Neutral Citation Number: [2023] EWCA Civ 1547

Case No: CA-2022-001866

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
UPPER TRIBUNAL JUDGE JACOBS
UA 2020 000872 V

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2023

Before :

LADY JUSTICE MACUR
LORD JUSTICE BEAN
and
LORD JUSTICE NUGEE

- -

Between :

PATRICIA KIHEMBO	**Appellant**
- and -	
DISCLOSURE AND BARRING SERVICE	**Respondent**

- -
- -

Mr Mansoor Fazli (instructed by **Titan Solicitors**) for the **Appellant**
Ms Carine Patry KC (instructed by **DBS Legal Team**) for the **Respondent**

Hearing date: 30 November 2023

- -

Approved Judgment

This judgment was handed down remotely at 15.00 on 21 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

1. This is an appeal by Ms Patricia Kihembo against the decision of the Upper Tribunal ("UT") (Administrative Appeals Chamber) dated 22nd June 2022. By that decision, the UT dismissed Ms Kihembo's appeal against two decisions of the Respondent, the Disclosure and Barring Service ("DBS"), dated 2nd January 2020 and 23rd April 2020. The first decision of 2nd January 2020 was to include Ms Kihembo in the Adults' Barred List; the second decision of 23rd April 2020 was to include her in the Children's Barred List.

2. Ms Kihembo previously worked as a live-in carer for the service user Ms SJP ("SJP"). She was employed by Carers 4 U Ltd. SJP has cerebral palsy and requires physical care and support. She does not lack mental capacity. Ms Kihembo worked as her carer from 2013 until May 2015, at which time SJP accused her of repeatedly hitting her with a shoe horn and spoon over a period of 3 months.

3. Carers 4 U Ltd suspended Ms Kihembo from work by letter of 24th May 2015, pending investigation of the allegation. The matter was investigated by the police and social services. The police investigation was open for no less than three and a half years and concluded with a decision to take no further action owing, in part, to a lack of evidence. Ms Kihembo denies having ever hit SJP.

4. The DBS sent Ms Kihembo a "Minded to Bar Letter (Adults)" dated 24th July 2019 and a "Minded to Bar Letter (Children)" dated 27th November 2019. Ms Kihembo took the opportunity afforded to her to make representations to the DBS. After considering the representations and all the evidence before it, the DBS notified Ms Kihembo of its decisions to include her in the Adults Barred List (by letter of 2nd January 2020) and in the Children's Barred List (by letter of 23rd April 2020). Both decisions were based on the same alleged conduct by Ms Kihembo toward SJP that occurred sometime between February and May 2015.

5. Ms Kihembo appealed against both DBS decisions. An oral hearing took place on 27th May 2022 in the UT before a three-member panel chaired by Judge Jacobs. Ms Kihembo was unrepresented at the hearing but attended, spoke on her own behalf and was cross-examined. The DBS was represented by Mr Ashley Serr of counsel. The decision of the UT dismissing the appeal was promulgated on 22nd June 2022. On 28th August 2022 permission to appeal to the Court of Appeal was in the first instance refused by UTJ Jacobs. On 23rd February 2023, Warby LJ granted permission to Ms Kihembo to appeal to this court.

6. The DBS is mandated to maintain the Adults' Barred List and the Children's Barred List by s 2 of the Safeguarding Vulnerable Groups Act 2006 ("SVGA 2006" or "the Act"). The DBS has the power to include a person in the Adults' Barred List under paragraph 9 (relevant conduct) and paragraph 11 (risk of harm) of Schedule 3 to the SVGA 2006; and in the Children's Barred List under paragraph 3 (relevant conduct) and paragraph 5 (risk of harm) of Schedule 3.

7. An individual's right to appeal a decision of the DBS to the UT is contained in s 4 of the Act:

> "4 Appeals
>
> (1) An individual who is included in a barred list may appeal to the [UT] against–
>
> a) […]
>
> b) a decision under [paragraph 2, 3, 5, 8, 9 or 11] of [Schedule 3] to include him in the list;
>
> c) […]
>
> (2) An appeal under subsection (1) may be made only on the grounds that [DBS] has made a mistake–
>
> (a) on any point of law;
>
> (b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.
>
> (3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.
>
> (4) An appeal under subsection (1) may be made only with the permission of the [UT].
>
> (5) Unless the [UT] finds that [DBS] has made a mistake of law or fact, it must confirm the decision of [DBS].
>
> (6) If the [UT] finds that [DBS] has made such a mistake it must–
>
> (a) direct [DBS] to remove the person from the list, or
>
> (b) remit the matter to [DBS] for a new decision.
>
> (7) If the [UT] remits a matter to [DBS] under subsection (6)(b)–
>
> (a) the [UT] 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 [UT] directs otherwise."

