Neutral Citation Number: [2025] UKUT 167 (AAC)
Appeal No. UA-2024-000890-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 or any other individuals referred to in these proceedings.

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

AE

Appellant

- v -

Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Nicholas Wikeley, Tribunal Member Suzanna Jacoby and Tribunal Member Michele Tynan

Hearing date(s): 9 May 2025
Mode of hearing: Oral hearing at Field House, London

Representation:
Appellant: Mr George Wills (counsel)
Respondent: Ms Bronia Hartley (counsel)

On appeal from:
DBS registration number: 01025750115
DBS Decision Date: 8 April 2024

Judicial summary

Safeguarding Vulnerable Groups Act 2006 - section 4(2)(b) – appeal on mistake of fact – Upper Tribunal heard oral evidence and made its own assessment of evidence – no material mistake of fact – decision of Disclosure and Barring Service confirmed.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the Disclosure and Barring Service dated 8 April 2024 was not based on any material mistake in any finding of fact and involved no mistake on any point of law.

REASONS FOR DECISION

Introduction

1. This appeal is about whether the Disclosure and Barring Service (the **"DBS"**) based its decision to place the Appellant's name on both the Children's Barred List and the Adults' Barred List (the **"Barring Decision"**) on one or more mistakes of fact (or errors of law).

2. The DBS's Barring Decision in question was made on 8 April 2024 under the Safeguarding Vulnerable Groups Act 2006 (the **"2006 Act"**).

The individuals involved

3. This case principally involves three individuals. The first is the Appellant, who we simply describe as such. The second is his ex-partner, who we refer to as Ellie (not her real name). The third is her then foster daughter, who we call Molly (also not her real name), who was aged 11 or 12 at the material time. We confirm the Rule 14 Order in this case, which is intended to protect the anonymity and privacy of all those involved.

A summary of the factual background

4. The Appellant and Ellie were in a long-distance relationship, having met through an online Christian dating platform in or about June 2021. At the time in question the Appellant would stay over at Ellie's house for one or two nights once a fortnight. She did not visit him as he lived in hospital accommodation associated with his job as a mental health support worker. In about December 2021 Ellie introduced the Appellant to Molly and to her other foster child, a younger boy.

5. In June 2023 Molly disclosed to Ellie that the Appellant had kissed her at her (Ellie's) birthday party in June 2022, i.e. a year earlier. On that occasion there had been a barbecue in the garden with friends and those present had been drinking alcohol. Ellie promptly reported Molly's disclosure to the police and her statement to the police (dated 13 June 2023) included the following passage:

> [Molly] said, "It all started last year on your birthday." I asked, 'What?' She said, "[the Appellant] kissed me and now he keeps following me upstairs." I asked her questions I said was it fatherly or a passionate and she said, "It was just a quick peck on the lips and it was just once." I said that's not OK but at that point I thought it may have been a fatherly kiss. I gave her a cuddle and said I would speak to him. She then went to bed.

> Following this disclosure she came home on Monday 12 June at approx. 19:30 hrs and disclosed the following. She said, "It wasn't just once that [the Appellant] kissed me it was several times." I said, "I thought it was a fatherly kiss." She said, "I thought you would know as he kept following me upstairs." I asked if she knew how many times and she said she didn't know. I asked, "When was the last time?' She said, "The last time that he came down." This was just before Christmas as he'd told me that he had been training so I haven't physically seen him.

6. In a lengthy police interview (dated 14 June 2023) the Appellant subsequently admitted to having kissed Molly with an open mouth while under the influence of alcohol at Ellie's party. He maintained that there was no sexual motive to the kiss. However, he described the kiss at the birthday celebrations as not the type that he would give to his own daughter and reported to feeling "not good about it" and "haunted". Molly provided an ABE interview but did not engage with the interviewing officer(s), following which the CPS decided to take no further action in relation to the incident.

