



Neutral Citation Number: [2026] UKUT 232 (AAC)
Appeal No. UA-2023-001953-V

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**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

SA

Appellant

- v -

DISCLOSURE AND BARRING SERVICE

Respondent

Before: Upper Tribunal Judge Stout, Tribunal Member R Smith and Tribunal Member R Graham

Hearing date(s): 22 May 2026

Mode of hearing: In person

Representation:

Appellant: Tomor Bahja (counsel)

Respondent: Tim Wilkinson (counsel)

On appeal from a decision of the Disclosure and Barring Service:

Reference: P0002XICYWQ

Decision date: 3 November 2023

SUMMARY OF DECISION

SAFEGUARDING OF VULNERABLE GROUPS (65)

The appellant, a former healthcare assistant, appeals against a decision of the Disclosure and Barring Service (“DBS”) to retain his name on the adults’ barred list following remittal of an earlier successful appeal. The case concerns two incidents of intimate care provided to vulnerable adult residents, in respect of which the first Upper Tribunal found that the appellant had no sexual intent but had acted in a manner that was “somewhat insensitive, or callous”, causing the service users to feel upset and uncomfortable.

The Upper Tribunal considers the proper approach to “second-time-round” appeals under section 4 of the Safeguarding Vulnerable Groups Act 2006 (SVGA 2006). It holds that where the Upper Tribunal has exercised its power under section 4(7)(a) of the SVGA 2006 to direct DBS to base its new decision on findings of fact made by the Tribunal, DBS is bound by those facts, but is not confined to those findings and may rely on additional facts. Further, the principles of issue estoppel, including the rule in *Henderson v Henderson*, apply to all the issues of fact and law determined by the first Upper Tribunal, or which could and should have been raised before the first Tribunal. Such issues cannot be (re-)litigated in the second appeal absent special circumstances.

In this decision, the Upper Tribunal finds that DBS materially erred in law and fact by departing from the binding findings of the first Tribunal and by making additional findings of fact that were unsupported by the evidence.

Although the errors rendered the decision unlawful, the Upper Tribunal is not satisfied that removal from the barred list is the only lawful outcome. The appeal is therefore allowed and the matter remitted to DBS for a new decision, which must be taken in accordance with the issues of fact and law determined by the Upper Tribunal in this decision. The Upper Tribunal further directs pursuant to section 4(7)(a) of the SVGA 2006 that DBS’s new decision must be based on the findings of fact made by both this Upper Tribunal and the first Upper Tribunal.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the Tribunal follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The Upper Tribunal finds that there were mistakes of law and fact in DBS’s decision. The matter is remitted to DBS to make a new decision pursuant to section 4(6)(b) of the Safeguarding Vulnerable Groups Act 2006. DBS is directed pursuant to section 4(7)(a) to base its decision on the findings of fact that we have made in this decision. Pursuant to section 4(7)(b), the appellant shall remain on the barred list pending the new decision.

REASONS FOR DECISION

Introduction

1. This is the second appeal by the appellant to reach the Upper Tribunal. The respondent, the Disclosure and Barring Service (**DBS**), determined by decision dated 26 August 2021 (**the first decision**) to include the appellant on the adults’ barred list. The appellant appealed that decision to the Upper Tribunal. The Upper Tribunal (Upper Tribunal Judge Citron, Ms Heggie and Mr Turner) (**the Citron Tribunal**) found that DBS made a mistake in findings of fact on which the decision of 26 August 2021 was based and remitted the case to DBS for a new decision.

2. DBS made a new decision on 3 November 2023 (**the new decision**), deciding that the appellant should be retained on the adults' barred list. The appellant appealed that decision. Permission was granted by Upper Tribunal Judge Brewer and this has been the final hearing of this second appeal. The case has required the Upper Tribunal to consider the approach that should be taken by the parties and the Upper Tribunal to second appeals such as this in DBS cases.
3. The structure of this decision is as follows:

Introduction	2
This hearing.....	3
Factual background	4
DBS's first decision of 26 August 2021	4
The Citron Tribunal proceedings and decision	5
DBS's new decision of 3 November 2023	7
The issues	9
Legal framework.....	10
DBS's jurisdiction	10
The Upper Tribunal's jurisdiction	10
The approach of the Upper Tribunal	11
The approach of the Upper Tribunal in 'second-time-round' appeals	12
<i>Why DBS is not limited considering only the facts set out in the section 4(7)(a) direction.....</i>	<i>13</i>
<i>Why cause of action estoppel does not apply to this appeal.....</i>	<i>14</i>
<i>Why issue estoppel, including the Henderson v Henderson principle, does apply to this appeal</i>	<i>15</i>
Our decision on the substance of the appeal	17
The incident of 6 September 2020 involving service user AB	17
(1) <i>Lifting AB's leg.....</i>	<i>17</i>
(2) <i>Unnecessarily rough and forceful / insensitive and callous</i>	<i>19</i>
(3) <i>Distress</i>	<i>20</i>
The incident of 10 December 2019 involving service user CS	21
(1) <i>Care contrary to the care plan.....</i>	<i>21</i>
(2) <i>Rough handling / insensitive and callous</i>	<i>21</i>
The over-arching points	23
(1) <i>Intentional and deliberate harm?.....</i>	<i>23</i>
(2) <i>"Inappropriate"</i>	<i>23</i>
(3) <i>Training and supervision.....</i>	<i>23</i>
(4) <i>Written warning regarding SA's conduct with fellow employees</i>	<i>24</i>
Conclusion and disposal.....	25

This hearing

4. At this hearing, we had before us the Upper Tribunal bundle (**UTB**) for this case, running to 389 PDF pages, together with the bundle that had been before the Citron Tribunal (275 PDF pages) (the **CTB**) and a bundle of authorities (559 PDF pages) (**AB**). Our bundle included two witness statements for the appellant dated 13 December 2022 (UTB, p 182ff) and 23 January 2025 (UTB, p 314ff).
5. The appellant's first language is not English. He gave evidence on oath/affirmation through a Bengali Sylheti interpreter. He was questioned by both advocates and the panel. We have borne in mind the appellant's difficulties with

understanding and communicating in English when considering the evidence in this case.

6. Although, as will be seen, we have ultimately concluded that the principle of issue estoppel (*res judicata*) applies to some of the matters that the appellant sought to challenge in this appeal because the matter was decided by the Citron Tribunal in the first appeal, we did not determine this as a preliminary issue, but proceeded at the hearing by hearing evidence from the appellant on all issues.

Factual background

7. SA worked as a healthcare assistant at a private care home for adults for a period of approximately 16 months between May 2019 and November 2020. He is a Bangladeshi national who has been resident in the United Kingdom since 1993. His employment was terminated on grounds of gross misconduct. His employer referred him to the DBS.

DBS's first decision of 26 August 2021

8. DBS's first decision of 26 August 2021 was summarised as follows by the Citron Tribunal in its judgment:

5. The letter conveying the decision (the "decision letter") set out findings of fact as follows:

- a. on 6 September 2020, in his role of healthcare assistant, whilst attending the personal care of a 65 year old service user, SA fondled her vagina with his fingers, without her consent, and then pressed down on her clitoris very hard with a wipe;
- b. on 10 December 2019, SA fondled the penis and testicles of a 61 year old service user without his consent;
- c. on dates prior to 17 July 2020, SA behaved inappropriately towards two female colleagues by adjusting their clothing and hugging them without their permission.