8. The right to appeal a decision of the UT to the Court of Appeal is provided by s.13 of the Tribunals, Courts and Enforcement Act 2007: it is confined to "any point of law arising from a decision made by the UT" (other than an extended decision, a category which is not relevant to this case).

9. The DBS's decisions to include Ms Kihembo in the Adults' Barred List and the Children's Barred List were based on its findings that:

> "During a period of approximately 3 months, ending on 18th May 2015, you repeatedly hit service user SJP with a shoe horn and a spoon causing red marks to her forehead and thighs and bruising to her knuckles and right eye."

10. The DBS stated in its reasoning that it had considered all information available to it, including Ms Kihembo's representations. It explained that the DBS arrives at findings on the balance of probabilities; that it is not precluded from considering matters that have been subject to no further action by the police; and that its actions were taken as soon as Carers 4 U Ltd were made aware of the allegations.

11. The DBS specified that the following considerations were taken into account when reaching the final decision(s) in respect of Ms Kihembo:

> "In your original evidence to the police you said that about 3 weeks prior to the alleged incidents you told SJP that you would be leaving as you were was [sic] pregnant and at this point Ms P's behaviour changed towards you. In your representations you made no mention of this, describing her relationship with SJP throughout as being good and saying that SJP made the allegations against you under pressure from her family.
>
> Information from the Manager of Carers 4 U supports your statement that SJP complained about her family to carers and that the family wanted SJP to have Indian carers.
>
> In your representations you claim that SJP's mother hated you for reporting that she had asked for and received money from her daughter to send to India on several occasions. The manager of Carers 4 U confirmed that you had reported concerns over SJP's mother asking her for money, that this had been passed on her Social Worker and this had been discussed with the parents. MN, who was at the meeting, confirmed that SJP left the meeting early after SJP's father became abusive and disowned SJP. This information provides some basis for your contention of antipathy towards her from SJP's family.
>
> However, the information from Carers 4 U shows that SJP had stood up to her family in the past, having pursued an action against her mother, although she did later withdraw from this as she had not wanted to give evidence in court. She had also received support from Social Services in severing connections with the family for a time. The information from Carers 4 U confirms that SJP had 'talked ill' of her parents to other carers, indicating she did not side with her family. Her past actions do not make it likely that she would support her family against you, a carer with whom she had a very good relationship, without cause.
>
> In your representations you claim that it was SJP's parents who had 'beat her hard' when she made a gagging noise and that on

the night of 16 May 2015, after returning from a visit to her family, SJP cried all night. Despite you normally keeping detailed notes in SJP's Daily Diary record, you did not note this in her notes of 16/17 May 2015. You also made no mention of the family physically abusing their daughter in 2015 and you documented the eye injury as the result of SJP scratching herself after her nails had been cut. No mention was made about the mark to her forehead.

In SJP's Daily Diary notes entries you made during the earlier period from 10.1.15 to 23.1.15 differ in tone from those made in the later period from 30.4.15 to 17.5.15. In the earlier period SJP is reported as co-operative in eating and taking medication and no concerns are registered. In the latter period you note her lack of cooperation with teeth cleaning, taking of medication and eating. Whilst this could indicate that SJP had become hostile towards you following you telling her that you would be going on maternity leave, your choice of words to describe your client's actions is more supportive of SJP's version of events. In the Daily Diary notes you refer to SJP 'wanting' or 'trying' to vomit her food up after eating, indicating that you saw this as an intentional action on SJP's part, despite confirming in your representations that you knew this was an involuntary reflex action SJP suffered after eating. This is consistent with SJP's claim that during this period her involuntary gagging aggravated you and was what prompted you to hit her with a spoon and shoe horn.

You say in your representations that when you eventually heard from the police in November 2018 that they were taking no further action on the case, you were told that there was no case to answer and that you had been cleared of the alleged offence. The police information that you received in the information bundle from us confirms that the passage of time, mainly caused by police internal delays, had a significant impact on the decision of police not to proceed, as well as SJP not being at risk because you were no longer caring for her. The Officer-in-Charge confirms that if so much time had not passed he would have asked for further information, such as whether there was a history of SJP making previous allegations. This information was requested from Carers 4 U by the DBS. The employer provided no information of any previous complaints made against staff by SJP. There is, therefore, no corroboration of your claim that SJP had made unfounded allegations against another staff in the past.

