. If the Upper Tribunal remits a matter to DBS, 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).

Our decision

40. We are grateful to Mr Serr who on behalf of DBS made detailed and helpful submissions at the hearing. We have considered his arguments carefully. We intend no disrespect in not attempting to summarise his arguments here, but only explaining why we have decided to allow this appeal.

(1) Relevant conduct

41. We deal first with the question of whether it was irrational for DBS to conclude that the appellant had engaged in conduct which, if repeated against a vulnerable adult, would endanger or be likely to endanger them.

42. We remind ourselves that irrationality is a high threshold and that we should not conclude that a decision is irrational unless it is one that no reasonable decision

maker could have reached on the basis of the evidence before it. However, we are satisfied that high threshold is met in this case.

43. We accept that in principle a person's neglect of their own child or children could, if that conduct were repeated in relation to a vulnerable adult, constitute relevant conduct in relation to a vulnerable adult for the purposes of paragraph 10(1)(b) of Schedule 3. However, care must be taken in identifying what the conduct is. As we shall explain, the fact that a person has had a child removed from their care in Family Court proceedings does not in and of itself mean that relevant conduct has occurred for the purposes of Schedule 3 to the SVGA 2006.

44. Regulation 10(1)(b) provides that, for the purposes of paragraph 9, "relevant conduct is … conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him". "Conduct" is not further defined in the legislation, but it is an ordinary English word and it ought to need no definition from us. "Conduct" refers to behaviour or actions. It may be distinguished from other human features such as personality traits, learning difficulties, and medical conditions. In this case, for example, DBS referred in its final decision letter to the appellant's *"poor problem solving and coping skills"*. These are not in themselves conduct, they are personality traits or attributes. A person's "conduct" is also not to be equated with other people's concerns or opinions about the risk posed by that person, such as (in this case) the views of social workers or (even) the Family Court. Nor is a person's conduct to be equated with what may have been done to that person in the past (by their own parents or abusive partners) that might render them more or less likely to conduct themselves inappropriately towards others in future.

45. "Conduct" is something that a person has actually done. Those other factors (personality traits, learning difficulties, medical conditions, the view of the Family Court etc) may be relevant to the degree of risk a person poses, so they are not irrelevant factors, but the first 'gateway' to a barring decision is that there has to have been relevant conduct. DBS is not, or should not be, in the business of barring someone simply on the basis of personality assessment.

46. We have considered DBS's final decision letter carefully, and the evidence on which it was based. We find very little in it that actually describes "conduct" by the appellant.

47. DBS's primary 'findings' on which the decision was based were that the appellant had her two children removed from her care. However, that was not conduct by the appellant, that was the result of orders by the Family Court. DBS does not know anything specific about why those orders were made by the Family Court because it has not obtained copies of the orders, or the reasons for which they were made, such as a transcript of the judgments. DBS does not have any of the evidence that was before the court when Child A was removed from the appellant's care in 2015. Nor, apart from the two documents we have detailed above, does it have any of the evidence as to what the circumstances were at the point that Child B was born or any explanation why the situation moved from the local authority considering that Child B needed to be subject to a Child

Protection Plan to the Family Court deciding that Child B needed to be removed from the care of the appellant at birth.

48. In relation to the removal of Child A, DBS states that Child A was removed "due to the risk of physical and emotional harm and your inability to protect and prioritise your child's needs above your own". However, that does not identify any specific "conduct" by the appellant. It is a high level, generic statement which is best described as an expression of opinion by social workers about the effects of conduct by the appellant; what the appellant's conduct was is largely not described in the documents. So far as can be divined, it appears from the history in the Section 47 assessment that social workers would have been prepared to allow the appellant to care for Child A if she had agreed to leave her abusive partner and had been willing to care for Child A on her own. In other words, on the basis of the evidence we have, it appears the local authority did not consider that the appellant by herself posed any significant risk to Child A. Her "conduct" that the local authority considered posed a risk to Child A appears from the documents to consist of her not leaving her abusive partner and keeping Child A with her in a home with an abusive partner. We note that the evidence does not show how old Child A was at the time, but the appellant's own age and the tenor of the documents suggests that Child A was still 'a baby'.

49. As to the evidence in relation to the appellant's "conduct" in relation to Child B in 2022, this is even thinner. At the time that the Section 47 assessment was written, Child B had not been born. There were no concerns at all about the appellant's care for her unborn child. She was attending all medical appointments and making appropriate preparations for the birth of the child. She was single and living in appropriate accommodation. The conclusion of the Section 47 assessment was that a Child Protection Plan was required for Child B. This is unsurprising given the history with Child A, but a Child Protection Plan is, as the name suggests, just a plan that a local authority makes, in conjunction with the child, their family and other professionals as appropriate, as to how to safeguard a child. It does not mean a child is going to be removed from their parent(s) and it does not require a Court order.