The Upper Tribunal oral hearing

7. We held an oral hearing of the Appellant's appeal on 9 May 2025. The Appellant was represented by Mr G. Wills of Counsel and gave sworn evidence. The DBS was represented by Ms B. Hartley of Counsel. We are indebted to both counsel for their assistance.

The legal framework for barring decisions

8. In this part of the decision, we summarise the legal framework governing barring decisions. Schedule 3 to the 2006 Act provides for several ways in which a person's name may be included by the DBS on a barred list. In the present case the DBS relied upon the 'relevant conduct' gateway, which (as regards the Children's Barred List) required the DBS to be 'satisfied' of three things, namely:

> a. that the Appellant was at the relevant time, had in the past been, or might in future be 'engaged' in, 'regulated activity' in relation to children;
>
> b. that the Appellant had 'engaged' in 'relevant conduct'; and
>
> c. that it was 'appropriate' to include the Appellant on the Children's Barred List.

9. If the DBS was satisfied of all three matters above, it was required by the 2006 Act to place the Appellant's name on the Children's Barred List. There are equivalent provisions governing inclusion in the Adults' Barred List.

10. Section 4 of the 2006 Act sets out the circumstances in which an individual may appeal to the Upper Tribunal against the inclusion of their name in either or both of the barred lists. An appeal may be made only on grounds that the DBS has

made a mistake on any point of law or in any finding of fact which it has made and on which the Barring Decision was based (see section 4(1) and (2)). Section 4(3) provides that, for the purposes of section 4(2), whether it is 'appropriate' for an individual to be included in a barred list is "not a question of law or fact" and so, to that extent at least, is non-appealable. An appeal under section 4 may only be made with the permission of the Upper Tribunal (see section 4(4)).

11. The relevant principles regarding factual mistakes have been set out in several recent decisions of the Court of Appeal, which are binding on the Upper Tribunal (see *DBS v JHB* [2023] EWCA Civ 982; *Kihembo v DBS* [2023] EWCA Civ 1547; and *DBS v RI* [2024] EWCA Civ 95 and see also the Upper Tribunal's decision in *PF v DBS* [2020] UKUT 256 (AAC)).

12. As to whether it is 'appropriate' to include a person in a barred list, the Upper Tribunal has only limited powers to intervene, as noted above. This is clear from the section 4(3) of the 2006 Act and the relevant case law. The scope for challenge by way of an appeal is effectively limited to a challenge on proportionality or rationality grounds. Thus, at paragraph [55] of *DBS v AB*, the Court of Appeal cautioned:

> "[The Upper Tribunal] will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter…".

13. The Court of Appeal added at paragraph [43] of *DBS v AB*:

> "…unless the decision of the DBS is legally or factually flawed, the assessment of the risk presented by the person concerned, and the appropriateness of including him in a list barring him from regulated activity…, is a matter for the DBS".

14. In the subsequent Upper Tribunal case, *AB v DBS* [2022] UKUT 134 (AAC), the Upper Tribunal decided (albeit in the context of a case that was based on the 'risk of harm' rather than the 'relevant conduct' gateway) that *DBS v AB* meant that the Upper Tribunal could consider, on appeal under the 2006 Act, a finding of fact by DBS that an individual poses "a risk" of harm but not a DBS assessment of the "level of the risk posed" (see [49]-[52] and [64]).

15. When considering appeals of this nature, the Upper Tribunal "must focus on the substance, not the form, and the appeal is against the decision as a whole and not the decision letter, let alone one paragraph…taken in isolation": *XY v ISA* [2011] UKUT 289 (AAC), [2012] AACR 13 (at [40]). As such, when considering the Barring Decision, the Upper Tribunal may need to consider both the final decision letter and the internal document headed 'Barring Decision Summary' that is generated by DBS as part of its decision-making process. The two documents together, in effect, set out the overall substantive decision and reasons (see *AB v DBS* [2016] UKUT 386 (AAC) at [35] and *Khakh v ISA* [2013] EWCA Civ 1341 at [6], [20] and [22]).