6. The decision letter stated that DBS was satisfied that SA had engaged in relevant conduct in relation to vulnerable adults, specifically inappropriate conduct of a sexual nature involving a vulnerable adult.

7. The decision letter also stated, amongst other things, that

- a. the way in which SA touched the service users in the 6 September 2020 and 10 December 2019 incidents was described by the service users as fondling or exploring, demonstrating that this was done in order to satisfy a sexual interest or curiosity; the service users' dependency was exploited by SA in one-to-one situations, increasing their vulnerability. The decision letter said that SA's representations denied sexual intent; however, DBS's concerns about exploitative attitudes were not addressed or mitigated; its concerns remained;
- b. SA demonstrated a lack of empathy for the feelings of service users in causing pain and humiliation to the service user in the 6 September 2020 incident (by forcefully lifting her leg and pressing down forcefully on her

clitoris); SA took away the service user's right to be in control of her personal care by failing to gain proper consent prior to performing intimate care and left her shaken;

c. SA demonstrated a pattern of exploitative, sexualised behaviour in order to meet his own intimacy needs whilst disregarding the personal rights or feelings of those in his care or working alongside him; and

d. SA was considered to present an ongoing risk of harm to any vulnerable adult who may be placed in his care, if he were to be given a further role in regulated activity in the future. DBS was concerned that SA would be willing to exploit such a role in order to satisfy his own intimacy and/or sexual needs; a repetition of this type of behaviour would always be likely to cause harm to a vulnerable adult.

The Citron Tribunal proceedings and decision

9. By UT11 form filed on 11 November 2021, the appellant sought permission to appeal the first decision. Permission to appeal was refused on the papers by Upper Tribunal Judge Jones, but granted following an oral renewal hearing by Upper Tribunal Judge Citron. Judge Citron explained the grant of permission as follows:

I give permission to appeal on the ground that in its decision about SA of 21 August 2021, DBS arguably made mistakes in the following findings of fact:

1. in finding that in his interaction with AB on 6 September 2020, SA "fondled" AB's vagina with his fingers "and then pressed down on her clitoris very hard with a wipe" (as it is arguable that, on the evidence, SA's actions did not have the sexual nature ascribed to it in the quoted words in DBS's finding of fact); and
2. in finding that in his interaction with CS on 10 December 2019, SA "fondled" CS's penis and testicles (as it is arguable that, on the evidence, SA's actions did not have the sexual nature ascribed to it in the quoted words in DBS's finding of fact).

Permission to appeal is not formally limited. However, the matters which have led me to give permission are as set out above, which I regard as arguable with a realistic (as opposed to fanciful) prospect of success.

10. The appellant was represented at the permission hearing. The appellant relied at the permission hearing on: his original grounds of appeal (Citron Tribunal Bundle (CTB) page 9ff); (ii) "Reconsideration Grounds" (CTB, p 166ff); and (iii) his witness statement of 13 December 2022. For present purposes, we need only note that the appellant in those documents had challenged other aspects of the facts on which DBS's decision was based. In particular, both the original grounds (CTB, p 13ff) and the "Reconsideration Grounds" (CTB, p 171) had expressed "concerns" about DBS's finding that SA lifted AB's leg onto his shoulder in a "forceful" manner. This issue was also covered at [8]-[9] of his 13 December 2022 witness statement and at paragraph 20 of Mr Bahja's skeleton argument for Citron Tribunal Hearing.

11. The Citron Tribunal found that there were material mistakes in the findings of fact in DBS's first decision and remitted the matter to DBS for a new decision.
12. Having considered SA's witness statement of 13 December 2022, and heard his oral evidence, the Citron Tribunal concluded as follows regarding SA's credibility (at [19]-[20]):

19. In his witness statement, SA:

a. said that he did not fondle the service user's vagina in the 6 September 2020 incident; nor did he press down very hard on the service user's clitoris with a wipe; he attended to clean her of excreted faeces and urine, and this is what he did.

b. noted that he had told the police that he did not fondle the service user's penis or his testicles in the 10 December 2019 incident; he merely showered and cleaned him.

c. acknowledged that he did hug, and make comments such as "I miss you" or "you are pretty" to, female colleagues at the care home, but said he thought them to be signs of friendship; there was no sexual intent in these actions or comments; and when he was told not to hug or comment on colleagues' personal appearances, he stopped doing so.

20. We found SA to be a reasonably open and cooperative witness and we accept much of what he said including, for the most part, the points made immediately above. However, we do not accept everything SA said, for a number of reasons, including

a. the passage of time and the fading of his memory, combined with an (understandable) human urge, as memory dims, to recall matters that have become less clear, in a way that promotes one's own interest;

b. that some of what he said related to matters outside SA's knowledge – for example, matters as to how the service users involved felt, or perceived what was happening in the incidents in question. SA's views on such things are something to be taken into account (in that he was a witness to the events), but are not, for obvious reasons, definitive; and

c. that we had near-contemporaneous written accounts of what had happened, in particular with regard to the 6 September 2020 incident, such that, when those accounts and that of SA clashed, we had to balance the strengths and weaknesses of all the evidence.

13. The Citron Tribunal then went on to set out three paragraphs of facts on which it directed DBS pursuant to section 4(7)(a) to base its new decision as follows:

21. With this in mind, we are of the view that DBS made a mistake in its findings of fact that SA "fondled" the service users' private parts in the two incidents, insofar as this indicates a sexual intent on SA's part. On

the evidence before us, we find that SA had no such intent. We are satisfied that, in terms of his subjective intentions, SA was, with regard to the 10 December 2019 and 6 December 2020 incidents, simply trying to do his job i.e. provide personal hygiene services to the service users. He was not acting for his sexual gratification. He was not intentionally trying to cause harm or discomfort to the service users.

22. We also find, however, that the way in which SA interacted with the service users was such that they perceived that their private parts were being fondled and they were upset and made uncomfortable by this. We find that this perception on the part of the service users was because of the way SA carried out his task of intimate care. We find that SA was somewhat insensitive, or callous, as to the manner of his giving intimate care, to an extent that the recipients felt they were being treated inappropriately. The service users perceived SA as touching their private parts in ways that they did not anticipate or consider that they had given consent.

23. For completeness, we think it more likely than not that SA did “press hard” with a wipe in the area of the service user’s clitoris in the 6 September 2020 incident – however, as stated above, this did not have a sexual connotation, but rather reflected an insufficiently careful and sensitive approach to the task at hand.

DBS’s new decision of 3 November 2023

14. DBS’s new decision of 3 November 2023 was reached following DBS’s usual process of sending the appellant a ‘minded to’ letter and allowing him to make representations before the final decision was issued.
15. DBS stated that it was satisfied that:
 - a. On 6/9/2020, whilst working as a Healthcare Assistant, SA provided inappropriate personal care to 65-year-old service user AB, roughly lifting her leg and being unnecessarily rough and forceful when cleaning her vaginal and clitoral area causing distress;
 - b. On 10/12/2019, whilst working as a Healthcare Assistant, SA provided personal care to service user CS on his own contrary to the care plan and roughly handled CS’s genitals when washing him, causing him to feel uncomfortable.
16. DBS stated that it was satisfied that SA had engaged in relevant conduct in relation to vulnerable adults, being conduct which endangered or was likely to endanger a vulnerable adult.
17. DBS went on to explain why it was satisfied that a barring decision was appropriate. Its reasons included the following:

DBS are satisfied that on two occasions, you provided inappropriate, rough intimate care to different service users in such an insensitive and

callous manner that both service users perceived they had been touched inappropriately and in a way that was not expected or for which consent was given. The second occasion, involving service user AB, occurred despite you being subject to previous disciplinary proceedings following allegations of a similar nature involving male service user CS some nine months earlier. Further, you failed to comply with CS' care plan, showering him on your own, thereby exposing the service user to the potential for further significant harm to be caused.