50. We do not know what happened at the time of Child B's birth to lead social workers to conclude that an application to the Family Court for an Interim Care Order was required, or why the Family Court decided to make that order and place Child B with a foster family. We see only from the social worker report of 18 January 2022 that the local authority had become "concerned enough for [Child B's] safety whilst in the care of [his mother" that it decided to apply to Court for an Interim Care Order, and that the Court granted that Order. The nature of the local authority's concerns are not identified and we do not have the Court's reasons for its Order. No further "conduct" by the appellant is described in the evidence. Child B appears to have been taken into foster care immediately following birth on 6 January 2022, so there was very little opportunity indeed for the appellant to demonstrate care for Child B.

51. Mr Serr referred in argument to the suggestion (and admission by the appellant) of past substance and alcohol misuse, but the evidence indicates that was not a

current problem at the time of the Section 47 assessment (although there was to be further testing, the results of which we do not have). DBS in its final decision letter proceeded on the basis that there were no such concerns. We consider it was right to do so.

52. It follows that the only evidence of "conduct" by the appellant that we and DBS have is that she has (at least in the past) remained in relationships with abusive men and, in 2015/2016, opted to remain in an abusive relationship because she did not feel she could care for a baby (Child A) on her own. This decision by the appellant is what social workers appear to have described as an "inability to protect and prioritise your child's needs above your own". To the extent that DBS in its decision may have regarded other matters as being "conduct" (such as the appellant's poor problem-solving and coping skills, the making of the orders by the Family Court, or the opinions of social workers about parenting abilities), these could be characterised as mistakes of fact or law and could have formed the basis for successful grounds of appeal in their own right. However, we focus on the first identified ground of appeal, which is whether DBS could rationally regard the appellant's conduct in remaining in an abusive relationship in 2015/2016 as relevant conduct as defined in paragraph 10(1)(b) of Schedule 3 to the SVGA 2006.

53. We do not see how anyone could rationally conclude that her conduct in this respect could be repeated in relation to a vulnerable adult. While we accept DBS's argument that a vulnerable adult may have many of the characteristics of a child (even, of a baby), the risk to Child A arose from Child A being the appellant's own baby for whom she was responsible 24 hours a day and who was living with her and her abusive partner. The risks to Child A were in our judgment specific to the family relationship and living arrangements. A vulnerable adult would not have that family relationship or living arrangement with the appellant. The appellant does not have a vulnerable adult in her family for whom she is responsible. The conduct is not therefore in our judgment conduct that is capable of being repeated by the appellant against or in relation to a vulnerable adult. We conclude that it was irrational for DBS to regard it as being relevant conduct for the purposes of paragraph 9(3)(a) of Schedule 3 to the SVGA 2006.

(2) Proportionality

54. If we are right about Ground (1) above then that is sufficient to dispose of the appeal. We recognise, however, that we may be wrong about how the legislation applies to cases like this. It may be that, for the purposes of deciding whether conduct is relevant conduct within paragraph 10(1)(b), it is only necessary to consider whether, if Child A had been a vulnerable adult, the appellant's conduct would have endangered that vulnerable adult in the same way. That is not what the legislation actually says, hence our approaching Ground (1) as we did. However, if we were wrong about that, then we accept that, if Child A had been a vulnerable adult, the appellant's conduct in refusing to leave her abusive partner would have presented much the same risk to the vulnerable adult as to Child A. Further, although the appellant does not have a vulnerable adult in her family at present, we accept that the definition of "relevant conduct" may require only that

consideration be given to what the situation would be if, at any point whether now or in the distant future, a vulnerable adult were to be in the appellant's care at home as a member of her family. If so, we accept that vulnerable adult would be endangered if the appellant repeated her conduct.

55. If that is how the legislation is to be approached, then we consider that many of the points we have made when considering Ground (1) become relevant instead in relation to Ground (2) and the question of whether it is proportionate to bar the appellant.

56. In accordance with the legal principles we have set out above, the question of whether a barring decision is a proportionate interference with the appellant's civil right to practice a profession, and her Article 8 rights, is a matter for this panel to decide, giving due weight to the view and reasoning of DBS. Applying the approach set out in *KS*, we accept that the first stage of the proportionality test is met: the objective of protecting children and vulnerable adults is sufficiently important in principle to justify the limitation of the appellant's rights.

57. The second stage asks whether the decision to bar the appellant was rationally connected to the statutory objective. At this point, it is in our judgment important to note that although it is often said that the statutory objective is the protection of children and vulnerable adults, that in fact over-simplifies the position in a way that does not matter in most cases, but does matter in this case. The SVGA 2006 scheme does not purport to be a scheme for the protection of children and vulnerable adults in all contexts. It is limited to the sphere of regulated activity. It is the purpose of other frameworks (the criminal law, social services, the Family Court) to deal with risks that arise outside the sphere of regulated activity.