16. The statement of law in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 indicates that materiality and procedural fairness are essential features of an error of law. There is nothing in the 2006 Act which provides a basis for departing from that general principle (*CD v DBS* [2020] UKUT 219 (AAC)).

17. Finally, unless the Upper Tribunal finds that the DBS has made a mistake of law or fact, it must confirm the decision of the DBS (see section 4(5) of the 2006 Act). If the Upper Tribunal finds that the DBS has made such a mistake it must either direct the DBS to remove the person from the list or remit the matter to DBS for a new decision. Following *DBS v AB* [2021] EWCA Civ 1575, the usual order will be remission back to DBS unless no decision other than removal is possible on the facts. If the Upper Tribunal remits a matter to DBS under section 4(6)(b), the Upper Tribunal may set out any findings of fact which it has made (and on which the DBS must base its new decision) and the person must be removed from the list until the DBS makes its new decision, unless the Upper Tribunal directs otherwise.

The Disclosure and Barring Service's decision to bar the Appellant

18. In its final decision letter of 8 April 2024, the DBS recorded that it was satisfied of the following:

> On the balance of probabilities you kissed your partner's foster daughter, [Molly], a child aged 11-12 years old, on multiple occasions between June 2021-December 2022 and specifically when you kissed [Molly] in June 2022 the kiss was of a sexual nature.

19. The DBS's final decision letter continued by stating that it was satisfied "you engaged in relevant conduct in relation to children. This is because you have engaged in inappropriate conduct of a sexual nature involving a child." The final decision letter added that:

> It is also considered that you have engaged in relevant conduct in relation to vulnerable adults, specifically conduct which, if repeated against or in relation to a vulnerable adult, would endanger that vulnerable adult or would be likely to endanger him or her.

20. The final decision letter then went on to explain in some detail why the DBS had concluded that it was appropriate to make a Barring Decision in relation to the Appellant.

The Appellant's grounds of appeal

21. The Appellant advances two grounds of appeal.

22. The first ground is that the DBS made a mistake of fact in its assessment of the evidence in relation to the kiss of June 2022.

23. The second ground of appeal is that the DBS made an error of law in respect of proportionality concerning its decision to bar the Appellant from working with vulnerable adults as well as with children.

24. We start, however, with some general observations about the Appellant's oral evidence.

The Appellant's oral evidence

25. The oral hearing of this appeal took a morning session (from 10.30 until 13.00). For most of that time (approximately 2 hours) we heard sworn evidence from the Appellant, who was subject to extensive questioning by Mr Wills and cross-examination by Ms Hartley, as well as to questions from one of our specialist members. We therefore had ample opportunity to assess the Appellant's oral evidence, albeit we accept it was given in a stressful environment. We also recognise that the Appellant may not have been speaking in his first language. That said, there were only a handful of occasions when the Appellant (quite reasonably) had asked for a question to be repeated as he had not followed its meaning.

26. Be all that as it may, the Appellant's oral evidence was less than impressive. Ms Hartley described it as "inconsistent" and "evasive". It was certainly muddled at times and there were several occasions on which the Appellant either could not, or would not, give a straight 'yes or no' answer to a direct question. In particular, the Appellant was very vague about the circumstances surrounding the incident at the birthday party in June 2022, meaning that on the balance of probabilities we attached greater weight to the evidence from the police statements in the summer of 2023, being closer in point of time.

Ground 1

Introduction

27. The first ground of appeal is that the DBS made a mistake of fact in its assessment of the evidence in relation to the kiss of June 2022 (i.e. at the birthday party).

28. We start by reviewing the various evidence in relation to this incident before making our own assessment. We consider the evidence of Ellie, Molly and the Appellant in turn.

Ellie's evidence

29. Ellie made a short witness statement to the police on 13 June 2023, a few days after Molly's first disclosure to her and the day after her second disclosure. We have already included (at paragraph 5 above) the passage in which she described the disclosure made by her foster daughter.

