Neutral Citation Number: [2025] UKUT 119 (AAC)
Appeal No. UA-2023-001947-V

Rule 14 Order: It is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellant in these proceedings or any school at which he worked.

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:

PC

Appellant

- v -

DISCLOSURE AND BARRING SERVICE

Respondent

Before: **Upper Tribunal Judge Stout**
Tribunal Member Graham
Tribunal Member Heggie

Hearing date(s): 10 March 2025
Mode of hearing: In person (Manchester)

Representation:
Appellant: In person, accompanied by his sister
Respondent: Ashley Serr (counsel)

On appeal from a decision of the Disclosure and Barring Service:
DBS Reference Number: 00977503603
Date of decision letter: 21 March 2023

SUMMARY OF DECISION

SAFEGUARDING VULNERABLE GROUPS (65)

The appellant was included by the Disclosure and Barring Service (DBS) on the children's barred list pursuant to paragraph 3 of Schedule 3 to the Safeguarding

Vulnerable Groups Act 2006 (SVGA 2006) because he had "attempted to pay for, downloaded and viewed indecent images of children". Since the decision, the appellant had been convicted of an offence of possession of indecent images of children so that his case would if it had been considered by DBS at that stage have fallen under the 'auto-barring with representations' provisions in paragraph 2 of Schedule 3. The Upper Tribunal decided that the conviction made no difference to the basis of the appeal which remained against DBS's original decision. The Upper Tribunal decided that there were minor errors of fact in DBS's decision largely as a result of failure properly to take into account the implications of the appellant's diagnosis of Autism Spectrum Disorder. However, the errors were not material. The Upper Tribunal decided there were no mistakes of fact or law in the decision and the appeal was dismissed.

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 that there are no mistakes of fact or law in the decision of the Disclosure and Barring Service. The decision of the Disclosure and Barring Service confirmed. The appeal is dismissed.

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 21 March 2023 including him in the children's barred list pursuant to paragraph 3 of Schedule 3 to the SVGA 2006. The decision was based on DBS's conclusion that the appellant had "attempted to pay for, downloaded and viewed indecent images of children".

2. This is the unanimous decision of the Upper Tribunal. The structure of this decision is as follows:-

This hearing / reasonable adjustments

3. The appellant is now 27 years old. He was diagnosed with Autism Spectrum Disorder (ASD) (sometimes referred to as Asperger's Syndrome) when he was about 13 years old. He is what is often described as 'high functioning', but his communication and social interaction skills are significantly affected.

4. At this hearing, the appellant attended accompanied by his sister, who acted as his representative. The following ground rules had previously been agreed at a case management hearing on 5 February 2025 and were confirmed again at the start of the hearing. Everyone sought to abide by them:

> a. Breaks of 15 minutes approximately every hour, in addition to the normal lunch break;
> b. Additional breaks may be requested as required;
> c. The appellant may bring his own water bottle, with water in it, to the hearing room;
> d. When questioning the appellant, counsel for DBS and the Tribunal will:
>
> i. Keep questions as short as possible;
> ii. Use simple language with as little jargon as possible;
> iii. Use literal language and avoid the use of metaphor and simile;
> iv. Ask only one question at a time (no 'tag' questions);
>
> e. Both the appellant and his sister may make submissions to the Tribunal at the beginning and end of the hearing;
> f. While the appellant gives evidence, his sister will take a 'representative' role. This means that she cannot answer questions for him, but she can raise with the Tribunal any concerns she has about any questions asked (and in particular if they do not adhere to the ground rules). She may also 're-examine' the appellant after DBS and the Tribunal have finished asking him 'open' questions to give him an opportunity to clarify his evidence on any point about which he has been asked by DBS or the Tribunal.

5. The appellant affirmed the truth of the statement dated 15 February 2023 that he had prepared and which had been attached to the representations submitted to DBS on his behalf by his solicitor. He was then asked questions by Mr Serr and the Tribunal as envisaged in the ground rules. His sister also took the opportunity offered by the Tribunal at the beginning of his evidence to ask some supplementary questions, as well as 're-examining' him at the end.

6. At the end of the hearing, both parties had an opportunity to make closing submissions. We took a break after Mr Serr's submissions to allow the

appellant's sister an opportunity to refine the submissions that she had prepared.

7. We record here at the outset that the appellant could not have asked for a better representative than his sister, who has displayed great fortitude and competence in representing him in these proceedings. We note also the support that the appellant has received from other family members.

DBS's decision

8. The appellant was referred to DBS by the school at which he was formerly working as an Advanced Teaching Assistant. DBS sent the appellant a Minded to Bar Letter on 8 January 2023. The appellant, then represented by a solicitor, sent representations in response to that letter, enclosing with the representations a number of references from family members and friends.

9. DBS made a final decision dated 21 March 2023. In accordance with DBS's normal practice, DBS completed a Barring Decision Process ("BDP") document before preparing the final decision letter. The BDP sets out DBS's reasoning more fully than the final decision letter.

10. The evidence that DBS had before it at the time of making the final decision included the evidence supplied by the appellant and the evidence supplied by his former employer and also information from the relevant Local Authority Designated Officer (LADO).

11. In summary, DBS found that the appellant attempted to pay for illegal material, that he "went to great lengths to access the 'dark web'", that he attempted to purchase a file on a dark web pornographic website that stated that everyone featured on the website was over the age of 18, but did not succeed in paying. DBS found that the appellant then visited a different pornographic website, assuming that all websites did not contain images of anybody under the age of 18, and downloaded a zip folder for free.