...

The repeat of the insensitive treatment when providing intimate care, despite disciplinary proceedings and the existence of a live written warning on your record, albeit relating to your conduct towards colleagues, indicates the presence of an inability for you to successfully address and modify how you interact with others over a sustained period of time. The continued failure to accept full responsibility for your actions, deflecting culpability to the employer and a lack of training/supervision, as reflected in representations, increases concerns about the risk of harm you continue to represent and the likelihood of harmful behaviour repeated in the future.

The contention that the lack of sensitivity in providing intimate care was due to a training and supervision issue rather than being a safeguarding matter is of concern in terms of determining the future risk of harm you represent in regulated activity. DBS maintain that as harm was caused, whether intentional or otherwise, and harm could be caused if the behaviour was repeated, your treatment of the two service users is a safeguarding issue. ... Your failure to complete mandatory training ... undermines any suggestion that the employer was culpable for any lack of training.

...

DBS have acknowledged that whilst there may have been no intention to cause either service user harm, the evidence and more so the apparent inability to empathise with those in your care, shows that you did not consider or indeed care about the impact of your actions on those entrusted to your care ...

The ongoing lack of insight demonstrated during the substantive hearing and in representations and need to preserve your own interests only serves to increase concerns about the risk of repetition ...

18. DBS also addressed SA's rights under Article 8 of the European Convention on Human Rights. DBS specifically considered the appellant's representation that a "less intrusive measure, ie two-to-one policy (two carers working for a resident at the same time)" should have been a sufficient safeguarding measure but explained that this was not an option open to DBS under the legislation. It went on to explain why it considered a barring decision was proportionate.

The issues

19. On reading the bundle in advance of the hearing, the panel was concerned that there was a lack of clarity as to what the grounds of appeal were and what the issues were that we needed to decide. This was a result of the appellant's original grounds of appeal being prolix, the grant of permission identifying certain points raised in the grounds of appeal as being arguable, but not limiting the grant of permission, and the appellant's skeleton argument for the hearing also being somewhat prolix and not restricted to the points identified in the grant of permission as being arguable. We therefore sought to clarify matters with the parties at the start of the hearing. After discussion, both parties confirmed that they were content to proceed on the basis that the issues for us to decide were as follows, and they both helpfully structured their closing submissions by reference to this revised list:-
20. First, how, as a matter of legal principle, we should approach the decision of the Citron Tribunal.
21. Secondly, as regards the incident on 6 September 2020 in respect of which DBS was satisfied that the appellant "provided inappropriate personal care to 65 year old service user AB, roughly lifting her leg and being unnecessarily rough and forceful when cleaning her vaginal and clitoral area causing distress":
 - (1) Did SA "roughly" lift AB's leg over his shoulder;
 - (2) Was SA "unnecessarily rough and forceful" when cleaning AB or "insensitive and callous" rather than "somewhat insensitive and callous";
 - (3) Was AB caused "distress" as distinct from upset and 'feeling uncomfortable'.
22. Thirdly, as regards the incident on 10 December 2019 in respect of which DBS was satisfied that the appellant "provided personal care to service user CS on your own contrary to the care plan and roughly handled CS' genitals when washing him causing him to feel uncomfortable":
 - (1) Was the manner in which SA provided intimate care contrary to the care plan;
 - (2) Did SA roughly handle CS's genitals and was he "insensitive and callous" rather than "somewhat insensitive and callous".
23. Fourthly, over-arching points:
 - (1) Does DBS's decision letter imply that SA intentionally and deliberately caused CS harm;
 - (2) Was the care provided by SA "inappropriate";
 - (3) Training and supervision – was DBS's decision irrational or disproportionate in not regarding training and supervision as being sufficient to mitigate the risk in this case;
 - (4) Was the written warning regarding SA's conduct with fellow employees an irrelevant consideration?

24. We deal with the first of these issues as part of setting out the legal framework for our decision. We then deal with the issues of fact (or mixed fact and law) raised under the second, third and fourth issues.

Legal framework

DBS's jurisdiction

25. DBS's responsibility for maintaining the adults' (and children's) barred lists is governed by the Safeguarding Vulnerable Groups Act 2006 (**SVGA 2006**).
26. The appellant in this case was originally included on the adults' barred list using its powers in paragraph 9 and 10(1)(a) of Schedule 3.
27. Under those paragraphs, subject to the right to make representations, DBS must include a person on the relevant list if (in summary and in so far as relevant to the present appeal):
- a. The person has engaged in conduct which endangers or is likely to endanger a vulnerable adult;
 - b. The person has been, or might in future be, engaged in regulated activity in relation to adults; and,
 - c. DBS is satisfied that it is appropriate to include them in the relevant list.
28. A person included on a barred list may at any time apply to DBS for a review under paragraph 18A of Schedule 3 to the SVGA 2006 on the grounds that, in the light of: (a) information which DBS did not have at the time of his inclusion in the list; or (b) any change of circumstances relating to him; and/or (c) any error by DBS, it is no longer appropriate for the person to be included in the list.
29. When the minimum barred period of 10 years has elapsed, a person may apply to DBS for permission to seek a review of their inclusion on a barred list under paragraph 18 of Schedule 3 to the SVGA 2006.

The Upper Tribunal's jurisdiction

30. Under section 4 of the SVGA 2006, an individual who is included in a barred list may appeal to the Upper Tribunal against (so far as relevant in this case): (i) a decision under paragraph 9 of Schedule 3 to include him in a list; and (ii) a decision under paragraph 18A of Schedule 3 not to remove the individual from the list.
31. An appeal to the Upper Tribunal under section 4 of the SVGA 2006 lies only on grounds that DBS has made a mistake: (a) on any point of law; or (b) in any finding of fact on which the decision was based (section 4(2)). For the purposes of section 4(2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact (section 4(3)).
32. By section 4(5), unless the Upper Tribunal finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS.

33. By section 4(6) if the Upper Tribunal finds that DBS has made a mistake of law or fact, it must: (a) direct DBS to remove the person from the list, or (b) remit the matter to DBS for a new decision.
34. By section 4(7), if the Upper Tribunal remits a matter to DBS, (a) it may set out any findings of fact which it has made (on which DBS must base its new decision); and (b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.