30. Ellie also described how she had confronted the Appellant with the disclosure by Molly:

> When I spoke to [the Appellant] following this disclosure I asked if he had kissed her more than once and he wouldn't answer me. Initially I rang him after [Molly's] first disclosure and asked if he had kissed her and he wouldn't answer me. I got really angry and told him he needed to tell me. He admitted her did kiss her on the lips but he had had a glass of wine and he knew he shouldn't have done it. He said he'd not touched a glass of wine since. Last night following [Molly's] second disclosure I rang him up and said "Have you kissed [Molly] more than once?" Again he wouldn't answer me. I was really cross with him. He said, "Having a drink lead me to it." I was angry and said you've ruined my life. I knew at that point that he had kissed her more than once. I can't remember the exact conversation as I was so angry however he has sent me text messages saying, "The most important thing is that you can find a place in your heart to forgive me, we shall see how to go forward." I took this to mean he had done wrong and I knew he had kissed her a few times.

31. The copy of the text messages (pp.78-80) corroborates Ellie's account in that regard. In any event we find her account to be credible. We note there has been no serious suggestion on the Appellant's behalf that Ellie's evidence about her conversations with Molly and the Appellant respectively is in any way unreliable.

Mollie's evidence

32. Mollie took part in an ABE interview that lasted for just under an hour. The date of the interview is not clear, but all the indications are that it was some time in the summer of 2023 but on a date after Molly's placement with Ellie had been ended (see p.82, where Ellie is described as Molly's "old carer"). Mollie appears to have been reluctant to engage with the interviewing officer to any real degree. She did say that on the day of the birthday party it had been too noisy downstairs so she had gone up to her bedroom (p.86). When the officer probed gently about what had happened next, Mollie replied "I don't really remember much" (p.88). She confirmed that the Appellant had come into her bedroom, but when she was asked what had happened she replied "I don't really know…" (p.89). A typical exchange is at p.90:

> Officer: "And what has happened when he's walked into the room?"
> Molly: "I think all I can remember is that he's come up to me and (inaudible)."
> Officer: "Sorry say that bit again (inaudible) a bit louder?"
> Molly: "He just came over to me and that's basically all I can remember."

33. Later in the ABE interview Molly stated that the Appellant had not previously been in her bedroom (p.93). In answer to the question "when he came over to you did he touch you at all?" she replied "I don't think so" (p.94). However, she later added that "he started getting a bit too close" around Christmas 2022 (p.98). The ABE interview was subsequently paused for a break but was not resumed as Molly refused to re-enter the interview room (p.106).

34. We acknowledge that the ABE interview does not include any really incriminating evidence as to what happened on the day of Ellie's birthday party in June 2022. That fact, in itself, may well account for the CPS decision not to press charges by way of criminal proceedings but we need not speculate about that. However, equally that interview does not amount to evidence that nothing untoward took place. The fact that Molly was mostly unco-operative in her ABE interview may well be accounted for by her young age and the emotional trauma she had experienced (including the effective breakdown of her most recent long-term foster placement). There may well be other reasons (e.g. the oppressive nature of a police interview room). So, the mere fact that in her ABE interview Molly did not repeat to the officer the precise disclosure she had made to Ellie does not assist the Appellant – not least as he himself has admitted that he had kissed Molly on her lips, as we shall see.

The Appellant's evidence

35. There are three main sources of evidence from the Appellant. These are the record of his police interview (pp.37-77), his written representations to the DBS (pp.127-129) and his oral evidence at the hearing before us together with his witness statement. We deal with the main features of each source in turn.

The police interview

36. The Appellant's police interview lasted for just over 1 hour 20 minutes. The Appellant declined the offer of a solicitor.