12. DBS noted the appellant's admissions that he was addicted to pornography, and that he masturbated while viewing indecent images of a child/children, but also recorded that he said he was masturbating to 'the sexual act' and not in response to the child/children. DBS noted that he said he did not realise they were indecent images until after he had masturbated. DBS noted that he viewed the images a second time a few days later to check whether what he had seen "was real". DBS concluded that the appellant must have known at the time that the images to which he masturbated involved children. DBS noted, though, that the appellant said he was disgusted by what he had seen, and informed a friend and also his mother.

13. DBS further noted that the appellant has "an interest in Anime" (Japanese animated films) and that he accepts he has pictures of Anime characters on his computer about which he said, "all characters are fictional and over the age of 18 irrespective of appearance". DBS took into account that he felt the animated

characters looked like adults and that he considered his interest in Anime had been misrepresented as evidence of a sexual interest in children. DBS also took into account that "you, your solicitor and members of your family have said that you would not engage in viewing indecent images of children again". However, DBS concluded that he did have a sexual interest in children and that this gave rise to risk to children emotionally and physically should he work in regulated activity in the future.

14. DBS found that the appellant had taken steps to address his behaviour by admitting his addiction and completing the Safer Lives programme, finding new hobbies, implementing controls on his computer use and access. DBS found that there was no evidence of the appellant having engaged in any inappropriate behaviour with any pupils in the schools where had worked.

15. DBS considered the appellant's rights under the European Convention on Human Rights (ECHR). DBS took into account the appellant's diagnosis of ASD. DBS acknowledged that barring would prevent him from pursuing his chosen career in education and any other employment and work with children in regulated activity settings, that this would reduce his earnings potential and affect his lifestyle and dependents, as well as adversely effecting his mental health. However, DBS considered that there was no less intrusive way of safeguarding children and that it was appropriate and proportionate to include him in the children's barred list.

The grant of permission to appeal

16. The appellant was granted permission to appeal by Judge Butler following an oral hearing. Judge Butler did not formally limit the grant of permission, but did identify the following specific factual findings of DBS as being arguable mistakes of fact and/or law (in the sense of being inadequately reasoned or evidenced):

    a. DBS's finding that the appellant attempted to pay for indecent images of children, rather than that he attempted to pay for images of persons aged 18 and over;
    b. DBS's finding that the appellant viewed the indecent image (video) of a child a second time rather than just that he accessed the dark web a second time;
    c. DBS's finding that the appellant must have realised the female in the video was a child at the time that he masturbated, and not just subsequently as he said;
    d. DBS's finding that the appellant went to great lengths to access the dark web, when in fact it was straightforward (and not illegal) to do so;
    e. DBS's failure to address the substance of the references that the appellant had provided, and to take those into account when considering what risk he poses to children;
    f. DBS's failure to take into account the appellant's ASD diagnosis, and his difficulty identifying body language and facial emotion when considering the relevance of his statement that 'it was weird because the kids didn't look like they were in distress'.

17. In addition, Judge Butler considered that it was arguable that the decision to bar the appellant was disproportionate.

Developments since DBS's decision in this case

18. Since the grant of permission in this matter, DBS has obtained further disclosure from the police and the appellant has on 6 February 2025 pleaded guilty to, and been convicted of, possession of prohibited images of a child contrary to sections 62(1) and 66(2) of the Coroners and Justice Act 2009. He was sentenced to 80 hours of unpaid work (community service) and 30 days of Rehabilitation activities, His desktop, laptop and other devices were confiscated and he was ordered to pay £199 financial penalty. He was also made the subject of a Sexual Harm Prevention Order (SHPO), to last until 5 February 2030. The SHPO places significant restrictions on his use of electronic devices and the internet, and also prevents him from teaching or instructing, either paid or in a voluntary capacity, any child under the age of 18. It does not prevent him working 'with' young people, as an amendment was made to the standard order by the Magistrates' Court, according to the appellant's sister in order to ensure that he was able to keep the new job that he has obtained in the hospitality industry.

The relevant legal principles

Relevant legal framework for DBS's decision

19. The appellant in this case was originally included on the children's barred list using DBS's powers in paragraph 3 of Schedule 3 to the SVGA 2006.

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

    a. The person has engaged in "relevant conduct", i.e. conduct which endangers or is likely to endanger a child (Sch 3, paragraph 3 and 4(1)(a)) **or** has engaged in conduct which if repeated against a child would endanger or be likely to endanger them (paragraph 4(1)(b));
    b. The person has been or might in future be engaged in regulated activity in relation to children; and,
    c. DBS is satisfied that it is appropriate to include them in the relevant list.

21. "Endangers" means (in summary) that the conduct harms or might harm the child: see Schedule 3, paragraph 4(4).

22. By paragraph 4(1)(c) of Schedule 3, "relevant conduct" specifically includes "conduct involving sexual material relating to children (including possession of such material)". By paragraph 4(3), "Sexual material relating to children" means "(a) indecent images of children, or (b) material (in whatever form) which

portrays children involved in sexual activity and which is produced for the purposes of giving sexual gratification". By paragraph 4(4), "image" means "an image produced by any means, whether of a real or imaginary subject".