In your representations you suggest it was unlikely that SJP would have sent you gifts for your new-born child if you had hit her. This type of behaviour is, however, not uncommon in

victims, who often feel guilty for the consequences on the person they accused.

In your representations you said that you were present when MN asked SJP had injured her eye and that the service user had yelled out that you had hit her with a shoe horn. This differs from your account made in your original discussion with the police in 2015 when you made no mention of this, nor is this account consistent with the information provided by MN. MN agreed that you were present, but that when she had first asked SJP about her eye she said the injury had been self-inflicted. It was only when they were alone the next day that she again asked SJP about it, as she was not convinced by her original explanation, and SJP claimed the injury had been caused by you hitting her with a spoon. There would appear to be no evident reason or gain to MN in providing this information, whereas the inconsistencies in the information you have provided reduces the credibility of your evidence.

It is accepted that the relationship between carer and service user and the care provided by you to Ms P had been good prior to mid-February 2015. However, during a period of approximately 3 months the DBS is satisfied that you repeatedly struck Ms P with an implement causing her physical harm. Ms P was particularly vulnerable as she suffered from cerebral palsy, had limited control over her movements and was reliant on her carer for assistance at all time. The impact on Ms P was not only physical but also emotional. She had no control over the gagging sounds which provoked you into striking her. This, combined with her physical limitations, made her powerless to prevent the response. As she was also reluctant to cause any upset this resulted in her feeling unable to confide in her family and other carers until pressed. Your behaviour shows a lack of understanding of the physical and emotional harm that resulted from your actions. Concerns therefore remain in relation to your inability to appreciate and understand how your actions impacted on a service user in your care.

You have also demonstrated that during the final 3 months of your employment with Carers 4 U you were unable to cope with the gagging noises by Ms P. You have demonstrated poor problem and coping skills by reacting to this by striking Ms P. As the noise was involuntary this response could not resolve the problem. By acting in this way, you caused Ms P pain and distress.

The person who was harmed by your actions was particularly vulnerable. The behaviour was repeated over a 3 month period and it caused Ms P physical and emotional harm. Concerns therefore remain in respect of your callousness and lack of empathy and poor coping skills, as demonstrated during this period.

> …
>
> … you have demonstrated a pattern of behaviour which has caused physical and emotional harm to a vulnerable person. Having acted this way in the past makes it more likely that you may repeat the behaviour were you to be faced with a similar situation in the future."

12. There are minor immaterial differences in the language of the final paragraphs of the reasons provided for Ms Kihembo's inclusion in the Adults' Barred List as opposed to the Children's Barred List. The decisions are based on the same reasoning.

The UT decision

13. The UT confirmed the decisions of the DBS, determining that the "DBS did not make mistakes in law or in the findings of fact on which its decision was based". The following assessment of the evidence is set out in paragraphs 7-17 of the UT's decision (it is common ground that the references to dates in "2018" should read "2015"):

> "7. The issue for us is whether 'DBS has made a mistake… in any finding of fact which it has made and on which' its decisions were based. We have decided that it was entitled and right to find that PK had hit SJP but not that she had done so over a period of 3 months. We do not consider that the difference in our findings are material – that is a legal word that means the difference does not affect the result. DBS's decisions do not depend on the number of times that SJP was harmed or the period over which it happened.
>
> 8. We now explain how we assessed the evidence and came to that conclusion. Our decision, like that of DBS, is based on the balance of probabilities. That means that it is more likely than not that the facts found occurred. That is different from the criminal standard, which is often described as meaning that it was beyond reasonable doubt that the facts occurred. We are not satisfied to that standard, because there are points to be made in PK's favour as well as against her.
>
> 9. We begin with what SJP said. She accused PK of hitting her with a shoe horn and a spoon. She told her family, who recorded what she said and took photographs. She repeated her account in her police interview. The police conducted the interview using ABE (Achieving Best Evidence) procedures, and through an interpreter. They had the family's recordings and photographs. Not only did SJP say that PK had hit her, she gave an explanation for what triggered PK to act as she had: it happened when she was making a gurgling or regurgitation sound associated with swallowing. She was also specific about what injuries she had sustained and how.