37. The following evidence on the Appellant's part emerged from his police interview. At first, he said he could not say how long his lips were on Molly's or whether his mouth was open or closed (p.48). As the questioning in his police interview unfolded, he admitted that when he kissed Molly his mouth was open (p.48). The Appellant also stated in his police interview that he "didn't feel good" about what had happened and that he should be "a responsible person" (p.49). He went on to say that the kiss was something he "shouldn't have done that if I'm in control of myself" (p.52). He also distinguished between past kisses and the one at the birthday party: "Oh that time, sir, I have given a kiss, not like, it's not like that, the one of, when I said I was on the alcohol – all the other times were not like that" (p.49); "…this particular one is the one that I believe – the other ones, that's why I said intention of, intention is also important…" (p.50). However, he admitted to having kissed her on the lips more than once (p.50). When asked whether he had sexual feelings towards Molly when he kissed her he did not deny it, saying instead "I was under the influence of alcohol, I cannot…' (p.52). When asked in his police interview whether he had ever kissed his own daughter like he kissed Molly that day, he replied in the negative (p.53). When asked why alcohol would make him kiss Molly like he would kiss his partner the Appellant was silent (p.54). When asked by the police whether he would be happy if an adult kissed his daughter in the way he had kissed Molly, the Appellant said "…that's why I said here, as a person, I don't feel good about it" (p.58). As the line of questioning further unfolded, the Appellant said that his conscience had been "haunting him

since that time" (p.59). When pressed by the police about why he felt bad about his actions that day, the Appellant said: "…to put my mouth together like that inside her mouth, that's what I wouldn't (inaudible) it's not something I would want to do" and that it happened "because I couldn't control myself at that" (p.74). The Appellant was asked twice whether he felt bad because the kiss had a sexual element to it. On both occasions his response was to deflect the question, saying, "You interpret it [like that]" (pp.74-75).

The Appellant's written representations to the DBS

38. In his written representations to the DBS, the Appellant denied having any sexual interest in Molly or indeed in any child or vulnerable person. He also denied having said in his police interview that he had kissed Molly in the same way as he would kiss his partner. He admitted that he seemed "to have a light brain regarding alcohol", referring to a work colleague's leaving party in 2019 when "I was made to understand though jokes the following day at work that I was drunk" on that occasion. The Appellant further explained as follows in his representations:

> That I have acted in a manner that is now interpreted as sexual towards Molly as a result of being drunk, which I know cannot happen in my clear eyes, makes me feel really bad with myself. I remember that the next day after the party, I was shown videos that were taken of me where in some of them; it appeared like I have passed out. In one of the videos, I realised that Molly has coloured my face with paint, which I did not even know when that happened. In another video, it looked like Molly was trying to make me an object of laughter. She was trying to stuff something into my mouth and nose, and I was reacting to that and was thinking that it was [Rover] (Ellie's dog) that was messing up with me. I was saying "[Rover] leave me alone." When I saw those videos, I was so embarrassed and really ashamed of myself. Therefore, relating this event with my past experience at a colleagues' send-off party, has made me to realise that in a situation of being drunk, I can do some senseless things. This is the reason that I accepted that I may have kissed Molly. And since this came to my knowledge, it has been haunting me, and I have not been happy with myself. Since then, I have made up my mind to totally give up any drink that contains alcohol.

The Appellant's oral evidence to the Upper Tribunal

39. The Appellant gave sworn evidence to the Upper Tribunal. In his evidence in chief, in answer to questions from Mr Wills, he confirmed the accuracy of his witness statement. He explained how he had come from Nigeria to work in the UK. He told us that he had a daughter aged 15 who lived in the Netherlands with his ex-partner, and he had two younger adopted children who lived with their grandmother in Nigeria. After completing his training in the UK, he had worked from 2017 as a nursing assistant in a psychiatric intensive care unit (PICU). He had not been the subject of any complaints from his colleagues or by service users.