23. The appellant's conviction for possession of prohibited images of a child contrary to sections 62(1) and 66(2) of the Coroners and Justice Act 2009 means that he would, if DBS had taken its decision subsequent to that conviction, have been subject to paragraph 2 of Schedule 3. By virtue of regulation 4(5) and paragraph 2(f) of the Schedule to the *Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 (SI 2009/37)* the appellant's offence is one of the criteria prescribed for the purposes of paragraph 2. That paragraph provides as follows:

> ***Inclusion subject to consideration of representations***
>
> **2**
> (1) This paragraph applies to a person if any of the criteria prescribed for the purposes of this paragraph is satisfied in relation to the person.
>
> (2) Sub-paragraph (4) applies if it appears to DBS that—
> (a) this paragraph applies to a person, and
> (b) the person is or has been, or might in future be, engaged in regulated activity relating to children.
>
> (4) DBS must give the person the opportunity to make representations as to why the person should not be included in the children's barred list.
>
> (5) Sub-paragraph (6) applies if—
> (a) the person does not make representations before the end of any time prescribed for the purpose …
>
> (6) If DBS
> (a) is satisfied that this paragraph applies to the person, and
> (b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, it must include the person in the list.
>
> (7) Sub-paragraph (8) applies if the person makes representations before the end of any time prescribed for the purpose.
>
> (8) If DBS
> (a) is satisfied that this paragraph applies to the person,
> (b) has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and
> (c) is satisfied that it is appropriate to include the person in the children's barred list,
> it must include the person in the list.

24. As can be seen, if someone to whom one of the criteria prescribed for the purposes of section 2(1) applies fails to make representations, they must automatically be included on the barred list: section 2(6). If they do make representations, however, then, just as with cases falling with paragraph 3, DBS

must decide whether it is appropriate to include the person in the children's barred list. Barring is not 'automatic' where representations have been made.

The Upper Tribunal's jurisdiction on appeal

25. 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)).

26. A mistake of fact is a finding of fact that is, on the balance of probabilities, wrong in the light of any evidence that was available to the DBS or is put before the Upper Tribunal; a finding of fact is not wrong merely because the Upper Tribunal would have made different findings, but neither is the Upper Tribunal restricted to considering only whether DBS's findings of fact are reasonable; the Upper Tribunal is entitled to evaluate all the evidence itself to decide whether DBS has made a mistake (see generally *PF v DBS* [2020] UKUT 256 (AAC), as subsequently approved in *DBS v JHB* [2023] EWCA Civ 982 at [71]-[89] per Laing LJ, giving the judgment of the Court and *DBS v RI* [2024] EWCA Civ 95 at [28]-[37] per Bean LJ and at [49]-[51]).

27. 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.

28. 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].)

29. It 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 Article 8 of the European Convention on Human Rights: see *KS v DBS* [2025] UKUT 045 (AAC). 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.

30. 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]).

31. 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].

32. 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.

33. 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].

34. 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).

35. 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).

The significance of the appellant's conviction to DBS's decision and this appeal

36. Before we set out our findings of fact and deal with the grounds of appeal in this case, we need to say something about the significance of the appellant having been convicted subsequent to DBS's decision.

37. As noted above when setting out the legal framework, DBS's decision to bar the appellant was made under paragraph 3 of Schedule 3 to the SVGA 2006, but the fact of the appellant's conviction for possession of indecent images means that, if his case were considered now by DBS, it would need to be considered under paragraph 2 of Schedule 3, the so-called "auto-barring with representations" provision.

38. We considered at the start of the hearing what implications this has for this appeal. After discussion with parties, we indicated that it appeared to us that it made no difference of principle for the following reasons. The parties agreed.

39. Our task is to decide whether any of the grounds of appeal succeed by reference to the circumstances as they were at the time of DBS's decision, at which point the appellant had not been convicted (and nor did he otherwise fall within paragraph 2 at that point). Counsel for DBS confirmed that DBS was not intending to review its decision to make a fresh decision under paragraph 2.

40. We noted that although paragraph 2 is referred to as an "auto-barring" provision, in fact where representations have been made, DBS has in principle exactly the same discretion under paragraph 2 as it does under paragraph 3 to determine whether it is appropriate to include someone on the barred list. Further, in principle, the conviction changes little that is relevant to DBS's statutory task of protecting vulnerable adults and children: the same conduct has occurred and the same risk arises whether someone has been convicted for it or not. However, we acknowledge that there may be some different considerations. In this case, for example, the appellant has with his conviction been made the subject of a Sexual Harm Prevention Order. If DBS were taking its decision now, it would need to take into account the terms and effect of that order and consider whether it was necessary also to bar the appellant in order to achieve the statutory safeguarding purposes. The fact of the conviction may also make a difference to what would be expected of DBS in terms of the need to ensure public confidence in the scheme.

41. This appeal, however, lies against DBS's decision of 21 March 2023 and must be determined by us by reference to the circumstances as they were at that date, and without taking into account the conviction itself.

The evidence and our findings of fact

42. We have taken full account of the appellant's evidence at the hearing, but we do not attempt to summarise it in this decision, other than to the extent that is necessary to deal with the grounds of appeal and to explain our decision. Our findings of fact are made on the balance of probabilities. In this section of the judgment, we simply record the findings we have made on the basis of the evidence before us. It does not follow that, simply because our findings differ from DBS, we consider that DBS has made any material mistake of fact in the decision. We deal with the question of whether DBS has made any such mistake when considering the grounds of appeal below.

43. The police disclosure received subsequent to DBS's decision shows that forensic imaging of the appellant's devices, seized from his home on 15 March 2022, located 4,568 prohibited images of children on his devices, of which 2,179 were live and accessible to the user. The creation date/time range of imagery was from 19 March 2019 to 13 March 2022. The police disclosure does not include formal confirmation as to the categorisation or content of these images. Specimen images are described in the police letter to DBS of 16 December 2024 as "prohibited images of female children aged approximately 8-12 years".