10. PK's own records provide some support for SJP's allegations in mid-May 2018. Regardless of the cause, we can be sure that SJP had a red eye on 16 and 17 May 2018, because of the contemporaneous records made by PK. On 16 May, she recorded that SJP's right eye was reddish, which SJP said happened when she scratched her eye after her mother had cut her nails. On 17 May, PK recorded that she had found SPK scratching her eye and said that it was plucking and itching. PK noted that the eye looked a bit red and that its lid was slightly swollen. There are references to other injuries on SJP's forehead, hand and hip, but there has been no independent evidence of being [sic] injuries being seen, and a nurse found nothing of concern during a hospital visit. We would have expected there to be more records of injuries noted by carers, especially if the assaults had been taking place for three months. This is a factor that has prevented us finding that the assaults took place over such a long period. Ultimately, though, it does not matter precisely what injuries were sustained, over how long a period, or how serious they were. The fact that the assaults took place at all is the most important factor and sufficient to justify DBS's decision. It is in PK's favour that she recorded what was visible on 16 and 17 May, but it was visible and it would have been suspicious if she had not recorded it.

11. SJP has no mental health issues and is mentally competent, so why should we not believe her? PK's answer is that she tells lies to get carers into trouble. The first point to note is that SJP does not tell lies all the time, but only on occasions and for a particular purpose. We asked PK about this at the hearing. She told us that SJP would say one thing to her parents and something different about them behind their backs. That is consistent with what PK has said before, but it did not involve getting anyone into trouble. When pressed, PK gave another example of a false allegation of sexual abuse about another carer, who was warned not to come back to the premises by SJP's brother. That was all. We would have expected there to be numerous occasions, perhaps involving petty matters, that would have come to mind to substantiate PK's assertion that SJP was a mischief maker, but it was not forthcoming.

12. Another possible explanation is that SJP's family manipulated her to accuse PK. We can see no reason why they would do this. They knew PK was leaving, which is what they wanted, as they preferred to have an Indian carer. That had tried to have her replaced before, but without making false allegations. Moreover, SJP's brother had been protective of his sister when their mother was trying to obtain money from her through PK, so it would be unlikely for him to be manipulated to persuade SJP to make and pursue this accusation.

13. PK told us that SJP had bought presents for her baby, spoken to her on the phone, and wanted to visit. She presented this as casting doubt on SJP's allegations against her. We accept PK's evidence about SJP's subsequent actions. We do not, though, consider that this casts doubt on the reliability of SJP's account. There is no necessary inconsistency in her behaviour. It is plausible that SJP was grateful for what PK had done during their time together, which after all had gone well until the end, and there was no reason for animosity against the baby.

14. An obvious question is why PK's behaviour change[d] in 2018. We have not been able to make any findings about this, because the evidence does not allow it. The trigger identified by SJP (her regurgitation) was present throughout the whole of the time that PK acted as her carer. If that was the cause, there was no direct evidence to account for the change in PK's behaviour and the evidence we have does not allow us to infer what may have accounted for the change. This is a factor in PK's favour, but it is not decisive. It is not necessary to find an explanation in order to accept what SJP says happened.

15. We have already given one reason for not accepting SJP's account of sustained assaults over three months: the lack of any signs of injuries. Hitting with a spoon or shoe horn need not produce obvious injuries but it still causes pain. So lack of visible evidence is a factor, but not decisive. A further factor is that SJP's account does appear to develop as it was repeated. Again, that is not necessarily decisive, as memory can recover and accounts can vary depending on the questions asked. But it is a cumulative factor that prevents us finding this part of SJP's evidence is sufficient to satisfy the balance of probabilities.

16. PK was very confident of her memory and her ability to recall dates. Her recollection does not, though, always accord with the documentation, especially with regard to dates. For example, her evidence to us differed from her own records made at the time in SJP's daily diary. We do not attach much significance to this. We certainly do not accuse PK of trying to change the timeline. There was no benefit to her in doing so. We have, though, when there is a conflict, relied on the contemporary documentary evidence.

17. The police investigated the allegation that PK had hit SJP. PK told us that she had been vindicated by the decision not to prosecute. We accept that this is what PK believes, but it is not what the police documents record. The full review that led to the decision to close the case is at pages 38-40. The state of the evidence was a factor in deciding not to pursue the case. But there were administrative failings that were taken into account, failing by the police and the Crown Prosecution Service. But there is a frank admission by the reviewing officer that there

> were further enquiries that would have been pursued had it not been for the delays."

14. The UT then recorded the effect of these conclusions on the facts:

> "18. Given our findings, it is self-evident that DBS had a sufficient factual basis to include PK in the adults' barred list, as she had harmed a physically vulnerable adult. The test of the children's barred list was also satisfied, as PK's conduct towards SJP would harm a child if repeated."