40. The Appellant also confirmed that he had met Ellie online through a Christian dating platform. He had met her in 2021 but did not meet her foster children for several months after first meeting her. When asked to describe his relationship with Molly, he replied that he could not say it was good. He described her as being a bit withdrawn from the beginning, in contrast to Ellie's foster son, who was very open and friendly with him from the outset. The Appellant said that he was trying to act as a father to them both and was doing his best to make Molly accept him in the way that her foster sibling did: "I tried to encourage her with school when she was moody. I would give her a hug or a peck on the cheek to cheer her up." He said that he would hug her in the same way he would hug her sibling. When asked how Molly reacted, the Appellant said that sometimes she would be withdrawn but if she shrank back, then he wouldn't press himself on her.

41. When Mr Wills asked him about the birthday party in June 2022, the Appellant confirmed that he had been drunk, but he only realised when he was shown a video later of how he had been behaving. He told us that he could not remember details of the incident in question: "Ellie called me... I don't remember anything else." In his witness statement, he said as follows: "During the party I saw Molly and I kissed her. This time I kissed her on the lips. I dispute that this was a passionate kiss or motivated by any sexual intention, but I do not remember the details because I felt drunk at the time." Likewise, his witness statement concluded as follows: "I continue to deny that I kissed Molly in the same way as I would have kissed Ellie. I accept kissing her on the lips on this one occasion and that was wrong, but it was not a passionate kiss, and I did not have any sexual intention. My recollection of the detail is unclear because of the alcohol I had consumed."

42. The Appellant confirmed to us that he had had two telephone conversations with Ellie after Molly had made her disclosure: "She called me and said Molly had told her… I said I was drunk. She asked me if I kissed her later. I said it's possible." In the second conversation Ellie had asked him if he had kissed Molly more than once: "I was dumbfounded. Ellie started shouting at me. I was in shock. She was yelling – she would not be able to foster. I felt really bad about things." He denied ever having said to the police that he had kissed Molly in the same way as he would kiss his partner. The Appellant stated that he did not accept that he had kissed Molly in a sexual way – this was an interpretation put on the incident later by the police officers and the DBS.

43. We have already indicated that we had difficulties with some aspects of the Appellant's oral evidence. This became more evident when the Appellant was cross-examined by Ms Hartley. In answer to her very first question, the Appellant said that he did not know where in the house the incident took place. He said that he did not have a very clear recollection but he conceded he had kissed Molly on the mouth. Ms Hartley then asked him about the telephone conversations with Ellie after Molly's disclosure. Ms Hartley asked whether he accepted that on the first call he had not answered Ellie's question right away: "I accept I didn't respond immediately … it was a shocking thing to hear." He denied that the real reason

he had not replied immediately was that he was shocked the incident had come out.

44. In response to Ms Hartley's direct question – "why did you kiss Molly on the lips with your mouth open?" – the Appellant sought to deflect the question by replying that he had no intention of anything sexual. When asked whether it was appropriate to kiss an 11- or 12-year-old on the mouth with one's mouth open, the Appellant answered "It's not something I would ordinarily want to do. I'm not happy with the suggestion that it's sexual." He accepted that he would not want someone else to kiss his own daughter like that. In answer to a direct question, the Appellant expressly denied having put his tongue in Molly's mouth. However, given his hazy recollection he had some difficulty in explaining this categorical denial: "I would not like to think I would do that. It's not possible. I would not kiss her in the same way as kissing Ellie."

Mistake of fact: our analysis

45. It is important to remind ourselves as to the precise terms of the factual finding made by the DBS. This was in the following terms:

> On the balance of probabilities you kissed your partner's foster daughter, [Molly], a child aged 11-12 years old, on multiple occasions between June 2021-December 2022 and specifically when you kissed [Molly] in June 2022 the kiss was of a sexual nature.