44. The police letter records an admission by the appellant of having viewed one video file on the dark web of a female child, believed to be around 11 years old, performing oral sex on an adult male, that the appellant felt sick after viewing it and deleted it.

45. The appellant and his sister tell us that the images found were all cartoon or animated images, that they were multiple images from the same four animated stories, and that they were categorised by police as Category C. We broadly accept what they tell us about the images as it would be consistent with the charges brought and the sentence imposed on conviction. It is also consistent with the police letter of 16 December 2024 which refers to the images 'depicting animated characters, such as monster girls engaging in sexual activity with each other, and adults', although it is unclear as to whether this is a reference to the images found on his device or to the appellant's admissions to police about his interests. However, we note that, given the appellant's admission that he had used the dark web to download, but then delete, a video involving a real child, we would expect at least a trace of this to have been located on his devices by forensic imaging, so it may be that not *all* of the images found were animated ones.

46. The police report and transcript of the appellant's police interview on 15 March 2022 has been provided. The interview was conducted without the appellant having an appropriate adult present, and without a solicitor, despite his family's efforts to ensure that he received such support because of his ASD diagnosis. The appellant says that he went ahead with the police interview without another adult or solicitor because he understood from the police officer that it would be better for him to do so and that, if he helped the police, he would be "on his way" more quickly. It is apparent from the transcript of the beginning of the interview that the appellant did not initially understand the caution. It had to be explained to him again, as a result of which he said that he would "try to be as honest as possible now". He went on in the interview to make multiple extensive admissions against his own interests.

47. We acknowledge the concerns that the appellant and his family have about the way this interview was conducted. It was readily apparent to us that, consistent with his ASD diagnosis, the appellant's communication and interaction skills are quite significantly affected, so instinctively we would have expected arrangements to be made for the appellant to have a solicitor or appropriate adult with him in the police interview. The transcript of the interview leaves us

doubtful as to whether the appellant properly understood the terms or effect of the caution, or his right to remain silent.

48. However, as a panel we have no expertise in criminal procedure, we are not dealing with a criminal case, and nothing in that interview was in the end relevant to the matter for which he was convicted, which was based simply on the images that were found on his device. The only question for us is whether we can fairly rely on what he said in the police interview, insofar as it is relevant to this appeal and DBS's barring decision. Given that the purpose of the scheme under SVGA 2006 exists to protect vulnerable adults and children, we do not consider that it would be right for us to discount the police interview on the basis of the concerns that have been raised about how it was conducted. What matters in this appeal is how much of what the appellant said to the police constituted reliable evidence as to his activities, knowledge and state of mind.

49. The appellant and his sister urge us to discount some of what he said in that interview on the basis that he 'exaggerated' in order to 'please' the police by 'telling them what they wanted to hear' so that he 'could get away quicker'. This particularly relates to what he said during the course of the interview about how he perceived the ages of the children (real or animated) in the images/videos that viewed. The appellant says that he told police he thought they were younger than he really thought they were because that is what he thought the police wanted to hear. We do not wholly accept this. The general impression that we gain, from the records of what the appellant said when he was arrested, and what he said during the interview, was that the appellant was relieved to have been 'caught'. Indeed, he said as much at several points in the interview, eg. p 193 where he says he *"won't be saying no comment at all"* as he *"just want[s] to get it out … of [his] system and get some legal advice at the same time"* and p 202 where he says that he is *"really glad that I've been arrested today because otherwise I would have gone further down"*. It seems to us that he had been (whether consciously or not) struggling with his sexual feelings for some time, and that he took the interview as an opportunity to unburden himself to an apparently friendly police officer who asked him open questions in an apparently understanding and relatively sympathetic manner. We therefore consider that we can broadly rely on what the appellant said during his police interview.

50. What we take from that interview, together with the appellant's evidence at this hearing, that is relevant to this appeal is as follows.

51. The interview lasted 1 hour and 10 minutes. The appellant during the course of the interview provided the police officer with extensive, intimate details about his sexuality and personal sexual history from his early teenage years onwards. He described how he had become interested in Anime since he was introduced to it by a friend when he was about 14, and how this had developed into a sexual interest in pornographic animation. He explained that all the characters were animated and 'not real'. Some were monsters or half monsters, some appeared to be young girls, others appeared older.

52. The sexual animations/images that the appellant accessed were all produced with disclaimers that say that the characters portrayed are over 18. The appellant's case is that he genuinely believed these disclaimers. It was suggested to him by counsel for DBS at this hearing that he cannot have done so, and that he must have known the characters were under 18, as when he was asked by police what age he thought these characters were he said "11 or 12".

53. We have considered carefully what we make of the evidence on this point, both by reference to what the appellant said in the police interview and what he said to us at this hearing. The conclusion that we draw is that the appellant did genuinely believe the disclaimers. It is apparent from the evidence we have of his communication and interaction that he does take language literally. Although we do not have independent expert evidence on the point available, all members of this Tribunal panel have substantial experience in special educational needs. We accept what the appellant says about this being a feature of ASD. We find that he genuinely thought that the disclaimers meant it was lawful to view this sort of material. We find he also genuinely believed that it was not illegal to watch animated pornography of any sort. This is apparent from his whole conduct, and also in particular the police interview at p 221 where he says as much.