Grounds of appeal to the Court of Appeal

15. There are four grounds of appeal to this court:

Ground 1: The UT plainly erred in law by not remitting the matter back to the DBS for reconsideration given that it found mistakes of facts in the decisions and it also made material positive findings of fact in favour of the Appellant. In the alternative, it erred by not ordering the removal of the Appellant's name from the lists.

Ground 2: The UT contradicted itself and erred in law when it stated that the Respondent did not commit a mistake of fact(s) when the UT had elsewhere in its decision effectively found that the Respondent had made such mistakes of fact.

Ground 3: The UT and the Respondent fell into error in respect of the proper application of the law in respect of the burden of proof.

Ground 4: The UT erred in its approach to credibility and it failed to provide adequate reasons.

The permission to appeal decision

16. By order of 23rd February 2023, Warby LJ granted permission to appeal on all grounds. His reasons were:

> "This is a first appeal for which the relevant test is that provided for by CPR 52.6. Ground 1 raises a point of law of some importance and has a realistic prospect of success. Grounds 2 and 3 also have a prospect of success that is more than fanciful. I am doubtful that Ground 4 has any such prospect but it is connected with the other grounds, should not involve any major extra effort or expense, and the risks of causing complications by excluding it from the scope of the appeal are a sufficiently compelling reason to grant permission on that ground also."

17. Following the grant of permission to appeal, the DBS accepted that Ground 1 of the appeal was made out. Accordingly, a Statement of Reasons and a draft order disposing of the appeal on that basis was proposed to the Appellant. The DBS informed the Court in correspondence dated 9th March 2023 that it conceded that the UT had erred in law and that the matter should therefore be remitted to the DBS for a new decision.

18. On 28th March 2023, the Appellant filed a Replacement Skeleton Argument, which submitted that the relief sought was that the matter ought to have been remitted back to the DBS, but also, in the alternative, the UT should have ordered the Appellant's removal from the Barred Lists if Ground One was made out. The Appellant also informed the Court that she no longer pursued anonymity. The Respondent's submissions dated 12th April 2023 stated that the Appellant was required to apply for permission to amend, particularly considering that the amendments had been made after permission to appeal had been granted.

19. By order dated 18th April 2023, Lewis LJ ordered that the court hearing the appeal would determine whether it was academic and whether the Appellant should be entitled to rely on the arguments in her replacement skeleton as well as the submission that the only decision the UT could have reached was to direct removal of the Appellant's name from the Lists. (I observe at this point that, in contrast with, for example, a direction that the name of a medical practitioner be erased from the relevant register or that of a solicitor from the Roll, a direction that an appellant's name be removed from the barred lists under the Act is a favourable outcome for the individual concerned.)

Is the appeal academic?

20. Section 4 of the SVGA 2006 creates an unusual jurisdiction. An appeal to the UT may be made on the grounds of either a mistake of law or a mistake in any finding of fact on which the decision was based, but s 4(3) lays down that the UT may *not* decide whether it is appropriate for the appellant to be included in a barred list. In the terminology of the criminal courts, the UT can consider appeals against conviction but not against sentence.

21. In *DBS v AB* Lewis LJ said at [72]-[73]:-

> "Section 4(6) of the Act performs a different role. It sets out the powers of the Upper Tribunal when it has found an error of law or fact. The Upper Tribunal then has a power to direct removal or remission of the matter back to the DBS. The question is when it would be appropriate to direct removal rather than remitting the matter back to the DBS. The fact that the Upper Tribunal is not intended to consider questions of appropriateness when deciding if there has been an error is, in my judgment, a strong pointer to the fact that the Upper Tribunal should not be deciding that question when deciding on the appropriate disposal under section 4(6) of the Act. Unless it is clear that the only decision that the DBS could lawfully come to is removal, the matter should be remitted to the DBS to consider. If, therefore, there is a question of whether it is appropriate to include a person's name on a barred list, the appropriate action under section 4(6) of the Act would be to remit the matter to the DBS so that it could decide the issue of appropriateness. That is consistent with the statutory scheme which provides for the DBS to determine the appropriateness of inclusion on a barred list but ensures that the Upper Tribunal can check that there has been no error of law or fact in the decision-making process.