58. Section 5 of the SVGA 2006 defines regulated activity relating to vulnerable adults by reference to Part 2 of Schedule 4 (while regulated activity in relation to child is to be construed in accordance with Part 1 of that Schedule). Although regulated activities as there defined may be carried out in the home environment, section 58 of the SVGA 2006 provides that the Act does not apply to "any activity which is carried out in the course of a family relationship", or "in the course of a personal relationship … for no commercial consideration". Under that section, "family relationships" include not only actual family relationships but also relationships "between two persons who … live in the same household, and … treat each other as though they were members of the same family" and "personal relationship" includes relationships between or among friends or friends of the family.

59. As the risks of the appellant's conduct relate (on the evidence we have) solely to her history of remaining in relationships with abusive partners, the risks are, it seems to us, rationally only capable of arising in the context of activities that she may carry out for children and vulnerable adults in the course of a family or personal relationship. Only such persons are, it seems to us, realistically likely to be at any risk as a result of the appellant remaining in abusive relationships. On the evidence we have, there is in our judgment no rational basis for supposing that her abusive partner(s) (if she has entered into further such relationships)

would visit her at work so that her conduct in remaining in that relationship could pose a risk to children or vulnerable adults in a professional context by exposing them to the risk of abuse or witnessing abusive conduct. There is also no evidence of her conduct when away from her abusive partners (at work or otherwise) posing a risk to children or vulnerable adults. Indeed, DBS specifically accepted that it did not consider that the appellant had a ”an impulsive, chaotic and unstable lifestyle”.

60. We acknowledge that arrangements can be made for children and vulnerable adults to be placed with a carer in the carer’s own home (where risks from a carer’s abusive partner would be real), but arrangements for home placements of this sort (fostering/adult fostering/childminding, etc) are always, in the experience of this panel, subject to detailed vetting of the home circumstances by the placing local authority or Ofsted. In any event, it is clear that DBS did not consider that the appellant’s home circumstances constituted a reason for barring.

61. It follows in our judgment that there was no rational connection between the barring decision and its object of protecting children and vulnerable adults in the context of regulated activity. As such, DBS’s decision to bar fails the second stage of the proportionality test.

62. If we needed to go on, we would conclude that the decision also fails at the third and fourth stages.

63. It fails at the third stage because there are, as we have noted, other frameworks for protecting children and vulnerable adults within the context of personal and family relationships, and for protecting those who are cared for in a non-family relationship within a person’s home. Barring is not therefore the least intrusive means of achieving the statutory objective in the appellant’s case.

64. As to the fourth stage balancing exercise, even if we were wrong at the second stage, and we should have concluded that there was *a* rational connection between the statutory objective and the decision to bar the appellant, we would at the fourth stage have concluded that the *extent* of any risk posed by the appellant in the context of regulated activity is so small that DBS has struck the wrong balance in this case. The risk is small because of the matters we have already identified. The reality is that such risk as there is arises not from the appellant’s conduct, but from personality traits such as poor problem-solving and coping skills. However, there is no evidence that these skills have ever affected the appellant in the context of caring for vulnerable adults. Having poor problem-solving and coping skills is not, without more, evidence from which it can reasonably be concluded a person poses a risk of harm to vulnerable adults. The burden is on DBS to show that it does. DBS’s approach in the decision letter of expecting the appellant to provide evidence that she has been conducting herself appropriately in the workplace inappropriately reverses the burden of proof in this respect.

65. Against the minimal evidence of risk, we must set the impact on the appellant. Although we have not had the benefit of hearing from her in person, and although we note that she has apparently managed to find alternative employment, it is clear from her grounds of appeal that DBS's decision had a significant impact on her, coming as it did so closely after the evidently distressing decision by the Family Court to remove Child B from her care. We accept that DBS's decision had a significant effect on the appellant's well-being and mental health, as well as on her job prospects and, at least in the short-term, her financial situation.

66. In our judgment, the impact on the appellant was disproportionate to the objective of barring in this case.

67. We add this: we have fully taken into account the reasoning in DBS's decision letter in the course of this decision, and have given weight to DBS's views in making our own proportionality assessment. However, the weight we have given to DBS's views has been limited by the errors that we have identified in DBS's understanding of the evidence (or lack of evidence) it had about the appellant's conduct. That said, we do acknowledge and accept DBS's view that, in general terms, the fact that a person has had children removed from their care by the Family Court is a 'red flag' that means their case warrants consideration for barring. However, as we have endeavoured to explain, the mere fact that a child has been removed from a person's care is not enough. In such cases, DBS needs to ensure that it obtains the right evidence, and carefully identifies what that evidence reveals about the individual's conduct that may be relevant to the risk the individual may pose if carrying out regulated activity. The burden is always on DBS to establish that a barring decision is justified in fact and law.

Conclusion

68. For the reasons set out above, we are satisfied that DBS's decision to bar the appellant was mistaken in law. The only lawful decision on the basis of the evidence before us is that the appellant should not be included in the barred list. We direct that the appellant's name is removed from the barred list.

Holly Stout
Judge of the Upper Tribunal

Michele Tynan
Tribunal Member

John Hutchinson
Tribunal Member

Authorised by the Judge for issue on 1 April 2025