54. However, we do not consider that it follows that he also believed that these animated characters *looked* over 18. Although we accept what the appellant and his sister say about another feature of his ASD being that he has more difficulty than most people in judging ages, in evidence to us, he explained what he said to police about the characters looking 11 or 12 as being what he thought the police would see when they looked at them. We consider the appellant was being truthful about that and what it means is that he recognised that these were images that looked like children, even though he simultaneously genuinely believed the disclaimers that they were 'in fact' over 18. He had been justifying his conduct to himself on that basis, as well as on the basis that they were 'only' animations and 'not real'. We acknowledge that the notion that an incorporeal animated character can 'be' a different age to the age it 'looks' may seem irrational, but humans are not always rational and we are in this decision simply recording the conclusions we have reached about how the appellant thinks.

55. The appellant in his police interview also describes his sexual interest in terms of attraction to petite, flat-chested women. He told police about a relationship he had with an adult woman, older than him, who fitted that description.

56. When he was arrested, police searched his house and, in addition to his electronic devices, seized a box the appellant had with three 'fleshlights' (artificial vaginas for use as male masturbation devices). The box depicted cartoon images of young girls and the police officer who interviewed the appellant suggested to him that the 'fleshlights' appeared to represent young females. The appellant's response was that the box said that the 'characters' were all women who lived alone, so again the appellant believed that 'they' were over 18. Again, we accept his evidence on this point on the same basis, and

with the same substantial caveat, as we have accepted his evidence about disclaimers above.

57. We asked the appellant at this hearing whether he recognised that the body types he appeared to be seeking out are body types that look like children. He said that he did now, but he did not really at the time, although there are indications (eg p 225) of the police interview that he recognised the contribution that this aspect of his sexuality had to 'leading him down this path'. At this hearing, he said that this was something that had been addressed in his Safer Lives program, and that he had learned that it is not illegal to have sexual thoughts about children, what is illegal is to act on those thoughts. He described how he has learned to address those thoughts, and his pornography addiction generally, by becoming much more sociable, taking up new hobbies, and taking cold showers.

58. Both to the police and to us, the appellant denies having ever thought about real children in the way that he thought about the animated characters. We accept that to some extent, but we consider that he had at some point begun to realise, whether he ever properly acknowledged that to himself or not, that he might be sexually attracted to real children. We draw that inference from parts of the police interview such as p 219 where the appellant acknowledges including the word "young" in the search terms he used online, and also p 213 where, when asked by police about whether he had viewed real life child pornography, he said that he had, although it was "difficult to find" and described a few images/videos he had seen in addition to the one he later downloaded from the dark web (p 213).

59. We accept the appellant's evidence to us at this hearing, consistent with his written evidence previously, that accessing the dark web is unfortunately relatively easy for someone with even average IT skills and requires only the downloading of a different browser from an open-access source on the ordinary internet. We accept the appellant's evidence to us that he was drawn to investigate the dark web because some animated material that he had seen on YouTube could be obtained on the dark web. However, we infer both from his developing interests as outlined above, and from what he clicked on once on the dark web, that he was also at least curious to see what child-appearance pornography he could access.

60. Once on the dark web, he looked at a number of sites out of general interest as to what is available on the dark web, but also navigated to a pornographic site that advertised itself as including child pornography, bestiality, necrophilia and other material. This site included a disclaimer that in fact there was no such real material on the site and all participants were over 18. Our conclusion about the appellant's belief in this disclaimer applies equally here. However, he tried to access the site because of his interest in the kind of images that it advertised itself as containing. That includes the child pornography.

61. This first site was behind a bitcoin paywall. The appellant used PayPal to convert some money into bitcoin and tried to access the site, but it did not work. We

accept his evidence that it was not difficult for someone with average IT skills to use PayPal to convert money to bitcoin. We also accept the appellant's evidence, despite the submissions of counsel for DBS, that he did not see any particular significance to the use of bitcoin as being an 'untraceable' currency that would only be used for illegal activities. We accept the appellant's evidence that he was naïve about such matters and that his general sense at the time was that bitcoin was just a 'growing currency'. In this respect, we note from the police interview that the appellant has no particular technological expertise and was unfamiliar with some technology that the police asked him about, such as peer-to-peer sites (p 225).

62. The appellant then navigated to another site which allowed him to download a zip folder of material for free, from which he opened and watched one real child pornography video. This is the video which he said in evidence at this hearing he did not realise involved a child until the end of the video. He said that at that point, he felt physically sick, deleted the video and later told his mother and friend about it. We do not wholly accept his evidence about the point at which he realised the video involved a child. The appellant describes how the child's face was on screen at the start of the video 'talking to herself'. Even allowing for the make-up, and the appellant's difficulties with judging ages, there is an inconsistency in what the appellant says about only realising when he saw the child's face unobscured at the end of the video, given that he also describes her face being unobscured at the start. At this hearing, he said that the reason he did not realise at the start of the video was that the child *"just treated it like a normal situation – that is why I did not think it was wrong at the time until the video ended"*. In other words, we find, it was the fact that the child did not appear to be in distress or being abused that initially made him think there was nothing wrong, rather than any belief he had about her age. These factors, together with the findings we have already made about what the appellant was looking for on the dark web, lead us to conclude that he must have known from the start of the video that she looked like a child, even if he did not realise until the end that she must actually be a child. We do, however, accept that at the end of the video he felt disgusted with himself and that this is why he felt the need to tell someone about what had happened.