> For those reasons, I would interpret section 4(6) of the Act as permitting the Upper Tribunal to direct removal of the name of a person from a barred list where that is the only decision that the DBS could lawfully reach in the light of the law and the facts as found by the Upper Tribunal. It is not difficult to think of examples where that might be appropriate. The DBS may have considered that a person had been found to have engaged in sexually inappropriate conduct on one occasion with a child. If, on the facts, it transpired that the conduct had not in fact occurred (or the respondent had wrongly been identified as the person responsible) and the person had not been guilty of the conduct, there would be no basis for including that person in a barred list and the Upper Tribunal could direct removal. By contrast, if the person were thought to have committed sexually inappropriate conduct with two children, but the Upper Tribunal decided on the facts that the person was responsible for one but not the second act of inappropriate conduct, the question of whether it would be appropriate to include the person on the children's barred list because of that one act would raise a question of appropriateness. The matter should then be remitted for the DBS to take a new decision based on the facts as found. The interpretation that I consider to be correct is therefore both workable and reflects the essential elements of the statutory scheme."

Hence the concession by the DBS in this case that Ground 1 was bound to succeed.

22. Ground 1 as originally drafted argued that the UT erred in law "by not remitting the matter back to the DBS for reconsideration". This suggested that the remittal would be for reconsideration in the light of the findings made by the UT, both favourable (no satisfactory evidence of hitting over a 3 month period) and unfavourable (the upholding of the finding of a single incident of assault).

23. By his amended skeleton argument and oral submissions in this court, Mr Fazli seeks to go further in two respects. Firstly, he seeks to win outright in this court by asking us to direct Ms Kihembo's removal from the Lists. In the alternative, his submission was that the appeal should be allowed and the case remitted either to the UT or to the DBS on the basis that the findings in relation to the single incident (but no more than that) should be reconsidered. We heard argument on this issue and in my judgment the appeal is not an academic one. I would give permission for Ms Kihembo's appeal to be argued on this amended basis and for Mr Fazli to be allowed to rely on his replacement skeleton argument.

The nature of the mistake of fact jurisdiction on appeal from the DBS

24. In *PF v DBS* [2020] UK UT 256 (AAC), a Presidential Panel of the UT (Administrative Appeals Chamber) chaired by Farbey J said:-

> "37. Section 4(2)(b) refers to a 'mistake' in the findings of fact made by the DBS and on which the decision was based. There is no avoiding that condition. The issue at the mistake phase is

defined by reference to the existence or otherwise of a mistake. If the Upper Tribunal cannot identify a mistake, section 4(5) provides that it must confirm the DBS's decision. That decision stands unless and until the tribunal has decided that there has been a mistake.

38. 'Mistake' is the word used and there is no reason to qualify it. The courts operate a test of whether a decision was 'wrong'. This has in the past been qualified by words like 'plainly'. Nowadays, that has to be understood in the way explained by the Supreme Court in *Henderson v Foxworth Investments* Ltd [2014] UKSC 41, [2014] 1 WLR 2600:

> "62. Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that the trial judge has gone 'plainly wrong', and considered that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion."

That draws attention to the need to identify an error or, in the language of section 4, a mistake. It is not enough that the Upper Tribunal would have made different findings. The word 'plainly' has not yet taken root in the Upper Tribunal's cases. The phrase was used in *XY* at [53], but the tribunal was merely giving a general description of the tribunal's jurisdiction on mistake of facts and not dealing with its interpretation. In order to avoid any doubt or confusion about what it means, it is better to use only the statutory language and avoid any qualifiers.

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

……..

41. The mistake may be in a primary fact or in an inference. There was a discussion at the hearing about primary and secondary facts and about inferences. It became clear that these terms were used in different senses, so we need to make clear what we mean. A primary fact is one found from direct evidence.

An inference is a fact found by a process of rational reasoning from the primary facts as a fact likely to accompany those facts.

42. One way, but not the only way, to show a mistake is to call further evidence to show that a different finding should have been made. The mistake does not have to have been one on the evidence before the DBS. It is sufficient if the mistake only appears in the light of further evidence or consideration.

43. When the Court of Appeal deals with a challenge to a judge's findings of fact on appeal, it largely limits itself to the evidence that was before the court below and only allows fresh evidence if it satisfies the conditions set out in Ladd v Marshall [1954] 1 WLR 1489. Laws LJ explained the basis of that approach in Subesh v Secretary of State for the Home Department [2004] EWCA Civ 56, [2004] Imm. A.R. 112:

> 44. The answer is, we think, ultimately to be found in the reason why (as we have put it) the appeal process is not merely a re-run second time around of the first instance trial. It is because of the law's acknowledgement of an important public interest, namely that of finality in litigation.