The approach of the Upper Tribunal

35. 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].
36. A mistake of law for the purposes of section 4(2)(a) of the SVGA 2006 includes all the well-established categories of error of law, including making an error of legal principle, failure to take into account relevant matters, taking into account irrelevant matters, material unfairness, irrationality or perversity (including in relation to a finding of fact) and failure to give adequate reasons for a decision: see generally *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9]-[11] and *KB v DBS* [2021] UKUT 325 (AAC) (**KB**) at [39].
37. What constitutes a mistake of fact for the purposes of section 4(2)(b) of the SVGA 2006 has been the subject of attention in the case law. In cases where the Upper Tribunal has before it only the evidence that was before DBS, it has been held that the Upper Tribunal is restricted and may only find a mistake of fact in circumstances that would amount to an error of law, i.e. perversity or irrationality: see *XYZ v DBS* [2025] EWCA Civ 191, [2025] 1 WLR 4531 (**XYZ**) at [27] per Andrews LJ, giving the judgment of the court, having considered previous decisions of the Court of Appeal in *DBS v RI* [2024] EWCA Civ 95, [2024] 1 WLR 4033 (**RI**) and *DBS v JHB* [2023] EWCA Civ 982 (**JHB**). In other cases, where the Upper Tribunal receives evidence that was not before DBS (such as oral evidence from the appellant), then it is open to the Upper Tribunal to find a mistake of fact if it is satisfied DBS's finding is wrong.
38. A finding of fact is not wrong merely because the Upper Tribunal would have made a different finding, but neither is the Upper Tribunal restricted (in cases where it has received evidence that was not before the DBS) to considering only whether DBS's findings of fact are reasonable. The Upper Tribunal is entitled to evaluate all the evidence itself, make its own findings of fact and draw its own inferences from the evidence before it in order to decide whether DBS has made a mistake (see generally *PF v DBS* [2020] UKUT 256 (AAC) (**PF**), as subsequently approved in *JHB* at [71]-[89] per Laing LJ, giving the judgment of the Court, *RI* at [28]-[37] per Bean LJ and at [49]-[51] per Males LJ and *XYZ* at [25] per Andrews LJ).
39. Facts must, however, 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 (**AB**) 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.

40. Any error of fact or law must be material to the ultimate decision, in the sense that it may have changed the outcome: *KB* at [31].
41. 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, unless it is satisfied that the only lawful outcome is that the person is removed from the list, in which case the Upper Tribunal must so direct: *AB* at [73] per Lewis LJ.

The approach of the Upper Tribunal in ‘second-time-round’ appeals

42. By ‘second-time-round’ appeals, we mean appeals such as this one where the individual has previously appealed successfully against a decision by DBS, the Upper Tribunal has remitted the matter to DBS for a “new decision” under section 4(6)(b) of the SVGA 2006 and the individual has appealed again to the Upper Tribunal against the new decision.
43. The statutory language of “new decision” suggests that the decision is to be taken afresh under the original statutory power (paragraph 9 of Schedule 3 in this case), but as the Citron Tribunal in this case exercised its discretion under section 4(7)(b) to direct that the appellant should remain on the list until DBS made its new decision, DBS in this case approached the “new decision” as a review under paragraph 18A. (It has not been suggested that this approach was erroneous and we are satisfied in this case that it would make no material difference to the outcome of this appeal if DBS had characterised its “new decision” as a decision under paragraph 9 of Schedule 3.)
44. When remitting the case, the Citron Tribunal also exercised its discretion under section 4(7)(a) to set out findings of fact “on which DBS must base its new decision”. It is to be noted that because section 4(7)(a) is discretionary, there may be cases in which the Upper Tribunal, having found a mistake of fact or law in DBS’s decision, remits the matter to DBS for a new decision without setting out any specific findings of fact for the purposes of section 4(7)(a).
45. In this case, the Citron Tribunal did exercise its discretion under section 4(7)(a) to set out three specific paragraphs of facts in [21]-[23] of its judgment. There is no dispute between the parties that those particular findings of fact are binding on the appellant and DBS and this Upper Tribunal. We agree that is the correct approach because that is the plain intent and effect of section 4(7)(a).
46. However, questions have arisen on this appeal as to:
 - a. Whether DBS is entitled in its new decision to rely on findings of fact going beyond the facts in [21]-[23] of the Citron judgment;
 - b. If so, whether DBS can rely on facts that were:

- i. Not included in the first decision letter; or
 - ii. Included in the first decision letter and not challenged by the appellant on the first appeal;
 - iii. Included in the first decision letter and challenged by the appellant on the first appeal but either:
 - 1. Not dealt with in the findings of fact at [21]-[23] on which the Citron Tribunal directed DBS to base its new decision; or,
 - 2. Not dealt with by the Citron Tribunal at all.
 - c. Whether the appellant is entitled to challenge in this appeal findings of fact in DBS's new decision letter that were also in DBS's first decision letter, but were:
 - i. Not challenged by the appellant in the first appeal; or
 - ii. Challenged by the appellant in the first appeal but either:
 - 1. Not dealt with in the findings of fact at [21]-[23] on which the Citron Tribunal directed DBS to base its new decision; or,
 - 2. Not dealt with by the Citron Tribunal at all.
47. In advance of this hearing, the judge drew to the parties' attention the possible relevance of the principles of *res judicata* (Latin for "a matter judged"), including cause of action estoppel, issue estoppel and abuse of process (the latter often being referred to as "the rule in *Henderson v Henderson*"). The parties were referred to *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46, [2014] AC 160 (*Virgin Atlantic*) at [17]-[24] for the general principles and to the discussion of their relevance to an appeal under the SVGA 2006 by the Court of Appeal in *XYZ* at [61]-[73]. The judge directed the parties to make submissions on the same. DBS provided submissions in writing in advance of the hearing and also dealt with these issues in oral closing submissions. Although the judge's directions had also been sent to the appellant's solicitor in advance of the hearing, Mr Bahja as counsel for the appellant had not personally received the judge's directions. Time was taken at the hearing to explain the directions to him and he was given additional time over the lunch adjournment to prepare submissions. He confirmed that he had had sufficient time to address the issues.

Why DBS is not limited considering only the facts set out in the section 4(7)(a) direction.

48. We have considered, first, the appellant's submission that DBS is not entitled to rely in its new decision on any facts other than those at [21]-[23] of the Citron Tribunal judgment. This interpretation of the statute is strongly resisted by DBS, and was not considered a tenable construction by Judge Brewer when she granted permission to appeal in this matter (albeit that she did not limit the grant of permission).
49. We agree with DBS and reject the appellant's submission. What section 4(7)(a) requires is only that DBS must "base" its "new decision" on any findings of fact that the Upper Tribunal has set out under that section. Although we acknowledge that section 4(7)(a) is capable of being interpreted in the way for which the appellant contends, that is not the only interpretation available. Having regard to

the statutory language and the context, in our judgment the use of the term “base” indicates only that the facts found by the Upper Tribunal must form the basis of the new decision, not that those facts must be the only ones that DBS takes into account.

50. The statute is clear that DBS, as the body charged by Parliament with the regulatory function, is required to make a “new decision”, not merely to carry out a review or revision of its decision. Restricting DBS only to the facts found by the Upper Tribunal would significantly restrict DBS’s regulatory function. The point is made at [43] of **XYZ** that there is a general principle that a statutory body cannot fetter its own freedom to perform its statutory duties or exercise its statutory powers. Those duties and powers could be restricted by statute, of course, but we consider that clearer words would have been required if section 4(7)(a) was to restrict DBS’s exercise of its regulatory function to the extent that it could not take into account other facts relevant to its decision in addition to those specified by the Upper Tribunal.
51. There is also a practical consideration: it is rare for the whole factual matrix considered by DBS to be in issue on an appeal to the Upper Tribunal. Accordingly, as happened in this case, the Upper Tribunal will usually only receive evidence and make findings of fact about certain core issues in the case. It would be impractical and unrealistic for DBS to have to leave out of account all the background facts when dealing with the “new decision” just because they were not in issue before the Upper Tribunal and therefore not set out in the section 4(7)(a) direction.