63. We also record here that we accept that the appellant did not view this particular video a second time. His solicitors got this point wrong in the representations they prepared for him to send to DBS (p 72). They seem to have misunderstood his statement which was appended to those representations, which is (we note) not as clear on this point as it might be. However, we accept that what he meant in his statement was that he went back on the dark web generally to check what he had seen, but he did not re-watch this video. We accept his evidence in this respect because he had downloaded this video and so did not need to go back on the dark web to find it. He wrote in the statement (which he swore at this hearing was true): *"I did go back on the dark web one more time after a couple of days but only for the fact that I wanted to see what I saw was real, and it was. I told my friend, and I told my mum. I was disgusted at what I did and I couldn't keep it a secret. My friend had reported me and told me weeks later after my mum told me to delete the files to ensure I don't look at them again, and I did*

delete them." We note that it is apparent from this statement that the appellant did not immediately delete the video (as he has said elsewhere), but only after his mum told him to. We consider his statement is likely to be the most reliable evidence in this respect as it was what he wrote closest to the time.

The grounds of appeal

64. We deal first with the six alleged mistakes of fact in DBS's decision. We approach these in the light of the evidence and our findings of fact as set out above. In each case, we consider first whether there was a mistake in DBS's decision and then whether that mistake is material, whether individually or cumulatively with any of the other errors. We then deal with the ground of appeal based on proportionality.

DBS's finding that the appellant attempted to pay for indecent images of children, rather than that he attempted to pay for images of persons aged 18 and over

65. We find that there was a minor error in DBS's conclusion in this respect. On our findings of fact, the appellant attempted to pay for indecent images of people who look like children, albeit that he believed the disclaimer that they were over 18 so that it would be lawful.

66. We do not consider that this error makes any material difference either on its own or when taken with the other errors we deal with below. The concern of the barring scheme is the protection of children and vulnerable adults. It makes very little difference to the risk that the appellant poses to children that he was attempting to pay for images that he believed looked like children albeit that he believed they were in fact over 18. That is so both in terms of the general risks posed to children by child pornography and the specific risk posed by the appellant.

67. We accept the submission by counsel for DBS that the risk posed to children by the child pornography industry generally is fuelled by people who wish to watch material that looks like that, whether or not it involves real children. That is why section 64 of the Coroners and Justice Act 2009 defines images of children for the purposes of the sections under which the appellant was convicted as including imaginary images, and why paragraphs 4(3) and 4(4) of paragraph 3 of the SVGA 2006 contain similar provision. The progression of the appellant's own internet activities shows how easy it is for one thing to lead to another. We accept DBS's submission that willingness to watch pornography involving images that look like children is capable of fuelling that industry and indirectly increasing the risk to real children from the actions of others.

68. So far as the appellant himself is concerned, we cannot see that it makes any material difference to the risk posed by him personally that he believed he was seeking to pay for images of over 18s. DBS concluded that he had a sexual interest in children and the material before us leads us to conclude that DBS was not wrong about that. We say that because what is meant by 'a sexual interest in children' is, consistent with the way the law approaches indecent

imagery, a sexual interest in people who look like children. It is an interest that the appellant has sought to pursue while remaining on the correct side of the law (albeit that he misunderstood the law and naively considered the disclaimers were keeping him on the right side of the law). It is also an interest that had only just begun to lead him to cross the boundary between imaginary and real children, and he was disgusted at himself when he crossed that boundary. Nonetheless, the sexual interest is there and that presents a risk that circumstances might arise in which that risk would manifest with a real child. The assessment of that risk is primarily a matter for DBS, but in this case, we share DBS's view that the areas of factual dispute raised on this appeal make no significant difference to the assessment of risk. We find that the factual error was not therefore a material mistake.

DBS's finding that the appellant viewed the indecent image (video) of a child a second time rather than just that he accessed the dark web a second time

69. DBS did make a mistake in this respect, although it cannot be criticised for this error because the appellant's solicitors made the same error in their submissions to DBS on his behalf. The error is not, though, material for the reasons we have already identified above. Further, as it is apparent from the police interview that this video was not in fact the only real child pornography that the appellant had ever watched, it is even more clear that it is immaterial whether or not he had watched one video twice.

DBS's finding that the appellant must have realised the female in the video was a child at the time that he masturbated, and not just subsequently as he said

70. DBS did not make a material mistake in this respect as the appellant did realise from the start of the video that the female at least looked like a child. The distinction between the appellant believing she looked like, rather than actually was, a child makes no material difference to risk for the reasons we have set out above.

DBS's finding that the appellant went to great lengths to access the dark web, when in fact it was straightforward (and not illegal) to do so

71. We have found as a fact that it is relatively straightforward to access the dark web, so that DBS was wrong to say that the appellant "went to great lengths" to do this. However, this is immaterial. What matters is that the appellant did not accidentally stumble on the dark web. He went there deliberately as we have set out in our findings of fact.

DBS's failure to address the substance of the references that the appellant had provided, and to take those into account when considering what risk he poses to children

72. It is unfortunate that the decision-maker at DBS did not read the appellant's references properly and referred to them as being from the appellant, his family and solicitors, when in fact they included at least one, quite powerful, reference

from a long-standing friend with some professional understanding of the issues. It would have been better if DBS had also acknowledged specifically that these references not only said that they did not believe the appellant would do this again, but that in their experience of him he did not display any sexual interest in children. However, we do not consider that there was any material mistake of fact or law in DBS's decision in this respect. In a case such as this which is concerned with a person's intimate thoughts and actions, which people may be able to conceal from even their closest family and friends, it is usual, and perfectly rational, for a decision-maker to place little weight on references as DBS has done in this case. We would have done the same. We do not therefore find that the minor factual error as to the identity of the referees was a material error of fact. Further, DBS's obligation to give adequate reasons does not require it to spell out the content of the references. The references were a relevant factor and DBS properly took them into account. The weight that DBS gave to the references was a matter for DBS. There was no material mistake of fact or law in the decision in this respect.