In *Edwards v Bairstow* [1956] AC 14 at 38, Lord Radcliffe referred to the efficient administration of justice. Those reasons make eminent sense in an appeal from a court or tribunal. They are not appropriate to an appeal from an administrative decision-maker and do not apply under section 4.

44. Whether or not the Upper Tribunal hears further evidence, it will have before it the reasoning of the DBS when it makes its assessment of the evidence. The respect to be shown to that reasoning was the only surviving area of disagreement by the end of the oral hearing.

…….

49". We prefer to avoid talking in terms of respect, or in terms of the starting point for the tribunal's consideration, beyond saying that an appellant must demonstrate a mistake of law or fact. We put it like this. The DBS's reasoning will be before the Upper Tribunal and the tribunal will take account of it for what it is worth in the context of the evidence as a whole. At one extreme, it may be of little assistance. If the tribunal has received significant further evidence (such as oral evidence that would not have been available to the DBS), it is likely that its evaluation of the evidence that was before it will have been overtaken so that the only appropriate approach will be for the Upper Tribunal to begin afresh. At the opposite extreme, it may play a significant role. If there is no further evidence put to the Upper Tribunal, the DBS's reasoning may well form the basis of the case that the

appellant has to meet. Between these extremes, its relevance and significance will depend on the circumstances of the case. There may, for example, be some feature of the case - assessing victim's evidence, perhaps - on which the DBS's reasons disclose a special understanding of the evidence on which its findings were based and on which the tribunal's specialist members may have some insights to contribute. Matters of specialist judgment relating to the risk to the public which an appellant may pose are likely to engage the DBS's expertise and will therefore in general be accorded weight.

……..

51. Drawing the various strands together, we conclude as follows:

a) In those narrow but well-established circumstances in which an error of fact may give rise to an error of law, the tribunal has jurisdiction to interfere with a decision of the DBS under section 4(2)(a).

b) In relation to factual mistakes, the tribunal may only interfere with the DBS decision if the decision was based on the mistaken finding of fact. This means that the mistake of fact must be material to the decision: it must have made a material contribution to the overall decision.

c) In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose.

d) The tribunal has the power to consider all factual matters other than those relating only to whether or not it is appropriate for an individual to be included in a barred list, which is a matter for the DBS (section 4(3)).

e) In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it.

f) The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS's factual findings in matters that engage its expertise. Matters of specialist judgment relating to the risk to the public which an appellant may pose are likely to engage the DBS's expertise and will therefore in general be accorded weight.

g) The starting point for the tribunal's consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the

> tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker."

25. Ms Patry KC informed us that permission to appeal to this court was refused in the *PF* case. However, it was referred to in this court in the recent case of *DBS v JHB* [2023] EWCA Civ 982 in which judgment was given on 17 August 2023. Elisabeth Laing LJ, with whom Lewison and Baker LJJ agreed, cited a number of authorities on the proper approach to be taken by appellate tribunals: *Indrakumar v SSHD* [2003] EWCA Civ 1677, *Subesh v SSHD* [2004] EWCA Civ 56, *Volpi v Volpi* [2022] EWCA Civ, and the judgment of Lewis LJ in *AB v DBS* to which I have already referred. She then set out at paragraphs 85-89 of her judgment a summary of the issues and decision of the UT in *PF v DBS*. Having done so, she said at [90]-[93]:-

> "90. On his appeal to the UT JHB did not challenge either the facts underlying the conviction or finding 1 (see paragraph 9.i., above). This was a case in which the UT heard very limited evidence from JHB, for example, that he had not been interviewed by the police about the allegation on which finding 3 was based. The UT does not seem to have heard much evidence which had a direct bearing on the matters on which the DBS relied in making findings 2 and 3, let alone any significant evidence. On the reasoning in *PF*, the decision of the DBS was therefore the starting point for the UT's consideration of the appeal. JHB did not claim that the DBS had erred in law. The UT could not exercise any powers on the appeal, therefore, unless it identified an error of fact in the approach of the DBS to the findings of fact on which the Decision was based. Those findings were the conviction for the Offence, which JHB did not challenge, finding 1, which JHB admitted, and findings 2 and 3. Those findings of fact did not include the DBS's assessment of the weight to given to the reports. The UT was not free to make its own assessment of the written evidence unless, and until, it found such an error.
>
> ……
>
> 92. The UT began its consideration of finding 2 by announcing that the DBS 'made a mistake with this finding'. The UT did not, in paragraphs 9-19, explain in what way finding 2 was 'wrong', or outside *'the generous ambit within which reasonable disagreement is possible*'. Its approach, rather, was to look at very substantially the same materials as the DBS, and to make its own findings of fact ('These are our findings'). Those findings were different from the DBS's assessment of those materials. I infer that what the UT meant when it referred to a 'mistake' in the first sentence of paragraph 9 was that the DBS had a mistaken view of the facts because the UT happened to differ from the