Why cause of action estoppel does not apply to this appeal

52. As described at [20] and [26] of **Virgin Atlantic**, cause of action estoppel is one aspect of the *res judicata* principle. It arises where the cause of action in later proceedings is identical to that in the earlier proceedings, the latter having involved the same parties and the same subject matter. Where cause of action estoppel applies, it is an absolute bar to relitigating all points decided in the earlier proceedings, in the absence of fraud (or similar).
53. The application of cause of action estoppel in relation to appeals under section 4 of the SVGA 2006 was considered in **XYZ**. The issue in that case was whether DBS was bound by findings of fact made by the Teachers’ Regulation Authority (TRA) in disciplinary proceedings concerning the same teacher. The Court of Appeal held not. In so concluding, it accepted, on the basis of the House of Lords’ decision in *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273 (**Thrasyvoulou**), that cause of action estoppel may in principle apply in public law proceedings where “Parliament has enacted a statutory scheme which is designed to establish the existence of a legal right ... unless the intention to exclude the *res judicata* principle could be inferred from construction of the relevant statutory provisions” (see [63] of **XYZ**). However, the Court of Appeal went on at [66]-[70] to discuss the difficulty of identifying what the ‘cause of action’ before the TRA was said to be that could be the subject of an estoppel so far as DBS’s decision was concerned. At [66]-[67] the Court of Appeal observed:

66. One of the problems in seeking to apply the *Thrasyvoulou* approach in the context of these particular public law proceedings is that at least one and probably both of the two separate statutory schemes with which we are concerned are not designed to finally establish the existence of a legal right. One might fairly describe the 2006 Act as conferring a statutory right on the DBS to make a barring order against certain individuals, and the 2002 Act and the regulations made under it as conferring a statutory right on the Secretary of State (and the TRA acting on his or her behalf) to make prohibition orders against teachers. But the DBS does not need to resort to any form of litigation to exercise its right, and the disciplinary process that the TRA initiates when an allegation of professional misconduct is made is of a very different character from bringing a claim in a court or tribunal against someone based on facts constituting an alleged legal wrong (or conferring an alleged legal right on the claimant).

67. Neither scheme is designed to establish the existence of a legal right, and the criteria which have to be satisfied before the different statutory rights conferred on the two bodies can be exercised are not identical....

54. Notwithstanding the Court of Appeal's observations in those paragraphs, we agree with the parties in this case that there is no difficulty in identifying one respect in which cause of action estoppel *will* apply in relation to appeals under section 4 of the SVGA 2006. The right of appeal against a DBS decision is a cause of action in respect of that decision which is designed, at least in part, to establish the existence of a legal right to removal from a barred list. Any attempt to bring a second appeal against the same DBS decision would therefore be barred by cause of action estoppel. Equally, we agree with the parties that cause of action estoppel does not prevent a second appeal from being brought against a *new* decision by DBS. The new decision gives rise to a second cause of action.

Why issue estoppel, including the Henderson v Henderson principle, does apply to this appeal

55. Issue estoppel, which is also an aspect of the *res judicata* principle, is the principle that, even where the cause of action is not the same in the later action as it was in the earlier one, any issue that is necessarily common to both proceedings that was decided on the earlier occasion is binding on the parties: see ***Virgin Atlantic*** at [17]. The related rule in *Henderson v Henderson* (1843) 3 Hare 100 precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. The House of Lords in *Virgin Atlantic* went on to consider the relationship between the two, and at [22](3)-[24] concluded (confirming the previous House of Lords authority of *Arnold v National Westminster Bank* [1991] 2 AC 93 (***Arnold***)) that the general rule that combines those two principles is that:

Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually

be absolute if it could with reasonable diligence and should in all the circumstances have been raised.

56. The observations of the Court of Appeal in **XYZ** as to the applicability of the *res judicata* principle in public law proceedings are also applicable to the question of whether issue estoppel applies in public law proceedings. As noted above, the Court of Appeal considered that the *res judicata* principle may be excluded if the intention to exclude that principle can be inferred from construction of the relevant statutory provisions. We accordingly invited the parties to address us on the question of whether section 4(7)(a) of the SVGA 2006, containing as it does a power for the Upper Tribunal to direct that certain findings of fact should be binding on the parties, meant that there was an intention to exclude the operation of the principle of issue estoppel.
57. Mr Wilkinson for DBS submits not and argues that the appellant cannot on this appeal challenge issues that were determined by the Citron Tribunal previously. Mr Bahja for the appellant agrees in principle, albeit that he argues that the issue estoppel runs the other way, in the sense that he submits that DBS could not in its second decision rely on matters that he submits DBS could/should have raised in the context of the first appeal.
58. We agree with the parties on the point of principle. The Upper Tribunal is a superior court of record (see section 3(5) of the Tribunals, Courts and Enforcement Act 2007 (**TCEA 2007**)) and its decisions are ordinarily binding on the parties who appear before it. On appeals under section 4 of the SVGA 2006 the Upper Tribunal may make decisions on issues of both fact and law that arise on the appeal. Issue estoppel applies to issues of law as much as to issues of fact. Once that is understood, we do not consider that the specific provision made in section 4(7)(a) for making certain factual findings of the Upper Tribunal binding can properly be construed as evincing a Parliamentary intention that the decision of the Upper Tribunal on an appeal would not otherwise be binding on parties as to the issues it has decided. Rather, section 4(7)(a) seems to us to be there to make clear that the Upper Tribunal's jurisdiction is not limited merely to adjudicating on whether DBS has made a mistake in any finding of fact as permitted by section 4(2)(b), but is also empowered to make its own findings of fact. It seems to us to be the equivalent provision to section 12(4)(b) of the TCEA 2007 which empowers the Upper Tribunal to make findings of fact when it remakes a decision on an appeal under section 11 of that Act. We do not therefore consider that the inclusion of section 4(7)(a) in the SVGA 2006 indicates that Parliament intended to exclude the operation of the otherwise generally applicable legal principles of issue estoppel.
59. It follows that we consider that the general rules in **Arnold/Virgin Atlantic** apply to these proceedings so that:
- a. The parties in this case (and we) are bound by any issues that were raised in the first proceedings before the Citron Tribunal, and decided by that Tribunal, whether or not the issue was specifically included in the scope of the Citron Tribunal's section 4(7)(a) direction; and

- b. It is not open to the appellant to raise in these proceedings any issue that could with reasonable diligence and should in all the circumstances have been raised as a challenge to the first decision as part of the first appeal.
60. The House of Lords in those cases held that the general rules may be departed from in special circumstances if necessary to avoid injustice. However, especially where an issue was both raised and decided on a first appeal, it is unlikely that will be appropriate.
61. We observe that the effect of these general rules as they apply in this context is necessarily somewhat one-sided. Since it is the appellant who has the right to appeal the decision of DBS, it is the appellant who is required to raise, at the first opportunity in the first appeal, any challenge to any finding of fact on which that first decision was based. A failure to do so may result in an appellant being barred from raising any challenge where the same finding of fact is relied on by DBS in its second decision.
62. Contrary to the appellant's submission, the same is not true for DBS. In principle, DBS may when making a new decision on remittal under section 4(6)(b) rely on facts that it did not previously rely on in relation to the first decision, whether or not it was aware of those facts at the time. Doing so might invite scepticism as to whether the facts are sufficiently credible or weighty to support a barring decision if they were not relied on first time round, but there is no prohibition on DBS taking that approach. Provided DBS bases its decision on any facts set out by the Upper Tribunal under section 4(7)(a) and treats the decision of the Upper Tribunal as binding in relation to all the issues of fact and law that it decided, DBS is free to exercise its regulatory function as it sees fit when taking its new decision.