46. This conclusion therefore involves two quite distinct findings which need to be separated out.

47. The first finding is that the Appellant kissed Molly on multiple occasions between June 2021 and December 2022. This finding is not itself in dispute. The Appellant accepted (at the very least) that he would from time-to-time kiss Molly by way of a peck on the cheek 'to encourage her'. Furthermore, there is in fact a glaring inconsistency in the Appellant's evidence as to the details of these interactions which is a further example of the unsatisfactory nature of some of his evidence. On the one hand, he acknowledged in his police interview that there had indeed been other occasions on which he had kissed Molly on the lips. Thus, the officer asked him "Have you kissed Molly on the lips more than once? And let's just start with this one – have you kissed Molly on the lips more than once?". The Appellant's response to this unambiguous question was a simple "Yes" (p.50). Yet on the other hand, in his witness statement, he strenuously denied this very same allegation – see paragraph 41 above. Whichever is the true position, the fact remains that there is a clear admission that the Appellant kissed Molly in some way on multiple occasions over the relevant period. In that regard we find there is no mistake of fact by the DBS in making that first finding.

48. The second finding is that the kiss he gave Molly in June 2022 at Ellie's birthday party was sexual in nature. This finding, of course, is very much in dispute.

49. Accordingly, we have to decide whether the kiss that the Appellant gave Molly on the day of Ellie's birthday party was sexual in nature. We were not directed to any provisions in the 2006 Act which could guide us in this assessment. However, the DBS response to the appeal suggested that some assistance could be obtained from section 78 of the Sexual Offences Act 2003, which stipulates as follows:

> penetration, touching or any other activity is sexual if a reasonable person would consider that—
>
> (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
>
> (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

50. Although that provision operates in the criminal law context, we consider it to be an instructive starting point. In particular, it makes a fundamental distinction which we consider may be relevant in other contexts, namely that some types of activity are by their very nature intrinsically sexual while other activities may be seen as sexual when viewed in the light of the circumstances or the perpetrator's purpose. Thus, section 78(a) covers conduct which is unambiguously sexual, and so an assessment need not be made of the circumstances or any person's purpose. Section 78(b), on the other hand, covers conduct which *may* be sexual, depending on the circumstances or a person's purpose (see further *R v H* [2005] EWCA Crim 732 and *R v Abdulahi* [2022] EWCA Crim 412).

51. We consider that kissing someone on the lips with an open mouth is by its very nature a sexual act. There is a world of difference between that type of kiss and the 'peck on the cheek' type of kiss. Indeed, we find it hard to contemplate any situation in which an adult's kiss on the lips with an open mouth is other than a sexual act. There are a number of features of the evidence which persuade us that the Appellant realised that he had 'crossed a line' in kissing Molly in the way he did during the birthday party. For example, the Appellant had refused to answer Ellie when she had asked him whether he had kissed Molly more than once. He also asked Ellie by text for forgiveness, a further acknowledgement that he had overstepped a boundary. Furthermore, the Appellant made several damning admissions about his conduct in his police interview.

52. The Respondent argues, moreover, that the evidence points to the Appellant having a sexual interest in children. Ms Hartley submitted that this was the most likely explanation for the inconsistencies in the Appellant's evidence. We understand how the DBS has arrived at that conclusion and cannot say that they have made a mistake of fact in reaching that assessment. However, for ourselves we are not confident enough to make a finding that the Appellant does indeed have a sexual interest in children. In that context we note that the Appellant's devices were removed for forensic analysis in June 2023 (p.107) but no results are provided in the documentation in the appeal bundle. We think it is a reasonable assumption that this means that there was nothing of any significance found on the Appellant's mobile phones or laptops. Absent any such further incriminating evidence, we would not ourselves find that the Appellant has a sexual interest in children. However, this does not assist the Appellant in this

appeal for two reasons. First, as already noted, we cannot say that the DBS have made any mistake of fact. Second, and in any event, the core finding of fact is that the kiss in question was sexual in nature and again that finding involves no material mistake of fact.

Ground 2

Introduction

53. The second ground of appeal is that the DBS made an error of law in respect of proportionality in relation to its decision to bar the Appellant from working with vulnerable adults as well as with children.