DBS's failure to take into account the appellant's ASD diagnosis, and his difficulty identifying body language and facial emotion when considering the relevance of his statement that 'it was weird because the kids didn't look like they were in distress'

73. The appellant's statement that 'it was weird because the kids didn't look like they were in distress' was mentioned in the BDP document as an indicator in favour of barring. The appellant's argument is that DBS failed to acknowledge the connection between the appellant saying this and his ASD diagnosis. The appellant also argues that, as we have ourselves found in our findings of fact above, the appellant's ASD is relevant to any understanding of how and what he was thinking.

74. We consider that the link between the appellant's ASD and his behaviour could have been recognised by DBS to a greater extent than it seems to have been. However, it cannot be said that DBS wholly failed to take the appellant's ASD into account as it clearly features in the decision.

75. Nor do we consider that DBS materially erred in any respect as regards the appellant's ASD diagnosis. The essence of the appellant's argument is that his ASD explains some of his behaviour and makes it less 'culpable'. We agree, but we do not consider that these factors have much bearing on the decision that DBS has to make. The scheme under the SVGA 2006 is not concerned with punishment, or with any assessment as to a person's culpability for the relevant conduct that gives rise to a risk to children/vulnerable adults. Those are the preserves of the criminal law. The scheme under the SVGA 2006 is concerned solely with the protection of children and vulnerable adults. If DBS considers a person poses a risk, it is unlikely to make a significant difference to whether it is appropriate to bar that person that the risk in part arises from a particular condition from which that person suffers.

76. In this case, taking the appellant's ASD properly into account has resulted in us reaching the conclusion that there were a number of factual errors in the

decision, but that those errors were immaterial for the reasons we have explained. This ground of appeal is also not therefore one that amounts to a material error of fact or law in the decision.

Proportionality

77. In accordance with the legal principles we have set out above, it is for us as a Tribunal to decide whether the barring decision in this case constitutes a proportionate decision that is compatible with the appellant's rights under the ECHR, which include his rights to privacy, family life, reputation and his civil right to practise his profession as a teaching assistant and to work with children generally. In doing so, we afford appropriate weight and respect to the view of DBS as the primary decision-maker and take full account of DBS's reasons for its decision as set out in its final decision letter and the BDP document.

78. We are satisfied that the objective of protecting children and vulnerable adults is sufficiently important in principle to justify the limitation of the appellant's rights and that the barring decision is rationally connected to the objective. We found no other material error of law or fact in DBS's decision and we accordingly afford DBS's views on proportionality in this case a high degree of respect.

79. In particular, we have decided that DBS was not wrong to find that the appellant has a sexual interest in children (as we have defined and explained what that means above). People who have a sexual interest in children in principle pose a risk of very serious harm to children. We recognise that the likelihood of such a risk eventuating in the appellant's case is towards the lowest end of the scale for people with such an interest, but it cannot be discounted. Although he has done some work to address that risk through Safer Lives, and will do more now through the rehabilitation order to which he is now subject following his conviction, much more time will need to pass without further incident or relapse before the risk that the appellant poses could in our judgment be regarded as having significantly reduced. We are in any event concerned with the position as it was at the point in time that DBS took its decision. That was only about a year after the appellant's arrest.

80. We have considered whether the risk that the appellant poses to children could reasonably have been prevented or reduced by other means. However, there were no other measures available to DBS, and at the time of DBS's decision no other authority had taken any action in relation to the appellant at all. We are therefore satisfied that, at the time of DBS's decision, barring was the only means of addressing the risk posed. Now there is an SHPO in place, which is a change of circumstances that might affect the balance of the proportionality decision, but that is not a matter for us on this appeal.

81. That leaves the question of whether the severity of the effects of the decision to bar on the appellant are outweighed by the objective of barring in his case. We are satisfied that they are. Although the appellant has been prevented from continuing in the profession in which he and his family had invested time and money in him training and qualifying, and in which he wanted to work, his age,

cognitive ability and level of education are such that, even at the time of DBS' decision, it could reasonably be anticipated he would in time find alternative employment (even taking into account his ASD). As a matter of fact, he has found alternative employment. DBS in its decision also correctly identified that other aspects of the appellant's private and family life and reputation would be affected. We are satisfied that the decision to bar in this case struck the appropriate balance between the appellant's private rights and the public interest in the protection of children.

Conclusion

82. For all these reasons, we conclude that there was no mistake of law or fact in DBS' decision and we dismiss the appeal.

Holly Stout
Judge of the Upper Tribunal

Roger Graham
Tribunal Member

Josephine Heggie
Tribunal Member

Authorised by the Judge for issue on 27 March 2025

Annex: Reasons for Rule 14 Anonymity Order

1. A Rule 14 Order had previously been made by an Upper Tribunal Registrar, but only related to certain redactions to the bundle. This notwithstanding, the Upper Tribunal had anonymised the appellant's name on the cause list for this hearing. As a Tribunal, we did not seek to correct this as we anticipated that the appellant may be under the assumption that anonymisation was automatic. It is not. At the start of the hearing, we asked the appellant if he wished us to make an order anonymising him in these proceedings. He confirmed that he did. DBS had no objection.