Our decision on the substance of the appeal

63. We now turn to deal with the second, third and fourth issues as we identified them above at paragraphs 21 to 23. In doing so, we set out the findings of fact that we have reached having had the benefit of hearing oral evidence from the appellant. Our findings of fact are made on the balance of probabilities.

The incident of 6 September 2020 involving service user AB

(1) Lifting AB's leg

64. The appellant argues that DBS made a mistake of fact in finding in the new decision that he "roughly" lifted AB's leg. In DBS's first decision, DBS found that the appellant "handled" AB "in a forceful manner lifting her leg onto [his] shoulder ...". The appellant challenged that finding before the Citron Tribunal. Although it was not one of the issues specifically identified by Judge Citron when granting permission to appeal, it had (as noted above at paragraph 10) been raised by the appellant in the application form, the grant of permission to appeal was not "formally limited", and the appellant argued at the hearing that DBS had made a mistake of fact in respect of that finding. The appellant's witness statement for that hearing included the following at [8]-[9]:

8. ... Before I started to clean her vagina, AB raised her leg to allow me to clean her. As I was cleaning her vagina, her leg rested in my shoulder only for a few seconds.

9. I never asked AB to put her leg on my shoulder nor did I grab her leg and put it on my shoulder.

65. Mr Bahja's skeleton argument for the hearing included the following:

"The DBS made findings of fact which were not based on evidence or inferences which could be drawn from that evidence. In her handwritten statement dated 6 September 2020 at 6.50pm AB asserted: (i) she rolled on her left side expecting SA to go at the back to clean her bottom (p 52); (ii) SA came to the front (p 52); (iii) he grabbed hold of her leg forcing it over his shoulder (p 52); and (iv) from that position, ie from the front, he cleaned her bottom (p 52). The irreversible inference from AB's evidence is that it would have been impossible for SA to have been in front, facing AB, grab her leg, forcing it over his shoulder and then, from that position, clean her bottom. ... AB's evidence on this point does not seem to make much sense. She might have been mistaken in her evidence or simply mis-recalled the incident. DBS has therefore failed to prove facts (ii) to (iv) above on a balance of probabilities."

66. We therefore consider that the issue of whether the appellant forcefully raised AB's leg was properly before the Citron Tribunal as an issue for it to decide. If it decided that issue, then we consider that the principle of issue estoppel (see above paragraphs 55-62) would apply so as to prevent the issue being raised again in this appeal.

67. The reason there is doubt about whether the issue was decided is because it was not mentioned in express terms in the Citron Tribunal's judgment. However, we accept the submission of Mr Wilkinson that this issue was determined by the Citron Tribunal. At [19]-[20] of its decision, the Citron Tribunal set out its assessment of the appellant's credibility (see above paragraph 12). It explained that it accepted much of what the appellant said, including the three specific points that it identified at [19], but that it did not accept everything that the appellant said. In particular, at [20c] it said that, in relation to the aspects of the evidence for which there are "near-contemporaneous written accounts of what had happened, in particular with regard to the 6 September 2020 incident", when "those accounts and that of SA clashed, we had to balance the strengths and weaknesses of all the evidence". It then went on at [21]-[22] to set out the respects in which it considered DBS had made mistakes of fact, without mentioning the forceful raising of the leg. At [23] it dealt specifically with one respect in which it considered DBS had not made a mistake (i.e. that SA did "press hard" with a wipe in the area of AB's clitoris).

68. The Citron Tribunal did not deal specifically with the raising of the leg, but we consider this is likely because the focus of Citron Tribunal was on the sexual aspect of the case, as DBS had found it to be in its first decision, and the Tribunal considered it unnecessary to say anything more specific about the respects in

which it found that DBS had not made mistakes. However, we consider that, when the decision is read as a whole and in context, it is clear that the appellant's evidence about the raising of AB's leg was rejected by the Citron Tribunal. We reach this conclusion because the raising of the leg is one aspect of the case that was dealt with in the contemporaneous statements to which the Citron Tribunal refers at [20c]. As the Citron Tribunal in this paragraph explained that it did not accept everything the appellant had said, especially where it contradicted contemporaneous written accounts, and did not in its decision specifically identify that DBS was mistaken in relation to this issue, we consider it to be clear that the Citron Tribunal rejected the appellant's case on this point. Moreover, the Citron Tribunal did at [22] find that he was "somewhat insensitive, or callous, as to the manner of his giving intimate care", which reasons are also consistent with it having rejected the appellant's evidence regarding the lifting of AB's leg.

69. It follows that the appellant is estopped from challenging DBS's finding of fact regarding the lifting of the leg again in these proceedings, unless special circumstances require that he be permitted to do so in the interests of justice. We are not persuaded that he should be so permitted. The issue was raised, fully litigated and determined on the previous occasion, when the appellant was represented by the same legal team as he is now. The absence of express reasons in the decision dealing with the point does not justify relaxing the general principle of issue estoppel in circumstances where we are satisfied, as we are here, that the Citron Tribunal did in fact determine the point and that its reasons are adequate to explain what it decided on this issue and why.
70. We add that, even if we are wrong and issue estoppel does not apply, we would have reached the same conclusion ourselves. We were unconvinced by what SA said in his witness statement and oral evidence regarding the lifting of AB's leg. It was inconsistent with AB's contemporaneous accounts, which are specific and detailed about this (in particular this passage from her handwritten witness statement prepared the same day as the incident: "He came to the front and I lifted my leg (as I often do for personal care) and he said 'put your leg over my shoulder'. I said 'I don't need to do that'. He insisted and grabbed hold of my leg (which is painful due to nerve damage) and forced it over his shoulder 2 or three times"). It was also inconsistent with what the appellant himself said in his employer's investigation meeting on 2 October 2020 about having 'upped' AB's leg.
71. It follows that DBS did not make a mistake of fact in finding that the appellant "roughly" lifted AB's leg. We add, for the avoidance of doubt, that we do not consider anything turns on DBS having described the lifting of the leg as "forceful" in its first decision letter and as "rough" in the second letter. We do not consider there is any material difference between the two adjectives in this context.

(2) Unnecessarily rough and forceful / insensitive and callous

72. As to DBS's findings that SA was "unnecessarily rough and forceful when cleaning [AB's] vaginal and clitoral area" and that he provided "rough intimate care ... in such an insensitive and callous manner that [AB] perceived [she] had been touched inappropriately", this is also an issue that was determined by the

Citron Tribunal as it was the subject of specific direction by the Tribunal under section 4(7)(a). At [22] of the Citron Tribunal's decision it determined that "SA was somewhat insensitive, or callous, as to the manner of his giving intimate care, to an extent that the recipients felt they were being treated inappropriately" and at [23] that SA did "press hard" with a wipe in the area of the service user's clitoris". DBS was required to base its new decision on those findings.