> DBS in its assessment of the same or very nearly the same materials.[emphasis added].
>
> 93. ……On the authorities, a disagreement about the evaluation of the evidence is not 'an error of fact'. In my judgment the material considered by the DBS did permit such a finding on the balance of probabilities. If such a finding was open to the DBS on the balance of probabilities, the DBS did not make a mistake in coming to that finding."

26. Ms Patry submitted that the words which I have italicised in paragraph 92 of the judgment of Elisabeth Laing LJ, while not departing from *PF*, "clarified it authoritatively". I agree that there is no indication in *JHB* that *PF* was in any way erroneous or that the mistake of fact jurisdiction has somehow been transformed into requiring a test of *Wednesbury* irrationality. It would be particularly inappropriate to confine it in that way when in some appeals from the DBS to the UT, including the present one, the UT hears oral evidence whereas the DBS does not. *PF* should in my judgment continue to be treated as good law.

Ground 1

27. As already noted, Mr Fazli's first submission under Ground 1 is that we should ourselves decide that Ms Kihembo's name should be removed from the two barred lists. As Lewis LJ's judgment in *AB* makes clear, it is only open to us to make such an order if no rational decision-maker could have made any finding of fact adverse to Ms Kihembo (even in relation to the single incident) and reached a decision that it was appropriate, because of that finding, to include her on the Lists. I would refuse to make such an order. This is not on the basis of any pleading point, but on the substantive basis that the contention is unrealistic. Although, as will appear below, I do not consider that the case against her even on the single incident was determined in a satisfactory manner, it cannot be said that there was, in effect, no case to answer.

28. I will turn next to Ground 3, concerning the burden of proof.

Ground 3

29. In the UT's judgment they give detailed reasons as to why they were not satisfied that it had been established that Ms Kihembo had assaulted SJP over a three month period. These included the fact that the UT "would have expected there to be more records of injuries noted by carers, especially if the assaults had been taking place for three months" (paragraph 10); the absence of direct evidence of why the Appellant's behaviour should have changed in the relevant year [it is common ground that this was 2015, not 2018 as stated in the judgment] (paragraph 14); and the UT's view that SJP's account does appear to develop as it was repeated (paragraph 15).

30. This may be contrasted with the way the UT reached its finding about the single incident. At paragraph 9 they set out SJP's accusation. At paragraph 10 they note that Ms Kihembo's own records provide some support for the allegations concerning 16/17 May.

31. Strikingly, the first sentence of paragraph 11 reads: "SJP has no mental health issues and is mentally competent, so why should we not believe her?"

32. It is impossible to read paragraph 11 without concluding that the UT considered it was for the Appellant to give a satisfactory answer to their rhetorical question, itself based upon the flawed premise that complainants with capacity are credible, and those without are not, and thus to prove her innocence. In short, they appear to me to have reversed the burden of proof.

33. In contrast, when they reach paragraph 15, where they make the remark already noted that the complainant's account did "appear to develop as it was repeated", they do not explain convincingly why that prevented them finding much of SJP's complaint proved but left the single incident allegation apparently intact.

34. I would therefore allow the appeal not only on Ground 1 but also on Ground 3. In view of my conclusion on Ground 3 it is not necessary to consider either of Grounds 2 and 4.

35. I would remit the matter to the DBS for reconsideration on the basis that the UT's finding that the three-month course of conduct had not been proved should stand, but the issue of the alleged single incident should be reconsidered afresh. The UT's finding in the Appellant's favour as to the course of conduct should remain binding because in my view more than eight years after the incidents in dispute, it would be unfair and oppressive for the whole case to be re-opened.

36. The decision-maker at the DBS should be someone without previous involvement in the case. He or she should consider whether the single incident has been established on the balance of probabilities. If it has, the decision-maker should go on to consider whether it would be appropriate for Ms Kihembo's name to remain on the barred lists, having regard not only to issues of risk but also to the passage of time.

Lord Justice Nugee:

37. I agree.

Lady Justice Macur:

38. I also agree.