54. The DBS's final decision letter summarised its reasoning for including the Appellant on the Adults' Barred List in the passage cited at paragraph 19 above. The Barred Decision Summary document further explained as follows:

> We acknowledge that [the Appellant] has worked with vulnerable adults with no evidence of concerns for over 6 years, however this does not reduce our concerns that he would not repeat such behaviour in such a setting. We note [the Appellant's] inability to control his urges and his transgression of boundaries also raises concerns that, in working with vulnerable adults, he may repeat similar behaviour by acting upon urges that he knows are unacceptable/ wrong. This behaviour would likely cause significant emotional harm to vulnerable adults.

The parties' submissions

55. Mr Wills submitted that the Appellant, even on the DBS's findings, had not engaged in "relevant conduct" for the purposes of paragraph 9 of Schedule 3 to the 2006 Act (as defined by paragraph 10). On the DBS's findings, the conduct of a sexual nature related solely to a child – no complaint of inappropriate sexual conduct had been made in respect of any adults at all, let alone vulnerable adults, and so the concern was not transferable. Mr Wills argued that any decision to bar for the purposes of the adults barred list had to be based on evidence, not hypotheticals, and accordingly the DBS's decision was disproportionate. As such, he submitted, it involved an error of law.

56. Ms Hartley, on the other hand, contended that the "relevant conduct" condition was satisfied, as by statute it included "conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him" (see paragraph 10(1)(b)). Furthermore, the bar for irrationality is a high one, being "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (*CCSU v Minister for Civil Service* [1985] AC 374 at p.410 *per* Lord Diplock). Assuming a decision was made in accordance with the statutory purpose and was rational, "it would require very unusual facts for it to amount to a disproportionate restriction on Convention

rights" (*Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1430 at [16] *per* Lord Hoffmann).

Proportionality: our analysis

57. We find that the "relevant conduct" test for vulnerable adults is made out for the reason given by Ms Hartley. As for the issue of proportionality, we note that the recent decision of the Upper Tribunal in *KS v Disclosure and Barring Service* [2025] UKUT 45 (AAC) helpfully drew together a number of the leading authorities. Thus, it is for the panel to reach our own decision on whether the decision was proportionate but we must give appropriate weight to the DBS's decision. The decision in *KS v DBS* applies the four-fold analysis of the Supreme Court in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700. Although Lords Sumption and Reed expressed themselves in formulating the doctrine of proportionality slightly differently, each confirmed there was no significant difference. Lord Sumption expressed the test in these terms:

> "the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective."

58. The objective of the barring scheme, in the most general terms, is to protect children and vulnerable adults from harm by those entrusted with their care in "regulated activity": see *KS v DBS* at [58]. A decision under the barring scheme prohibiting the Appellant from engaging in regulated activity is rationally connected to the objective of the scheme. Accordingly, in terms of the *Bank Mellat* test, limbs (i) and (ii) are clearly met. In terms of limb (iii), under the 2006 Act barring is an "all or nothing" decision and there is, moreover, no legal ability to impose conditions. Given the DBS's findings, we cannot envisage a less intrusive measure than barring. Turning to limb (iv) of the *Bank Mellat* test, namely "whether… a fair balance has been struck between the rights of the individual and the interests of the community", we accept there will inevitably be negative consequences for the Appellant of being barred, not least in terms of his employment and career options. However, those disadvantages are outweighed by the importance of the aim of protecting the vulnerable group concerned. In making that assessment we bear in mind that the Appellant continues to deny or minimise his actions such that the risk of transgression of boundaries remains a live one.

Disposal

59. As we find neither ground of appeal is made out, we dismiss the Appellant's appeal against the DBS's final decision letter dated 8 April 2024.

Conclusion

60. The Upper Tribunal therefore concludes that the decision of the DBS was not based on any material mistake in any finding of fact and involved no error on any point of law. As such, we confirm the Barring Decision.

61. Accordingly, we dismiss the appeal.

Nicholas Wikeley
Judge of the Upper Tribunal

Suzanna Jacoby
Specialist Member of the Upper Tribunal

Michele Tynan
Specialist Member of the Upper Tribunal

Authorised by the Judge for issue on 29 May 2025