73. It is concerning that in its new decision DBS has used language that goes beyond that used by the Citron Tribunal and which does in our judgment suggest a greater level of force in relation to the cleaning of AB's vaginal area than the Citron Tribunal found there to be. "Unnecessarily rough and forceful" sounds worse than 'pressing hard', and "insensitive and callous" sounds more serious than "somewhat insensitive, or callous", both because of the removal of the qualifying "somewhat" and because of the use of the conjunctive "and" rather than disjunctive "or" that the Citron Tribunal used when expressing its finding.
74. DBS should, in our judgment, simply have based its decision on the findings of the Citron Tribunal as required by section 4(7)(a). Its failure to do so is an error of law. Taken on its own, however, we would not have been satisfied that this was a material error because the difference in language is minor. However, as we have also found that there are other respects in which DBS in its new decision has erroneously departed from the findings of the Citron Tribunal in a way that seeks to make SA's conduct appear more serious than the Citron Tribunal found it to be (see below paragraphs 76-86), we do consider this to be a material error as it is possible that it has materially contributed (cumulatively with these other errors) to DBS making a decision that it may not have made had it based its decision on the findings of the Citron Tribunal as it is required by law to do.

(3) *Distress*

75. Finally, as regards DBS's finding in the new decision that AB was caused "distress", this word was also used by DBS in the first decision and the Citron Tribunal made a relevant finding about it in a paragraph of its judgment that was specifically the subject of the section 4(7)(a) direction. At [22], the Tribunal found that both AB and CS were "upset and made uncomfortable" by perceiving that their private parts had been fondled. The appellant argues that DBS has again wrongly departed from the finding of the Citron Tribunal in this respect, but we disagree. We consider that it is legitimate to describe someone who has been "upset and made uncomfortable" as having been distressed. Moreover, as the word "distress" was used by DBS in its first decision, the appellant should have challenged that finding in the first appeal if he wished to do so (see paragraphs 55-62 above). Yet further, we would in any event conclude, having read the contemporaneous evidence, that AB was caused "distress" by the appellant. She expressed distress when complaining about it, was observed to be affected by it for days after the incident and requested not to see the appellant again (UTB, pp 89, 90, 91, 154).

The incident of 10 December 2019 involving service user CS*(1) Care contrary to the care plan*

76. The appellant argues that DBS erred in finding in the new decision that the care that the appellant provided to CS was “contrary to the care plan” and that SA “failed to comply with CS’ care plan, showering him on [his] own, thereby exposing the service user to the potential for further significant harm to be caused”. This was not a finding of fact that DBS included in its first decision letter, so the appellant could not have challenged it in the first appeal.
77. The basis for DBS’s finding of fact in this respect is the notes of a meeting between the appellant and the home manager on 13 December 2019 (UTB, p 92) which shows the manager asking SA why he showered CS on his own rather than with the other careworker. DBS has inferred from this that the care plan was for CS to have two staff when being showered (UTB, p 242).
78. However, the fact that the manager asked SA this question in a meeting does not show that he acted contrary to the care plan. In oral evidence, SA said he had never seen the care plan because it was not his job to look at care plans, he just did whatever he was told to do by the senior on the shift. At the meeting on 13 December 2019, when asked why he showered CS on his own, SA answered that the other careworker did other tasks and that his supervisor had “wrote down that as me working on my own. It was on the list...”. SA’s evidence, both to us and his employer, was thus that he had simply been doing what he was told to do.
79. The care plan itself was not provided to, or obtained by, DBS and is not in the bundle. However, there is some evidence about it in the bundle. An email in the bundle from a social worker at Cambridgeshire County Council (UTB, p 154) states with regard to this incident: “This was looked into by Police but care plan indicated that this particular service user needed washing and drying of the genital area there was nothing to indicate that touch was anything beyond the care and support need.” The Crime Report at UTB p 179 includes the following: “he touched [CS] genitals because it was his job to both clean and dry them (the care home confirm he SHOULD be doing this)” and “The OIC has documented details of the care plan in place for the victim which specifies the washing and drying of the genitals”.
80. Having considered all the documentary and oral evidence we are satisfied that DBS made a mistake of fact in concluding that the appellant showering CS on his own was contrary to the care plan. We need only be satisfied that the finding of fact is wrong (see above paragraphs 37-38), but for completeness we record that we are satisfied that this is a finding of fact that is not just wrong, but is also irrational or perverse as there was no evidential basis for it and, in fact, evidence to the contrary.

(2) Rough handling / insensitive and callous

81. The appellant further argues that DBS has made a mistake of fact in concluding that the appellant “roughly handled” CS’s genitals and that he provided “rough intimate care” to CS in an “insensitive and callous manner”.
82. This was not a finding of fact that DBS made previously in its first decision. Previously, DBS found that the appellant “fondled” CS’s genitals, consistent with the complaint that was made by the resident (UTB, pp 92 and 179).
83. That finding of fact was challenged by the appellant in the first appeal and the Citron Tribunal decided that the appellant had not “fondled” CS’s genitals. It found ([22]) that “the way in which SA interacted with the service users was such that they perceived that their private parts were being fondled” and that this was “because of the way SA carried out his task of intimate care” and that he was “somewhat insensitive, or callous ... to the extent that the recipients felt they were being treated inappropriately”.
84. Mr Wilkinson in his closing submissions referred to UTB, p 243 in the structured judgment process document and suggested that DBS had inferred that SA’s handling of CS was rough because his handling of AB was rough.
85. We do not consider that it was open to DBS in the light of the Citron Tribunal decision, or the documentary evidence, to find that the appellant “roughly handled” CS’s genitals. The complaint was of “fondling”, which is not a word that can reasonably be equated with “rough handling”. There is no documentary evidence that supports a finding that SA roughly handled CS’s genitals, and the appellant denied it in cross-examination. The words may have been taken from the Investigation Report into the AB incident prepared by SA’s employer (UTB, p 138), which referred to the previous incident with CS as follows: “[SA] was involved in a safeguarding referral December 2019 as a result of rough handling a resident. This was not substantiated. He has shown consideration to residents and overall [is] of a gentle nature.” However, that report has itself incorrectly characterised the nature of the previous allegation and cannot reasonably be relied on as evidence of what the allegation was at the time. It is also not in our judgment rational for DBS to infer from the fact that there is evidence of forceful lifting of AB’s leg that SA, who was otherwise perceived as a gentle person, “roughly handled” CS the previous year. Again, we are therefore satisfied that this finding of fact was wrong, but we would also have found it to be perverse if it were necessary for us to do so (see above paragraphs 37-38).
86. Further, the Citron Tribunal had specifically considered the issue of how the appellant handled CS’s genitals and had made specific findings of fact on the basis of which section 4(7)(a) required DBS to base its new decision. Again, in finding that the appellant “roughly handled” CS’s genitals, DBS failed to do so. What we have said above in relation to AB about DBS replacing the Tribunal’s assessment that SA was “somewhat insensitive, or callous” with “insensitive and callous” also applies here. In all these respects, DBS has erred in law by failing to base its new decision on the findings of fact of the Citron Tribunal.

The over-arching points*(1) Intentional and deliberate harm?*

87. The appellant argues that DBS's new decision letter implies that SA intentionally and deliberately caused CS harm, contrary to the findings of the Citron Tribunal. We disagree. The letter expressly acknowledges that there was no intention to cause either service user harm but explains why DBS considers there does not have to be any intention to cause harm for harm to be caused or for there to be concerns about the future risk of harm a person may represent in a regulated activity position. There is no mistake of fact or law in DBS's conclusion in that respect. DBS's reasoning is logical and reasonable.