2. We bear in mind that we should not order a restriction on publication simply because both parties seek it: see *X v Z Ltd* [1998] ICR 43, CA. However, in this case, we are satisfied that the private interests of the appellant are such that it is appropriate to protect those interests by anonymising him at the hearing and in this judgment. Our reasons for so concluding are as follows.

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

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

4. Article 6(1) of the European Convention on Human Rights (ECHR) provides that: *"Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of…"* and then a series of reasons are listed, including: *"the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice"*.

5. Numerous cases have emphasised the link between open justice and the right under Article 10 of the European Convention of Human Rights to freedom of expression and have provided guidance on the nature of that right, including stressing the importance of names to the exercise of that freedom (see, in particular, *Khuja v Times Newspapers Limited and ors* [2017] UKSC 49, [2019] AC 161 at [14]-[30]). Section 12(4) of the Human Rights Act 1998 (HRA 1998) requires the Court to have *"particular regard to the importance of the Convention right to freedom of expression"* when considering whether to make any order that might affect the exercise of that right. This is not a case in respect of which there has been any press interest, nor does any seem likely. That does not affect

the principles we have to apply, but it does mean there is no one who can realistically be notified as a 'respondent' to this application for the purposes of section 12(2) of the HRA 1998.

6. An order anonymising someone who would otherwise be named in court proceedings is an interference with the principle of open justice. As Lord Reed JSC described in *A v BBC* [2015] AC 588 at [23]: *"It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy…In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny"*.

7. Ordinarily, it is said that it is not unreasonable to regard a person who brings proceedings as having accepted the normal incidences of their public nature, including the potential embarrassment and reputational damage inherent in being involved in litigation: see *TYU v ILA SPA Ltd* [2022] ICR 287 at [44] *per* Heather Williams KC (sitting as she then was as a Deputy High Court Judge).

8. In this particular jurisdiction, the considerations are somewhat different to those in the authorities we have mentioned, because this is an appeal in relation to the appellant's inclusion on the barred lists, the statutory scheme for which provides for the identity of those on the lists to be kept confidential and only revealed by DBS to those with a legitimate interest in knowing. Generally, that just means prospective employers, as the Divisional Court (Flaux LJ and Lewis J) explained in *R (SXM) v DBS* [2020] EWHC 624 (Admin), [2020] 1 WLR 3259. That case was a judicial review brought by someone who claimed to be the victim of sexual abuse who wanted to be informed by DBS whether the alleged perpetrator had been included on the barred list. The Divisional Court held that DBS had acted lawfully in refusing to disclose that information. It is, of course, not possible to tell from the judgment in *SXM* whether the alleged perpetrator had appealed to the Upper Tribunal or not, since that fact would itself have conveyed to the claimant in that case that the alleged perpetrator had been included on the barred list. It is, though, relevant for us to take into account that not anonymising an appellant in an appeal to the Upper Tribunal goes 'against the grain' of the legislative scheme as it was recognised to be by the Divisional Court in *SXM*.

9. We also consider that, in the context of appeals against DBS decisions, the emphasis that courts and tribunals in other contexts place on it being reasonable to assume that someone who litigates accepts the incidence of publicity that comes with that should perhaps be given less weight. That is because the legislative scheme gives those who are subject to it an expectation that they will not be publicly named and because the right of appeal to the Upper Tribunal is an essential element of that same legislative scheme. The hearing before the Upper Tribunal in DBS cases is the "fair and public hearing … by an independent and impartial tribunal" with "full jurisdiction" which secures that the barring scheme under the SVGA 2006 is compliant with Article 6 of the European Convention on Human Rights: cf *R (G) v Governors of X School* [2011] UKSC

30, [2012] 1 AC 167 at [33] and [84] *per* Lord Dyson, [94] *per* Lord Hope and [101] *per* Lord Brown. It is important that an appellant should not be deterred from exercising their appeal rights by the fact that an appeal to the Upper Tribunal might bring with it publicity from which they are otherwise protected under the statutory scheme.

10. Similar considerations apply in relation to the Sexual Harm Prevention Order to which the appellant in this case is subject. The identities of those subject to such orders are not public, but those who need to know will be informed of the existence of such an order on a DBS check.

11. In this particular case, we are satisfied that the appellant's right to privacy under Article 8 of the European Convention on Human Rights is engaged as the issues in the case have significantly affected his personal life, mental health and reputation. Indeed, his family have already moved house in order to minimise the risk to him (and them) that may arise where it becomes known that a person has been convicted (or, even, accused) of sexual misconduct/offences in relation to children. Given the publicity that has been afforded to some such cases in the past, we take judicial notice of this risk.

12. As we have noted, although it is often said that a claimant implicitly accepts publicity by commencing legal proceedings, it is hard to see why someone who exercises their statutory right to appeal DBS's decision should be deprived of the privacy they would otherwise have enjoyed if they had not appealed but accepted the barring. Although there may be a public interest in the appellant's name, given the outcome in this case, those who really need to know will continue to be informed by DBS through the scheme in the ordinary way. The public interest in the decision-making processes of DBS and this Tribunal is served by the public hearing and publication of this decision. Such public interest in naming the appellant as remains is in our judgment outweighed in this case by the potential interference with the private rights of him and his family.

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

14. For anonymity to be achieved in practice in this case, it seems to us that it is also necessary to anonymise the names of the schools at which the appellant worked.