(2) "Inappropriate"

88. The appellant argues that DBS should not have described the care he provided to AB and CS as "inappropriate" given that in both cases it was care that was required by their care plans.
89. So far as CS is concerned, we agree that DBS erred in law in describing the care provided to CS as "inappropriate, rough intimate care" for essentially the same reasons as we have found above at paragraphs 76-80 that the care provided to CS was not provided "roughly" and was provided in accordance with the care plan. DBS's finding in this respect is also not consistent with the findings of fact of the Citron Tribunal on which DBS was required by section 4(7)(a) to base its decision. What the Citron Tribunal found was that "the recipients *felt* they were being treated inappropriately". DBS should have based its decision in respect of CS on that finding.
90. As regards AB, the position is a little different. Although DBS should also have based its decision in relation to AB on the Citron Tribunal's finding that AB *felt* she was being treated inappropriately, we do not consider that DBS has erred in using the word "inappropriate" to describe, generically, the nature of the care that he provided to AB. Although it was not "inappropriate" for him to be cleaning her vaginal and clitoral area, it is reasonable to describe the way in which he carried out her care as "inappropriate", given the findings that the appellant forcefully lifted AB's leg and 'pressed hard' with a wipe.

(3) Training and supervision

91. The appellant argues that DBS's decision was irrational or disproportionate in not regarding training and supervision as being sufficient to mitigate the risk in his case. Although we have some reservations about DBS's reasoning in this respect in its decision letter, we do not consider that DBS's approach to the training and supervision issue was irrational or disproportionate.
92. In its decision letter, DBS stated that "there is no less onerous measures available to DBS other than inclusion in the barred lists ... It is not within DBS's legislative remit to impose a partial bar or less intrusive measures as proposed by your legal representative". That is correct, and is a point that was made by the three-judge

panel in *KS v DBS* [2025] UKUT 45 (AAC) at [61]-[63]. It does not mean, of course, that DBS does not have to take into account, when considering whether it is appropriate and proportionate to place an individual on the barred list, whether it is necessary to do so in order to safeguard children and vulnerable adults from harm in future. A risk that could be mitigated by training, and which DBS was satisfied the individual would mitigate in future by undertaking training, might therefore lead to a decision that barring was disproportionate.

93. However, DBS has not, contrary to what we understand to be the substance of the appellant's submission, ended its analysis of proportionality with the statement we have quoted in the previous paragraph about less onerous measures not being available to DBS. It has, rather, considered in the light of all the evidence whether the level of risk posed by the appellant should be regarded as being lower than it might otherwise be because his conduct can in part be explained by a lack of training or supervision, or whether any future risk could reasonably be mitigated by training or supervision. That is the right approach and we are not satisfied that its conclusions in this regard were irrational or disproportionate.
94. In the light of our conclusions in relation in particular to CS, DBS will need to revisit the question of appropriateness and proportionality. However, we make the following observations as to DBS's reasoning on this issue in the light of the oral evidence we have received at this hearing, and drawing on the specialist expertise of our members:
 - a. DBS was not wrong to find that the appellant had failed to complete mandatory training at the outset of employment when required by the employer (UTB, p 223);
 - b. Training is not required for someone to know that they need to be sensitive, and not forceful, when providing intimate personal care, although we consider that training may assist in terms of addressing how consent is sought and managing the service user's expectations of how care will be provided;
 - c. DBS was not wrong in its assessment that the appellant continues to demonstrate a lack of insight, or in treating that as a relevant factor to weigh in the balance when considering the appellant's submissions about training and supervision.
95. As regards the appellant's lack of insight, we note, in particular, that the appellant remained steadfast under questioning that AB was not distressed (or upset) by the personal care he provided, even after he had been taken to the documents in the bundle where AB reported feeling upset, and other carers had observed her being upset. His belief in that regard was based on her not having expressed any concern to him at the time, and having said 'thank you' when he left her room. Further, in oral evidence, he confirmed that his position was still as it had been at the investigatory meeting with his employer (UTB, p 125) that he has not learned anything from this situation as "nothing happened".

(4) Written warning regarding SA's conduct with fellow employees

96. In its first decision, DBS had included SA's conduct towards two female colleagues "by adjusting their clothing and hugging them without their permission" as one of what were in that decision *three* incidents of what DBS identified as "relevant conduct" "of a sexual nature" involving a vulnerable adult. DBS subsequently accepted that SA's conduct towards his fellow employees was not "relevant conduct" for the purposes of the SVGA 2006 as it did not concern vulnerable adults. However, DBS has still relied on this warning in its new decision letter in the following passage:

The repeat of the insensitive treatment when providing intimate care, despite disciplinary proceedings and the existence of a live written warning on your record, albeit relating to your conduct towards colleagues, indicates the presence of an inability for you to successfully alter and modify how you interact with others over a sustained period of time.

97. The appellant argues that DBS should have left the warning in relation to colleagues out of account altogether as an irrelevant consideration. We are sympathetic to that submission because the appellant's conduct towards his colleagues was different in character to the conduct towards service users that has led to the barring decision. Moreover, the appellant's (unchallenged) evidence is that, having been warned, he did not repeat that behaviour. However, the conduct is not wholly different, in the sense that both the conduct towards colleagues and the conduct towards service users involved close personal interaction and failure to anticipate the reaction and feelings of others. We are therefore satisfied that the warning was not an irrelevant factor to take into account.

Conclusion and disposal

98. We have found that DBS:
- Made a mistake of law in finding that SA was "unnecessarily rough and forceful when cleaning [AB's] vaginal and clitoral area" and that he provided "rough intimate care ... in such an insensitive and callous manner...", rather than basing its decision on the facts found by the Citron Tribunal (above, paragraphs 72-74);
 - Made a mistake of fact in concluding that the appellant showering CS on his own was contrary to the care plan (above, paragraphs 76-80);
 - Made a mistake of fact and/or law in concluding that the appellant "roughly handled" CS's genitals and that he provided "rough intimate care" to CS in an "insensitive and callous manner" (above, paragraphs 81-86);
 - Made a mistake of law in finding that the care SA provided to CS was "inappropriate" rather than basing its decision on the facts found by the Citron Tribunal (above, paragraphs 88-90).
99. By section 4(6) of the SVGA 2006, we must therefore either: (a) direct DBS to remove the person from the list, or (b) remit the matter to DBS for a new decision. In accordance with the legal principles we have set out above (paragraph 41), we

may only remove the appellant from the list if we are satisfied that is the only lawful outcome. We are not so satisfied. Although our conclusions mean that the appellant's conduct was less serious, in particular in relation to CS, than DBS considered it to be in its new decision (and far less serious than DBS considered it to be in his first decision), this is still not a case where the only lawful outcome would be removal of the appellant from the list. The current position should therefore be maintained pending that new decision, so, pursuant to section 4(7)(b), we direct that the appellant remain on the barred list until DBS takes its new decision.

100. In remitting the matter to DBS, for the reasons we have set out above at paragraphs 55-62, our decision is binding on the parties as to the issues of fact and law that we have decided. However, for the avoidance of doubt, we also direct, pursuant to section 4(7)(a) that DBS must base its decision on the findings of fact that we have made in this decision. Our decision should also be regarded as incorporating, and re-making, the findings of fact made by the Citron Tribunal in its decision.

Holly Stout
Judge of the Upper Tribunal

Roger Graham
Specialist Member

Rachael Smith
Specialist Member

Authorised by the Judge for issue on 22 June 2026

*Re-issued 13 July 2026 under rule 42,
to correct accidental omission of section 4(7)(b) direction.*